

Beware of Incorporating by Reference!

November 11, 2025

PRACTICES Employee Benefits and Executive Compensation

Anyone who has tried to read plan documents can tell you that they are long and make for tedious reading. To avoid making already long plan documents even longer, many plans, particularly pre-approved plans, may include provisions incorporating outside documents (such as administrative charters, 401(k) loan policies, qualified domestic relations procedures, and administrative procedures) into the plan document. For reasons explained below, plan sponsors and fiduciaries must pay attention to such provisions and review and approve all outside documents that have been incorporated into the plan by reference.

Incorporating outside documents by reference in the plan document, while making the document shorter, may create possible compliance risks for the plan sponsor. Specifically:

- When outside documents are formally incorporated into the plan, there is a strong argument that they become part of the official plan document. This can increase exposure to the plan and plan sponsor because the outside documents may not have been reviewed by legal counsel.
- Incorporated documents may have to be provided to participants who request copies of the plan document if they are considered part of the plan document. A failure to provide these documents could be treated as a failure to provide requested ERISA plan documents within the required 30-day time period, resulting in penalties of up to \$110 per day.
- Further, if outside documents are incorporated by reference into the official plan document, there is an increased chance that the plan will not be administered in accordance with its terms. This is particularly true if the outside documents are not updated to reflect legal changes or are not provided to the third party administrator.

Plan sponsors can mitigate these risks by reviewing their plan documents to see if any outside documents are incorporated by reference, and if they are, obtaining copies of the outside documents and having them reviewed by legal counsel to ensure that they are legally compliant and consistent with the terms of the underlying documents. Any outside documents that are incorporated should be updated regularly to reflect legally required changes and other administrative changes. Plan sponsors of individually designed plans can consult with legal counsel to determine whether the plan should be amended so that the outside documents are no longer incorporated.