

Nothing in Life is Free: ERISA Expense Account Considerations

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Many 401(k) plans contain spending accounts funded by revenue-sharing generated by a plan's mutual fund holdings. These accounts, often referred to as ERISA expense accounts, revenue-sharing accounts, or plan expense reimbursement accounts, can cause complications for plans if not administered properly.

These revenue-sharing accounts can accumulate quickly, and in large plans, can result in hundreds of thousands of dollars each year. However, plan sponsors often do not know that the accounts are accumulating, and when they find them, may think they have just discovered "free money."

But nothing in life is free, and missteps with the use of these funds could result in participant claims. Accordingly, before utilizing these funds, plan sponsors should use care and consider the following questions:

- **Are the funds being held in the trust?** DOL Advisory Opinion 2013-03A (which is available [here](#)) noted that revenue sharing payments that were being received by the third party administrator prior to being received by the plan are not plan assets. However, the DOL did state that it is possible that revenue sharing amounts received by [the third party administrator] in connection with a particular plan's investments are assets of the plan. While the DOL has not specifically opined on whether and when revenue-sharing fees held in the trust are plan assets, the safest approach for a plan is to treat any amounts held in the trust as plan assets. If the assets are held in the trust, the plan sponsor should determine whether the plan document contains any language regarding the use of amounts held in the ERISA expense account. Plan sponsors have a fiduciary duty to ensure the funds in the ERISA expense account are used and/or allocated in accordance with the applicable terms of the plan. If a plan does not contain provisions addressing the use of funds in an ERISA expense account, the plan sponsor should consider amending the plan to do so.
- **How are the funds generated?** The plan sponsor should determine which investment options in the plan are generating the funds and whether there are other lower-cost investment funds for those options that could be chosen (without revenue-sharing). Plan sponsors should carefully document (i) the reasons for choosing investment funds that offer revenue sharing, and (ii) why they believe offering such funds is in the best interest of plan participants and beneficiaries.
- **How are the funds in the ERISA expense account being used?** Subject to the terms of the plan document, plan sponsors can choose to either (i) use the funds in ERISA expense accounts to pay certain administrative expenses, or (ii) allocate them among plan participants. If the funds are used to pay plan expenses, plan sponsors must ensure the expenses constitute reasonable administrative expenses (such as audit and recordkeeping fees), as opposed to settlor expenses (such as adding voluntary plan features). If the funds are to be allocated among participants, plan sponsors must consider how the funds are to be allocated (*i.e.*, on a per capita or pro rata basis) and to whom (*i.e.*, among all plan participants or only among participants invested in the mutual funds that generated the fees).
- **What about disclosure?** The plan sponsor should review the plan's summary plan description and ERISA 408(b)(2) notice to ensure that it has properly disclosed the revenue-

sharing arrangements to participants.

Plan counsel can assist plan sponsors in determining whether their plan has such an account, and if it does, ensuring the funds in the account are used and/or allocated appropriately. While the foregoing actions will not eliminate completely the risk of participant claims relating to the ERISA expense account, properly reviewing and documenting how the ERISA expense account is operating, ensuring compliance with documentary and disclosure requirements, and making conscious decisions on how funds are used, can help plan sponsors defend against any such claims.