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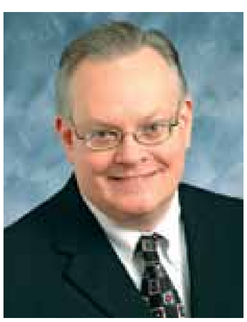
Summer 2012

Human Resources Newsletter

HR Focus



At-Will Employment – Does it Really Matter?

by Lou C. Rabaut: **lrabaut@wnj.com**

At-will language is now standard in almost every non-union employee handbook. But why bother with at-will language if you can still be sued for race discrimination, sex harassment or any of the other things employers are sued over these days? Does being an at-will employer really matter anymore?

If you wanted to describe at-will language in medical terms, it is the equivalent of a polio vaccine. The vaccine helps prevent you from contracting polio. But the polio vaccine doesn't prevent cancer or a heart attack nor does it even cure the common cold. So why get a polio vaccine? Because polio is a terrible, debilitating disease.

Like the polio vaccine, at-will status helps prevent an employer from being sued for breach of contract. And while it will not prevent a discrimination or harassment complaint, at-will status can help protect an employer from very expensive litigation.

In 49 states, at-will status is presumed. Only in Montana are employees presumed to be "for cause," meaning that the employer must have cause before discharging an employee. In Michigan, at-will status is presumed but the parties can agree that employment will end only "for cause."

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An ERISA Lesson Learned the Hard Way: *Tussey v. ABB, Inc.*

by Anthony J. Kolenic, Jr.: **akolenic@wnj.com**

The devil is in the details and may bring costly damages to unsuspecting companies. Recent ERISA fee litigation, the new Department of Labor service provider and participant disclosure rules and the development of new revenue sharing and fee allocation models within plans are all resulting in a new focus on:

- The amount of recordkeeping fees impacting participants' accounts;
- The allocation of those fees (and their analog, revenue sharing) to participants' accounts; and
- The way those things are understood by the plan sponsor and communicated to participants.

The typical use of revenue sharing in a 401(k) plan to pay recordkeeping fees and other expenses can have the effect of burying those fees and expenses in a thick haze, to the point where some participants and plan sponsors believe the plan is "free." It is not, of course, and that is why we have had ERISA fee litigation and intervention by the government in the form of the recent service provider and participant fee disclosure rules.

Tussey v. ABB, Inc. is an "excessive fee" case that came to a bad result for the employer after a month-long trial: **$35 million** in damages. This result was based on failures by the employer to monitor recordkeeping costs and negotiate for rebates and on a change from one investment fund to another that the judge felt had not been handled appropriately by the plan fiduciaries. Interestingly, the damages could have been 10 times that amount if the judge had accepted the plaintiffs' argument that ABB's breaches of fiduciary duty had "infected" all of its investment decisions. The plaintiffs had argued that the damages should be measured by reference to the alleged better investment performance of ABB's defined benefit plan. The judge said that she was "suspicious," but chose not to go there.

In *Tussey*, the recordkeeper had been selected in an RFP process based upon a per-participant hard-dollar fee. ABB soon agreed to move from that per-participant fee to a revenue sharing-based compensation system. From the recordkeeper's standpoint, this allowed the fees to increase with the assets of the plan ("fee creep,"as it is called), which ABB did not monitor. The recordkeeping fees soon crept far beyond their market equivalent.

In addition, the recordkeeper began doing other work for ABB at less-than-market costs, such as payroll, health plan recordkeeping and defined benefit and nonqualified plan administration. The judge concluded this work had been subsidized by the excess, above-market fees ABB paid in connection with its 401(k) plan.

After looking at all of the circumstances, the judge was strongly influenced by a number of factors:

- ABB had violated its own investment policy statement, which required that all revenue sharing be used to reduce plan administrative costs for plan participants;
- ABB never calculated what it was allowing the plan to pay the recordkeeper; and
- ABB never attempted to leverage the plan's size to decrease the fees it was paying, even after it was told by an outside consulting firm that it was overpaying and that it appeared the plan fees were subsidizing the corporate services provided to ABB by the recordkeeper, and even after the recordkeeper told ABB that it viewed its plan services and its corporate services to be interconnected.

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Interns,

do we have to pay them?

by Steven A. Palazzolo: **spalazzolo@wnj.com**

Summer is here and it's the time of year when we hear the pitter patter of eager little feet running around the office work place. And those eager little feet are attached to eager little interns. Very often those eager little interns are not getting paid. And this is no surprise to anyone. Want to know what might be a surprise? Could be these eager little interns should be getting paid and if they are not, you may be violating the Fair Labor Standards Act (FLSA).

So here is the big question: Does your summer internship program violate the FLSA? Could be. You see, most interns are unpaid, right? But, did you know that it's almost impossible for a for-profit company to have an unpaid internship program that does not violate the FLSA? That's right. Almost always, interns must be paid. You can pay them minimum wage if you want, but you've got to pay them.

WH Publication 1297 and Section 10b11 of the Department of Labor (DOL) Field Operations Handbook describe the following six situations in which you DO NOT have to pay interns (what the DOL calls trainees):

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational institution;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

"It's almost impossible for a for-profit company to have an unpaid internship program that does not violate the FLSA."

In order for an internship program to be an unpaid program, you have to meet all six of these requirements. If you miss one of these requirements and you are not paying your interns, you can be found liable. Liable for what you ask? Possibly owing double back pay for three years for all unpaid interns and the interns' attorney fees. Realistically, very few internship programs are going to meet all six of the DOL requirements.

In 2010 the DOL issued a fact sheet on when interns need to be paid. You can see it at http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

What's so bad about being a "for cause" employer? Here is the rub. As an employer, you may think that Employee Joe's third forklift accident this year is excessive (not to mention costly). But by being a "for cause" employer, you agree to submit your decision to a jury of total strangers. And if the jury concludes that you did not have cause, then Employee Joe can be awarded back pay and reinstated or awarded future damages.

What happens if the employer fails to put clear at-will language into key documents? A discharged employee may claim that there was a verbal representation by the employer's hiring manager promising that the employee would only be discharged "for cause." Of course, the hiring manager vehemently disagrees. So who gets to decide? The jury.

Accordingly, most employers work very hard to clearly establish at-will status. They put an at-will statement in the application form. They put an at-will statement in their employee handbook. They draft policies so only the President of the Company, in a signed agreement, can change at-will status to "for cause" status. But is that enough? Let's explore ways in which an employer can undo its efforts to create at-will status.

CONFLICTING DOCUMENTS

What happens if the employer has clearly stated at-will language in some documents (like the application form and the employee handbook), but has "for cause" language in other key documents (like confidentiality and non-compete agreements or in employee discipline forms)? Consider the following scenarios. In each case, the employer had clear at-will language in its application form and in the employee handbook.

- A non-compete agreement states that the non-compete requirement will be waived or shortened in time if the employee is terminated other than "for cause."
- In addition to at-will language, the same employee handbook contains a detailed, progressive discipline process, which mandates that the employee will receive three warnings prior to termination.
- The employer issues a performance improvement plan which states that the employee will be on "probation" for the next 90 days.
- A job offer letter states: "We look forward to your long-term employment with the Company."

Each of these scenarios could threaten the employer's efforts to establish at-will employment. Given such ambiguity, a discharged employee may claim that he only could be fired "for cause." And a jury may get to decide.

CARELESS LANGUAGE

There are some words that just don't go well with the concept of at-will employment:

- **Probation**. The use of the word "probation" can suggest that, once an employee completes her probationary period, her employment converts to "for cause" status. This belief arises out of the structure of union contracts. Most union contracts provide for a probationary period (during which time the employee may be discharged with or without cause). Once the probationary period has passed, the employee may only be discharged "for cause." Typically, a dispute over whether cause existed is resolved through binding arbitration. If you are an at-will employer, don't use the word "probation."
- **Due process**. The concept of "due process" has its roots in government. A person charged with a crime is entitled to "due process" before conviction or acquittal. Government employees may be entitled to due process because of the nature of their employer (a governmental agency). If you are an at-will employer, don't use the words "due process."
- **Cause**. Use of the word "cause" when referring to discipline or discharge is directly contrary to the concept of at-will. This word should not be used by at-will employers.

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By being a "for cause" employer, you agree to submit your decision to a jury of total strangers.

Mental Disorders
in the workplace

by Karen J. VanderWerff: **kvanderwerff@wnj.com**

In March 2012 a federal district court held an employer liable for disability discrimination after it terminated an employee shortly after he had requested a leave of absence to adjust to new medication for bipolar disorder. The court awarded $315,000 to the employee. This case serves as a reminder that the Americans with Disabilities Act (ADA) applies to both mental and physical disabilities.

Recent statistics indicate that one in four adults will suffer from a diagnosable mental illness in a given year. Although not all individuals with a mental illness will be considered to have a disability under the ADA, many of these individuals will be covered by the ADA.

Under the ADA, an individual has a disability if he/she has a physical or mental impairment that substantially limits one or more of the major life activities of such individual. A "mental impairment" is defined as "[a]ny mental or psychological disorder, such as . . . emotional or mental illness." Examples of "emotional or mental illness" include major depression, bipolar disorder, anxiety disorders (which include panic disorders, obsessive compulsive disorders and post-traumatic stress disorders), schizophrenia and personality disorders.

Similar to employees with physical disabilities, employees with mental impairments are entitled to a reasonable accommodation, which may include changes to workplace policies, procedures or practices; leaves of absence; or physical changes to the workplace. In addition, a supervisor may be required to adjust the way he/she interacts with an employee as a reasonable accommodation. Determining whether an accommodation is reasonable is fact specific. Therefore, it is critical that an employer engage in an interactive process to determine if a reasonable accommodation exists.

As part of an interactive process, an employer may request medical documentation regarding the employee's mental health condition and any functional limitations. The request should be limited to documents that enable an employer to determine if the individual has a covered disability. For example, an employer that receives a doctor's slip that provides that the employee needs time off for stress could request additional medical documentation regarding the employee's medical condition and clarification on the leave requested.

An employer does not have to necessarily grant the accommodation being requested by the employee. During the interactive process, an employer can determine whether other reasonable accommodations exist. For example, an employee with a disability who has difficulty concentrating may request his/her own office. If only certain job functions are impacted by the employee's difficulty concentrating, the employer could allow the employee to use a conference room when these job functions are being performed.

Employers also do not necessarily have to overlook misconduct of a workplace rule by an individual with a mental illness provided that the workplace conduct standard is job-related and consistent with business necessity. Therefore, before determining if discipline

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Service Provider Contracts Deserve and Require Employers' Attention

by Heidi A. Lyon: **hlyon@wnj.com**

With so much focus on the disclosure of fees charged to plans, it's easy to miss that new Department of Labor (DOL) rules, effective July 1, 2012, specify several other requirements for a contract or arrangement with a retirement plan service provider to be reasonable. We've long advised employers they should have a reasonable written contract with all of their benefit plan service providers. Why does this deserve attention now?

The new DOL rules, coupled with a recent surge in participant lawsuits against employers for failing to monitor plan service providers, raise and further highlight the risks of not having a reasonable contract. It is essential to have a contract that complies with the new rules and protects the interests of the plan and employer.

WHAT THE LAW REQUIRES

All contracts or arrangements between benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) and those providing services to the plans for compensation are required by ERISA to be reasonable. Employers are generally the plan fiduciaries responsible for ensuring this requirement is met.

"It's not just the amount of compensation that must be disclosed... include a description of the services that will be provided, the status of the provider, the cost of recordkeeping services and the manner in which compensation will be paid."

Although the latest DOL disclosure rules are inapplicable to health and welfare plans (primarily because their fee structures are so different), the DOL has reserved a section to issue rules for these plans in the future.

A contract or arrangement for services will no longer be reasonable unless a retirement plan's covered service providers make certain disclosures reasonably in advance of its effective date (or extension or renewal date) and update the disclosures for changes or to correct errors in a timely manner. These providers generally include ERISA fiduciaries, recordkeepers, brokers and others who expect to receive at least $1,000 of direct or indirect compensation in connection with providing certain services to the plan. A more detailed explanation of covered service providers and the disclosure rules can be found in the article by George Whitfield in the February 2012 edition of this newsletter or at www.wnj.com/publications.

It's not just the amount of compensation that must be disclosed reasonably in advance. Other items that now must be disclosed include a description of the services that will be provided, the status of the provider (e.g., under what law an investment adviser is registered), the cost of recordkeeping services and the manner in which compensation will be paid (e.g., deducted from accounts or investment returns). As required before, the contract also must allow for the provider's services to be terminated on reasonably short notice.

Even though service providers have the obligation to disclose, employers must ensure the disclosures occur because the consequences of non-compliance impact the employer. The employer is required to request the disclosures if they are not forthcoming and report any service provider who does not comply to the DOL. Failure to comply with the new requirements can result in penalties and taxes and jeopardize the plan's tax qualification. It also exposes the employer to fines and potential litigation. In such litigation, courts will focus on whether the required disclosures occurred and whether the terms of the contract or arrangement are reasonable.

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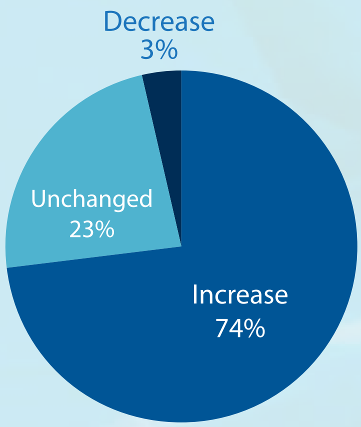
Mini Poll: The Changing World of HR

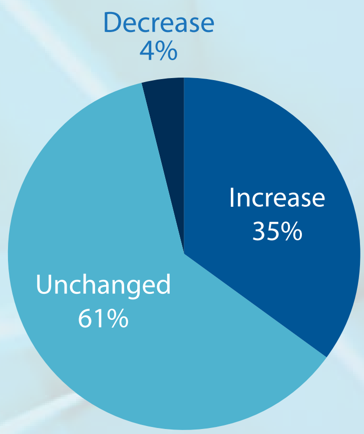
During the May 2, 2012 HR seminar in Grand Rapids, attendees were asked three questions about their HR activities and expectations. Here are the results.

HIRING OUTLOOK DURING THE NEXT 12 MONTHS

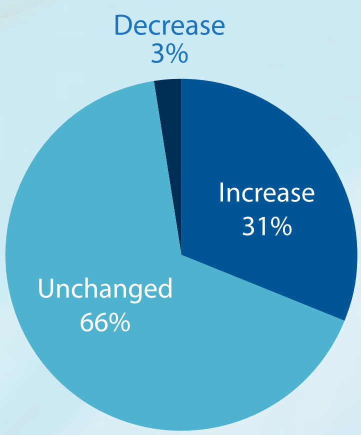
Full-Time



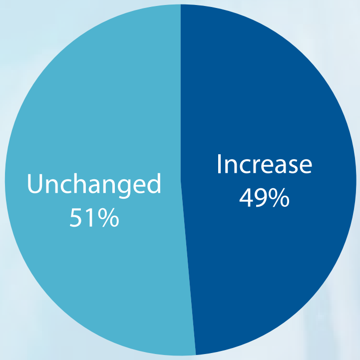
Part-Time



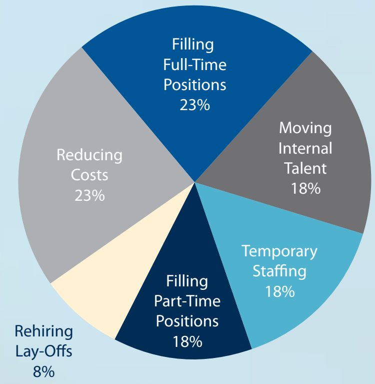
Intern



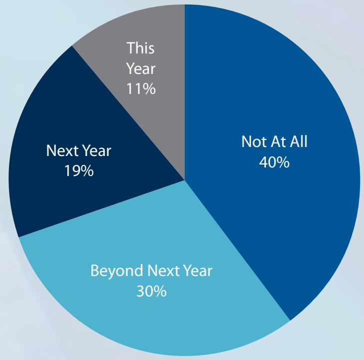
College Graduate



RANKING OF CURRENT PRIORITIES



PLANNING A DEFINED CONTRIBUTION HEALTH PLAN?



Retirement Plan Service Provider & Investment Fee Disclosures: More Work To Be Done

By John H. McKendry, Jr.: **jmckendry@wnj.com**

U.S. Department of Labor (DOL) regulations require that retirement plan service providers whose fees are paid directly or indirectly from a plan make disclosures of their fees by July 1, 2012. Then, plan sponsors must make disclosure of plan level and individual investment fees and performance to plan participants by August 30, 2012.

EVALUATION OF SERVICE PROVIDER DISCLOSURES REQUIRED

Plan sponsors cannot simply review and file the provider disclosure. The prohibited transaction rules require that the fees be reasonable. In addition, the regulations require that the provider disclose its fiduciary status. To fulfill their duties, plan sponsors must perform at least the following four tasks:

1. **Confirm that all service providers have made the required disclosures.** If a service provider that receives at least $1,000 in fees has not made a disclosure, the plan sponsor must demand a disclosure within 90 days and, if it is not provided, notify the DOL of the failure. The plan sponsor should also review the disclosure to confirm that it meets all of the regulatory requirements and provides sufficient information for the sponsor to determine if the fees are reasonable for the services provided. If it does not, the plan sponsor should request the items needed for complete disclosure. If the provider does not provide any requested disclosures, the sponsor may have to terminate the relationship.
2. **Determine the provider's fiduciary status.** Particularly if the provider is receiving fees related to investment advice, there is no legal or practical reason that the provider should not have acknowledged its status as a fiduciary. If the provider attempts to avoid that status, the plan sponsor should evaluate whether the relationship should continue.
3. **Compare the disclosed fees with contractual or promised fees.** The fees should not be different from those disclosed in the provider's service agreement or be used to secure the business. If the fees paid exceed the amount agreed upon, the plan sponsor should request a return of the excessive fees.
4. **Determine whether the fees are reasonable.** The prohibited transaction rules require that a provider's fees be reasonable for the services provided. The preferred method to make this determination is to engage an independent benchmarking service to compare the fees charged in light of the services provided against all plans of similar size and characteristics.

> "...engage an independent benchmarking service to compare the fees charged... against all plans of similar size and characteristics."

UNANTICIPATED DISCLOSURE REQUIREMENTS FOR BROKERAGE WINDOWS

The original investment fee disclosure requirements applied largely to "designated investment alternatives." Many plans include an opportunity for participants to leave the designated investment menu and select individual investments through brokerage accounts. Most observers believed that the investment specific disclosure requirements did not apply to these brokerage windows.

The DOL turned these assumptions on their head in a series of Questions and Answers issued on May 5, 2012. Q&A 13 requires a general disclosure of basic information regarding the brokerage window – how the window works, to whom to give investment

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The determination of reasonableness turns on more than just meeting the requirements discussed above. Following are some best practices to observe to ensure a contract or arrangement is reasonable. Note that these also may be relevant for health and welfare plans because they are subject to ERISA's reasonable contract or arrangement requirement even though the latest DOL disclosure rules are inapplicable.

BEST PRACTICES

1. **Get the terms in a written contract.** Without a written document there is no reliable way to demonstrate what the terms are and whether they are compliant.
2. **Understand the terms.** For example, many employers are unaware of whether they have hired (and the plan is paying for) a provider who is an ERISA 3(21) fiduciary investment advisor or 3(38) fiduciary investment manager. There's a big difference and the employer should know.
3. **Compare the terms.** It's important to know how the terms compare with those of similar plans including, but not limited to, the compensation being paid.
4. **Negotiate for the best terms possible.** Unless negotiation occurs from the beginning, the first agreement you receive rarely reflects the best terms you can get and, thus, is rarely appropriate to sign without negotiation. Things you may want to negotiate include the standard of care the provider will observe, the method and venue for resolving disputes, which state's laws apply and the terms (if any) on which the parties will indemnify each other.
5. **Regularly reevaluate the terms of the contract and its reasonableness.** It isn't a defense to say the terms were reasonable three years ago if they are not still reasonable.
6. **Document the process followed to arrange, renew or extend the contract.** Even if the terms of a contract are found to be unreasonable in some way, you may be protected if you followed a reasonable process when entering into it.
7. **Obtain expert review from unbiased counsel to ensure the contract is compliant and protects you.** Courts and the DOL haven't shown much sympathy for employers who have failed to understand the contract details or hire someone who does. Further, service providers draft these agreements and cannot give unbiased legal advice on them, so it's important to seek assistance from an independent expert.

Any service contract that hasn't been reviewed for compliance with the new DOL rules, or entered into in accordance with the best practices outlined above, should receive review now. If you have any questions, please contact Heidi Lyon or any other member of our Employee Benefits Practice Group.

is appropriate, an employer needs to evaluate if the conduct standard is job-related for the position and consistent with business necessity. Courts have upheld the discharge of employees who allege that their hostile and threatening conduct is the result of a mental illness. On the other hand, an employer may not be able to discipline an employee who alleges his disheveled appearance is the result of a mental illness for violating the employer's appearance policy if the employee has no customer contact.

To assist employers on this issue, the EEOC has issued a 30-day enforcement guidance on psychiatric disabilities. This guidance can be found at: http://www.eeoc.gov/policy/docs/psych.html.

The judge concluded that monitoring the overall expense ratio of the mutual funds offered in the plan was not sufficient on the part of ABB's plan fiduciaries because monitoring at that level did not show what was being paid to the recordkeeper for its services, did not allow benchmarking of the recordkeeping fees against the market and did not reflect the benefit to the recordkeeper of having the plan on the recordkeeper's investment platform. The judge concluded that the ABB fiduciaries "were not concerned about the cost of recordkeeping unless it increased ABB's expenses."

Further, the judge concluded that ABB had not changed funds for the legitimate reasons in ABB's investment policy statement, but instead was motivated by a desire to decrease the fees ABB paid directly and to maintain the appearance that participants were not paying for administration of the plan.

Note that the recordkeeper was not found to be responsible to any degree for these breaches of fiduciary duty, even though:

- The recordkeeper was tracking all of this;
- The recordkeeper asked for additional fees in years when the account values had decreased and the revenue sharing was not covering its fees; and
- The recordkeeper knew that the revenue it was generating per ABB plan participant far exceeded its revenue from other plans it serviced.

Using revenue sharing to pay plan expenses is certainly not a *per se* breach of fiduciary duty, but the judge noted that "the prudence of choosing that option must be evaluated according to the circumstances of each plan." In other words, the judge expected that the ABB fiduciaries would explore the specific circumstances of their plan and its relationship with its recordkeeper and not just accept the recordkeeper's sales statements at face value.

The judge also emphasized that the individual ABB employee-fiduciaries owed their first duty to the participants, not to ABB.

The ABB plan fiduciaries learned their lesson the hard way. In doing so, however, they have provided the rest of us with invaluable guidance on how a court might view the actions of employees and committee members who bear the responsibility of taking care of their company 401(k) plan and its participants.

For help in analyzing your plan's fees and expenses and in determining what to do if you think you might have an "ABB problem," call any member of the WNJ Employee Benefits Group.

instructions, any account balance requirements, trading restrictions and whom to contact with questions.

At the fee level, the description must disclose: any start-up fee; ongoing fee or expense; and commissions charged for purchases and sales of securities including sales loads. The statement should advise participants to ask the provider about all investment related fees. Moreover, the participant must be provided a quarterly statement of fees actually charged against the account for the preceding quarter. Q&A 30 indicates that any window that offers more than 25 investment alternatives must provide the designated investment alternative fee information for: (1) at least three investment alternatives: equity, fixed income and balanced; and (2) every other investment in which at least the greater of five participants or 1% of all participants are invested.

Because these disclosures are required by August 30, 2012, plan sponsors should act immediately to:

1. Identify any brokerage windows provided;
2. Contact the broker that provides the window requesting the information necessary to meet the general disclosure requirements;
3. Work with the broker to identify the three investment alternatives that will be utilized to meet the detailed fee disclosure requirements; and
4. Work with the broker to identify those investments in which the greater of five participants or 1% of all participants were invested and to collect the information needed to satisfy the detailed fee disclosure requirements.

A failure to meet or review the disclosures not only risks a violation of the prohibited transaction requirements but also claims of a breach of fiduciary duties by the DOL and plan participants. A plan sponsor's work must begin and be completed to mitigate these risks.

Employers also threaten their at-will status when managers make mushy statements like:

- "We only terminate employees when they do something bad, like stealing."
- "I fully expect that you will be with us for many years."
- "We don't fire people willy-nilly. We always have a good reason."

CONCLUSION

Although at-will language cannot prevent claims of discrimination, it still can prevent many legal claims over an employee's discharge. Like the polio vaccine, it is a medicine worth taking. Accordingly, an employer is well advised to:

- Clearly make a statement of at-will employment;
- Prevent the at-will status from being changed (except by the President in writing);
- Not undo at-will status through other documents; and
- Train leaders so they understand the concept of at-will and do not make statements contrary to the at-will status.

If you have questions, contact Lou Rabaut or any member of the Labor and Employment group.

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