NH HICKS

Legal and Pension Consultants

QUALIFIED PLANS IN TODAY'S ENVIRONMENT

Fiduciary & Legal Review

2021

NH HICKS

Legal and Pension Consultants
www.nhhicks.com

Who we are:

NH HICKS is a multi-generational company with one goal: To provide the best service, value and price in the retirement plan industry.

Each client is assigned an administrator and a consultant. Our administrators have over 250 years of combined experience. This provides administrative support by which we can ensure that all plan administration is performed in a timely manner, with a high degree of expertise. Our consultants assure a presence for one-on-one meetings to design and explain a plan that best fits a company's business and its retirement goals.

What we do:

NH HICKS specializes in quality pension plan administration with local service at a reasonable cost. We are a fee only third party pension administration and consulting firm that does not handle any investments or insurance. We offer flexibility through individually designed retirement plans and self-directed retirement accounts. Self-directed gives clients freedom to choose their own investments.

We currently administer over 1000 qualified retirement plans primarily throughout California, Oregon, Washington, Colorado, Utah and Idaho. Our goal is to provide excellent service to all clients by working closely with their tax and financial advisors.

Given the continuous stream of regulations, our firm and legal department are unsurpassed in experience and constantly updating and adapting to today's regulatory environment. Our annual plan review keeps our clients up-to-date with the best possible plan options along with keeping your plan in compliance with the latest IRS and DOL regulations.

www.nhhicks.com:

Our website is being updated daily with the newest regulations, common trends and articles from leaders in the financial industry. We have adapted to new technology, gone paperless, expanded our website and brought value through actively participating in numerous social media forums. You will also be able to find our complete staff biographies, email addresses, fees, forms, FAQ's and other vital information.

Contact us at:

Tom Hicks	Debbie Rath	Samantha Rath
(530) 521-7024	(530) 891-4975	(530) 891-4975

PLAN DESIGN HIGHLIGHTS

FIDUCIARY & LEGAL ISSUES

- Significance of Fiduciary Status
- Fiduciary Rules
- 3(16) vs. 3(21) vs. 3(38) Fiduciary
- Litigation Updates
- IRS and DOL Actions
- The SECURE Act I & II
- New Plan Set Up Deadline
- Tax Credit for New Plans
- ERISA Fee Disclosure
- Determination of Controlled Group
- Red Flag Issues
- Compliance Assistance
- Missing Participants
- MEPs/PEPs
- CalSavers

HICKS NOTES

NH HICKS Experience Counts

Legal and Pension Consultants

(800) 310-4975 | www.nhhicks.com

May 2021 By Tom Hicks, Attorney At Law

SO MUCH HAPPENING:
Issues and Opportunities in a Changing World

In 30 years, I have never seen such a flurry of activity in both government oversight and market responses to these new rules. It seems the IRS and DOL are in a competition to see who can distribute more guidance.

In response, the market is touting new products and planning ideas. While it is impossible to go through every law change and what opportunities it presents in this newsletter, I am trying to organize this in a way that will make sense and give you a preview of what we will cover in our upcoming webinar.

There are two distinct areas of compliance and liability exposure. Fiduciary and administrative are really two completely different duties and analysis. Ultimately, the plan fiduciaries and named administrators, usually the employer, are responsible for both areas of compliance. However, many will hire outside parties to handles these plan functions.

The Compliance side covers the plan testing, limits, filings, and all administrative functions. This traditionally is the domain for "Third Party Administrator" or TPA, who typically get paid a fee for these administrative services.

The Fiduciary side deals with the money. Where is it invested? Who decided and what process did they use come to their decisions? This traditionally is the domain of the trustees (business owners) and their investment advisors and investment companies.

Bundled plan providers generally attempt to be experts in both areas, while unbundled providers stick to their individual area of expertise. Most TPAs have relationships with the various advisors and investment companies which allow for ease of administration.

Further, it is Important to understand the functions running a plan.

- First is plan design. Is this a tax plan for the owners or an employee benefit plan without regards to the owners? Plan design will be an issue when using bundled or pooled employer plans (PEPs) as they tend to only offer a basic plan design.
- Next is enrollment and participant education. The investment companies are best equipped to handle these functions.
- Payroll is next as someone must take the contributions and get them to the investment company. This is where there may be some overlap. In unbundled scenario, the payroll department of employer or bookkeeper handles this function. In a payroll provider bundled plan, the payroll/ bundled provider handles this.
- Finally, is annual administration. This is an administrative compliance function required by both bundled and unbundled plans.

Clearly, now more than ever, you should work with competent compliance and planning experts. Click here to view our newsletter outlining the retirement plan players and the roles they play.

So, what's happened in the last 18 months?

New Legislations. We have essentially seen the passage of three major pieces of federal legislation that impact retirement planning.
SECURE Act. A few key provisions include increasing the required minimum distribution age for retirement accounts to 72, allows long-term, part-time workers to participate in 401(k) plans, and extends new plan startup deadline.

The CARES Act, designed to provide relief during the COVID-19 pandemic, waived most RMDs for 2020, created the coronavirus-related distributions for 2020, and expanded 401(k) loan options for those impacted by the pandemic.

The Consolidated Appropriations Act of 2021 was passed. As part of the bill, the COVID-Related Tax Relief Act of 2020 (COVIDTRA) was also passed, which was designed to bring expanded unemployment benefits, relief payments, business loans and new tax benefits to the millions of Americans struggling during the pandemic.

Governmental Guidance issued by different governmental agencies on different topics.
Department of Labor (DOL)

- Missing participants & Cybersecurity: Two important fiduciary areas responsible by the plan sponsor.
- Fiduciary investment advice for retirement investors, employee benefit plans and investment advice providers in two documents.
- "Fiduciary Rule," PTE 2020-02 **(Part 12): The requirement that investment advisers and broker-dealers to receive no more than reasonable compensation.**

Internal Revenue Service (IRS)

- Coronavirus-related relief for retirement plans and guidance for partial plan terminations.
- Audit of plans to examine worker classifications, RMDs in large DB plans and participant loans.
- Operational Compliance List is provided to help plan sponsors and practitioners achieve operational compliance.

New Plans and Plan Design Options

- MEPs and PEPs
- Plan overviews including 401(k), defined benefit and combination plans, SEPs, and SIMPLES.
- CalSavers
- After-tax voluntary contributions and the Mega Roth
- ESOPs for small employers

While we cannot discuss all the issues in this newsletter, you can join me at our upcoming June webinars as I discuss how to take advantage, what to watch out for, and the traps this new activity has created. Join us here.

3(16) vs. 3(21) vs. 3(38) Fiduciary
What's the Difference?

"A retirement plan adviser can serve in with a 3(16), 3(21) or 3(38) fiduciary capacity, and in some cases, both capacities. The needs and desires of the plan sponsor typically dictate the specific arrangement, which is predicated upon the subject of risk mitigation versus risk avoidance."

3(16)
Named & acts as Plan Administrator
Oversees Management & Administration
Selection, evaluation & monitoring all providers
Evaluation of all plan fees
Delegate administration responsibilities
Oversee operation of Plan
Provide reporting & disclosure materials

3(21)
States in writing co-fiduciary status
Assists in drafting IPS
Helps design initial fund menu
Provides monitoring
Recommends changes
Recommends mapping strategies
Provides Documentation

3(38)
States in writing co-fiduciary status
Drafts IPS
Builds initial fun menu
Monitors menu
Makes changes
Determines mapping strategies
Provides Documentation

3(21) vs. 3(38) Fiduciary; What's the Difference? Gratke Wealth. David Gratke. 11-1-2011.
http://davidgratke.com/401k/321-vs-338-fiduciary-whats-the-difference/

HICKS LEGAL
Fiduciary and Compliance Review Services

Why are Retirement Plan Fiduciaries turning to Independent Fiduciary Advisors?

ERISA imposes high standards upon fiduciaries. The courts refer to those duties as “the highest known to law”. Retirement Plan fiduciaries may be personally liable if they know, or should have known, of a breach by another fiduciary. Pleading ignorance or inexperience will not be an adequate legal defense. Complying with the broadly expanded 408(b)(2) Regulations is a daunting task. ERISA encourages plan sponsors to hire “Prudent Experts”.

To comply with the new 408(b)(2) regulation, a responsible plan fiduciary will develop procedures that will demonstrate that its arrangements with third-party service providers are reasonable. Documenting the process by which the required information is solicited, reviewed, and evaluated is the most effective means to achieve compliance. We provide individual consultation with a California Attorney to protect fiduciaries from this liability. We will meet with you to:

1. Identify an individual or committee that will be responsible for identifying covered service providers and soliciting and evaluating the required disclosures. The disclosures must be received “reasonably in advance” of the date the service provider contract or arrangement is entered into, extended, or renewed.

2. Implement a written policy or procedure to identify the duties of the responsible individual or committee, the required elements of disclosure (which differ depending on the type of covered service provider), and the process to be followed if the required disclosures are not provided, in whole or in part.

3. Document the responsible individual’s or committee’s review of the information disclosed and the report of its findings to the fiduciary with ultimate responsibility for entering into the service provider contract or arrangement. Document the process by which such fiduciary decision-making is made.

4. Provide “benchmarking” services to allow the responsible plan fiduciary to evaluate and compare the service provider’s aggregate compensation with other comparable service providers and industry standards, and to otherwise assist in supporting the process by which the fiduciary determines and documents that a service provider’s compensation is reasonable.

Procedural due diligence is especially important in evaluating the performance of investment options offered under a 401(k) or 403(b) plan where participants can direct the investment of their own accounts. Direct and indirect fees and other charges affect the value of participants’ accounts, and the documentation of procedural diligence can provide an effective defense in the event of litigation claiming that the plan fiduciary has violated its duty to monitor fees and expenses.

The SECURE Act

As part of a larger government spending package, which was signed into law on December 20, 2019, Congress included provisions from the Setting Every Community Up for Retirement Enhancement (SECURE) Act. The act reflects policy changes to defined contribution plans, defined benefit pension plans, individual retirement accounts (IRAs), and 529 college savings accounts. Most provisions in the law go into effect on January 1, 2020.

Here is a summary of some key provisions of the SECURE Act:

Required minimum distributions (RMDs) now begin at age 72
Americans are working longer and will no longer be required to withdraw assets from retirement plans and IRAs at age 70½. RMDs now begin at age 72 for individuals who turn 70½ in the calendar year 2020 and later.

IRA contributions beyond age 70½
As Americans live longer, an increasing number are continuing to work past their traditional retirement age. Under the SECURE Act, employees can continue to contribute to their traditional IRAs past age 70½ if they are still working. That means the rules for traditional IRAs will align more closely with retirement plans.

Long-term, part-time workers will be able to join the company 401(k) plan
Up until now, if an employee worked less than 1,000 hours per year, the employee was generally ineligible to participate in the company's 401(k) plan. Except in the case of collectively bargained plans, the law now requires employers maintaining a 401(k) plan to offer a plan to any employee who worked more than 1,000 hours in one year, or 500 hours over 3 consecutive years. Employer contributions are not required for these employees even if the plan is top-heavy. Although employers need to start tracking these part-time employees, the earliest entry date of these employees will be January 1, 2024.

Increased tax credit for starting a retirement plan, up to $5,000
The new law provides an increased start-up retirement plan credit for smaller employers of $250 per non-highly compensated employees eligible to participate in a plan at work (minimum credit of $500 and maximum credit of $5,000). This credit would apply to small employers with up to 100 employees over a 3-year period beginning after December 31, 2019 and applies to SEP, SIMPLE, defined contribution plans, and defined benefit plans.

$5,000 withdrawal per parent penalty-free upon the birth/adoption of a child
The new law permits an individual to take a "qualified birth or adoption distribution" of up to $5,000 from an applicable defined contribution plan, such as a 401(k) or an IRA. The 10% early withdrawal penalty will not apply to these withdrawals, and you can repay them as a rollover contribution to an applicable eligible defined contribution plan or IRA.

This is a summary of some of the key provisions that affect retirement plans. If you need more information, please contact us at NH Hicks.

New Plan Set Up Deadlines

The **Setting Every Community Up for Retirement Enhancement (SECURE) Act** was passed in December 2019 and made policy changes that will impact the adoption of new defined contribution plans and defined benefit plans. Here are the new plan deadlines for 2020 and beyond.

Start-Up Safe Harbor Plan: October 1st

This deadline has not changed. If an employer does not currently sponsor a retirement plan and is interested in starting a safe harbor 401(k) plan, the deadline is 90 days before year end. That means October 1, 2020 to install a new safe harbor plan for this year.

Adding Safe Harbor Provisions for 2020: Dates vary

If the client already sponsors a 401(k) plan and is looking to add a safe harbor provision, there are now different deadlines depending on the safe harbor provisions.

- Safe Harbor Match: The deadline to add a safe harbor match remains unchanged at 30 days before the start of the plan year. An employer has until December 1, 2020 to add a safe harbor match for 2021.

- 3% Non-Elective Safe Harbor: A plan sponsor has until 30 days before the end of the plan year to add a 3% non-elective safe harbor provision. That is December 1, 2020 for calendar year plans.

- 4% Non-Elective Safe Harbor: If the plan sponsor misses the 3% safe harbor deadline above, there is a new option available. They can now add a safe harbor non-elective provision up to the last day of the following plan year if the plan sponsor is willing to contribute 4% of pay instead of the 3%. So, they have until December 31, 2021 to add a 4% non-elective safe harbor provision to their plan for 2020.

Profit Sharing or Defined Benefit Plans:
Due date of business tax return plus extensions

An employer can now set up a plan, and make deductible contributions, until the due date of the employer's 2020 tax return plus extensions. It is important to note that this only applies to employer contributions, as it is not possible to make 401(k) deferrals retroactively to the previous year. This extra time provides a great opportunity for companies to achieve some additional tax savings right at the time they realize it the most …. as they are looking at a large tax payment due to the IRS.

We think the SECURE Act offers qualified plan opportunities and a little reprieve from the effects of potential procrastination. NH Hicks is always here to help our advisors and clients.

ERISA Fee Disclosures

408(b)(2) and 404(a)(5) are new ERISA regulations that require actions by the sponsors of all retirement plans with participant directed accounts. Each ruling has separate and distinct requirements. The purpose of these regulations is to ensure that plan fiduciaries (and plan participants who direct the investment of their individual accounts) have the information they need to make informed investment decisions.

Although much of the disclosure required by the new regulations is provided by investment companies or other service providers, plan fiduciaries will still need to educate plan participants about the fee disclosure and be prepared for questions from participants who will now see how much they are actually paying for certain services.

Here is a brief summary of these regulations:

- **<u>408(b)(2) Disclosure to Plan Sponsors</u>** – This regulation required “service providers” to provide plan fiduciaries with the following information in writing **by July 1, 2012:**

  1. A description of the services to be provided to the plan and/or plan participants (the services include those of registered investment advisors, brokerage firms, actuaries, accountants, and third party administrators);
  2. The fees and compensation deducted from participants accounts for those services.

  Once the plan sponsor has the disclosure, the next steps are to review it to determine whether the fees and services are reasonable and then document their findings.

  Failure to comply with these 408(b)(2) disclosure regulations constitutes a prohibited transaction subject to a 15% excise tax and exposing the plan fiduciary to personal liability for breach of fiduciary duty.

- **<u>404(a)(5) Disclosure to Plan Participants</u>** – **By August 30, 2012**, plan fiduciaries are required to make their initial disclosure of fees to all eligible employees (participating and nonparticipating), as well as to former employees and beneficiaries with account balances. Under 404(a)(5), plan fiduciaries are required to disclose the following:

  1. The information necessary to make informed decisions when selecting investments;
  2. An explanation of recordkeeping, administrative services and other expenses that are deducted from participant accounts;
  3. Fees for individual transactions, such as loan setup maintenance, and distributions, that are deducted from applicable participant’s accounts.

  The first quarterly disclosure of fees actually charged to each participant’s account was due on November 14, 2012.

For answers to questions about your fiduciary responsibilities under either the 408(b)(2) service-provider fee disclosure rules or 404(a) participant fee disclosure rules, go to nhhicks.com and click on Hicks Legal.

Determination of Controlled Group and/or Affiliated Service Groups

To determine whether the companies are affiliated or controlled please supply: the name of all business owners, percentage and relationship, each entity type, number of employees, nature of the business nature and any business relationship to one another. Show if any of the businesses provide services to one another or mutual third parties and the percentage of the services provided. List any existing qualified retirement plans the businesses may sponsor.

Controlled Group [IRC Codes 414(b)(c) and 1563]

A Controlled Group exists for businesses with a parent-subsidiary or brother-sister relationship.

Parent-Subsidiary Controlled Group: A parent-subsidiary controlled group exists when one business (common parent) owns at least 80% of one or more other businesses (subsidiaries).

Brother-Sister Controlled Group: A brother-sister controlled group exists when five or fewer persons own 80% or more of the stock value or voting power of each corporation and the same individuals together own more than 50% of the stock value or voting power of each corporation, taking into account the ownership of each person only to the extent such ownership is identical with respect to each organization (e.g. if a common owner owns 30% of one business and 80% of another business, the owner's identical ownership in the two businesses is 30%).

Affiliated Service Group [IRC Code 414(m)]

An Affiliated Service Group (ASG) is a group of employers treated as a single entity because of a combination of ownership and services rendered. An ASG can fall into one of three categories: (1) A-Organization Groups (A-Org) consists of an Organization designated as a First Service Organization (FSO) and at least one A-Org, (2) B-Organization Groups (B-Org) consists of an FSO and at least one B-Org, or (3) Management Groups.

An FSO must be a "service organization". An organization is a service organization if capital is not a material income producing factor. As a general rule, the capital is a material income producing factor if a substantial portion of the income of the business is attributable to the employment of capital in the business (e.g. inventories, plant, machinery, or other equipment.) In a service organization, fees would come from commissions or compensation for personal services, such as health, law, architecture, accounting, performing arts, and consulting.

The A-Organization Groups must consist of an FSO and another service organization, which is known as the A-Org. The A-Org must (1) have ownership interest in the FSO and (2) the A-Org must regularly perform services for the FSO or must be regularly associated with the FSO in performing services for third parties.

The B-Organization Groups must consist of an FSO and another organization, which is known as the B-Org (B-Org does not have to be a service organization). The B-Org must meet all of the following three requirements: (1) a significant portion of its business must be the performance of services for a FSO (or an A-Org with respect to the FSO), (2) the services must be historically performed by employees in the service field of the FSO or the A-Org's, and (3) 10% or more of the interest in the organization must be held, in aggregate, by highly-compensated employees.

The Management Groups must consist of a recipient organization and a management organization. To be an affiliated service group, the management organization's principal business must be the performance of management functions, on a regular and continuing basis for the recipient organization. There does not need to be any common ownership between the management organization and the organization for which it provides service.

Compliance Division Programs

The Internal Revenue Service and Department of Labor offer a comprehensive system of correction programs to sponsors of 401(a), 403(b) and Simplified Employee Pension (SEP) plans. Each program is designed to correct specific problems.

DOL Delinquent Filer Program (DFVCP):

- Failure to file Form 5500.
- The DOL fees for small plans (fewer than 100 participants) are $10 per day after the due date, not to exceed $750 per return, with a maximum of $1,500 for multiple late returns. The DOL fees for large Plans (100 or more participants) are $10 per day after the due date, not to exceed $2,000 per return, with a maximum of $4,000 for multiple returns.
- NHI will charge annual administration fees plus $500 for DOL submission.

IRS Penalty Relief for Late 5500-EZ:

- Failure to file Form 5500-EZ owner-only plans.
- The IRS fee is $500 per delinquent return up to $1,500 per plan.
- NHI will charge $250 for each missed year to prepare 5500-EZ and submission.

IRS Voluntary Correction Program (VCP):

- Failure to timely adopt plan documents or restatement.
- The IRS fees are based on the size of the plan.
- NHI will charge document fees plus $500.

IRS Self Correction Program (SCP):

- Operational Failures such as document amendments, certain loan problems, ADP/ACP tests, top-heavy, 415 limits, and minimum distributions.
- There is no IRS fee.
- NHI will charge a fee of $500.

DOL Voluntary Fiduciary Correction Program (VFCP):

- Late deposit of 401(k) or employer contributions.
- There is no DOL fee.
- NHI will charge a fee of $1,500 (The client could incur additional NHI fees depending on the severity of the violation and the amount of time required.)

Determination of Controlled Groups or Affiliated Services Groups:

- If research needs to be completed to determine whether the companies are affiliated and/or controlled, our fee is $500 for a letter. If we cannot determine whether the companies are affiliated and/or controlled, NHI will charge $2,000 to file for an IRS determination letter.

Plan Audit Services:

- Our fees are $200 per hour.

CalSavers Retirement Savings Program

Beginning on July 1, 2019, California private employers with 5 or more employees, who do not already sponsor a retirement plan, may voluntarily enroll in the CalSavers Retirement Savings Program (CalSavers). Employers that do not voluntarily enroll *must* enroll in CalSavers according to the following schedule:

100 or more employees	June 30, 2020
50 to 99 employees	June 30, 2021
5 to 49 employees	June 30, 2022

The key features of the CalSavers program are shown below:

- This is a workplace retirement savings program for employers with at least 5 employees that do not sponsor their own retirement plans ("Eligible Employers"). This may mean a 401(k) plan, a 403(b) plan, a SEP or SIMPLE plan, or a multiple employer (union) plan.
- CalSavers applies to private for-profit and non-profit employers, but not to federal or state governmental entities.
- CalSavers requires employees at least age 18 and receiving a Form W-2 from an eligible employer, to be automatically enrolled in the CalSavers program after a 30 day period, during which they may either opt out, or customize their contribution level and investment choices.
- The default is an employee contribution of 5% of their wages subject to income tax withholding, automatically increasing each year by 1% to a maximum contribution level of 8%. Employer contributions currently are prohibited.
- Eligible Employers who enroll in CalSavers will provide some basic employee roster information to CalSavers. CalSavers will then contact employees directly to notify them of the program and to instruct them about how to enroll or opt-out online. Those who enroll will have an online account which they can access in order to change their contribution levels or investment selections
- Once an Eligible Employer has enrolled in CalSavers, their subsequent obligations are limited to deducting and remitting each enrolled employee's contributions each pay period, and to adding new eligible employees within 30 days of hire (or of attaining eligibility by turning age 18, if later).
- Eligible Employers are shielded from fiduciary liability to employees that might otherwise arise regarding investment performance or other aspects of participation in the CalSavers program.
- There are employer penalties for noncompliance. The penalty is $250 per eligible employee for failure to comply after 90 days of receiving the CalSavers notification, and $500 per eligible employee if noncompliance extends to 180 days or more after the notice.

Here are some online resources for Eligible Employers:

- Employer checklist to help employers prepare for enrollment,
- CalSavers Program Disclosure Booklet providing details of the program, and
- Online FAQs.

NH HICKS

FEES FOR SERVICES

401(k) Profit Sharing Plans:
Installation/Documents (takeover no charge) .... $1250 + $10 per eligible participant
Administration .... $1350 + $30 per eligible participant

Defined Benefit Plans:
Installation/Documents (takeover no charge) .... $1350 + $10 per eligible participant
Administration including actuarial certification .... $2200 + $50 per eligible participant

DB/DC Combination Plans:
Installation/Documents (takeover no charge) .... $2700 + $20 per eligible participant
Administration including actuarial certification .... $3650 + $50 per eligible participant

*Additional Fees will be added for the installation and administration of Cash Balance Plans

Owner Only –401(k):
Installation/Documents (takeover no charge) $550
Administration (assets less than $250,000) $300
Administration (assets $250,000 and more) $550

Owner Only – Defined Benefit Plan:
Installation/Documents (takeover no charge) $1300
Administration including actuarial certification $1700

Owner Only – DB/DC Combination Plans:
Installation/Documents (takeover no charge) $1700
Administration including actuarial certification $2100

Special Transactions:

Defined Contribution Plans
Comparability allocation (multiple runs) $250
Amendments, trust accounting or 5500 audit consulting .... $125 per hour
Distributions or extensions (annual loan $35) .... $ 95
QDRO or RMD $225
Cycle 3 Restatements (Owner only $550) $950

Defined Benefit Plans
PBGC Reporting $225
Trust accounting or 5500 audit consulting .... $125 per hour
Distributions or amendments $225
Loans (annual loan $35) or Extensions .... $ 95

Our fees are offset by all third party payments we receive from investment companies.

5-19-2021