

# BULLETIN

## DOL Approves Charges for Distributions

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On May 19<sup>th</sup>, the Department of Labor issued guidance permitting plans to charge participants for the costs of distributions. While a relatively common practice, the legality of such charges has been questionable. Now it's clearly permissible. The guidance is Field Assistance Bulletin 2003-3 ([http://www.dol.gov/ebsa/regs/fab\\_2003-3.html](http://www.dol.gov/ebsa/regs/fab_2003-3.html)).

In effect, this FAB reverses the DOL's position on this issue. In Advisory Opinion 94-32A (the so-called "Homer Elliott letter"), the DOL ruled that a plan could not charge a participant (or the participants' account) for the cost of reviewing and qualifying a domestic relations order (QDRO). The rationale was that the law created rights in participants and beneficiaries, and plan sponsors and fiduciaries could not limit access to those rights by imposing a charge on their exercise.

By extension of that rationale, plans would not be able to charge for distributions--at least the normal form of retirement benefit--because participants have a right to receive retirement distributions under a plan.

In the FAB, the DOL stated that it is reversing its position on the Homer Elliott Advisory Opinion because . . . "the Department has determined that neither the analyses or conclusions set forth in

that opinion are legally compelled by the language of the statute [ERISA]."

In the FAB, the DOL gives specific examples of expenses which could be charged to participants (or to their accounts):

1. Hardship withdrawals. Participants may be charged for the administrative expenses for processing hardship withdrawals. It is not clear whether this would also be true of the expense of determining whether the participant is entitled to take a hardship withdrawal, but we presume this is also intended.
2. Calculation of benefits payable under different plan distribution options. Some plans will provide alternative calculations to participants of the consequences of the benefit options under the plan. Plans may charge participants for those calculations.
3. Benefit distributions. Plans may charge participants for the processing of their distributions, at least distribution on a periodic basis. It seems likely that the DOL also meant to include lump sum distributions, for they point out that ERISA does not preclude the allocation of expenses related to distributions.

4. Accounts of separated vested participants. Plans may charge accounts of separated vested participants for administrative expenses, even if they do not charge the accounts of participants who are currently employees. For example, the employer may pay for the administrative expenses for all of the participants who are currently employed. However, an employer may decide that it will not pay for the administrative expenses of participants who are no longer employed, but who have vested account balances. In those cases, reasonable administrative expenses can be charged directly to the former employee participant accounts (such as a proportion of the expenses for an outside third party administrator).
5. Qualified Domestic Relations Orders (QDROs) and Qualified Medical Child Support Orders (QMCSOs) determinations. A plan may charge individual participants, or their accounts, for the reasonable expense attendant to QDRO or QMCSO determinations.

As a word of caution, the DOL points out that in order to charge expenses to the participants or their accounts, the expense must be one that is properly chargeable to the plan and the plan document must provide that such expenses will be paid from plan assets (or at least not preclude it). Further, if the plan document addresses the issue, the plan fiduciaries must follow the terms of the plan. Where the plan is silent on whether or not these costs may be allocated to the accounts of participants, the fiduciaries must make a determination in the best interest of the participants. We suggest, therefore, that plans be amended to specifically permit these types of expenses to be allocated to

participant accounts to reduce (if not eliminate) the fiduciary issue.

The DOL also points out that its regulations require that summary plan descriptions describe any plan provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or on an account of a participant or beneficiary, if the fee or charge must be paid in order for the participant to receive his or her benefits under the plan. In addition, the SPD must include a statement identifying any circumstances that may result in the offset or reduction of any benefits that a participant or beneficiary might otherwise reasonably expect based on the description of the plan's benefits. Thus, the summary plan description should clearly describe any such charges and the conditions under which they would be imposed.

Finally, and as an additional precautionary note, the FAB does not discuss the inter-relationship between the right to charge participants as described in the FAB and ERISA section 406(b), which generally prohibits a fiduciary from using its authority to cause itself to be paid an additional fee. For example, an employer cannot use its authority as a fiduciary to cause itself to be paid reimbursements (with certain very limited exceptions described in the regulations under ERISA section 408(b)). Thus, even if the expense could otherwise be allocated to the participants, section 406(b) may still preclude it.

The greatest impact of this change will probably be that plan sponsors and service providers will routinely charge participants for distributions--much as they now do for participant loans. ■