

Debunking SPD Myths, Part 5: *Yes, There are Reporting Requirements for "Top Hat" Plans*

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DEBUNKING SPD MYTHS, PART 5: YES, THERE ARE REPORTING REQUIREMENTS FOR “TOP HAT” PLANS

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It is well known by employers that nonqualified deferred compensation (“NQDC”) plans that are established to provide unfunded deferred compensation benefits to a select group of management or highly compensated employees (referred to as “top hat plans,” as in the top hat, for example, worn by the “Monopoly Man”) are not subject to the typical ERISA reporting and disclosure requirements. Top hat plans have the advantage of being extremely flexible in a number of ways that typical qualified retirement plans cannot be. In fact, top hat plans are expressly exempt from ERISA’s participation, vesting, distribution, minimum funding, and fiduciary standards.

As part of our ongoing “Debunking SPD Myths” series, we will explain that employers must be aware, however, that at least some reporting requirements apply to top hat plans. Employers should be aware of these requirements when establishing a top hat plan. Employers should also consider that, at least in some circumstances, some participant disclosure—even though not required—may be helpful in the case of top hat plans.

Myth: We Have No Reporting Requirements for Top Hat Plans

Part 1 of ERISA Title I, which provides the rules for reporting and disclosure, does not expressly exempt top hat plans. It does,

however, provide an *alternative* method of compliance, referred to as a “top hat letter.”

Under this alternative, instead of filing an annual Form 5500 return as required for qualified retirement plans, the plan administrator of a top hat plan may file a one-time statement with the Department of Labor (“DOL”) that includes:

1. The name and address of the employer;
2. The employer identification number (“EIN”) assigned by IRS;
3. A declaration that the employer maintains a plan or plans primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; and
4. The number of those plans and the number of employees in each plan.

The statement may be delivered to the DOL by mail, or, pursuant to proposed regulations, electronically. Pending issuance of a final rule, the DOL has indicated that plan administrators may satisfy the top hat plan statement requirement using electronic submission, on a voluntary basis. Upon the effective date of a final rule, the electronic submission would be the only acceptable method.

The statement must be filed within 120 days after the plan becomes subject to ERISA (generally the day the plan is established).

Even if an employer files the one-time statement, certain ERISA rules will continue to apply. Top hat plans remain subject to ERISA's claims and appeal rules, preemption of state law provision, and civil enforcement provisions. Also, a plan administrator must still provide the DOL certain documents upon request.

Myth: We Can't Fix a Late Top Hat Letter Filing

All hope is not lost, however, if the plan administrator fails to file the statement within 120 days. The DOL maintains the Delinquent Filer Voluntary Compliance Program ("DFVCP") under which a plan administrator may voluntarily correct a failure to file the top hat statement. To comply with the terms of the DFVCP, the plan administrator must:

1. Prepare a statement that meets the requirements for a top hat filing;
2. Pay the applicable fee (between \$750-\$4,000 per plan) either by mail or electronically; and
3. If payment is made by mail, submit the most current Form 5500, with only line items 1a and 1b, 2a through 2c, and 3a through 3c, of the Form 5500 completed.

There is no "per administrator" or "per sponsor" cap. If an employer sponsors several plans required to file annual reports, the maximum applicable penalty amounts would apply for each plan.

Top Hat Plans Do Not Need an SPD, but Should Consider Some Method of Participant Disclosure

Again, to be clear, in addition to not being subject to the reporting requirements, top hat plans are not required to provide a summary plan description ("SPD") to participants. In fact, some types of nonqualified plans (e.g., defined benefit supplemental executive retirement plans or "SERPs") that do not involve employee elections to defer, often do not provide any kind of documentation to participants.

However, having some kind of documentation to provide to participants—whether a short summary or a full copy of the plan document— is a good business practice. First, any NQDC plan is a contractual arrangement. In order to effectively enforce the contract, and avoid potential claims and misunderstandings, it is helpful to provide participants a clear written explanation of the plan's terms and restrictions, and the participant's obligations under the plan. Second, providing a clear explanation of the plan terms helps to ensure that participants appreciate the role that the nonqualified deferred compensation plays in their compensation package. Employers spend considerable money on compensation programs designed to reward and retain valued employees. Not taking action to ensure those employees understand and value these programs is a lost employee relations opportunity.

Conclusion

Top hat plans are complex, but the simplified reporting requirements created by the DOL make life much easier for employers. Additionally, the need to help participants understand their benefits so that they can take actions in their own financial self-interest is significant. An experienced and qualified employee benefits lawyer who can provide practical advice in these scenarios can help employers easily comply with the top hat reporting requirements, and find the appropriate level of disclosure for their top hat plans.

See part 1 of our “Debunking SPD Myths” series: [The SPD Basics, and \(Almost\) Every Employer Needs One](#)

See part 2 of our “Debunking SPD Myths” series: [Think That Emailing Your SPD to Employees is Always Enough? Think Again](#)

See part 3 of our “Debunking SPD Myths” series: [Your Insurance Contracts and Summaries of Benefits and Coverage are Not SPDs for Your Health or Other Welfare Benefits Plan](#)

See part 4 of our “Debunking SPD Myths” series: [Know Your Alternative Methods of Distribution for Terminated Participants and Beneficiaries](#)

About the Author

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