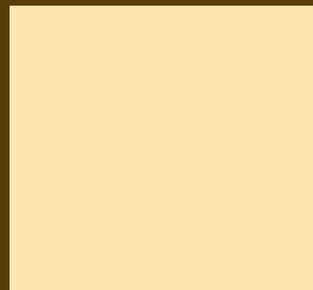


# PROFIT SHARING PLANS

for Small Businesses



*Profit Sharing Plans for Small Businesses* is a joint project of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) and the Internal Revenue Service (IRS). Its publication does not constitute legal, accounting, or other professional advice.

This publication and other EBSA materials are available by calling toll-free:

**866-444-EBSA (3272)**

Or visit the agency's Web site at: **[www.dol.gov/ebsa](http://www.dol.gov/ebsa)**

*Profit Sharing Plans for Small Businesses* (IRS Publication 4806) is also available from the IRS at:

**800-TAX-FORM (800-829-3676)**

(Please indicate catalog number 53787K when ordering)

This material is available to sensory impaired individuals upon request:

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## WHY PROFIT SHARING PLANS?

Profit sharing plans can be a powerful tool in promoting financial security in retirement. They are a valuable option for businesses considering a retirement plan, providing benefits to employees and their employers.

Employers start a profit sharing plan for a host of reasons:

- ❑ A well-designed profit sharing plan can help attract and keep talented employees.
- ❑ Contributions to a profit sharing plan are discretionary. The employer can choose when and how much to contribute.
- ❑ This type of plan gives employers flexibility in design of key features.
- ❑ A profit sharing plan benefits a mix of rank-and-file employees and owner/managers.
- ❑ The money contributed may grow through investments in stocks, mutual funds and other investment vehicles.
- ❑ Contributions and earnings generally are not taxed by the Federal government or by State governments until they are distributed.
- ❑ A profit sharing plan may allow participants to take their benefits with them when they leave the company, easing administrative responsibilities.

This booklet highlights some of a profit sharing plan's advantages and some of your options and responsibilities as an employer operating a profit sharing plan. For more information, a list of resources for you and for prospective plan participants is included at the end of this booklet.

## ESTABLISHING A PROFIT SHARING PLAN

When you establish a profit sharing plan, you must take certain basic actions. One of your first decisions will be whether to set up the plan yourself or to consult a professional or financial institution — such as a bank, mutual fund provider, or insurance company — for help with establishing and maintaining the plan. In addition, there are four initial steps for setting up a profit sharing plan:

- ❑ Adopt a written plan document,
- ❑ Arrange a trust fund for the plan's assets,
- ❑ Develop a recordkeeping system, and
- ❑ Provide plan information to participants.

**Adopt a written plan document** — Plans begin with a written document that serves as the foundation for day-to-day plan operations. If you have hired someone to help with your plan, that person likely will provide it. If not, consider obtaining assistance from a financial institution or retirement plan professional. In either case, you will be bound by the terms of the plan document.

A *profit sharing plan* allows you to decide (within limits) from year to year whether to contribute on behalf of participants. If you do make contributions, you will need to have a set formula for determining how the contributions are divided. This money is accounted for separately for each employee. Your contributions to the plan can be subject to a vesting schedule (which provides that an employee's right to employer contributions becomes nonforfeitable only after a period of time). Annual testing ensures that benefits for rank-and-file employees are proportional to benefits for owners/managers.

Once you have decided on a profit sharing plan for your company, you will have flexibility in choosing some of the plan's features — such as when and which employees can participate in the plan. Other features written into the plan are

required by law. For instance, the plan document must describe how certain key functions are carried out, such as how contributions are deposited in the plan.

Unless it includes a 401(k) cash or deferred feature, a profit sharing plan does not usually allow employees to contribute. If you want to include employee contributions, see *401(k) Plans for Small Businesses* (Publication 4222).

A profit sharing plan can be for employers of any size.

**Arrange a trust fund for the plan's assets** — A plan's assets must be held in trust to assure that assets are used solely to benefit the participants and their beneficiaries. The trust must have at least one trustee to handle contributions, plan investments, and distributions. Since the financial integrity of the plan depends on the trustee, selecting a trustee is one of the most important decisions you will make in establishing a profit sharing plan. If you set up your plan through insurance contracts, the contracts do not need to be held in trust.

**Develop a recordkeeping system** — An accurate recordkeeping system will track and properly attribute contributions, earnings and losses, plan investments, expenses, and benefit distributions. If a contract administrator or financial institution assists in managing the plan, that entity typically will help keep the required records. In addition, a recordkeeping system will help you, your plan administrator, or financial provider prepare the plan's annual return/report that must be filed with the Federal government.

**Provide plan information to participants** — You must notify employees who are participants in the plan about certain benefits, rights, and features. In addition, a summary plan description (SPD) must be provided to all participants. The SPD is the primary vehicle to inform participants and beneficiaries about the plan and how it

operates. The SPD typically is created with the plan document. (For more information on the required contents of the SPD, see **Disclosing Plan Information to Participants**.)

## **OPERATING A PROFIT SHARING PLAN**

Once you have established a profit sharing plan, you assume certain responsibilities in operating the plan. If you hired someone to help in setting up your plan, that arrangement also may have included help in operating the plan. If not, another important decision will be whether to manage the plan yourself or to hire a professional or financial institution — such as a bank, mutual fund provider, or insurance company — to take care of some or most aspects of operating the plan.

Elements of operating profit sharing plans include the following:

- Participation
- Contributions
- Vesting
- Nondiscrimination
- Investing profit sharing plan monies
- Fiduciary responsibilities
- Disclosing plan information to participants
- Reporting to government agencies
- Distributing plan benefits

### **Participation**

Typically, a plan includes a mix of rank-and-file employees and owner/managers. However, some employees may be excluded from a profit sharing plan if they:

- Have not attained age 21;
- Have not completed a year of service (2 years in certain plans); or
- Are covered by a collective bargaining agreement that does not provide for participation in the plan, if retirement benefits were the subject of good faith bargaining.

Employees cannot be excluded from a plan merely because they are older workers.

### **Contributions**

In a profit sharing plan, you can decide on your business's contribution (if any) to participants' accounts in the plan. You have the flexibility of changing the amount you contribute to the plan each year, according to business conditions.

If you do make contributions, you will need to have a set formula for determining how the contributions are allocated to participants' accounts. The simplest, and most common, allocation formula specifies that the employer contribution is allocated so that each participant receives an amount that is the same percentage of his or her compensation.

### **Contribution Limits**

Employer contributions and forfeitures (nonvested employer contributions of terminated participants) are subject to a per-employee overall annual limitation. This limit is the lesser of:

- 100 percent of the employee's compensation, or
- \$49,000 per year for 2009 and 2010.

Employers can deduct amounts that do not exceed 25 percent of aggregate compensation for all participants and the per-employee limits mentioned above.

### **Vesting**

In profit sharing plans, you can design your plan so that employer contributions become vested (nonforfeitable) over time, according to a vesting schedule.

If you require 2 years of service to participate, all contributions are immediately vested. All employees must be vested according to plan terms.

### **Nondiscrimination**

In order to preserve the tax benefits of a profit sharing plan, the plan must provide substantive benefits for rank-and-file employees, not just business owners and managers. These requirements are called nondiscrimination rules and compare both plan participation and contributions of rank-and-file employees to owners/managers.

Traditional profit sharing plans are subject to annual testing to assure that the amount of contributions does not discriminate in favor of owners and managers. If you allocate a uniform percentage of compensation to each participant, then no testing is required because your plan automatically satisfies the nondiscrimination requirement.

### **Investing Profit Sharing Plan Monies**

After you decide on a profit sharing plan, you can consider the variety of investment options. One decision you will need to make in designing a plan is whether to permit your employees to direct the investment of their accounts or to manage the monies on their behalf. If you choose the former, you also need to decide what investment options to make available to the participants. Depending on the plan design you choose, you may want to hire someone either to determine the investment options to make available or to manage the plan's investments. Continually monitoring the investment options ensures that your selections remain in the best interests of your plan and its participants.

### **Fiduciary Responsibilities**

Many of the actions needed to operate a profit sharing plan involve fiduciary decisions. This is true whether you hire someone to manage the plan for you or do some or all of the plan management yourself. Controlling the assets of the plan or using discretion in administering and managing the plan makes you or the entity you hire a plan fiduciary to the extent of that discretion or control. Thus, fiduciary status is

based on the functions performed for the plan, not a title. Be aware that hiring someone to perform fiduciary functions is itself a fiduciary act.

Some decisions with respect to a plan are business decisions, rather than fiduciary decisions. For instance, the decisions to establish a plan, to include certain features in a plan, to amend a plan, and to terminate a plan are business decisions. When making these decisions, you are acting on behalf of your business, not the plan, and therefore, you would not be a fiduciary. However, when you take steps to implement these decisions, you (or those you hire) are acting on behalf of the plan and thus, in making decisions, may be acting as fiduciaries.

#### **Basic Responsibilities**

Those persons or entities that are fiduciaries are in a position of trust with respect to the participants and beneficiaries in the plan. The fiduciary's responsibilities include:

- Acting solely in the interest of the participants and their beneficiaries;
- Acting for the exclusive purpose of providing benefits to workers participating in the plan and their beneficiaries, and defraying reasonable expenses of the plan;
- Carrying out duties with the care, skill, prudence, and diligence of a prudent person familiar with such matters;
- Following the plan documents;
- Diversifying plan investments.

These are the responsibilities that fiduciaries need to keep in mind as they carry out their duties. The responsibility to be prudent covers a wide range of functions needed to operate a plan. And, since all these functions must be carried out in the same manner as a prudent person would, it may be in your best interest to consult experts in various fields, such as investments and accounting.

The plan must designate a fiduciary, typically the trustee, to make sure that contributions due to the plan are collected. If the plan and other documents are silent or ambiguous, the trustee generally has this responsibility. As part of following the plan documents in operating your plan, the plan document will need to be updated from time to time for changes in the law.

#### **Limiting Liability**

With these responsibilities, there is also some potential liability. However, there are actions you can take to demonstrate that you carried out your responsibilities properly as well as ways to limit your liability.

The fiduciary responsibilities cover the process used to carry out the plan functions rather than simply the end results. For example, if you or someone you hire makes the investment decisions for the plan, an investment does not have to be a “winner” if it was part of a prudent overall diversified investment portfolio for the plan. Since a fiduciary needs to carry out activities through a prudent process, you should document the decision-making process to demonstrate the rationale behind the decision at the time it was made.

In addition to the steps above, there are other ways to limit potential liability. The plan can be set up to give participants control of the investments in their accounts. For participants to have control, they must have sufficient information on the specifics of their investment options. If properly executed, this type of plan limits your liability for the investment decisions made by participants. You can also hire a service provider or providers to handle some or most of the fiduciary functions, setting up the agreement so that the person or entity then assumes liability.

#### **Hiring a Service Provider**

Even if you do hire a financial institution or retirement plan professional to manage

the whole plan, you retain some fiduciary responsibility for the decision to select and keep that person or entity as the plan's service provider. Thus, you should document your selection process and monitor the services provided to determine if a change needs to be made.

Some items to consider in selecting a plan service provider:

- Information about the firm itself: affiliations, financial condition, experience with profit sharing plans, and assets under their control;
- A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled, and proposed fee structure;
- Information about the quality of prospective providers: the identity, experience, and qualifications of the professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; the firm's experience or performance record; if the firm plans to work with any of its affiliates in handling the plan's account; and whether the firm has fiduciary liability insurance.

Once hired, these are additional actions to take when monitoring a service provider:

- Review the service provider's performance;
- Read any reports they provide;
- Check actual fees charged;
- Ask about policies and practices (such as trading, investment turnover, and proxy voting); and
- Follow up on participant complaints.

(For more information, see *Understanding Retirement Plan Fees and Expenses* at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).)

### **Prohibited Transactions and Exemptions**

There are certain transactions that are prohibited under the law to prevent dealings with parties that have certain connections to the plan, self-dealing, or conflicts of interest that could harm the plan. However, there are a number of exceptions under the law, and additional exemptions may be granted by the U.S. Department of Labor, where protections for the plan are in place in conducting the transactions.

One exemption allows the provision of investment advice to participants who direct the investments in their accounts. This applies to the buying, selling, or holding of an investment related to the advice as well as to the receipt of related fees and other compensation by a fiduciary adviser. Please check [www.dol.gov/ebsa](http://www.dol.gov/ebsa) for more information.

Another exemption in the law permits you to offer loans to participants through your plan. If you do, the loan program must be carried out in such a way that the plan and all other participants are protected. Thus, the decision with respect to each loan request is treated as a plan investment and considered accordingly.

### **Bonding**

Persons handling plan funds or other plan property generally must be covered by a fidelity bond to protect the plan against loss resulting from fraud and dishonesty by those covered by the bond.

### **Disclosing Plan Information to Participants**

Plan disclosure documents keep participants informed about the basics of plan operation, alert them to changes in the plan's structure and operations, and provide them a chance to make decisions and take timely action with respect to their accounts.

The **summary plan description (SPD)** — the basic descriptive document — is a plain-language explanation of the plan and must be

comprehensive enough to apprise participants of their rights and responsibilities under the plan. It also informs participants about the plan features and what to expect of the plan. Among other things, the SPD must include information about:

- When and how employees become eligible to participate in the profit sharing plan;
- The contributions to the plan;
- How long it takes to become vested;
- When employees are eligible to receive their benefits;
- How to file a claim for those benefits; and
- Basic rights and responsibilities participants have under the Federal retirement law, the Employee Retirement Income Security Act (ERISA).

The SPD should include an explanation about the administrative expenses that will be paid by the plan. This document must be given to participants when they join the plan and to beneficiaries when they first receive benefits. SPDs must also be redistributed periodically during the life of the plan.

A **summary of material modification (SMM)** appries participants of changes made to the plan or to the information required to be in the SPD. The SMM or an updated SPD must be automatically furnished to participants within a specified number of days after the change.

An **individual benefit statement (IBS)** shows the total plan benefits earned by a participant, vested benefits, the value of each investment in the account, information describing the ability to direct investments, and (for plans with participant direction) an explanation of the importance of a diversified portfolio. Plans that provide for participant-directed accounts must furnish individual benefit statements on a quarterly basis. Plans that do not provide for participant direction must furnish statements annually.

A **summary annual report (SAR)** is a narrative of the plan's annual return/report, the Form 5500, filed with the Federal government (see **Reporting to Government Agencies** for more information). It must be furnished annually to participants.

A **blackout period notice** gives employees advance notice when a blackout period occurs, typically when plans change recordkeepers or investment options, or when plans add participants due to corporate mergers or acquisitions. During a blackout period, participants' rights to direct investments, take loans, or obtain distributions are suspended.

### **Reporting to Government Agencies**

In addition to the disclosure documents that provide information to participants, plans must also report certain information to government entities.

#### **Form 5500, Annual Return/Report of Employee Benefit Plans**

Plans are required to file an annual return/report with the Federal government, in which information about the plan and its operation is disclosed to the IRS and the U.S. Department of Labor. Beginning with the reports for 2009, plans that must file the Form 5500 must do so electronically. These reports are made available to the public.

Depending on the number and type of participants covered, most profit sharing plans must file one of the following forms:

- Form 5500, Annual Return/Report of Employee Benefit Plan,**
- Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan** (available January 1, 2010), or
- Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan**

Most one-participant plans (sole proprietor and partnership plans) with total assets of \$250,000 or less are exempt from the annual filing requirement. However, regardless of the value of the plan's assets, a final return/report must be filed when a plan is terminated.

#### **Form 1099-R**

**Form 1099-R**, *Distributions From Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.* is given to both the IRS and recipients of distributions from the plan during the year. It is used to report distributions (including rollovers) from a retirement plan.

#### **Distributing Plan Benefits**

Benefits in a profit sharing plan are dependent on a participant's account balance at the time of distribution.

When participants are eligible to receive a distribution, they typically can elect to:

- Take a lump sum distribution of their account,
- Have their account transferred directly to an IRA or another employer's retirement plan, or
- Take periodic distributions.

#### **TERMINATING A PROFIT SHARING PLAN**

Profit sharing plans must be established with the intention of being continued indefinitely. However, business needs may require that employers terminate their profit sharing plans. For example, you may want to establish another type of retirement plan in lieu of the profit sharing plan.

Typically, the process of terminating a profit sharing plan includes amending the plan document, distributing all assets, and filing a final Form 5500. You must also notify your employees that the plan will be discontinued. Check with your plan's financial institution or a

retirement plan professional to see what further action is necessary to terminate your profit sharing plan.

#### **COMPLIANCE**

Even with the best intentions, mistakes in plan operation can still happen. The U.S. Department of Labor and IRS have correction programs to help profit sharing plan sponsors correct plan errors, protect participants, and keep the plan's tax benefits. These programs are structured to encourage early correction of the errors. Having an ongoing review program makes it easier to spot and correct mistakes in plan operations. See the **Resources** section for further information.

#### **A PROFIT SHARING PLAN CHECKLIST**

- 1. Have you decided how much to contribute to the plan this year?
- 2. Have you decided to hire a financial institution or retirement plan professional to help with setting up and running the plan?
- 3. Have you adopted a written plan that includes the features you want to offer, such as how contributions will be allocated and when they will be vested?
- 4. Have you notified participants and provided them with information to help in their decision making?
- 5. Have you arranged a trust fund for the plan assets or will you set up the plan solely with insurance contracts?
- 6. Have you developed a recordkeeping system?
- 7. Are you familiar with the fiduciary responsibilities?
- 8. Are you prepared to monitor the plan's service providers?
- 9. Are you familiar with the reporting and disclosure requirements of a profit sharing plan?

For help in establishing and operating a profit sharing plan, you may want to talk to a retirement plan professional or a representative of a financial institution that offers retirement plans—and take advantage of the help available in the following **Resources** section.

## RESOURCES

### *To Find Out More...*

Expanded information on the topics addressed in this publication is available on the IRS and U.S. Department of Labor's (DOL's) Employee Benefits Security Administration's Web sites, **www.irs.gov/ep** and **www.dol.gov/ebsa**. For the IRS, go to the IRS Web address and click on "Types of Plans" in the left pane. For DOL, go to the DOL Web address and click on "Publications/Reports" and scroll down to "Compliance Assistance Publications – Retirement."

The Web sites feature this publication as well as additional information on profit sharing plans and other retirement plans, as listed below. Publications can be ordered by calling the appropriate agency's toll-free number — for the IRS, **(800) TAX-FORM (829-3676)** or for DOL, **(866) 444-EBSA (3272)**.

The following items, issued by both the IRS and DOL, are available on the Web and through the toll-free numbers:

*Choosing a Retirement Solution for Your Small Business*, Publication 3998, provides an overview of retirement plans available to small businesses.

*401(k) Plans for Small Businesses*, Publication 4222, provides detailed information regarding the establishment and operation of a 401(k) plan.

*Automatic Enrollment 401(k) Plans for Small Businesses*, Publication 4674, explains a type of retirement plan that allows small businesses to increase plan participation.

*Payroll Deduction IRAs for Small Businesses*, Publication 4587, describes an arrangement that is an easy way for businesses to give employees an opportunity to save for retirement.

*Retirement Plan Correction Programs*, Publication 4224, provides a brief description of the IRS and DOL correction programs. The publication also

includes a description of programs sponsored by the Pension Benefit Guaranty Corporation (PBGC) that apply to defined benefit plans.

*SEP Retirement Plans for Small Businesses*, Publication 4333, provides a brief description of this low-cost type of retirement plan.

*SIMPLE IRA Plans for Small Businesses*, Publication 4334, describes a simple way for small businesses to contribute toward retirement.

### **Related materials available from DOL:**

#### **For small businesses:**

*Understanding Retirement Plan Fees and Expenses*

*Meeting Your Fiduciary Responsibilities*

*Selecting an Auditor for Your Employee Benefit Plan*

*Reporting and Disclosure Guide for Employee Benefit Plans*

To view these publications, go to **www.dol.gov/ebsa** and click on "Publications and Reports."

In addition, DOL sponsors two interactive Web sites — the Small Business Advisor, available at **www.dol.gov/elaws/pwbaplan.htm**, and, along with the American Institute of Certified Public Accountants (AICPA), **www.choosingaretirementsolution.org**.

#### **For employees:**

*A Look at 401(k) Plan Fees*

*What You Should Know about Your Retirement Plan* (also in Spanish)

*Savings Fitness...A Guide To Your Money and Your Financial Future* (also in Spanish)

*Taking the Mystery Out of Retirement Planning* (also in Spanish)

*Top 10 Ways to Prepare for Retirement* (also in Spanish)

*Women and Retirement Savings* (also in Spanish)

To view these publications, go to **[www.dol.gov/ebsa](http://www.dol.gov/ebsa)** and click on “*Publications and Reports.*”

**Related materials available from the IRS:**

*The Retirement Plans Products Navigator*, Publication 4460.

*Lots of Benefits*, Publication 4118, discusses the benefits of sponsoring a retirement plan and the stages involved in the life cycle of a retirement plan.

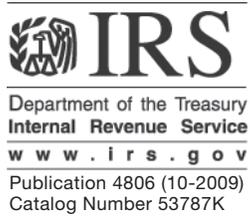
*Have You Had Your Check-up This Year for 401(k) Retirement Plans*, Publication 3066, encourages employers to perform a periodic “check-up” of their 401(k) retirement plans through the use of a checklist, and how to initiate corrective action if necessary.

*401(k) Plan Checklist*, Publication 4531.

*Designated Roth Accounts under a 401(k) or 403(b) Plan*, Publication 4530, discusses this popular feature found in many 401(k) and 403(b) plans.

*Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*, Publication 560.

To view these related publications, go to the Retirement Plans Community Web page at **[www.irs.gov/ep](http://www.irs.gov/ep)** and click on “EP Forms/Pubs/Products” in the left pane.



U.S. Department of Labor