

Paying Employee Benefit Plan Expenses Chart

Andrée M. St. Martin and Jennifer E. Eller,
Groom Law Group, Chartered

This Chart is a guide for employers to use in determining which types of expenses can be paid from the assets of an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (IRC).

The assets of an employee benefit plan can be used to pay certain of its expenses while other types of expenses may not be paid from plan assets. The chart below is designed to be used by plan sponsors to assist them in evaluating whether expenses incurred by their plans can be paid from the plans' assets. The information asked for in the three right-hand

This is just one example of the many online resources Practical Law Company offers.



To access this resource and others, visit practicallaw.com.

columns should be completed by the plan sponsor. For more information on expenses that can properly be paid from employee benefit plan expenses, see *Practice Note, Paying Employee Benefit Plan Expenses* (www.practicallaw.com/4-504-8434).

Type Of Service For Which Expense Was Incurred	Example	Legally Permitted (Fiduciary, Not Settlor In Nature)?	Authority For Legal Consideration	Chargeable to the Plan Under Plans Terms?	Arrangement And Amount Prudent And Reasonable?	Does Employer, Plan Fiduciary or Service Provider (Unrelated) Provide Service?
1. Basic Administrative Services (plan wide)	Plan record keeping.	Yes	Field Assistance Bulletin (FAB) 2003-3 (May 19, 2003) (FAB 2003-3); Department of Labor (DOL) Booklet: "A Look At 401(k) Plan Fees for Employees (DOL Guidance for Employees)			
	Plan accounting.	Yes	DOL Guidance for Employees			
	Legal services relating to plan fiduciary issues (not settlor issues).	Yes	FAB 2003-3; DOL Guidance for Employees			
	Trustee.	Yes	DOL Guidance for Employees			
	Safekeeping of plan assets (for example, custodial services).	Yes	401(k) Plan Fee Disclosure Form from the Employee Benefits Security Administration's website, prepared by the American Bankers Association/American Council of Life Insurance/ Investment Advisory Institute (Fee Disclosure Form)			

Paying Employee Benefit Plan Expenses Chart

Type Of Service For Which Expense Was Incurred	Example	Legally Permitted (Fiduciary, Not Settlor In Nature)?	Authority For Legal Consideration	Chargeable to the Plan Under Plans Terms?	Arrangement And Amount Prudent And Reasonable?	Does Employer, Plan Fiduciary or Service Provider (Unrelated) Provide Service?
	Periodic/annual compliance auditing.	Yes	FAB 2003-3; DOL Info. Ltr. To Henderson (July 28, 1998) (Henderson Ltr.)			
	Legally required reporting (such as Form 5500).	Yes	FAB 2003-3			
	Claims processing.	Yes	FAB 2003-3			
	Legal fees in connection with determining if a domestic relations order is qualified (if disclosed in SPD).	Yes	FAB 2003-3; 29 C.F.R. § 2520.102-3(l)			
	Participant communications.	Yes	DOL Adv. Op. 2001-01A (2001-01A), Ex. 2 & 5			
	Third-party administration expenses including "start up" and ongoing expenses.	Yes	2001-01A, Ex. 6			
2. Additional Administrative Services (plan wide)	Telephone voice response systems.	Yes	DOL Guidance for Employees			
	Educational seminars.	Yes	DOL Guidance for Employees			
	Retirement planning software.	Yes	DOL Guidance for Employees			
	Investment advice.	Yes	FAB 2003-3; DOL Guidance for Employees			
	Electronic access to plan information.	Yes	DOL Guidance for Employees			
	Daily valuations.	Yes	DOL Guidance for Employees; Fee Disclosure Form			
3. Investment-Related Services	On-line transactions.	Yes	DOL Guidance for Employees			
	Sales charges (also known as loads or commissions).	Yes	DOL Guidance for Employees			
	Management fees (also known as investment advisory fees or account maintenance fees).	Yes	DOL Guidance for Employees; FAB 2003-3			
	Contract termination charges.	Yes	29 C.F.R. § 2550.408b-2; Fee Disclosure Form			
	Product termination fees.	Yes	29 C.F.R. § 2550.408b-2; Fee Disclosure Form			
Asset liability modeling studies to determine asset allocations that best match investment objectives.	Yes	EBSA Q&A 15, 2009 Enrolled Actuaries Annual Meeting				



Type Of Service For Which Expense Was Incurred	Example	Legally Permitted (Fiduciary, Not Settlor In Nature)?	Authority For Legal Consideration	Chargeable to the Plan Under Plans Terms?	Arrangement And Amount Prudent And Reasonable?	Does Employer, Plan Fiduciary or Service Provider (Unrelated) Provide Service?
4. Expenses Incurred In Connection With Settlor Decisions (may not be paid with plan assets)	Legal or consulting services in connection with plan formation.	No	2001-01A, Ex.1; DOL/PWBA Ltr. to Maldonado (March 2, 1987) (Maldonado Ltr.)			
	Plan design activities (such as legal or consulting expenses incurred in advance of the adoption of the plan or plan amendment, plan design studies & cost projections to determine the financial impact of the plan change).	No	2001-01A, Ex. 1 to 4; Maldonado Ltr.			
	Drafting of discretionary amendments (such as plan spin-off, establish a participant loan program & early retirement window).	No	2001-01A, Ex. 1			
	Other employer responsibilities (such as preparation of FASB Statements No. 87 & 88).	No	2001-01A, Ex. 2			
	Legal and consulting expenses in connection with plan termination (decision to terminate and drafting of plan amendment).	No	2001-01A, Ex. 1; DOL Adv.Op. 97-03A (Jan. 23, 1997) (97-03A); Maldonado Ltr.			
	Actuarial services related to forecasting future years' minimum required contributions for purposes of plan sponsor budgeting.	No	EBSA Q&A 15, 2009 Enrolled Actuaries Annual Meeting			
	Actuarial services related to determining effect of yield curve/asset method choices as an aid in choosing to use the full yield curve or segmented rates and whether to use market value of assets or smoothed asset method for calculating minimum funding requirements.	No	EBSA Q&A 15, 2009 Enrolled Actuaries Annual Meeting			
	Actuarial services relating to forecasting pension expense for plan sponsor's balance sheet reporting.	No	EBSA Q&A 15, 2009 Enrolled Actuaries Annual Meeting			

Paying Employee Benefit Plan Expenses Chart

Type Of Service For Which Expense Was Incurred	Example	Legally Permitted (Fiduciary, Not Settlor In Nature)?	Authority For Legal Consideration	Chargeable to the Plan Under Plans Terms?	Arrangement And Amount Prudent And Reasonable?	Does Employer, Plan Fiduciary or Service Provider (Unrelated) Provide Service?
5. Fiduciary Implementation of Settlor's Decisions	Drafting required plan amendments (such as to maintain the plan's tax-qualified status).	Yes	2001-01A, Ex. 1; 97-03A			
	Routine non-discrimination testing (including actuary fees).	Yes	2001-01A, Ex. 3 & 4			
	Seeking IRS determination letters.	Yes	2001-01A, Ex. 3 & 4; 97-03A			
	Implementing discretionary amendment.	Yes	2001-01A, Ex. 3			
	Implementing a plan termination (including auditing the plan, preparing/filing annual reports, preparing/filing an IRS determination letter request on plan termination, preparing benefit statements and calculating accrued benefits, and notifying participants of their benefits under the plan).	Yes	97-03A; 2001-01A			
	Actuarial services to determine the current year's minimum contribution requirement if done by or for the plan for the purpose of management, maintenance or administration of the plan and not for plan sponsor budgeting or other sponsor-related purposes.	Yes	EBSA Q&A 6, 2010 Enrolled Actuaries Annual Meeting			
	6. Insurance and Bonding	Insurance costs for the plan fiduciaries or for the plan to cover liability or losses occurring by reason of the act or omission of a fiduciary provided that insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by the fiduciary.	Yes	ERISA § 410(b); Henderson Ltr.		
PBGC premiums, for years in which the plan is not in distress or involuntary termination proceedings.		Yes	PBGC Adv. Ltr. 74-10 (Note: PBGC authority is not necessarily afforded the same deference by the DOL)			
Bonding.		Yes	ERISA § 412; Maldonado Ltr.			



Type Of Service For Which Expense Was Incurred	Example	Legally Permitted (Fiduciary, Not Settlor In Nature)?	Authority For Legal Consideration	Chargeable to the Plan Under Plans Terms?	Arrangement And Amount Prudent And Reasonable?	Does Employer, Plan Fiduciary or Service Provider (Unrelated) Provide Service?
7. Sanctions/ Penalties	Imposed on the plan.	Yes	Henderson Ltr.			
	Imposed on someone other than the plan (such as on a plan administrator as personal liability).	No	Henderson Ltr.			
	Imposed for the late payment of PBGC premiums, for years in which the plan is not in distress or involuntary termination proceedings.	Yes	PBGC Op. Ltr. 94-6 (Note: PBGC authority is not necessarily afforded the same deference by the DOL)			
8. Fiduciary Error Correction	Cost of correction under the Voluntary Fiduciary Correction Program (VFC Program) (such as, closing costs & prepayment penalties).	No	VFC Program, 71 Fed. Reg. 20262 (April 19, 2006)			
9. Collateral Matters	Pursue, support or oppose a proxy proposal that does not enhance the plan's investment.	No	DOL Adv. Op. 2007-07A			
10. Graduation Ceremonies for Apprenticeship and Training Programs		Yes, but expenses must be modest relative to plan assets and satisfy additional criteria.	Field Assistance Bulletin (FAB) 2012-01 (Apr. 2, 2012) (FAB 2012-1)			
11. Outreach Expenses for Apprenticeship and Training Programs		Yes, but expenses must be for marketing or promotion of programs, and satisfy additional criteria.	FAB 2012-1			

For more information related to employee benefits, search for the following resources on our website.

Topics

- *Employee Benefit Plans: Administration and Compliance*
<http://uslf.practicallaw.com/topic5-503-9113>
- *Health and Welfare Plans*
<http://uslf.practicallaw.com/topic2-503-9119>
- *Retirement Plans*
<http://uslf.practicallaw.com/topic0-503-9120>

Practice Note: Overview

- *ERISA Fiduciary Duties: Overview*
<http://us.practicallaw.com/5-504-0060>
- *Retirement Plan Determination Letters Toolkit*
<http://us.practicallaw.com/7-501-3923>

Practice Notes

- *ERISA Bonding Requirements*
<http://us.practicallaw.com/9-503-3454>
- *Negotiating ERISA Service Provider Agreements*
<http://us.practicallaw.com/8-517-8904>
- *Paying Employee Benefit Plan Expenses*
<http://us.practicallaw.com/4-504-8434>
- *Service Provider Disclosure Requirements for Pension Plans*
<http://us.practicallaw.com/7-508-2407>
- *Voluntary Fiduciary Correction Program (VFCP)*
<http://us.practicallaw.com/4-523-2663>

Checklists

- *Drafting Qualified Retirement Plans Checklist*
<http://us.practicallaw.com/7-518-1879>
- *SPD Compliance Chart for ERISA Plans*
<http://us.practicallaw.com/8-506-0985>

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/0-503-5315>

Practical Law Company provides practical legal know-how for law firms, law departments and law schools. Our online resources help lawyers practice efficiently, get up to speed quickly and spend more time on the work that matters most. This resource is just one example of the many resources Practical Law Company offers. Discover for yourself what the world's leading law firms and law departments use to enhance their practices.

To request a complimentary trial of Practical Law Company's online services, visit practicallaw.com or call **646.562.3405**.

PRACTICAL LAW COMPANY®

