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Avoiding Traps in Employee Benefit Plans Administration

Presented by:

Andrea Bailey Powers
205.244.3809
apowers@bakerdonelson.com

Retirement Plan Pitfalls

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- Depositing Participant 401(k) Contributions
  - Current DOL Regulations require employers to deposit participant deferrals and loan repayments on the earliest date the amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following. (Have yet to find DOL accept deposit date of 15th business day of following month.)
  - If deposit is late, DOL will view as both a breach of fiduciary duty and a prohibited transaction.
    - Breach of Fiduciary Duty – Employer must reimburse both current and former participants for the earnings that were lost as a result of the delay. Also, DOL may apply 20% penalty and extend correction for up to six plan years.
    - Prohibited Transaction – IRS imposes excise tax of 15% on "amount involved" which is basically 15% of earnings on participant contributions for period delinquent; however, tax compounds each year PT is not corrected

- Depositing Participant 401(k) Contributions (cont'd)
  - Safe Harbor for "Small Employer"
    - "Small Employer" is defined as having fewer than 100 participants as of the beginning of each plan year
    - Deposits treated as having been made to a plan in accordance with the general rule (i.e., on the earliest date on which such contributions can reasonably be segregated from the employer's general assets) when contributions are deposited with the plan no later than the 7th business day.
  - No Bright Line Rule for Large Employers
    - In recent audits have seen DOL designate 3 – 10 business days as maximum period to deposit participant contributions

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- Crediting Service for Temp Employees
  - Many employers use temporary agencies for staffing and then hire as "regular" employee after some period of time, such as 3-6 months
  - Unless Temp Employee was true independent contractor, must give service credit while a Temp Employee for eligibility and vesting under retirement plan
  - If improperly exclude otherwise eligible employee, IRS correction procedures generally require employer to contribute 50% of average deferral for NHCEs and 100% of match and/or profit sharing contribution

Health Plan Hazards

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- **COBRA Traps**
  - COBRA coverage for spouse dropped "in anticipation of" divorce
    - Generally COBRA only available if covered under Plan on day preceding qualifying event date. What about ex-spouse who was dropped in prior open enrollment but for whom divorce was finalized in current plan year? Ex-spouse likely has COBRA right.
    - Must inform plan administrator within 60 days of entry of divorce to enforce right.
    - What if ex-spouse had break in coverage? Can there be application of preexisting condition limitations?
  - Tolling of COBRA periods due to "incapacity"
    - Recent case law has tolled time periods to elect and pay for COBRA coverage where qualified beneficiary was deemed incapacitated.
    - Standard was applied for "mental" incapacity where person unable to act on own behalf.

Health Plan Hazards

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- **GINA and Health Risk Assessments – What Not to Ask**

  HRAs commonly ask for information on family history – which is now "genetic information" covered by GINA. May obtain family history on HRA, only if comply with all of the following:

  1. Employee must give prior knowing, voluntary, and written authorization.
  2. Information must be given voluntarily. May offer reward for completion of HRA, so long as reward given whether or not the employee answers the questions regarding genetic information. This is called a bifurcated HRA.
  3. When offering healthy lifestyle programs may not single out for participation employees who have provided genetic information that indicates they are at higher risk of acquiring a health condition in the future. EXAMPLE: Employees who voluntarily disclose a family medical history of diabetes, heart disease, or high blood pressure on a health risk assessment . . . and employees who have a current diagnosis of one or more of these conditions are offered $150 to participate in a wellness program designed to encourage weight loss and a healthy lifestyle. This does not violate Title II of GINA
  4. Any individually identifiable genetic must be accessible only by employee or family member receiving services, or to any health care professional or board-certified genetic counselor involved in providing the services. Such information may not be accessible to managers, supervisors, others who make employment decisions, or anyone else in the workplace.
  5. Any individually identifiable genetic information resulting from the wellness program services must be available only for purposes of those services and not disclosed to the employer except in aggregate terms that do not reveal an person's identity.

- **Springing Deferred Compensation Under Severance Agreements**
  - An employment or other similar agreement – such as a severance, retention or change-in-control agreement may be subject to IRC § 409A in a variety of circumstances, such as
    - IF payable upon voluntary termination of employment;
    - IF total amount of benefits could exceed $500,000;
    - IF payable more than two years after the employee's termination date;
    - IF employee has direct or indirect discretion over timing of payment

      (Example: Severance pay conditioned upon execution and non-revocation of waiver and release of claims. To comply with federal employment laws, employee is given 45 days to consider release and then 7 days after executing to revoke. If severance payment tied to execution of release and expiration of revocation period, may have § 409A violation.)

- **Correcting § 409A Errors**
  - IRS Notice 2008-113 sets forth list of permissible corrections for operational errors for deferred compensation plans. Correction depends on who is affected (insider or non-insider) and when error occurred (current year, prior year, longer)
  - Example: Plan provides for 5-year installment payments but paid non-insider participant a lump sum. Participant must repay excess amount to the Plan. If corrected in current year, nothing else. If corrected year after, then participant also pays company interest on excess amount at AFR short term rate. If corrected in 2nd year after, participant repays excess + interest, + 20% excise tax. (Participant saves on premium interest tax which is where deferred amounts deemed to have been income – subject to tax – in year of deferral.) Excess amount included as taxable income in year of distribution. Participant may deduct repaid excess amount in year of correction.
  - Burden is on Participant to correct
  - Employer CANNOT pay taxes, penalties or any other amount for Participant if want relief Notice provides

QUESTIONS?