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The Ferenczy Flash

FROM THE LAW OFFICES OF Ilene H. Ferenczy, LL

Clues From the Ivory Tower: What the DOL and IRS Had to Say

As one of the co-chairs of the ASPPA Government Affairs Committee (GAC), Ilene had the pleasure of meeting with the IRS and the Department of Labor (DOL) on June 13, 2011, to discuss the current status of governmental thinking on a myriad of issues. There were two issues discussed that may impact you:

- The DOL's take on a new trend in retirement plan administration called multiple employer plans, and
- The IRS's concerns regarding historic retirement plan documentation.

Multiple Employer Plans: Maybe Not So Much

There is a burgeoning trend in providing third party administration (TPA) services for qualified retirement plans where the TPA sponsors a multiple employer plan. Under this structure, the TPA firm becomes the actual plan sponsor, and permits its client companies to adopt the plan as participating employers. Why do this? Well, among other things, the value to the clients is that a significant portion of the fiduciary duties with regard to plan administration will be performed by the TPA, who is trained to do this properly. Furthermore, the plan will benefit from economies of scale, including potentially lower asset management rates (because the pool of money is larger) and a division of administrative costs among several employers (e.g., the multiple employer plan would require only one CPA audit). Among other things, the value to the TPA firm is that it has more control, which should enable it to be more effective in providing its services.

A multiple employer plan is defined in Internal Revenue Code (the Code) Section 413(c) to be (believe it or not) a plan maintained by more than one employer. ERISA defines an employer to be "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." ERISA further requires that an employee benefit plan be sponsored by an employer.

Why are we giving you so much technical detail? Because the DOL representatives told GAC on June 13th that it is their opinion that the structure being considered by some TPA firms is not a multiple employer plan, but a series of individual single-employer plans covered under a

common document. Why? Because there is not a sufficient connection between the plan sponsor (the TPA firm) and the participating employers and their employees to enable the TPA firm to act as the plan sponsor. If the DOL position holds, many of the advantages to the TPA-provided multiple employer plans evaporate. The DOL's position has never been formalized with respect to retirement plans, but has been longstanding with regard to health and welfare plans. The DOL representatives indicated to us that they believe that the same analysis they used for the multiple employer welfare plan should be used for retirement plans.

Is the DOL right? Who knows at this point? Various people and organizations are rapidly researching the issue to see whether there is a reasonable basis for disagreement. However, we are writing simply to give you a heads up: If you are a TPA who has or is thinking of having a multiple employer plan such as that described above, there may be danger on your horizon. If you are a plan sponsor thinking of joining such a plan, you may want to hold up for a while until this shakes out.

Plan Documentation ... to Quote Sam Cooke, "Don't Know Much About History ..."

The IRS continues to struggle with how much documentation an employer must have in its records to prove that its plan meets all requirements for the tax benefits it receives. Here's the set-up: a plan sponsor applies for a favorable determination letter (for either an ongoing plan or a plan termination) or is audited. The plan has historically adopted preapproved (i.e., prototype or volume submitter) documents. Yes, those preapproved documents are deemed to meet all language requirements and no individual favorable determination letter (FDL) is needed. But, how does the IRS know that the documents were adopted on a timely basis throughout the years?

If you applied for an FDL on earlier documents, theoretically, those documents were vetted by the IRS as part of the FDL process. But, if you have no prior FDL, the IRS has never looked at this issue and "should" do so now.

The result? If you request an FDL for a preapproved plan or you are audited, the IRS is now commonly requesting that the plan sponsor produce signed and dated copies of old documents and amendments. Frequently, the IRS requests documents as far back as the initial adoption of the plan. The purpose of the request is to determine if the documents were adopted timely, so it is very important to produce executed copies (yes, those signatures and dates are important). We have had four such situations come up with our clients where the IRS required documents with the earliest dates ranging from 1998 to 2001.

The problem? It is usually difficult –and sometimes impossible– to produce these documents. Sometimes the signed and dated copies may reside with service providers who no longer handle the plan, and sometimes the documents are just lost in space.

The bigger problem? If these documents cannot be produced, the IRS treats them as not having been signed timely, resulting in a document qualification problem that must be resolved under Audit CAP (with a sanction to be paid by the employer).

Let us say at the outset that we believe that the search for nonconforming plan documents from years ago is a waste of energy when the IRS and others in government are complaining that their budgets are pinched. In fact, in our opinion, this is something like the chase of Jean Valjean by Inspector Javert in *Les Miserables*—a lot of effort over a loaf of bread that was stolen 20 years earlier. Is it wrong if a plan was not adopted properly in 1998? Yes. Do we care in 2011, after the plan has provided benefits to hundreds of employees in the 13 years since? Not really. (For what it's worth, we are confident our client with this problem did adopt the plan timely. Our point is simply ... why are you chasing this down at this late date?)

GAC discussed this issue with the IRS at the June 13th meeting, and received mixed reviews. It is clear to our firm, however, that clients and practitioners should understand that there is a risk that needs to be addressed if all historic documents cannot be easily produced. It may be that the IRS will decide to give us some relief from this problem at some point. However, it has become apparent that changes in personnel or policy at the IRS can cause this issue to arise again sometime in the future. Perhaps it's better to protect against it now.

To do that, consider taking the following action:

- Review all plan document files with your TPA, lawyer, or other advisor to identify if all amendments and restatements can be located and that you have signed and dated copies of everything. If you do, put it all in a document file or binder, and keep it safe. Spread the love ... give copies to all of your benefit plan advisors, just in case you need to track something down in future years.
- If you are missing any documentation, take action now. Talk to your current and prior service providers, legal counsel, fundholder/recordkeeper, TPA, etc., and find someone who has a copy. When you receive it, make sure to store it carefully and “spread the love” to your other advisors, as discussed above.
- If you discover that there is documentation that is forever lost, consider entering the IRS's Voluntary Correction Program as a “nonamender.” This involves taking the position that those documents were not adopted timely, paying an IRS user fee to enter the program (and professional fees to draft the submission), and receiving a compliance statement. The compliance statement is your “Get Out of Jail Free” card because it corrects the problem and stops the IRS from raising this issue with regard to the corrected years on future audit.

Furthermore, we strongly recommend that employers submit their prototype and volume submitter documents to the IRS during the plan's next open FDL submission period. This will protect the plan and the employer from further “lookbacks” by the IRS to periods before the FDL is issued, which will save you from having this problem again in the future. The cost for submitting a preapproved plan for an FDL is currently \$300 (plus professional fees). This process may be expensive the first time, as you may need to go back and prove adoptions as discussed above, but later submissions should be as easy as pie.

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