

Two ERISA Alerts!

205 North Tenth Street, Suite 300 · Boise, Idaho 83702
 208.342.5522 · 1.866.ERISALAW
 www.erisalawgroup.com

Critical Deadline: Restatement and Submission of Preapproved Plans Must be Properly Completed by April 30th

Inside This Issue

- 1 Critical Deadline: Restatement and Submission of Preapproved Plans Must be Properly Completed by April 30th
- 2 ERISA Lessons for Employers from Flex Plan Demise

All sponsors of plans should immediately take steps to ensure that the April 30 deadline will be met. Failing to recognize issues is a recipe for disaster.

Employers Restating Plans: *Caveat Emptor* (Buyer Beware!)

The absolute deadline to amend and restate all preapproved 401(k), profit sharing and other qualified retirement plans and to submit them to the Internal Revenue Service for a determination letter is April 30, 2010.¹ Preapproved plans include *prototype and volume submitter plans*.

It is critical that such process be handled correctly to avoid significant and commonly encountered problems, failures, and liabilities.

Although this deadline has been known to practitioners and employers for two years, and it has been permissible for plans to be restated and submitted any time up until the April 30 deadline, there has been a flurry of activity as the deadline approaches.

We have been and continue to assist our clients that are on our firm's preapproved documents with their restatements and submissions. We also are assisting clients with this process that use documents provided by others, such as third-party administrators, recordkeepers, or financial institutions.

It is important² that the process be undertaken properly. For example, without limitation:

(1) Prototype Eligibility. It is imperative to determine whether a plan is actually eligible for the six year cycle as opposed to another (often shorter) IRS approval cycle; the question often requires legal counsel and judgment, and sometimes direct input from the IRS.

¹ The IRS restatement and submission cycle for preapproved plans is now every six years. April 30, 2010 is the first preapproved plan restatement and submission deadline under the new IRS process as outlined most recently in Revenue Procedure 2007-44. **There are different equally unforgiving deadlines for individually designed plans.**

² "Important" understates the matter. The restatement process, and the IRS review process of determination letter requests, provides frequent opportunity for the government to discover "qualification failures," much to the surprise and anxiety of the employer. A plan qualification failure has serious and real (not just theoretical) consequences.

Critical Deadline - Continued

(2) Purposeful Desired Plan Design. It is imperative to ensure that the terms of the restatement are consistent with the current document or are *intentionally* different.

(3) Inadvertent Cutback or Violations. It is imperative to determine whether any plan revisions create new issues or problems, are prohibited cutbacks or otherwise unintentionally violate ERISA, are truly in the interests of the employer (rather than the plan provider or TPA), and/or are indeed required or desirable for the employer.

(4) All Documents Available. It is imperative, if submitting for a determination letter (and even if not), to ensure that *all* prior versions of the plan (and amendments) are *signed*, available, and were timely executed.

We regularly face situations where these and other crucial issues were not adequately addressed by employers and their providers. The results could be disastrous, leading to a host of potential difficulties and liabilities, including the potential of "disqualification" and fiduciary breach. Often the fix is quite expensive.³ In most instances, those problems can be avoided, but not if the process is engaged without due regard for and legal knowledge of the very complex procedural and substantive rules that govern it.

All sponsors of plans should immediately take steps to ensure that the April 30 deadline will be met. Failing to *recognize* the necessary issues (particularly before the government does) is a recipe for disaster.

ERISA Lessons for Employers from Flex Plan Demise

The recent failure of a large Northwest cafeteria plan provider/third-party administrator highlights important lessons with respect to 401(k) and other qualified retirement plans, and regarding deferred compensation, cafeteria or health plans.

*A little bit of
diligence and work
at the front end can
go a long way
towards protecting
employers and
employees when
things go awry.*

Employers routinely enter into relationships with third-party administrators, recordkeepers and bundled service providers (such as financial institutions) without ever thinking about the "what ifs." Although all "what ifs" can never be anticipated (keeps life interesting), some "what ifs" certainly can be and should be considered. A little bit of diligence and work at the front end can go a long way towards protecting employers and employees when things go awry.

Whether it's a cafeteria plan TPA or other plan provider that closes its doors or experiences dislocations, and also whenever an employer changes providers (which, these days, more often than not will be to a financial institution bundled service provider), employers should be mindful of several issues.

³ For new clients, very often we are engaged after the fact, when time is running out and the score is scarily unclear or the client is way behind. A carefully designed, informed and prepared "statue of liberty play," or a "hail mary pass" with a dose of good luck, at often significant and otherwise avoidable legal costs and heartache, often favorably resolves the matter that could have been completely averted with informed proper advance attention.

ERISA Lessons for Employers -Continued

(1) It is compelling that experienced ERISA legal counsel review the services agreement. Very often (more than not in our experience), the agreement reveals that certain legally required testing and/or other requirements under the Internal Revenue Code and ERISA Title I are not being fulfilled. Little does the employer know that the recordkeeper often performs all of the tasks that the law requires only for medium to large plans (generally, ten or twenty million dollars and up). Typically the employer learns that it is getting a half-portion product, rather than full service, when it is too late and the damage is done. Also often the employer learns that the fine print of the services agreement, which the employer did not carefully read, positions the TPA far more favorably than the employer.

(2) Often, but not always, when an employer's relationship with one administrator ends and another one begins, the employer must adopt new plan documents. New plan documents do not, in most cases, mean that it is a new plan. It is the same plan; just some of the documents and the players have changed. Whether the new configuration of the plan is treated as a continuation of the old plan (that is, the same plan), or as a new plan, will affect a variety of issues. These matters include, without limitation:

- (a) the deadline, type and content of Form 5500 filings,
- (b) various IRS tests,
- (c) in the case of a 401(k) or other qualified plan, whether plan distributions may even be made (this is often overlooked!),
- (d) in the case of a cafeteria plan, the application of the use it or lose it rule and other oddities,
- (e) the actual language in the documents, and
- (f) the timing, manner and content of disclosures to participants.

Positioning the plan correctly when there is a change in plan providers can either heighten or minimize the employer's presence (and in turn exposure) to the government.

(3) The employer has a fiduciary duty to the participants whenever terminating a relationship with a TPA and/or entering into a new one. It is not just an *employer-employee* matter. The employer and its decisionmakers have a fiduciary legal duty to act exclusively in the employees' best interests. The notion of fiduciary duty means a lot of things, including without limitation:

- (a) how the plan money is handled (whether it is a cafeteria plan or another plan),
- (b) identifying the actions the employer should take to protect the employees' monies, and
- (c) determining the expense and cost to the participants of the arrangement.

Although the principles of fiduciary duty are clear and sound (*unwavering loyalty to the participants and expert prudence*), the application of these principles for each plan and circumstance can be quite different.

Although the principles of fiduciary duty are clear and sound (unwavering loyalty to the participants and expert prudence), the application of these principles for each plan and circumstance can be quite different.

Lessons for Employers -Continued

(4) In the transition from one provider to another, required matters often get overlooked and then lost. Remember: it is the employer and *individual fiduciaries* that get tagged by the Internal Revenue Service or Department of Labor, not the TPA. Employers need to make sure that all amendments are handled, all testing is done, all filings and disclosures to participants are made, and so on and so forth *ad nauseum*, during and after the transition. It is incumbent upon the employer to become informed of the legal requirements so that it may act properly.

For any ERISA plan, there are three intertwined yet distinct components: the money, administration, and legal compliance.

(5) When adopting new plan documents furnished by a provider, employers should remember that they are drafted with the provider's interests also in mind. Their interests are of course legitimate and valid *when viewed from the provider's perspective*. In certain key areas, the provider's arrangement, both the operations and documents, may not be favorable to the employer and may be at odds with the employer's best interests. As one small example, a prototype plan adoption agreement completed by most TPAs likely will look different in several key areas than the same adoption agreement completed for the same employer by an independent advisor to the plan or employer. The employers and fiduciaries that desire to truly understand their objectives, options, risks, and pros and cons need to receive independent advice not colored by other important considerations (such as investments, recordkeeping, and the fees, revenues and costs thereto).

(6) For any ERISA plan, there are three intertwined yet distinct components: the money, administration, and legal compliance. Naturally and not incorrectly, the money receives the most attention. In today's marketplace, however, often that attention and the forces attendant to it eclipse the administration and legal requirements to the extent that employers constantly and unknowingly (a) carry huge unacceptable risks (unacceptable if known to them), and (b) maintain a plan design that likely is not the most appropriate or best plan either for the employer or its employees. This Alert is not in any way a criticism of plan providers; in fact, many with whom we deal are excellent. However, they will tell you (and all of their service agreements and documents will state) that they are not attorneys and cannot offer legal advice. One objective of this Alert is to simply draw attention to the fact of the three separate, necessary functions – administration, investment and legal – and the benefits, including checks and balances, to be derived from three separate types of experts for ERISA plans.

When it comes to ERISA, the best advice to employers receiving services is the axiom laid down in 1817 by U.S. Supreme Court Chief Justice John Marshall: *Caveat Emptor!*

For additional information regarding your circumstances, contact Jeff Mandell or John Hughes at (208)342-5522 or 1-866-ERISALAW.

This alert is intended to provide general information only and does not provide legal advice. This bulletin does not discuss potential exceptions to the above rules. The application of ERISA laws can be complex. For information regarding the impact of these developments under your particular facts and circumstances, please call us. This material may also be considered attorney advertising under court rules of certain jurisdictions.

*Achieving your employee benefit objectives...Solving your employee benefit problems
Clients locally and coast to coast...Since 1982*