

From: Jeff Mandell
To: Marla Kettering
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Subject: ERISA Short Takes

Clients, Colleagues and Friends —

Here is some of what is happening in our ERISA world.

1. Merger of Plans. EGTRRA's changes in the amount of money that may be contributed to various qualified retirement plans encourage employers that maintain both a money purchase pension plan and a profit sharing plan to merge the plans and thereafter maintain solely a profit sharing plan. Assuming the required legalities are followed, this transaction reduces costs and liability with little or no (depending on one's view) downside: One of the troubling questions to mergers, however, was vesting. If you eliminate the pension plan by merging it, must you accelerate vesting and 100% vest all participants in their pension plan accounts on account of ERISA's termination requirements?

The IRS recently issued its ruling on the point and surprised the employee benefits community--accelerated vesting will not be required in the most common plan situations. If the two plans have the same vesting schedule, which often is a 2-6 year graded schedule, and if the same schedule is maintained in the surviving profit sharing plan, and if the two plans cover the same employees (which also typically is the case), then employees can continue to vest after the merger in the same way they would have vested without regard to the merger.

More and more, the Treasury Department should be applauded for being practical and for recognizing the realities employers and their advisors face. Employees, after all, as well as employers, not familiar with ERISA's intricacies, would have little reason to think that employees should become 100% vested and one could view such result as a windfall for the employees and an injustice to the employer.

Many of our clients either decided to merge their money purchase pension plan/profit sharing plan structure or are considering same. This new development makes the process simpler and easier to understand. It also eliminates the potential financial disincentive to a merger which, in 90% plus of the cases, makes complete sense for the employer and may not reduce contributions to the employees. Finally, the ruling allowed me to adjust my analysis and to now advise clients that they, in most cases, may avoid the voluntary IRS approval process of the merger (and specifically the attendant legal fees and costs associated with such work) without assuming unreasonable risk, again,, of course, assuming the numerous Internal Revenue Code and ERISA requirements relating to mergers are observed.

2. Employee Plans Compliance Resolution System (EPCRS): If a plan makes a mistake (for example, in plan operation by not following the plan terms or an amendment deadline is missed), the tax and other consequences can be disastrous. Much of my practice (for the last dozen years) involves the fixing of these mistakes. Earlier this year the Internal Revenue Service renewed and improved EPCRS, which is the IRS fix-it program and essentially guidebook for correcting plan errors. Often it makes sense to follow these guidelines; other times it is not. It is a facts and circumstances determination, giving due regard to the risks, costs and burden involved with the matter.

Most importantly, above all, if a mistake with a plan is ever discovered, *any mistake*, no matter how old, you are playing with fire (*BIG FIRE*) if you do not address it and at least consider or try to fix it. In today's IRS corrective environment, being penny wise can make you extremely pound foolish. Playing audit lottery these days is, in most circumstances involving plans, foolish. I can not stress enough the importance of discussing the matter with an experienced ERISA attorney (not just your third party administrator, recordkeeper, accountant or financial advisor) immediately when the problem is discovered. You need to know your options and understand some law (like it or not) to enable you to make an informed, reasoned decision. You need to take into account the enormous range of penalties the IRS, U.S. Department of Labor and courts of law may impose (and do impose!). Informed, ? and not necessarily expensive action might dramatically change your exposure. You want to reduce the flame or

put it out before it becomes a devastating firestorm.

3. New claims and summary plan description Department of Labor rules. The Department of Labor has issued new regulations that govern claims procedures and summary plan description disclosure requirements. All of your plans, whether they are retirement plans or health insurance or other welfare benefit arrangements, or cafeteria plans, must be updated to incorporate these new provisions. Health plans in particular will need to change their adjudication of claims drastically. For qualified retirement plans, summary plan descriptions must contain new disclosures and information for participants. Arguably, inexplicably, the vendors of plan documents have not yet updated their summary plan descriptions to comply with these rules, which are currently in effect.

4. EGTRRA - We are in the final stages of bringing all of our clients' plans into compliance with GUST and EGTRRA. The final deadline for most all employers is December 31, 2002. Note, however, that the summary plan descriptions which are given to participants also must be updated to incorporate the changes. Of particular importance are the EGTRRA revisions which meet the Department of Labor materiality requirement that must be disclosed in writing to participants. Also, I am finding that most SPDs fail to sufficiently address the "U" "GUST", which is USERRA, the Veteran's Right legislation. If an employer does not have the proper procedures in place, it is almost of certainty that such employer will violate the law if the employees goes on military leave and leave itself open for numerous, not pie in the sky, damages. I am speaking on the employee benefit aspects of USERRA at the National Benefits Conference in October in Washington D.C. which is hosted by the American Society of Pension Administrators. (If you are interested in our Powerpoint presentation-- Powerpoint is a big first for us-- please let us know).

Jeff, this added 9-18-02 also put in IF EGTRRA State conformance

Illinois automatically conforms like many states. Idaho, they had to change that updated which they do ever year but it requires action. Wisconsin I could not tell. Texas has no state income tax so its a non issue.

Regarding New Jersey, it says that full conformity is not expected.

5. Participant direction of investments. Little by little the employee benefits community and the courts are gaining experience with the relatively new model of participants direction of investment of their retirement plan accounts. If you the employer are allowing participants to direct their investments, then you only are relieved from investment responsibility for your employees investments if you follow a handful of rules. Unfortunately, many employers are not following these rules and the financial institutions which quarterback the plan or provide investment services are not sufficiently handling the legal component of participant direction. Your summary plan description and other disclosures must contain specific certain language, and certain channels of communication and training requirements must be satisfied. As you likely know, Section 404(c) of Title I of ERISA, and its lengthy regulations thereunder, comprise the governing body of law on this subject matter. Courts finally are now beginning to construe a Section 404(c), now that enough years of experience with these types of arrangements have elapsed. Also we are gaining ground completely open-ended participant investment arrangements, often involving open-ended brokerage accounts. Again, even with these types of accounts, the employers and fiduciaries for the plans continue to have legal investment responsibility over these investments unless there is a successful lateral pass, under the Department of Labor rules, from the employer to the investing participant. The disclosures and information that must occur between the employer and the participants is different than that which is involved with the more popular arrangement involving a menu of funds from which the participant selects. (In lieu of or in addition to individual consultation, please call if you might be interested in written materials for purchase).

6. Enron after shocks. As of yet, legislation has directly focused on retirement plans has not yet been enacted to show up the perceived Enron 401(k) problems. When/if that occurs, our clients will be informed.

7. Section 457 plans. Section 457 plans are for the not-for-profit sector the rough equivalent of Section

401(k) plans for the for-profit sector. EGTRRA made significant changes to the Section 457 requirements and earlier this year the Treasury Department issued its long awaited comprehensive guidance for such plans. All of these plans must change both their documents and their operations, now. The new rules unfortunately complicate these plans by making greater distinctions between the 457 plan maintained by the government as opposed to the 457 plan maintained by the nongovernment not-for-profit employer. If you are one of these employers that maintain one of these plans, you have got to comply with the rules just like a private employer or risk severe tax consequences. Budgetary constraints notwithstanding, it is ill-advised to offer these plans if you are not willing to dedicate the resources to at least try to maintain these plans in compliance.

8. Add something about encouraging plans for small businesses and publication 3998. Yes, we could add a link here if you want.

8. Information About Our Staff. In addition to me (Jeffery Mandell), The ERISA Law Group, P.A. is comprised of the following: (a) **George Cicotte, Esq.**, of-counsel. George has limited his practice for over 10 years to ERISA. He most recently joined us from Covington and Burling in Washington, D.C. George is a _____ native. (b) **Kathleen McRoberts**, LLM, Masters in Tax, University of Florida. After over six months with us, Kathleen is still eagerly interested in this stuff. She is from Pocatello. (c) **Steve Alkire, Esq.**, is of-counsel with over twenty years of tax, corporate, and employee benefits experience. Steve's legal and accounting credentials and ? are too numerous to mention here. (d) **Connie Pratt** is our paralegal with over 25 years of legal experience. My Midwest clients might remember Connie from our Wisconsin years. (e) **Marla Kettering** is our paralegal, secretary, assistant, utility man, keeping all of us as glued together with 20 years of legal experience. (f) **Mary Mandell**, with over 15 years of paralegal and other legal experience, is our office manager handling billing, payroll, purchases and accounts, receivables and payables. (g) **Lynn DeCelles**, our part-time secretary and administrative assistant with over ____ years of legal experience. Finally, (h) **Adrienne M** is our file clerk, library clerk, and assistant to Marla Kettering.

Add Section 401(a)(9) age 70 ½ and death minimum distributions.

Add beneficiary designations, QDROs, state enforcement actions and Nuts and Bolts 401(k) seminar