APRIL 2011

THE ERISA LAW GROUP, P.A.

ERISA Newsletter

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Does Your EIN End With a "1" or a "6"?

If you maintain a qualified retirement plan (such as a 401(k) plan) and your federal employer identification number ("EIN") ends with a "1" or a "6," then your plan may need to be submitted to the IRS for approval this year. If so, the deadline is intractable.

If your EIN ends with a different number, you should identify your submission deadline. If you are part of a controlled or affiliated service group, regardless of your EIN, you may need or want to submit your plan this year.

Several critical legal issues need to be considered relative to the submission. Failure to properly address these issues can quickly turn a beneficial process into a negative and costly one.

Cycle A Determination Letter Applications Due

Individually designed retirement plans must be submitted to the Internal Revenue Service for review every five years. The submission is intended to result in the issuance of a "favorable determination letter." The five year periods or "cycles," as they are labeled, were initially defined in 2005 in IRS Revenue Procedure 2005-66 (and later revised in Revenue Procedure 2007-44). We are already back to "Cycle A"; the first of the five one year cycles.

In general, ***individually designed plans maintained by a single employer with an EIN that ends with a "1" or a "6" must prepare and submit an application for determination letter anytime between now and January 31, 2012.***

Identify Your Plan's Cycle

The plans of employers whose EIN last digit is other than a "1" or a "6" will be submitted after Cycle A ends in their appropriate Cycle B, C, D or E. Plan sponsors that are members of a controlled group or affiliated service group may elect to submit their plans during Cycle A irrespective of the last digit of their EIN (there are detailed rules regarding the making of this election).

Know your plan approval IRS deadline – immediate action may be required

The rules relating to when and how to submit a plan for a favorable determination letter are many and complicated. Changes to a plan, or the employer maintaining the plan, may have the effect of changing the submission cycle. Missing a cycle has significant adverse consequences. In that event, you should immediately contact us to discuss remedial action.

Finally, preapproved prototype and volume submitter plans are on a different ***six*** year cycle, which generally ended on April 30, 2010, and are not discussed here.

Critical Points When Applying for Determination Letter

In applying for a determination letter, there are several critical points to address. It is not a perfunctory task.

Consistency of Restated Plan Document

The determination letter application process requires that the plan be restated on a new document to incorporate changes made to the plan since the last restatement. The restatement of the plan document should be closely examined to ensure consistency with the prior plan document and plan operations. We have seen numerous instances where consistency was not achieved, causing confusion and in some cases operational qualification failures (that is, where plan administrative practices deviate from the plan terms).

Proper Completion of Application

The determination letter application (IRS Form 5300) must be properly completed. Failure to correctly complete the application could raise red flags during the IRS' review. For example, the questions regarding the existence of a controlled group or affiliated service group must be properly answered and the correct information regarding the plan's coverage testing must be provided (assuming that a ruling on Internal Revenue Code Section 410(b) coverage is requested, which it should, particularly since it does not require an additional fee).

Failure to properly complete the application could also nullify the effect and purpose of the favorable determination letter when it is needed in the future. The favorable letter is conditioned on the accuracy of the employer's submission (just like an insurance policy that might deny coverage when based on incorrect information in the application).

Qualification Failures

It is vital to carefully review the plan prior to submission to ensure that there are no qualification failures that the IRS will discover during its review. If there are qualification failures, the determination letter application should be coordinated with the IRS' correction program (the Employee Plans Compliance Resolutions System). If plan failures are not properly addressed by the employer, and the IRS identifies any such failures on its own during its review of the determination letter application, the resulting liabilities could be significant. For example, it will be essential to ensure that the plan was properly and timely updated for new laws like the Pension Protection Act of 2006 ("PPA") and the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART").

The law governing plan submissions is complex, with severe consequences for errors

We have seen many plans not timely or properly updated for these and other law changes. As another example, often the restatement will inadvertently make changes to the plan that ERISA or the Internal Revenue Code do not allow.

Scope of Ruling

When applying for a determination letter, the employer has several decisions to make. One such decision relates to the scope of the ruling which will be sought. That is, the determination letter application requires the employer to choose whether certain rulings are to be obtained. Generally, it is advisable to obtain the broadest ruling available (which we refer to as a "full scope letter"), but depending on the facts and circumstances we sometimes recommend that a ruling be sought that does not cover all the bases.

The importance of submitting a ***clean*** plan and ***properly*** completed application to the IRS cannot be overstated. A proper process attuned to these sensitive legal and tax issues achieves three critical objectives. It will:

- secure an IRS approval which, if called into question, will be honored by the IRS and other parties,
- minimize or avoid the significant risk that the IRS will now or later discover problems with the plan that could lead to severe penalties, and
- allow the employer to take corrective action before a plan problem gets worse and more expensive to fix.

Please let us know if we can assist with your submission or your understanding of the determination letter requirements and your cycle.

Updating Summary Plan Descriptions

ERISA imposes deadlines for plan summaries to be amended and rewritten. Employers should make sure their summaries are compliant with these rules.

SPDs Required

With few exceptions, every employee benefit plan subject to ERISA must have a summary plan description ("SPD") in addition to the plan document. The SPD must:

- summarize the material provisions of the plan,
- contain certain required content and statements that the Department of Labor dictates, and
- be distributed to participants pursuant to specific timing and delivery requirements.

SPDs are required for most all employee benefit plans, including an employer's self-funded or insured health plan, cafeteria, dental, vision, or disability plan, as well as for 401(k) plans, pension plans, profit sharing plans, deferred compensation arrangements, severance plans and more.

Timing Requirements

Plan summaries must be updated within the law's deadlines

Although many employers update their plan documents on a timely basis, many employers may be unaware of the timing rules affecting SPDs. The key updating events (in general terms without detailing the specific dates) are:

- when a plan is established (or new employees become eligible), the SPD must be distributed to participants;
- when there is a material change to the plan, the SPD must be modified (typically by a separate notice, memo to participants, or replacement page, as opposed to an entirely new SPD);
- generally every five years, an entirely new rewritten SPD must be provided to participants; and
- upon a participant's request, the SPD must be furnished immediately.

Suggestions and Comments

With respect to the third bullet above, employers should check all of their SPDs to ensure a restatement has been produced within the last five years. With respect to the fourth bullet above, a court recently imposed penalties against an employer for failing to provide an updated SPD in response to a participant request, even though the five year rule would have given that employer more time to produce a new SPD.

The frequency of SPD updates for retirement plans has been a constant requirement. Health and cafeteria plans have now become subject to more frequent required SPD amendments.

Employers and other plan sponsors are often provided with SPDs that do not comply with ERISA. Often the employer is unaware of this shortcoming. Plan document providers typically recommend that employers obtain legal review of the sample provided documents. Without this independent involvement, legal compliance of a SPD or plan with ERISA's unique requirements often and easily is overlooked.

New updates to SPDs are required

With respect to health and cafeteria plans, most all such plans required updates in 2010, and future revisions will be required as health care reform evolves. The increasing body of law that applies to these plans, including developments in just the past few years, compels greater attention to both the plan and the SPD.

Finally, if an employer's various health and welfare benefits and documents have not yet been bundled into an ERISA-compliant wrap plan, now would be an appropriate time to do so.

For additional information or if you have questions,
contact Jeffery Mandell or John Hughes at 208-342-5522 or 1-866-ERISALAW.

This bulletin 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.