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Does Your Company EIN End With a "2" or a "7", or is Your Plan a Multiple Employer Plan?

(*Even if Not, Read This for Valuable Information*)

Summary

If you maintain a qualified retirement plan (such as a 401(k) or defined benefit plan) and your company's federal employer identification number ("EIN") ends with a "2" or a "7" (or if your plan is a multiple employer plan), then your plan may need to be submitted to the IRS for approval this year. If so, the deadline is intractable.

If your company EIN ends with a different number, you should identify your plan's submission deadline because missing it has horrific consequences.

Inside This Issue

In addition, several critical legal issues need to be considered with the submission. The failure to properly address these issues often quickly turns a beneficial process into a negative and costly one. ***Employers should be vigilant to ensure they do not submit a plan to the IRS that will reveal a qualification failure. If such problems exist, they should be addressed by way of the IRS' correction program in advance of or simultaneously with the submission.*** If the IRS discovers problems, for example, a missing or late amendment, before the employer appropriately addresses them, the penalties could be significant. Please see the next article for more information.

Cycle B Determination Letter Applications Due

"Individually designed" retirement plans (see Prototype Plans and Categories below) 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," which letter essentially is a crucial insurance policy. 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 B"; the second of the five one year cycles.

In general, individually designed plans maintained by a single employer (or by multiple employers deemed a "single employer") with an EIN that ends with a "2" or a "7" must prepare and submit an application for determination letter any time between now and January 31, 2013. ***Individually designed "multiple employer" plans must also submit their plans during Cycle B, irrespective of their EIN.***

Identify Your Plan's Cycle

The plans of employers whose EIN ends with other than a "2" or a "7" will be submitted after Cycle B ends in their appropriate Cycle C, D, E, or A.

The rules relating to when and how to submit a plan for a favorable determination letter are many and complicated (absurdly in our humble opinion). 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, even draconian, consequences. In that event, you should immediately contact us to discuss remedial action.

Prototype Plans and Categories

With respect to the ***specific issue of the IRS' express approval of plans***, there are different categories of plans. The discussion above, regarding EINs, relates to an IRS category called "individually designed." Other categories, the most common of which these days is a "standardized prototype" plan, fall under other IRS approval rules not necessarily dependent on EINs. For example, most preapproved prototype and "volume submitter" plans are on different ***six*** year cycles. The first six year cycle for preapproved defined contribution plans ended on April 30, 2010. If your preapproved plan ("preapproved" being a very misleading term) was not restated and/or submitted by that date, you likely have significant problems and liabilities.

The six year cycle for defined benefit plans ends on April 30, 2012. Preapproved defined benefit plans should be restated and perhaps submitted by that date.

The next six year cycles for both defined contribution and defined benefit preapproved plans (during which the plans must be restated) have not yet been announced.

An explanation of the various IRS categories and the various IRS approval mechanisms, and why you are (and perhaps should not be) in one category versus another category, and of the respective important advantages and disadvantages to each specific employer of the various available categories, is beyond the scope of this Newsletter. ***The point is you (or your own ERISA attorney) must know where your plan fits in this perverse universe and the precise reason why. Otherwise, you either might be (and perhaps likely are) at risk or not in the category most appropriate for your objectives, budget, and circumstances.***

More About Knowing Your Plan -- The Liabilities Are Yours

For many qualified plans, particularly in recent years, determination letters are not the appropriate form of IRS approval of the plan. Instead as mentioned above, for certain categories the plan is supposed to receive other forms of Internal Revenue Service approval. Whether any plan needs to or should receive a determination letter depends upon numerous legal and practical factors, many complex, which are beyond the scope of this Newsletter.

The legal burden of knowing what category your plan is in, and thus what type of government approval your plan requires, is the employer's responsibility. It is not the legal responsibility of the provider of the plan document, regardless of who that provider is or what it tells you. The significant adverse consequences of failing your burden is all yours, nobody else's. Accordingly, employers are strongly advised to seek their own private legal advice regarding this issue of paramount importance, ***upon which the entire tax premise of the plan rests***.

Finally, see Preapproved Plan Alert at the end of this Newsletter.

Critical Points When Applying for Determination Letter

As introduced above, when applying for a determination letter there are several critical points to address. It is far from 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 with plan operations. Without proper legal attention, inconsistencies and plan qualification failures are common.

Proper Completion of Application

The determination letter application (IRS Form 5300 or Form 5307) 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 often are not).

The failure to properly complete the application could also nullify and void 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).

Avoid IRS Discovery of 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. Qualification failures, and ones the IRS discovers, happen all the time. For example, many plans are not timely or properly updated for law changes (such as PPA, HEART or WRERA). Also, often the restatement will inadvertently make changes to the plan that ERISA or the Internal Revenue Code do not allow.

If there are qualification failures, the employer should coordinate the determination letter application with the IRS' correction program (the Employee Plans Compliance Resolution System). If the employer does not properly address plan failures with legal counsel, and the IRS identifies any such failures on its own during its review of the determination letter application, the resulting liabilities could be and often are very painful.

Bottom Line

The importance of submitting a ***clean, vetted plan*** and ***properly completed*** application to the IRS cannot be overstated. Otherwise, the process that is intended to secure approval of the plan to obtain the plan's unparalleled tax benefits can backfire and threaten plan qualification. This in turn can cloud a bright and sunny day into a long protracted Wisconsin winter.

If we can assist with your submission, your understanding of the determination letter requirements and your cycle, your understanding generally of the government's approval of your plan or of the IRS approval status of your plan specifically (which may surprise you), please let us know.

Preapproved Plan Alert

The Internal Revenue Service just announced radical changes to its approval program for preapproved qualified plans (that is, prototype and volume submitter plans). See Announcement 2011-82. Although the true effects of the change will play out in the years that follow, many ERISA practitioners, including us, believe it is a very bad development for many plan sponsors.

An employer with a preapproved plan is strongly encouraged to review its approval status at this time, particularly considering the question as to whether the employer needs to take action this year.

Announcement 2011-82 represents a sea change, yet in line with an unfavorable twenty year trend, that reduces the Service's short-term work load and exposes employers to uncomfortable risks.

Firm Recognition and News

Jeffery Mandell of The ERISA Law Group, P.A. has been named in the 2011 *Mountain States Super Lawyers* for his expertise in Employee Benefits/ERISA.

In addition, Jeff continues in his appointment to represent Idaho before IRS and DOL officials in the IRS TE/GE Council. The Council engages in candid high-level dialogue regarding the respective interests of employers, employees and the government in order to improve the United States' retirement and tax-exempt system. He last week returned from the annual (and very productive) meeting in Baltimore; numerous hot issues of concern to plan sponsors and the employee benefits community were addressed.

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