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ERISA Newsletter

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Does Your Company EIN End With a "4" or a "9"? (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 "4" or a "9," your plan may need to be restated and submitted to the IRS for approval by **January 31, 2015**. Multiemployer plans must also restate and submit by January 31, 2015.

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

Several critical legal issues need to be considered with a plan submission to the IRS. The failure to properly identify and address these issues often quickly turns a beneficial process into a negative and costly one. **Employers should be vigilant to ensure they conduct a proper review and do not submit a plan to the IRS that will reveal qualification failures. If such problems exist, they should be properly addressed by way of the IRS' correction program in advance of (or simultaneously with) the submission.** If the IRS discovers problems during its review of the submission, for example, a missing or late amendment, before the employer appropriately addresses the issue, the penalties could be significant.

Cycle D 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," which letter essentially is a crucial insurance policy. The five year periods, or "cycles" as they are labeled, were initially defined in 2005 by IRS Revenue Procedure 2005-66 (and later revised by Revenue Procedure

2007-44). We are currently in the second "Cycle D"; the fourth 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 "4" or a "9" must prepare and submit an application to the IRS for a determination letter by January 31, 2015.

Identify Your Plan's Cycle

The individually designed plans of employers whose EIN ends with other than a "4" or a "9" will be submitted after Cycle D ends in their appropriate Cycle A, B, C, or E.

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, even draconian, consequences.

Preapproved Prototype and Volume Submitter Plans

With respect to 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 are "prototype" or "volume submitter" plans, fall under other IRS approval rules not necessarily dependent on EINs. Instead, most preapproved prototype and volume submitter plans are on six year cycles. The first six year cycle for preapproved defined contribution plans ended on April 30, 2010. If your preapproved plan was not restated and/or submitted by that date, you likely have significant problems and liabilities. The six year cycle for preapproved defined benefit plans ended on April 30, 2012.

We are currently in the next six year cycle for defined contribution preapproved plans. Preapproved defined contribution plans must be restated by April 30, 2016. Preapproved plans that are of the "volume submitter" variety may be submitted for their own individual determination letter in certain circumstances by that time. Prototype plans, unfortunately, may no longer be submitted for their own determination letters (with certain exceptions).

An explanation of the various IRS categories 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***

that you (or your own ERISA attorney) must know where your plan fits in this universe and the reason why. Otherwise, you might be at risk or not in the category most appropriate for your objectives, budget, and circumstances.

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 IRS approval. Whether any plan needs to, or should, receive its own determination letter depends upon numerous legal and practical factors. ***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.*** Accordingly, employers are strongly advised to seek their own independent legal advice regarding this issue of paramount importance, ***upon which the favorable tax status of the plan rests.***

For additional information or if you have questions, please contact Jeffery Mandell (jeff@erisalawgroup.com) or John Hughes (john@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW.

This Newsletter is intended to provide general information only and does not provide legal advice nor create an attorney-client relationship. The application of ERISA laws is complex. For information regarding the impact of these developments under your particular facts and circumstances, you are advised to seek qualified counsel. This material may also be considered attorney advertising under court rules of certain jurisdictions.