EMPLOYEE BENEFITS UPDATE

Legal News™

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Legal News: Employee Benefits Update is part of our ongoing commitment to providing legal insight to our clients and our colleagues.

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Thank you.

Harvey Kurtz
Managing Editor

Employee Benefits Developments for March 2007

Qualified Retirement Plans

A domestic relations order (DRO) can be a qualified domestic relations order (QDRO) even if it is issued after the participant's death, the parties divorce, or benefit payments have started. The U.S. Department of Labor issued an interim final rule (7 Fed Reg 10070) in response to a directive included in the Pension Protection Act to issue regulations to clarify that a DRO does not fail to be a QDRO merely because of when the DRO is issued, or because it modifies an earlier QDRO.

If a bank is unwilling to open an IRA without the participant's signature, when the IRA is needed to comply with the automatic rollover rules for amounts greater than $1,000, just mention FAQ 4. Banks are required by the Customer Identification Program that is part of the USA PATRIOT Act to obtain the signature of participants before opening any IRAs. However, the agencies who wrote the rules under the PATRIOT Act included in their Frequently Asked Question 4 the following comments:

> Thus, in light of the requirements imposed on the plan administrator under EGTRRA…the former employee will not be deemed to have "opened a new account" for purposes of [these rules] until he or she contacts the bank to assert an ownership interest over the funds, at which time the bank will be required to [obtain the signature of the former employee].

Here is a quick primer on the hot topic of fees charged to 401(k) plans. The challenges include finding all the fees and asking good questions of the plan's investment advisors, brokers, consultants, outside administrators, and mutual fund companies (among others). Two hard-to-find fees are 12b-1 fees and sub-transfer agency fees. Some mutual funds pay 12b-1 fees to cover account servicing and sales and distribution costs. These fees may be used to compensate brokers, but they also may be assigned to pay service providers to the plan such as the record keeper. Sub-transfer agency fees may be paid by mutual funds to

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other entities to track buy and sell orders and credit mutual fund shares to participant accounts. This is sometimes referred to as "revenue sharing."

It is important for plan fiduciaries to determine if mutual funds held in the plan are paying 12b-1 fees and whether any agents or advisors to the plan receive sub-transfer agent fees. If so, the fiduciary should consider whether the aggregate consideration — taking these amounts into account — being received by a service provider to the plan is reasonable.

Employee Welfare Benefit Plans

A study released by the Employee Benefits Research Institute indicates that the percentage of workers whose employers sponsor a health plan has remained in the low 80 percent range since the late 1980s and the percentage of workers eligible for health benefits has been in the mid-70 percent range during the same time. Their study suggests that the link between employment and access to group health coverage has remained stable during this period. The percentage of workers with group health coverage from their own employer dropped from 68.4 percent in 1988 to 61.4 percent in 2005, and the percentage of workers taking available group health coverage dropped from 87.9 percent in 1988 to 83.5 percent in 2005. However, the percentage of workers without health insurance during these years was substantially unchanged.

Executive Compensation

Comments were provided by Internal Revenue Service officials on the "soon to be released" 409A final regulations at a March 20, 2007, conference.

United States Department of Treasury (Treasury) Attorney-Adviser Daniel Hogans and others indicated:

- Employers should plan on a January 1, 2008, effective date of the regulations.
- The final regulations "enhance significantly" guidance as to who is a "specified employee" for purposes of the six-month payment delay rule for key employees of public companies.
- Plans will need to document election procedures, conditions under which amounts will be paid, and the extent to which payment is subject to the six-month delay. In other respects, the speakers said they tried to minimize plan documentation requirements.
- Rules for measuring amounts includible in income under Code Section 409A and calculation of the interest and taxes are described by the Treasury officials as "fiendishly complicated," and will not be included in the Section 409A final regulations. Additional proposed rules will be issued on this subject. Notice 2006-100 should be used "as a template" while these regulations are being finalized.
- Treasury has given "due consideration" to whether the "two times" exemption from Code Section 409A rules for severance pay is to apply in situations where this limit is exceeded. At issue is whether only severance pay in excess of the "two times" limit is subject to Code Section 409A rules or whether exceeding the limit by any amount

destroys the exemption with respect to the entire amount of severance pay.

- "Good reason" terminations continue to be a concern. Some commentators argued that the definition of "termination for good reason" should be a "facts and circumstances" test and other commentators argued that there should be a "safe harbor" definition. We are to "assume we will see some additional guidance."

- Determining the value of the service recipient's stock when it is not publicly traded also is a matter of concern. Owners of closely held corporations are concerned that they may need to pay for an appraisal to satisfy the proposed regulations. The Treasury officials indicated that this was not the intent and that the proposed regulations only required a "reasonable application of a reasonable valuation method," which provides a "quasi-safe harbor."

Internal Revenue Service regulations generally require that, for purposes of avoiding United States federal tax penalties, a taxpayer may only rely on formal written opinions meeting specific requirements described in those regulations. This newsletter does not meet those requirements. To the extent this newsletter contains written information relating to United States federal tax issues, the written information is not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal tax penalties, and it was not written to support the promotion or marketing of any transaction or matter discussed in the newsletter.

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