Recent Developments on Fee Disclosure, IRS Survey Results, Cafeteria Plan Limit Changes, and Required Health Plan Summaries

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ERISA PLAN FEE DISCLOSURE

All employers that sponsor a retirement plan under the Employee Retirement Income Security Act of 1974 (ERISA) and that permit participants to self-direct the investment of their account balance must receive detailed fee disclosure information from covered plan service providers no later than July 1, 2012. Plan sponsors, in turn, must provide all plan participants with fee disclosure information by August 31, 2012. While the July 1 deadline applies to all plans, the August 31 deadline may not. Fiscal year plans that are not calendar year plans must disclose fee information to plan participants by the later of : 1) 60 days after the first plan year beginning on or after November 1, 2011; or 2) August 31, 2012.

Since a plan sponsor has fiduciary liability for not providing this disclosure, it is crucial that the sponsor keep in close contact with the plan's service providers to make sure all needed information will be available for the sponsor to communicate to plan participants. The purpose of these requirements is to ensure that participants are aware of all costs, direct and indirect, that relate to their accounts and to permit the employer to see the trust costs of administration for purposes of determining reasonableness of the fees.

IRS PROVIDES COMPARATIVE SURVEY RESULTS AND AUDIT FINDINGS

The IRS contacted a random sampling of sponsors of 401(k) plans last year in order to solicit information on plan design and operational issues. In March of 2012, the IRS announced some of its findings that should be of interest to 401(k) sponsors both with regard to whether the sponsor's plan is competitive with those of other sponsors and regarding mistakes that are made in the administration of a 401(k) plan that the IRS has discovered on audit. The full report, called "Section 401(k) Compliance Check Questionnaire—Interim Report February 2012," can be found on the IRS Web site.

The most common design features found in 401(k) plans are shown in Table 1.

These findings are very useful in determining not only what design features potential employees might expect based on employment elsewhere but also what administrative functions are typically outsourced so the employer is not attempting to handle in-house those plan activities that are typically handled by outside parties with expertise those areas.

At the same time the IRS announced the findings from the survey, it also discussed common errors found when the IRS audits a plan. It is always preferable either to avoid these mistakes in the first place or to discover and correct them before the IRS discovers them on an audit. Here are the most common errors the IRS detected in auditing 401(k) plans:

- **Failure to amend the plan in a timely manner:** The IRS is finding that plans are not amended to reflect changes in the law, or if amended, the sponsor cannot find supporting documentation at the time of the audit.
- **Failure to follow the terms of the plan:** In particular, the IRS noted many plans do not follow the definition of compensation included in the plan.
- **Failure to include or exclude employees in accordance with the terms of the plan:** This may occur in particular when there are different eligibility requirements such as immediately entry for deferrals under a 401(k) plan but a one-year wait for employer-matching contributions. The IRS also stated mistakes may occur when a new company is acquired and the new employees may or may not be eligible under the terms of the plan.
- **Failure to properly administer loans:** Instances of violations include permitting loans over $50,000, not properly handling unrepaid loans upon a termination of employment, authorizing more loans than the plan document permits, granting a loan for over five years

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Table 1. Common Design Features of 401(k) Plans

Design Feature	Found in Plans Surveyed (%)
Plan uses safe harbor formula (meaning no nondiscrimination testing)	43
Participants can change deferral amount anytime	41
Catch-up contributions (age 50 and older) allowed	96
Roth contributions allowed	22
Employer matches employee deferrals	68
One-year waiting period for matching contributions	58
Employer provides profit sharing not dependent on employee deferrals	65
No waiting period for participant deferrals	13
One-year waiting period for participant deferrals	54
Age 21 entry requirement	64
If plan is top heavy, makes minimum contributions to rank and file	79
If plan fails nondiscrimination testing, returns excess contributions to highly paid participants	59
Plan permits in-service withdrawals other than for hardship	62
Plan permits hardship withdrawals	76
Plan permits loans	65
Plan administered by third-party administrator	53
Third-party administrator responsible for amending plan	73
Third-party administrator responsible for preparing Form 5500	83

when it does not relate to a primary residence, and most egregious of all, granting loans when the plan document does not have a loan provision.

- **Failure to properly test a 401(k) plan for nondiscrimination:** Errors include not identifying in accordance with law who is highly compensated, not counting in the test eligible employees who elect not to defer, not using the proper definition of compensation per the plan document, and not using the methodology described in the plan document when performing the testing.
- **Failure to ensure deferrals do not exceed the amount permitted for the year under Code Section 402(g).** This error occurs when the plan fails to cut off deferrals at the statutory limit, which for 2012 is $17,000.
- **Failure to deposit elective deferrals in a timely manner:** While the maximum time limit is the 15th day of the month following the month in which the deferral would have otherwise been paid, this is not a safe harbor and cannot be used by a plan sponsor that could have made the deposit sooner. The only safe harbor that exists is for small plans in which there are fewer than 100 participants. In that case, if the employer makes the deposit within seven days of when it would have been paid, it will not be challenged.

CAFETERIA PLAN CHANGES THAT TAKE EFFECT IN 2013

Since the Patient Protection and Affordable Care Act (PPACA) is currently being reviewed by the U.S. Supreme Court and it is unknown to what extent, if any, provisions will be struck down, employers that have a Code Section 125 cafeteria plan with a flexible spending account for healthcare expenses need to make plans for certain changes mandated by PPACA. In 2013, the maximum before-tax contribution that can be made by a plan participant to a healthcare flexible spending account is $2500. The new limit applies to the participant's tax year, which is almost always the calendar year notwithstanding the plan year of the cafeteria plan.

While a calendar year cafeteria plan should not have major difficulties with making this change, it is more complicated for a noncalendar year cafeteria plan because the election must be made before the beginning of the plan

year. On May 30, 2012, the IRS published Notice 2012-40, which states the new limit applies as of the first day of the plan year beginning in 2013.

This change in law was made to be a revenue raiser and was designed to address a perceived abuse found in cafeteria plans.

Because this change in law was made to be a revenue raiser and was designed to address a perceived abuse found in cafeteria plans that under law did not have a dollar limit for healthcare flexible spending accounts (although there were nondiscrimination requirements), it is likely that even if PPACA is struck down in its entirety by the Supreme Court, Congress could quickly reenact the less controversial provisions such as this.

UPDATE ON SUMMARY OF BENEFITS UNDER HEALTH PLAN

In the November/December 2011 issue of this journal, this column discussed the PPACA requirement that an employer that maintains a group health plan provide a concise summary of the plan provisions. This document is called a summary of benefits and coverage (SBC). The column stated that the original March 23, 2012, deadline for distributing the SBC was revoked by the issuing agencies (the Department of Health and Human Services, the IRS, and the Department of Labor) in light of the numerous comments submitted on the proposed regulations by employers and insurers.

Since the publication of that column, final regulations were issued on February 14, 2012, by the issuing agencies. (See *Federal Register,* Vol. 77, pages 8668–8706.) The requirements of the regulations must be met for group health plans on the first day of the first open enrollment period that begins on or after September 23, 2012.

Most medical practices have a fully insured group health plan and therefore should look to the insurer to prepare the SBC document for distribution to the participants by the employer. In many circumstances, the SBC can be provided electronically by the insurer to the employer and by the employer to the participants or eligible employees. However, there are certain limitations placed on this method of distribution by the Department of Labor such as limiting it to those employees whose regular duties include computer access to the employer's electronic information system. While the SBC can be a standalone document, it can also be included in the ERISA required summary plan description as long as it is prominently placed and set apart from the rest of the summary plan description.

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.