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THE CICOTTE LAW FIRM, LLC

ERISA AND EMPLOYEE BENEFITS + CORPORATE

Fall 2012 Newsletter

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In This Issue

IRS No Longer Forwarding Letters to Missing Plan Participants: The IRS will no longer forward letters to assist in locating missing plan participants. Employers and plan administrators should make plans for alternate search methods.

Tax Rules Expiring at End of 2012: At the end of 2012, many tax rules relating to pensions and benefits will sunset unless Congress acts to extend the applicable laws. Many of the provisions could affect how participant distributions are taxed.

Age Discrimination Claim Survives Sixth Circuit Review: The Sixth Circuit recently affirmed the ERISA preemption of numerous state law claims brought by participants of a top-hat plan. However, an age discrimination claim survived.

New Fee Disclosure Regulations Now in Effect: Previously issued fee disclosure regulations took effect earlier this summer. Frequent implementation concerns include determining fiduciary status, disclosure of audit fees, and prohibited transactions.

2013 Benefit Limits: The IRS has released adjusted retirement, compensation, and health benefit limits applicable for 2013.

SBC Reminders: Obamacare requirements continue to go into effect, including new SBC requirements. We have summarized some common issues to watch for when preparing and reviewing your SBCs prior to distribution.

IRS Will No Longer Forward Letters to Missing Participants

The IRS has issued Revenue Procedure 2012-35, modifying its procedure for forwarding letters to missing individuals and/or missing plan participants. Specifically, the IRS will no longer forward letters on behalf of persons such as plan administrators or plan sponsors of abandoned plans under the Department of Labor's abandoned plan program. Plan sponsors and administrators attempting to locate missing plan participants should now use alternate methods to locate missing participants or other individuals.

Previously, the IRS letter forwarding service was generally available to assist in the search for individuals for a "human purpose," including locating missing plan participants who were owed plan benefits. However, because of the availability of several alternative missing person locator resources, including the Internet, the IRS has redefined the purposes for which it will forward letters.

According to the IRS, "[a] human purpose is one in which a person is seeking to find a missing person to convey a message of an urgent or compelling nature, or is seeking to find a missing person because of an emergency situation." For example, the letter forwarding service will now be limited to events such as to "notify a person of a serious illness, imminent death or the death of a close relative. In addition, the forwarding service may be used to locate a missing relative to convey an urgent or compelling message, or to help locate persons being sought for a medical study to detect and treat medical defects or diseases."

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Many Pension and Benefits Related Tax Rules Expiring

Many favorable benefit related tax rules expired at the end of 2011 and more are scheduled to expire at the end of this year. Employers and plan sponsors should familiarize themselves with the potential effects on their benefit plans as well as participants in those plans.

Absent congressional action, many provisions of the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") and Jobs and Growth Tax Relief Reconciliation Act ("JGTRRA") will sunset at the end of 2012. Consequently, the Code will revert to its status prior to the laws' enactment.

Some of the affected provisions include (i) exclusion for employer provided educational assistance under Code section 127; (ii) education savings accounts (formerly called education IRAs); (iii) adoption credit under Code section 23; (iv) employer provided adoption assistance exclusion under Code section 137; and (v) credit for employer provided child care facilities.

Additionally, taxpayers will face higher taxes on investment income and gains, as well as higher rates on ordinary income. Under current law, higher income taxpayers will face a 3.8% surtax on their investment income and gains.

Potential strategies plan participants and beneficiaries may use for coping with possible higher tax rates include:

Use Roth accounts

Qualified distributions from Roth accounts are tax free. Conversely, distributions from regular tax-deferred accounts (except to the extent of after tax contributions), are taxable. In a rising tax rate environment, employees should utilize designated Roth accounts if their retirement plans provide this option.

A designated Roth account is a separate account in a 401(k), 403 (b) or 457 plan to which the employer allocates an employee's designated Roth contributions and their gains and losses. Rather than making elective, pre-tax contributions to his/her regular account, the employee directs that part or all of the contribution be made to a nondeductible designated Roth account within the plan. Such an account set up within a 401(k) plan is called a Roth 401(k). Unlike a traditional Roth IRA, there is no income limitation on annual contributions to a designated Roth account and employees of all income levels are eligible to contribute.

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"In a rising tax rate environment, employees should utilize designated Roth accounts if their retirement plans provide this option."

IRS Letter Forwarding –continued from p. 1

Letter forwarding requests that merely provide a financial benefit and do not satisfy the definition of "human purpose" will not be processed.

The Social Security Administration ("SSA"), continues to have a similar letter forwarding program that plan administrators and sponsors may use. However, as of August 2012, the SSA program charges $35 per letter. Details are available at http://www.socialsecurity.gov/foia/html/ltrfwding.htm

Plan administrators and sponsors should bear in mind that under applicable PBGC requirements, the IRS and SSA letter forwarding programs, by themselves, have never been sufficient. Rather, plans must make a diligent search which includes, (i) inquiry of the missing participant's beneficiaries and alternate payees; and (ii) use of a commercial locator service to search for the missing individual.

Plan administrators should make note of this modification to the IRS letter forwarding program and put in place appropriate policies and procedures to search for missing plan participants.

Age Discrimination Claim Survives in Suit by Plan Beneficiaries

Former Chrysler and Daimler Chrysler ("Chrysler") executives who participated in a "top-hat" plan filed suit after they lost most, or in some cases all, of their benefits when Chrysler went bankrupt in 2009. Each of their claims was found to be preempted by the Employee Retirement Income Security Act ("ERISA"), except for an age discrimination claim. The case illustrates that employers should review non-qualified retirement plan policies and procedures to avoid any disparate adverse impact on older employees or retirees when paying benefits or, potentially, in any other aspect of operating a plan.

A top hat plan must remain unfunded to defer taxation of plan benefits. Consequently, any account used to hold top hat plan accounts must remain subject to claims from the employer's creditors in the event of bankruptcy. Additionally, even though a top-hat plan is an ERISA plan, many of ERISA's protections and rights do not apply.

At various times before 2007, John Loffredo and other former Chrysler executives participated in the Chrysler's Supplemental Executive Retirement Plan ("Plan"). To facilitate payment of benefits, the company established a "rabbi trust" in which it deposited assets to cover plan benefits. The trust document permitted the use of trust funds to pay benefits and related expenses, except that in the event of bankruptcy, the trust funds were required to be available to pay general creditor claims. Additionally, the plan permitted Chrysler (later Daimler Chrysler AG) to buy out an employee's right to benefits by creating an annuity to pay an equivalent income stream.

As the company's financial situation worsened it eventually became insolvent and filed for bankruptcy in 2009 and remaining assets of the Plan became part of the bankruptcy estate. However, the former executives alleged that Chrysler was aware of the impending bankruptcy and had previously used trust assets to purchase annuities for a select group of executives and retirees that did not include the plaintiffs, thus resulting in a "securitization" that protected them from any future shortfalls in the Plan. In addition, the former executives alleged that the Plan would have survived the bankruptcy if it had been properly managed.

Because many of the protections under ERISA do not apply to top-hat plans, Loffredo and the former Chrysler executives framed their claims under state law. Suit was subsequently filed against the company and its related entities in state court alleging state law claims of promissory estoppel, breach of fiduciary duty, fraud, statutory conversion, and age discrimination. The case, however, was removed to federal court, and motions filed by the defendants to dismiss, arguing that ERISA preempted the state law claims.

The federal district court granted the motion to dismiss and the Sixth Circuit Court of Appeals affirmed the dismissal, holding that the claims conflicted with ERISA and thus were preempted, with the exception of the age-discrimination claim, which has been remanded for further proceedings.

"*[T]*hough a top-hat plan is an ERISA plan, many of ERISA's protections and rights do not apply.*"*

With regard to the age discrimination claim the Sixth Circuit held that ERISA preserves state law claims from preemption to the extent they mirror claims under the Age Discrimination in Employment Act ("ADEA").

The court found that because Loffredo and the other executives argued that "securitizing the retirement benefits of active employees but not most retired employees had a disparate impact on older beneficiaries," their claim was covered by the ADEA. The court also remarked that such a claim was not implausible because "the securitized beneficiaries on average were younger than the retirees whose benefits were not secured."

Although a decision on the age discrimination claim in this case has yet to be decided, employers should cautiously approach any arrangement or policy that could result in disparate treatment among older and younger plan participants, employees, and retirees.

New Fee Disclosure Regulations Now in Effect

New fee disclosure requirements, under regulations previously issued by the Department of Labor, took effect this summer requiring plan administrators and certain service providers to provide fee disclosures to employers and participants. Because of the numerous disclosure requirements, plan sponsors, employers, and service providers may encounter issues or questions regarding how to satisfy their disclosure obligations or whether the new requirements apply. Plan sponsors and service providers should work together to determine what disclosures are required and ensure effective compliance efforts have been properly implemented.

The participant level disclosure regulations require "disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans." Under the service provider disclosure regulations, "certain service providers to pension plans [must] disclose information about the service providers' compensation and potential conflicts of interest."

Some issues and concerns brought to our attention by employers and/or service providers include (i) whether an investment advisor providing only investment advice to participants is considered a fiduciary to the plan and subject to disclosure obligations;
(ii) whether audit fees should be disclosed by a plan administrator; and (iii) whether receipt of a fee for investment advice constitutes a prohibited transaction that qualifies for the necessary services exemption.

Fiduciary Status

The Employee Retirement Income Security Act ("ERISA") provides that a person is considered a fiduciary to the extent s/he (i) exercises, or is responsible for exercising, any discretionary authority or control respecting the management of the plan, or exercises any authority or control respecting the management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan;" or (iii) has any discretionary authority or responsibility in the administration of the plan. Individuals who are granted such authority are also characterized as fiduciaries, regardless of whether they exercise the authority.

Additionally, to be considered a fiduciary, a person must generally (i) advise the plan as to the value of securities or other property, or recommend the investment, purchase, or sale of securities or other property; and (ii) either directly or indirectly (A) has discretionary authority or control with respect to purchasing or selling securities or other property for the plan, or (B) renders any investment advice to the plan based on the particular needs of the plan. Although applicable Labor Regulations reference providing "advice to the plan," these provisions are applicable to the fiduciary whether the advice is provided to a plan or a participant.

To the extent the applicable investment advisory agreement provides the advisor with any discretion relating to the investment of assets in a plan or client account, a fiduciary relationship will exist. Furthermore, providing investment advice for a fee may also subject a person to fiduciary disclosure obligations.

Disclosure of Audit Fees

The new disclosure regulations require a "plan administrator (or person designated by the plan administrator to act on its behalf)" to disclose certain plan related information relating to general investment alternative information, administrative expenses, and individual account expenses. This plan related information includes expenses such as legal, accounting, and recordkeeping fees.

"[P]roviding investment advice for a fee may also subject a person to fiduciary disclosure obligations."

Because audit fees can be directly or indirectly related to legal, accounting, and recordkeeping expenses, any applicable audit fees should be included in a plan administrator's fee disclosures.

Prohibited Transactions

Under ERISA, unless an exemption applies, "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction . . . [that] constitutes a direct or indirect" furnishing of services between a plan and a party in interest or a transfer to a party in interest of any assets of the plan.

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Fee Disclosures -continued from p. 4

A party in interest generally includes any fiduciary of an employee benefit plan, as well as a person providing services to a plan. Thus, a person providing investment advisory services to a plan is considered a party in interest.

Because many investment advisors are paid fees from plan assets, and there is a transfer of plan assets to a party in interest, a prohibited transaction occurs. However, additional provisions under ERISA provide exemptions to certain prohibited transactions such as when the services to the plan are necessary and provided pursuant to a reasonable contract or arrangement for reasonable compensation. The "necessary services" exemption may be satisfied by complying with the requirements set forth in the service provider disclosure regulations referenced above.

To the extent a person providing investment management or advisory services is an agent of an employee benefit plan, s/he will generally be deemed to have a contract or arrangement with the plan. In situations where a person provides investment management or advisory services, but does not have a contract with a plan, the services are provided pursuant to an arrangement, particularly when plan assets are involved.

In situations where an employer, plan administrator or service provider has not fully complied with required disclosure obligations, the Department of Labor has indicated that *the final rule allows for timely corrections of an error or omission in required disclosures when acting in good faith and with reasonable diligence. Such corrections, however, must be made not later than 30 days from the date that the individual or entity knows of the error or omission.*

If a service provider fails to provide required information to a plan administrator or employer the applicable contract or arrangement is generally treated as resulting in a prohibited transaction and plan fiduciaries as having engaged in a fiduciary breach. However, a class exemption provides an exception, provided that, among other requirements, the responsible plan fiduciary requests the missing information from the service provider in writing; and, if that fails, notifies the Employee Benefits Security Administration ("EBSA") within 30 days of the events. Notice to the EBSA may be made online at www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html.

"[T]he Department of Labor has indicated that the final rule allows for timely corrections of an error or omission in required disclosures when acting in good faith and with reasonable diligence."

SBC Reminders

Health insurance issuers and plan sponsors continue to familiarize themselves with the applicable requirements for complying with the Summary of Benefits and Coverage ("SBC") requirements. We have encountered several insights that may be helpful when completing and reviewing SBCs.

- For group health plan coverage, SBCs with respect to participants who enroll or re-enroll through an open enrollment period, must be provided beginning on the first day of the first open enrollment period that begins on or after September 23, 2012.

-With respect to participants who enroll in coverage other than through an open enrollment period, the SBC must be provided beginning on the first day of the first plan year that begins on or after September 23, 2012.

-SBC Header and Footer: The instructions to the SBC provide that the footer should be included on every page. However, subsequent guidance in the form of FAQs provide that "i[f] a plan or issuer chooses, it may include the header only on the first page of the SBC. In addition, a plan or issuer may include the footer only on the first and last page of the SBC, instead of on every page."

- For disclosures to plans and to individuals in the individual market the deadline to provide the SBC was September 23, 2012.

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Expiring Tax Provisions -continued from p. 2

Roth Rollover

Employees who are thinking of rolling a regular IRA into a Roth may want to do so prior to 2013 to avoid higher tax rates. A Roth IRA may accept rollovers from an employer sponsored plan as long as it is an eligible rollover distribution. Employees should keep in mind that a conversion will increase adjusted gross income.

Required Minimum Distributions

For purposes of the 3.8% surtax, investment income does not include distributions from tax-favored retirement plans, such as qualified employer plans and IRAs. However, taxable distributions from qualified employer plans and IRAs are potentially subject to the surtax. As a result, taxpayers should carefully plan their distributions to minimize exposure to the tax.

Taxpayers must generally begin taking Required Minimum Distributions ("RMDs") during the year in which they attain age 70-1/2; however, the first RMD may be delayed as long as it is taken prior to April 1st of the following year. In the event a participant delays their first RMD until Year 2, s/he must still take Year 2's RMD during Year 2.

Delaying the first year's RMD may benefit some participants, but may also have the following effects:

- Taking double distributions in Year 2 could result in the participant exceeding the surtax's threshold and exposing unearned income to a higher tax obligation;
- Even if the taxpayer does not reach the surtax threshold, all or part of the first RMD may be taxed at a higher rate than if it was distributed during Year 1. This may occur regardless of whether the Bush-era sunsets go into effect at the end of 2012. In the event tax levels remain the same in 2013, taking two RMDs in 2013 could result in all or part of the distribution being taxed at a higher bracket;
- More of the participant's Social Security Benefits may be subject to tax;
- The resulting increase in the participant's AGI for Year 2 may cause a reduction in deductions and/or credits subject to an AGI floor.

* * *

Because all employees and participants have differing financial circumstances, these potential strategies may not be appropriate for all individuals.

Employers and plan sponsors may wish to advise participants and beneficiaries to seek the advice and counsel of an independent legal or tax advisor when considering tax planning strategies related to their retirement benefits.

"[P]lans and issuers may combine information for different coverage tiers in one SBC, as long as the appearance is understandable."

SBC Reminders -continued from p. 5

-SBC instructions require the issuer to replicate all symbols, formatting, bolding, and shading, including a 12-point font size.

-Language under "Your Rights to Continue Coverage" should follow the model language provided in the instructions. Specific language is provided depending on whether the coverage is group or individual coverage.

-SBCs must be published in a culturally and linguistically appropriate manner.

-Plans and issuers may combine information for different coverage tiers in one SBC, as long as the appearance is understandable.

-Employers and insurance issuers should not incorporate an SPD by reference as this is prohibited in the SBC instructions.

Should you need assistance in preparing and/or reviewing an SBC, please contact one of the attorneys in our office.

2013 Retirement, Compensation, and Health Benefit Limits

Retirement Limits	Under Age 50	50 +
Maximum salary deferral to a 401(k), 403(b) or 457 plan	17,500	23,000
Maximum annual additions to a defined contribution plan	51,000	56,500
Maximum annual benefit in a defined benefit plan	205,000	205,000
SIMPLE account maximum deferral	12,000	14,500
Maximum IRA Contribution (Deductible or Roth)	5,500	6,500
ESOP distribution periods	5 years	6-10 years
account balances up to:	1,035,000	+205,000/year

Compensation Limits	2013	
Social Security Wage Base	113,700	
Highly compensated employee	115,000	
Maximum eligible compensation	255,000	
SEP minimum compensation	550	
Key employee	Officer	1% Owner
	165,000	150,000

Health Benefit Limits	2013	
HSA - Individual	3,250 (4,250 for age 55 +)	
HSA - Family	6,450 (7,450 for age 55 +)	
High Deductible Health Plan	Individual	Family
• minimum deductible	1,250	2,500
• maximum out-of-pocket	6,250	12,500
PPACA minimum annual limit on essential health benefits for 2013	2,000,000 (calendar year plan)	

About the Cicotte Law Firm

The Cicotte Law Firm is located in Kennewick, WA, and represents employers in several states in all aspects of benefits law, handling diverse employment, labor, tax and corporate matters.

The Firm's practice covers all areas relating to employee benefits, including designing "defined contribution-style" health plans (HRAs, HSAs, & FSAs), assistance with COBRA, HIPAA, ARRA, and PPACA issues, advising on fiduciary responsibilities, maintaining legal compliance with non-discrimination requirements, analyzing unusual benefit claims, representing employers in labor relations matters where pension or welfare benefits are involved, advising on the federal tax implications of complex benefits-related issues, and examining the ERISA status of compensatory arrangements.

Other practice areas vital to corporate function available at the Firm include corporate formation, corporate compliance, negotiations, mergers and acquisitions, SEC compliance, and HR liaison activities.

The Firm is also able to assist companies with licensing agreements, non-compete agreements, and nondisclosure agreements.

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