Employee Benefits Plan Alert

COVID-19 Employee Benefits Update

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In response to the many conversations we have had with employers and plan sponsors related to the economic disruption caused by COVID-19, we are providing this comprehensive update. Specifically, the potential impact on compliance matters that affect the qualification requirements or operations of a retirement plan and other employee benefit plans that need to be considered and addressed when employees are terminated, employer contributions adjusted, or other plan operations are affected.

Partial Termination of a Retirement Plan

An employer who is considering a layoff, reduction of employees, closing of a plant or division must consider the partial termination regulations. Typically, when 20% of your total plan participants are laid off in a particular year, a partial termination is deemed to have occurred.

The law requires all “affected employees” to be fully vested in their account balance as of the date of a partial plan termination. They must become 100% vested in all employer contributions regardless of the plan’s vesting schedule.

An employer who partially terminates a plan must determine which participants require an acceleration of vesting due to the partial termination. Participants who improperly incurred forfeitures are owed more benefits. To the extent those forfeitures have been distributed to other participants and cannot be recovered, the employer will be responsible for making the affected participants whole.

Safe Harbor Plans

Safe harbor plans that provide an employer non-elective contribution or employer match are currently required to provide a 30-day notice to participants in advance of any cessation or reduction of the employer contribution(s). That process is available if the original safe harbor notice provided that such contributions could be reduced or suspended, or the employer is operating at an economic loss for the plan year.

Employer Discretionary Contributions

A retirement plan that has an employer discretionary contribution should not be affected. This type of condition provides the employer with a choice to authorize an employer contribution on a year-to-year basis. Therefore, an employer can forego the making of a contribution without ramifications.

Fixed Employer Contributions

There are certain rules requiring a contribution to be made to a plan that provide a fixed contribution. The facts and circumstances of that provision would need to be reviewed to determine if employees have satisfied those terms, requiring the contribution to be made. If a contribution was not made under that circumstance, the plan could be violating the anti-cut back rules of the Internal Revenue Code (IRC).

There may be the availability to suspend a contribution by the timely adopting of a plan amendment. This process should be carefully considered.

Loans and Hardship Withdrawals

Although most defined contribution plans allow in-service distributions, plan sponsors should review their plans or specific policies to understand the available in-service withdrawals and other operational features. For example, a loan policy may limit the number of loans that a participant can have outstanding at one time. A plan can be amended to allow additional loans. Currently, the maximum limit for a loan is subject to the IRS limits (i.e., loans cannot exceed the lesser of 50% of the account balance or $50,000). However, recent proposals are considering raising the loan amount to $100,000.

Hardship withdrawals is a plan provision that allows in-service distributions under certain circumstances. Most plans utilize the safe harbors provided by the IRS to determine if the immediate and heavy financial need requirement (which permit a plan to make the distribution) is satisfied. Although the safe harbors do not include a provision for COVID-19, there may be new legislation to provide additional relief. If the federal government declares the coronavirus to be a “disaster” that would satisfy the recently revised safe harbor criteria.

Timing of Employee Voluntary Contributions from Payroll Transmitted to Retirement or Welfare Plan

To the extent possible, an employer should attempt to maintain the consistent schedule of transmitting employee deferrals from wages and loan repayments to the plan. This “timing rule” is enforced by the IRS and Department of Labor in their examinations. Employers should attempt to maintain the same payroll deposit schedule for employee salary deferrals and loan repayments.

Nonqualified Deferred Compensation Plans or Other Employment Arrangements

These arrangements should be reviewed to ensure the provisions of IRC §409A are not violated when an employee is terminated and any type of payments from the plan are effected. Additionally, some of these types of plans may be impacted by a change to the contribution made to the qualified retirement plan maintained by the employer. IRC §409A contains the rules which generally prohibit employees from making salary deferral election changes mid-year (including canceling elections) and/or changing the timing of payments.

Voluntary termination of a non-qualified plan has several other requirements that need to be considered. These include: requiring the termination of all similar nonqualified arrangements; not allowing payments for 12 months after the plan termination; and, precluding the company from adopting a new nonqualified plan of the same kind within three years after the action to terminate the plan(s).

The Affordable Care Act (ACA) and Employer Penalties

Prior Employee Benefit Services Group (EBSG) Alerts discussed the success rate of our responses to IRS penalty notices that have practically eliminated all proposed penalties by the IRS. We are not aware of any change of the IRS’ current position (i.e., not providing any relief) to an employer who terminates the group health plan coverage for an employee when a layoff begins which may produce an ACA penalty for failing to offer coverage to 95% of full-time employees. Additionally, an employer can be subject to the Affordable and Minimum Value penalty if the employer-sponsored coverage is unaffordable or does not provide minimum value, and if one or more full-time employees receive subsidized coverage through an exchange.

To Be Continued

The above discussions are not an all-inclusive list of issues that need to be addressed when a downsizing of a workforce occurs, or all the changes that may be needed to a plan to facilitate an operation. Each process should be carefully reviewed to determine its full impact before finalization occurs.

More specific questions relating to payroll considerations and changes are expected, considering the many new features made by the recently enacted Families First Coronavirus Act.

Last Call for 403(b) Plans

The time to adopt an amended or restated 403(b) plan is running out. A restated 403(b) plan document is required to be adopted **by March 31, 2020**. This plan document is typically provided from a plan's record keeper, third party administrator, a law firm or other provider.

Further information regarding this IRS requirement can be found in our prior EBSG Alert here.

Our EBSG has assisted many plan sponsors with the creation of an IRS-approved 403(b) restated plan document, or reviewed a plan document that has been provided to them to ensure the many "form" requirements of the plan document are satisfied.

Contact Us

The Employee Benefit Services Group at PKF O'Connor Davies is available to assist employers with the various compliance reporting and other compliance requirements imposed by federal agencies. We also provide a full spectrum of compliance services for qualified retirement plans, nonqualified deferred compensation plans, and welfare plans. For more information, please contact your client services partner or either of the following:

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