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Employee Benefits and Executive Compensation

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Happy New Year! Have You Made Your 2019 Retirement Plan Resolutions?

With the holidays behind us, now is a great time for employers to review common retirement plan administrative issues and consider whether any "New Year's resolutions" should be made for 2019 for their qualified retirement plans ("Plan").

The following list summarizes some of the more common plan administration errors:

Improperly Applying the Plan's Definition of Compensation - Failing to properly apply the Plan's definition of compensation can result in miscalculated deferral contributions, matching contributions and/or employer contributions. Employers should periodically review their payroll codes against their Plan's definition of compensation, particularly following any addition of new pay types or employee groups, to ensure continued compliance.Treatment of compensation paid after termination of employment should also be consistent with the terms of the Plan.

Improper Plan Loan Administration - Where a Plan allows loans to participants, those loans must be originated consistent with the Plan's terms, including any adopted loan policy, and applicable IRS regulations. Failing to follow these loan parameters can result in negative tax consequences for participants and potential operational failures for the Plan. Employers should periodically review Plan loan administration against the Plan terms and loan policy to ensure that all loans are being properly administered and paid and to timely correct any errors, as applicable.

Late or Unpaid Required Minimum Distributions - Plan participants are generally required to commence Required Minimum Distributions ("RMDs") by no later than the April 1st following the year in which they attain age 70½ or, for participants who do not own more than 5% of the company, the date of their termination of employment, if later. Negative tax consequences (in the form of a 50% excise tax) to the participant can result if an RMD is distributed late. Employers should periodically review participant records (especially age and address fields) to ensure that participant data is up to date and participants are having their RMDs started in a timely manner. Additionally, employers should document their missing participant search procedures and make sure their procedures are consistent with IRS and DOL guidance.

Late Transfers of Participant Contributions - A fiduciary breach can arise if an employer fails to transfer participant contributions (elective deferrals or participant loan payments) from employer assets / payroll to the Plan in a timely manner consistent with applicable regulations. Employers should periodically review payroll practices to ensure that participant contributions are being transferred to the Plan as soon as administratively possible.

Not Fully Documenting Hardship Distributions - As with loan distributions, hardship withdrawals must be made consistent with plan terms and applicable regulations. Generally, for any approved hardship withdrawal request, it is recommended that an employer obtain and maintain (1) documentation showing the hardship request, review, and approval, (2) documentation substantiating the participant's financial need, and (3) documentation to support that the distribution was properly made in accordance with applicable rules and Plan terms and properly reported for tax purposes. While an employer may engage the services of a third party administrator ("TPA") or record keeper to assist with processing hardship withdrawals, employers should never assume that the TPA or record keeper is taking steps consistent with these guidelines without confirmation from the TPA. Therefore, employers should review their agreements with TPAs and record keepers and ensure that either the TPA is complying with these recommendations or that the employer has implemented proper procedures internally to address these recommendations.

Unidentified Controlled Group Members and Undocumented Participating

Employers - Where an employer brings in a new affiliate (e.g., by acquiring a company), special attention must be paid to the terms of the Plan to address how the employees of the new affiliate are treated under the Plan. If this is not properly tracked and communicated before an acquisition occurs, the employees of the new affiliate may be improperly included or excluded from the Plan. Additionally, many retirement plans require that any affiliate of the plan sponsor that will participate in the Plan affirmatively elect to participate in the plan prior to commencing participation. This may require that the affiliate (and the plan sponsor) approve resolutions and execute a participation agreement to participate in the Plan. Therefore, when deals and acquisitions are being negotiated, benefits counsel should be brought in to ensure that any participating employers are properly documented and to ensure that the Plan is amended where necessary to address new participating affiliates. Additionally, employers should periodically review their corporate structure to ensure that any employers participating in the Plan are properly documented in the Plan documents.

If an issue is identified and not timely addressed, both the Internal Revenue Service and Department of Labor have correction programs that may offer employers relief. The important thing is to address any identified issues in a timely manner and through the appropriate correction program, if applicable, and put procedures in place to make sure those issues do not recur.

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