



A Day in the Life of an Employee Benefits Attorney (AKA Questions that keep coming my way)

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Every day I counsel employers on a variety of issues related to all flavors of employee benefit plans and programs, big and small – and often more complex than they might first appear. My role as an employee benefits attorney is more of a proactive counselor, problem solver and corporate tax advisor. Here is a small sample of commonly recurring issues that come my way from company owners, executives and human resources professionals.

Health/Welfare Plans

- Can our health plan offer different waiting periods for different groups of employees?
- What role should human resources be taking in making sure life insurance plan participants have completed evidence of insurability requirements with insurer (EOI)?
- Should we continue active health plan coverage for individuals on post-FMLA medical leave? When should we send a COBRA notice? Should we subsidize COBRA to conform with ACA affordability?
- We would like to offer certain employees a significant cash incentive to opt out of our health insurance. We explain this clearly in our open enrollment materials. Do we need to do anything else?
- We offer a high deductible health plan and contribute to employee Health Savings Accounts. We would like to set up an arrangement independent of our health plan for free telehealth and digital/text medical visits, so that employees can obtain certain medical services free of charge, to help offset the high deductible? Is this permissible?
- We are on notice that we are receiving, with respect to our self-insured medical plan, a Blue Cross Blue Shield settlement related to errors

in medical claims adjudication and a MLR rebate? We do ask employees to contribute a monthly amount for coverage, but at the end of the day, we pay all medical claims and we maintain a stop loss policy (for which we pay the premiums), but which is in the name of the health plan. Can we retain all of the settlement proceeds and the MLR rebate?

- We just received a penalty notice from the IRS saying that we did not provide health care offers in accordance with ACA rules? After analysis, it looks like we did fail to offer coverage (or affordable coverage) to certain employees called out by the IRS. Should we just pay the penalty or is there another strategy?

Qualified Retirement Plans

- Our 401(k) Plan requires 1,000 hours of service to participate in both elective deferrals and matching contributions. Do we have to amend this requirement due to the Cares Act? Are there different strategies to meet these Cares Act requirements?
- We have off-cycle payrolls, for things like commission, bonus, overtime, and other non-regular wage payments. Is it permissible to wait to remit employee elective deferrals on these off-cycle payrolls until the next regular payroll so as to simplify administration for our payroll personnel?
- We just discovered that for the last three years, our payroll has not counted certain bonus payments in “plan compensation” but our Plan says that “plan compensation” is W-2 taxable wages. Do we have to correct this? Can we self-correct or do we have to request IRS to correct?
- We would like to offer higher or more flexible profit sharing contributions to several groups

of management in our 401(k) Plan? Is this permissible?

- We have two different defined benefit pension plans for our salaried and union groups. Our actuary is pressing us to consider updating our actuarial assumptions (mortality table and interest) to more modern day assumptions. Can we amend the plans unilaterally to update the assumptions? Do we have to negotiate with the Union on this issue?
- Our qualified default investment alternative is a commonly used target date retirement fund series. We selected this series about five years ago and it is performing at a mediocre level. Do we as plan fiduciaries need to do anything on this investment selection if the vendor that sponsors the fund series (and is our bundled recordkeeper) says that it is fine?
- We maintain several defined contribution plans for our workforce, including a plan for exempt, non-exempt, and union employees, and we offer a 403(b) plan. Each of these plans allows loans per IRS requirements. Our workforce often has account balances in more than one of these plans, due to internal transfers or rehires into other groups. Our plan recordkeeper just alerted us that they have not been considering outstanding loans in all plans in the aggregate, to determine the maximum loan amount available to a participant, which is required by the IRS. The plan recordkeeper has alerted us there are more than \$500,000 in excess loans due to this operational failure. What do we do? Whose fault is this?
- We utilize a fair number of staffing employees for periods between 6 months – 18 months, that we permanently hire. Do we have to offer any sort of service credit in our retirement plans for these employees' time with the staffing agency?

Executive Employment Agreements/ Deferred Compensation Plans

- We are renewing our CEO's employment agreement. We would like to change the terms of some of his deferred compensation benefits, like the schedule of his severance payments in case of employment termination and the timing of payment of his existing stay bonus (we are contemplating an upcoming sale of our business and want him to stay with the new employer through a transition period). Since his current employment agreement is expiring, can we just start "fresh" on all these sorts of benefits or offer different benefits in lieu of these "expired" terms?
- We are a nonprofit employer and are negotiating a substantial employment agreement for our incoming CEO. We also have a new human resources professional who is taking the laboring oar in drafting the agreement, using one from her last employment role which was a large for-profit manufacturer. The CEO has asked for a deferred compensation retirement benefit program, in addition to our 401(k) Plan benefits. Our human resources professional has suggested using a model that was used with her last employer (that conforms in all aspects with Code Section 409A), where the employer credits an annual amount to a deferred compensation program, the executive may select nominal investments of the credits, the executive vests in the program 20% each year for five years, and his benefits are paid in five annual installments on each anniversary of his employment termination. This strategy conforms with Code Section 409A, she explains, and the arrangement offers the best of all worlds. The CEO vests 100% after five years, but there is no taxation of benefits until distributions occur. What do we do about employment taxes on these credits? Is this a good strategy for a nonprofit employer?

Mergers and Acquisitions

- We are selling our privately held business, which involves a parent entity and a number of subsidiaries. The parent and the subsidiaries are mostly partnerships, but one or two of the lower tier subsidiaries are corporations, including at least one C Corporation. We have several valued employees who have served the business for over 20 years and we would like to reward them with bonus payments based on a small percentage of the sales proceeds. Some of these bonus payments will be large in comparison to our valued employees' annual salaries – as we feel they have paid their dues over the years. Are there any tax risks or disclosure requirements with this proposal?
- We are buying the stock of a company that maintains a 401(k) Plan. We suspect they may have some operational failures in the Plan in the past, and have decided that we will terminate the 401(k) Plan immediately after closing of the sale to limit our exposure. Is this a good strategy?
- We are buying all of the assets of a company that maintains a self-insured health plan for its employees that runs on a September 30 fiscal year. Our fully insured health plan runs on a January 1 calendar year. We do not want to assume any liabilities for the seller's self-insured health plan and would like to enroll the seller's employees in our health plan on January 1. How do we manage this? Do we as the buyer, have COBRA responsibilities for September – December? Also – what do we do about employees' flexible spending account balances?

As evidenced above, employee benefits can touch many aspects of a business and its employees, and most of the issues that surface are complex. Be sure to turn to your trusted employee benefits counsel when these issues keep you up at night.

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