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**Ferenczy Law FlashPoint:**  
***Giving you "Your ERISA Edge"***

**Planning Proper Fee Payments**

It is not uncommon in our industry for administrative fees to be paid by plan assets, either through direct payment by trustees, through ACH deductions from the trust, through revenue sharing, or through ERISA Accounts. However, only certain fees are permitted to be paid by the plan. Is anyone at your organization looking at this issue before fees are paid?

*Settlor vs. Administrative Fees*

Some actions clearly are performed for the benefit of the plan sponsor, rather than the plan, itself. For example, suppose that Company A sponsors a defined benefit plan for its employees. Times are tight, however, and the company is thinking it might have to take action to reduce the cost of the plan. Company A's CFO contacts its actuary and discusses these concerns. The actuary reviews the situation and comes up with three alternative re-designs to reduce the plan costs. Company A's Board reviews the options and selects one. The actuary contacts Company A's attorney, who prepares an amendment, Board resolution, and updated SPD.

Which of these fees can be paid by the plan?

Longstanding guidance from the Department of Labor (DOL) indicates that discussions, designs, and documentation of amendments that take place to establish, design, terminate, or make decisions about the plan are "settlor functions" that are properly paid for by the plan sponsor and not the plan. These are not fiduciary activities involved with the plan administration, but issues relating to how the plan will be structured, what benefits will be provided, and what the sponsor can afford to offer its employees. The DOL also explains that the sponsor should pay for the cost of preparing plan amendments to put its decisions into effect. On the other hand, expenses incurred to carry out (i.e., administer) the amendments and decisions are proper plan expenses. On the other hand, costs of preparing amendments to keep the plan in compliance with qualification rules, however –such as the current updating of preapproved defined contribution plans – are reasonable plan expenses, says the DOL.

*Who's Making the Decision of What the Plan Can Pay?*

When TPAs or recordkeepers perform services for plans, it is not unusual for some of those services to be settlor functions under the DOL's guidance. The question is: is anyone checking to see if the plan is permitted to pay for everything the service provider charged?

- If the TPA prepares an amendment during the year at the plan sponsor's request, is that billed separately or does the payment come from the plan assets?
- If the actuary determines information that must be shown on the plan sponsor's financial statements, does that charge get paid by the employer separately from the cost of the preparation of the annual actuarial valuation?
- Are the legal fees for consultations regarding employer issues about the plan charged differently than consultations about plan administrative issues?

It is not uncommon for a service provider's fee agreement to say that the provider is not responsible to separate out settlor functions from administrative functions (i.e., determine what may or may not be paid from the plan's assets). After all, the plan's fiduciary is the one really responsible for this task. But, having said that, does the plan's fiduciary really know that this process is required? And, does the service provider's process allow the fiduciary the opportunity to make that determination, or does the process preclude the fiduciary from making a determination?

Consider these important facts:

1. Whoever decides that the fee payment is appropriate is exercising discretionary control over plan assets ... so is a fiduciary.
2. If the plan pays for services that were really provided to the company, that is potentially:
  - a) A breach of duty by the authorizing fiduciary; AND
  - b) Either:
    - i) An improper loan of plan assets to the plan sponsor; or
    - ii) Embezzlement by the plan sponsor of plan funds.

**We recommend:**

Every plan sponsor should understand what can and cannot be paid from plan assets. If you make these kinds of decisions and do not know how to differentiate between things that can and things that cannot be paid for by the plan, you need to get educated.

Every service provider to the plan that takes funds out of the plan automatically should have a written procedure (agreed to by the plan fiduciary) under which the plan fiduciary has time to review the bill, that the passage of that time without objection is deemed to be approval by the fiduciary of the bill for payment by the plan, and that an automatic transfer of funds occurs only after that time has expired without objection. A procedure for resolving disputes is also a good thing.

Every recipient of revenue sharing makes sure that the plan fiduciary is evaluating what parts of the bill can be paid from plan assets and, if the revenue sharing exceeds those charges, takes whatever action is needed to ensure that settlor functions are not paid by the plan.

If you would like to consult with us about this issue, or if you want more information about what constitutes settlor vs. administrative functions (including copies of DOL Opinion Letters 97-03A and 2001-01A), contact Ilene or Gina. We're here to help.



*Think About This ... Get Your ERISA Edge*

You're struggling with a technical question and just don't know where to go to get an answer. You've looked at the various books you have in the office and are not satisfied. You've called all your friends in the industry. You and others in your office are taking up an inordinate amount of time pondering this issue and are getting nowhere. Do you realize that you can call one of our lawyers with that question and get charged for 10 or 20 minutes of time and have the problem solved? For somewhere between \$60 and \$200, you could have an answer ... or at least know that the question is more complex than you thought.

Call us! Really!



*The SRPC Is Back!*

Plan to attend the **2015 Southern Retirement Plan Conference: Pensions on Peachtree!** Plan to join us for two days of unique pension education, the opportunity to network with your retirement plan cohorts in the South, the most fun Southern BBQ around, and the sweet spring weather in Atlanta!

The **2015 SRPC** has been scheduled for April 13-14, 2015. Listening to the comments of last year's attendees, we are having the conference on Monday and Tuesday of the week, so that you do not have to worry about getting out of the city late in the day on a Friday.

More information is forthcoming. But, y'all mark your calendars now and plan to be there!

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