Checklist for 401(k) Plan Best Practices

Whether for internal purposes or in preparation for an audit by the IRS or DOL, employers who sponsor 401(k) plans may find it useful to review the "best practices" checklist below. While this list is by no means exhaustive, employers that apply this checklist and are comfortable with their findings will enjoy a level of comfort in their compliance with applicable law.

Additionally, the checklist also contains some special considerations when an employer is involved in a corporate merger or acquisition. Improper handling of employee benefit issues, including 401(k) plan sponsorship, may create hidden liabilities for an unwary buyer. The list below, tailored for 401(k) plans only, is a starting point for the critical due diligence work required in planning for a successful corporate transaction.

A. PLAN DOCUMENTS AND GOVERNMENTAL FILINGS FOR 401(k)PLAN

Copies of the following plan documents should be retained:

1. Copy of the most recent version of plan, including all amendments adopted to date and copy of all authorization and adoptive resolutions and related trust agreements

2. Copies of the plan's statement of investment policy and applicable investment management agreements, if any.

3. Copies of IRS Forms 5500, including attachments (*e.g*., auditors report) filed by the employer for the last three taxable years and copies of the most recent summary annual reports, where applicable.

4. Copy of the summary plan description and any summaries of material modifications.

5. Copy of the favorable IRS determination letter for the plan as well as a copy of all IRS correspondence and copy of each plan amendment submitted to the IRS.

6. Copies of Board or Committee materials pertaining to plan (including agendas minutes, and documents distributed at meetings).

Section 107 of ERISA provides that records used to compile information that is required to be reported (e.g., Forms 5500, Summary Annual Reports) must be retained for at least 6 years. Section 209 of ERISA requires that records used to determine an employee's benefit also must be retained. However, the law is not clear on the timeframe under Section 209 of ERISA, in which case, employers need to retain for as long as it would be deemed "prudent." As a practical solution, employers may wish to avail themselves of the guidance contained in the DOL Final Regulations which permit electronic retention of records. 29 C.F.R. Part 2520, 67 Fed. Reg. 17264 (April 9, 2002).

B. 401(k) PLAN ADMINISTRATIVE COMPLIANCE

Records should be maintained which demonstrate that the following has occurred or exists:

1. That summary plan descriptions have been given to all participants, and the date of each such distribution and filing.

2. That the required annual return on IRS Form 5500 has been filed timely (including supporting schedules).

3. That all required plan audits have been performed.

4. That there is compliance with DOL regulations addressing communication of employee benefit material through electronic media, if applicable.

5. That appropriate loan procedures and Qualified Domestic Relations Order (QDRO) procedures are in place, if applicable.

6. That summary annual reports have been distributed annually to plan participants on a timely basis.

7. That any lawsuits or complaints to, or by, any person or governmental agency have been filed or are pending and whether any such lawsuits or complaints are expected.

C. SPECIAL CONSIDERATIONS RELATING TO 401(k) PLANS UPON A MERGER OR ACQUISITION

Due diligence should include the following:

1. Whether the seller's plan has been amended for all required changes in the law.

2. Whether the seller's plan has a current favorable IRS determination letter.

3. Whether the seller's plan is in compliance with nondiscrimination testing, including ADP and ACP testing.

4. Whether the seller's plan communications to employees have been distributed in a timely manner.

5. Whether the seller's plan is under an IRS or DOL examination.

Please feel free to contact us at 918-486-1065 if you have any questions or comments about these issues or any other development in the 401(k) plan area.