

HEALTH & WELFARE PLAN LUNCH GROUP

May 2, 2019

ALSTON & BIRD LLP

One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7885
E-mail: john.hickman@alston.com

© 2019 All Rights Reserved

INDEX

1. May 2019 H&W Update Call



ERISA Plan asset and related compliance issues

May 2, 2019

Generally Speaking

- ERISA Plan assets are subject to the following fundamental principles:
 - Plan assets must be held in a trust (well, almost always)
 - Plan assets may only be used for the exclusive benefit of participants/beneficiaries and/or to defray *reasonable* administrative expenses
 - This is commonly referred to as the “Exclusive Benefit” rule
 - Plan assets can not be used in certain “prohibited transactions”
- Also, those *handling* funds must be bonded



What are “plan assets”?

- DOL regs define “Plan Assets” as
 - Amounts that a participant or beneficiary *pays to an employer* OR has *withheld from wages* for contribution to the plan (“Participant Contributions”)
 - As of the earliest date such contributions can be segregated from the employer’s general assets (“Reasonable Segregation”)
- Employer contributions may also become Plan Assets



Participant Contributions

- Amounts withheld from an individual’s pay:
 - After-tax contributions
 - PRE-TAX CONTRIBUTIONS
 - Treated as employer contributions for tax/Code purposes
 - Treated as employee contributions for ERISA purposes
- Amounts paid to the Employer (other than through withholding)
 - COBRA premiums from Qualified Beneficiaries
 - Retiree premiums



Reasonable Segregation

- Employee contributions do not become Plan Assets until the earliest moment that they can be reasonably segregated from general assets
 - No later than 90 days after being withheld by employer or contributed by the employee
 - 90 day rule is NOT a safe harbor
 - Practical application
 - Salary reductions (after-tax or pre-tax)-same day or shortly thereafter
 - Other-the moment that they are received by the employer subject to a reasonable delay (e.g. to let checks clear)
 - Payments received by Vendors as intermediary?



Employer Contributions

- Employer contributions may become Plan Assets in one of the following ways:
 - Segregate employer contributions from general assets
 - Trust
 - Separate account in the plan's name
 - Separate account in a third party's name?
 - Where *apparent* intent to create plan assets is established (even if not segregated from general assets)
 - Apparent vs. actual intent
 - Communications to participants and documentation play key role



Trust Requirement

- Plan assets must be held in trust with one or more trustees
- Relief provided by TR 92-01:
 - Plans funded through cafeteria plans
 - Insured plans
 - Not a formal exception-just a non-enforcement policy



Trust Relief-Cafeteria Plans

- If employee contributions are made on a pre-tax basis through the cafeteria plan, then the DOL will not enforce the trust requirement provided that:
 - The plan is not considered to have Plan Assets for any reason other than pre-tax salary reductions
 - E.g. Employer deposits employer contributions to trust but holds pre-tax contributions in general assets.
 - 92-01 does not apply in this example
 - Employee contributions are maintained in general assets of the employer
 - Transmitting funds to non-insurance carrier TPA to pay claims (prior to payment) presumably will eliminate 92-01 relief
 - O.k. to transmit funds to carrier (acting either as insurer or TPA)



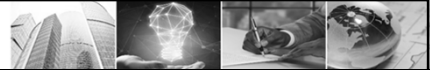
Trust Relief-Cafeteria Plans

- 92-01 relief extends to COBRA and retiree premiums (even though not pre-tax) received in connection with benefit plans funded through the cafeteria plan
- 92-01 relief does not apply (outside of a cafeteria plan) to after-tax contributions from active employees to a self-insured plan
- EMPLOYEE CONTRIBUTIONS ARE STILL PLAN ASSETS and subject to other rules governing plan assets (e.g. exclusive benefit rule)



Trust Relief-Insured Plans

- If pre-tax OR after-tax employee contributions are made to an insured plan, the DOL will not enforce the trust requirement provided that
 - Contributions are used solely to pay premiums
 - Contributions are forwarded *directly* to the carrier
 - Actual rule requires transmission to carrier within 3 months
 - Plan asset rule will likely trump and require transmission in accordance with Reasonable Segregation rule
 - Receipt of premiums by intermediary will create trust requirement
 - Refunds are returned to participants
- EMPLOYEE CONTRIBUTIONS ARE STILL PLAN ASSETS and subject to other rules governing plan assets (e.g. exclusive benefit rule)



Trust Relief- TPA Issue

- Existence of trust associated with plan will eliminate 92-01 relief
- Receipt of Plan Assets by TPA (even for an instant) to pay claims or pay premiums will eliminate 92-01 relief
- Possible Resolutions:
 - Check writing authority over an employer's general asset account
 - "Employer Reimbursement" approach
 - Employer deposits employee contributions in separate account in employer's name; transmits claim funds to TPA from general assets; reimburses self from separate employee contribution account
 - TPA pays claims from its account and then receives reimbursement from employer "in arrears"



What is a "Trust"

- Either taxable or non-taxable (e.g. VEBA)
- Usually established at financial institution in accordance with state laws
- Will have one or more trustees (sometimes the financial institution itself is trustee)
- Will have trust document
- May have separate state and/or federal filing requirements (e.g. VEBAs required to file Form 990)
- Commingling within trust may be o.k. provided there is adequate separate accounting of Plan Assets for the various plans



Trust Requirement-Violations

- No fixed dollar penalties
- Action by DOL, participant or beneficiary to establish a trust
- Inability to properly defend yourself in lawsuit claiming misuse of funds (i.e. a breach of exclusive benefit rule)
- Form 5500 penalties
 - Auditor's report required for large plans
 - Financial schedules required for large and small plans
 - Failure to include these things makes the form "late"



Exclusive Benefit Rule

- Plan Assets may only be used to
 - Provide benefits under the plan and/or
 - Defray reasonable administrative expenses
- PLAN ASSETS CAN NEVER INURE TO THE EMPLOYER
 - E.g. forfeitures from Health FSA
 - E.g. demutualization proceeds (to the extent attributable to participant contributions)
- This rule applies even where plan assets are not held in trust
 - If relying on TR 92-01, there must be adequate accounting of how plan assets are used



Exclusive Benefit Rule-Reasonable Administrative Expenses

- Only certain administrative expenses may be paid with Plan Assets
 - Those allowed by the plan
 - If plan is silent, then follow general rules
 - If plan requires employer to pay, cannot use plan assets
 - Only those direct expenses properly and actually incurred in the performance of a fiduciary's duties under the plan
 - Formation expenses (paid by employer only) vs. Administrative expenses (paid by either employer or plan assets)
 - Those that are "reasonable"



Exclusive Benefit Rule-Formation v. Administrative Expenses

- Formation (not payable with Plan Assets)
 - Plan design decisions relating to establishment, amendment, and termination of a plan
 - Cost of establishing a plan
 - Research, analysis of options
 - Overhead costs such as rent, computer time, office space and general telephone expense
- Administrative (payable with Plan Assets)
 - Amendments required by law
 - Drafting SPDs and plan documents (and SMMs)
 - Fees for recordkeeping services
 - Fees for administrative services
 - Internal costs vs. External Costs (TPA)



Exclusive Benefit Rule-Administrative Expenses

- Administrative expenses must be “reasonable”
 - Based on relevant facts and circumstances. DOL guidance . . .
 - Fees must be disclosed to be reasonable
 - Aggregate payments from ALL sources (including third parties) must be reasonable
 - Doesn’t have to be the cheapest vendor
 - Consider impact of regulations on interchange revenue, referrals payments and HSA investment fees
 - TPA contracts should be in writing
 - Under ERISA, must have clause allowing termination w/o penalty and upon short notice
 - Interest retained by TPA, if any, must be in agreement
 - NOTE: recent guidance on indemnification language
 - Costs for settlor and non-settlor functions should be accounted for separately



Exclusive Benefit Rule-Prohibited Transactions

- In addition to exclusive benefit rule, you cannot. . .
 - use Plan Assets for your own benefit
 - enter into transactions in which you will receive personal compensation (anti-kickback)
 - allow plan to engage in certain transactions with “Parties In Interest”
 - Exchange of property
 - Lending of money/extensions of credit except in certain situations (e.g. no interest loan for plan operating expenses)
 - Furnishing of goods or services by party in interest except for reasonable compensation
 - Transfer Plan Assets for use by parties in interest
 - “float” by TPA presumably o.k. if in service agreement and does not cause compensation to be unreasonable



Exclusive Benefit Rule-Violations

- Enforcement by DOL or lawsuit by participants/beneficiaries for breach of fiduciary duty
 - Personal liability for loss to the plan
 - Injunction to stop doing what you are doing or to begin doing something else
 - Preclusion from acting as fiduciary in the future
- Penalties for prohibited transactions
- Criminal Penalties for missappropriation of funds



Bonding

- Those *handling* Plan Assets must be bonded
 - “Fidelity Bond”
 - Covers the plan sponsor for loss due to fraud, embezzlement, theft or gross negligence
- “Handling” means the ability to affect the disposition of funds
- Bond must be 10% of funds handled during the prior reporting year (min of \$1k and max of \$500k)



Bonding

- When is Bonding not required:
 - When Plan Assets are not segregated from general assets
 - If you are a specified person or entity
 - Banks
 - Trust companies
 - Insurers or service providers who provide or underwrite benefits in accordance with state law for plans covering employees of other employers



Question & Answer

