

# HEALTH & WELFARE PLAN LUNCH GROUP

May 2, 2019

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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



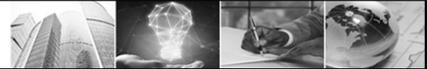
## Trust Requirement-Violations

- 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 misappropriation 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

