ISLER DARE RAY RADCLIFFE & CONNOLLY, P.C.

EMPLOYEE BENEFITS UPDATE

July 2012

DOL Rules That Certain Tax-Exempt Organization 403(b) Plans Are No Longer Exempt from ERISA

Executive Summary

If you are a tax-exempt organization that has taken the position that your 403(b) plan is exempt from ERISA, and you also maintain a separate 401(a) plan that holds employer contributions that are linked to employee contributions under the 403(b) plan, the 403(b) plan will now be subject to ERISA.

What You Should Do

- Review your current 403(b) and 401(a) plans to determine ERISA status.
- If contributions to your 401(a) plan are tied to your 403(b) plan, evaluate your existing plan design and assess what changes (if any) may be appropriate. Options may include:
  - Retaining both plans and making your 403(b) plan ERISA-compliant
  - Keeping your 403(b) plan intact but moving the matching feature from your 401(a) plan to your 403(b) plan, while freezing or terminating your 401(a) plan
  - Adding a 401(k) elective contribution feature to your 401(a) plan, while freezing or terminating your 403(b) plan

Recently, the Department of Labor issued Advisory Opinion 2012-02A, which limits the ability of tax-exempt organizations to claim that their 403(b) plans are exempt from ERISA when they also maintain a tax-qualified 401(a) retirement plan that has certain contribution features that are linked to the 403(b) plan.

Historically, many tax-exempt organizations have taken the position that the tax-sheltered annuity programs that they sponsor under Section 403(b) of the Internal Revenue Code have been exempt from the fiduciary, reporting and disclosure requirements of ERISA. This exemption has been based on "safe harbor" provisions in Department of Labor regulations providing that completely voluntary programs, which are funded fully by employee contributions and have limited employer involvement, will not be considered to be pension plans that are established or maintained by an employer for purposes of ERISA coverage.

Many 403(b) plans re-evaluated their ERISA exemption when comprehensive 403(b) regulations took effect in January 2009 and have decided that their continued maintenance and oversight of the 403(b) plan has caused them to be subject to ERISA, since they can no longer take the position that they have limited employer involvement.[1]

Nevertheless, for those tax-exempt organizations that have continued to maintain the position that their 403(b) plans are exempt from ERISA, the new Advisory Opinion cautions that a related 401(a) plan could jeopardize the continued exemption of the 403(b) plan, depending on how the 401(a) plan is designed.

The new Advisory Opinion clarifies that there is nothing wrong with a tax-exempt organization continuing to maintain both 403(b) and 401(a) plans, and that a 403(b) plan will not lose its exempt status under the ERISA safe harbor merely because the employer also maintains a 401(a) plan with profit-sharing or fixed contributions that are not contingent or linked in any way to the level of employee contributions under the 403(b) plan. Rather, this new guidance addresses a more narrow set of circumstances, by providing that if a tax-exempt organization with a 403(b) plan also sponsors a 401(a) plan to which it makes matching contributions, these contributions should be viewed as being conditioned on the amounts that employees contribute to the 403(b) plan. Consequently, the 403(b) plan will no longer meet the voluntary and limited employer involvement standards under the "safe harbor" provisions, and therefore will become subject to ERISA.

In light of this guidance, tax-exempt organizations that sponsor both 401(a) and 403(b) plans should re-examine their plans to assess their current status under ERISA and determine whether any restructuring, redesign or consolidation of plans might be appropriate.

* *

If you have any questions about these new developments in particular, or about your benefit plans in general, please let us know.

ISLER DARE RAY RADCLIFFE & CONNOLLY, P.C.
1945 Gallows Road, Suite 650
Vienna, Virginia 22182
703-748-2690

Andrea I. O'Brien
aobrien@islerdare.com

Vi D. Nguyen
vnguyen@islerdare.com

[1] Note, however, that that even some 403(b) plans that are subject to ERISA have taken the position that they do not need to comply with certain audit and 5500 requirements, or the new service provider and participant fee disclosure regulations under ERISA Sections 408(b)(2) and Section 404(a)(5), with respect to pre-January 1, 2009 contracts that meet certain standards, per Department of Labor Field Assistance Bulletins 2009-02 , 2010-01, and 2012-02.