
the dana report

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ABOUT THE FIRMS

Jennings Law Firm, Ltd. and Dana Consulting Group, Ltd. were established to provide employers with a single source of comprehensive legal and consulting services relating to retirement plan and employee benefit matters.

QUOTES

"Time is a series, or a succession of events. If this is true, then controlling your life means controlling your time, and controlling your time means controlling your life."

– Hyrum W. Smith

"Time is the scarcest resource and unless it's managed, nothing else can be managed."

– Peter Drucker

Route To:

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2009 Retirement Plan Limits

The IRS recently announced new dollar limits relating to qualified retirement plans. Visit the Education Center on www.danaconsulting.com for our COLA worksheet updated for the 2009 limits. ■

Fiduciary Duties & ERISA Lawsuits

Lawsuits against retirement plan fiduciaries are increasing and the Supreme Court's decision in *LaRue v. DeWolff* (*dana report*, April 2008) may facilitate even more of these suits. So what is a plan fiduciary to do?

- If participants are permitted to direct the investment of their accounts, verify if your plan satisfies the rules under ERISA Sec. 404(c). Your plan's investment advisor can assist you with this.
- Adopt a written investment policy statement. One caveat here: if you adopt one, make sure you follow it. Moreover using a "canned" statement printed from a website is probably less than worthless. Your plan's investment advisor can assist you with developing an investment policy statement.
- Conduct annual trustees' meetings with your investment advisor. These meetings (coupled with documented investment performance reports and benchmarks) go a long way toward successfully defending against these suits.
- Update your summary plan description (SPD). You are probably using an "old" SPD with one or more summary of material modifications attached to it. As explained in our last newsletter we are sending out en-

agement letters for the EGTRRA Restatement. We recommend that you use this as an opportunity to update your SPD so it reflects all current provisions.

- Improve communications about your plan with your employees. You should conduct an annual employee meeting about the plan. If employees have complaints, they may be willing to voice them at this kind of meeting. You then have warning that perhaps you need to take a closer look at your plan. Also, annual meetings enhance the visibility and perception of the plan. Your company expends a lot of resources in maintaining this plan. You should let employees know regularly what a great employee benefit program it really is.
- Plan fees. See below. ■

What is Your Plan Paying in Fees?

Several fund companies have sponsored advertisements illustrating the effect fees have on investment performance. Fees and expenses paid by retirement plans, particularly 401(k) plans, have become a "hot issue" over the past several years and with good reason. The fund company illustrations show that, as fees increase, an employee's long term account balance can be dramatically diminished.

ERISA expressly permits a plan to pay reasonable expenses for administering the plan. Paying more than reasonable fees, or paying fees for improper expenses, constitutes a violation of ERISA's fiduciary provisions and may constitute a prohibited transaction.

Fees can be divided into three general categories: plan administration, investments and advice.

Plan administration fees include fees for recordkeeping and compliance. They can also include legal fees. The Labor Department has differentiated between settlor costs and administrative costs. Settlor costs, such as expenses to create the plan, cannot be paid from plan assets, although subsequent plan amendments may be paid from plan assets.

Investment fees include fees the mutual fund charges to manage the fund. These are often expressed as an expense ratio. This ratio multiplied by the amount of money in the fund should yield the fees paid to the fund, right? Many funds pay revenue sharing to support their operations. For example, the fund may be paying an outside record-keeper to maintain participants' account balances in the fund. These are sometimes called sub-transfer agency (or sub TA) fees. Or, the fund may be paying the plan's advisor a fee or commission, which may or may not be a fixed 12b-1 fee.

Advice fees include fees paid to the plan's financial advisor. These include direct payments to advisors and brokers, as well as 12b-1 fees, reimbursements, bonuses, etc.

The fiduciary needs to identify the fees, expenses or whatever else they are called that the plan is paying. Ideally the fiduciary needs to identify the category of each fund expense and then allocate each expense to its proper category. This enables the fiduciary to compare the categories of each fund's fees so he can make an "apples to apples" comparison.

Sorting out all of the fees your retirement plan may be paying can be a daunting task. As we have repeatedly said in the past, good financial advisors help their clients identify and evaluate the fees their plans are paying. This is an important issue each plan sponsor needs to be paying close attention to. ■

S Corporations and Health Premiums

Contributions to a qualified retirement plan may only be made based on reasonable compensation for services actually rendered. S corporation distributions do not constitute compensation for this purpose.

The question was posed to us recently whether health insurance premiums paid by an S corporation on behalf of its "2% shareholders" constitute compensation for retirement plan purposes. These premiums are includible in the shareholder's gross income but are excludible from FICA/Medicare wages. In our view, these health insurance premiums are compensation for services rendered.

We have published a firm memorandum that is published in the Education Center section of our website. ■

News from California

The city of San Francisco recently amended its Environment Code to require employers with 20 or more employees to provide transportation benefits to certain employees, beginning in 2009. Employers have the option of providing an IRC 132(f) qualified transportation fringe program, a transit pass or a van pooling program.

What originates in California sometimes finds its way East and we offer no predictions on that, but we thought this would be a good opportunity to remind employers that they can establish a pre-tax payroll-deduction program that enables their employees to pay their work-related commuting costs and parking. The employer does not actually pay the costs or parking charges (although it can), but enables employees to pay for these costs through payroll deduction.

Employees' payroll deductions are excludible from their FICA/Medicare wages, so employers can actually realize a profit by offering a program.

If your employees are now paying for transit or parking to come to work, this is a great program that only "costs" the employer the time to administer the program. ■

Home Office Distinction Blurs

According to the U.S. Bureau of Labor, 20% of employees performed a portion of their work-related duties at home in 2007. The study found:

- Hours worked at home averaged 2.8 hours per day, while hours worked at the office averaged 7.9 hours per day.
- Men and women were equally likely to work at home.
- Multiple job holders were more likely to work at home: 62% versus 33%.
- On an "average day," 20% of men performed some housework versus 52% for women, and 37% of men prepared meals versus 64% of women.

When we talk with our clients, business owners cite finding and retaining qualified and dedicated employees as their greatest challenge. The competition for these employees is ferocious and is only likely to increase. Money alone is not employees' primary goal in working; studies consistently show this.

Employers need to adapt to a changing workforce with differing needs to attract the best employees. Work-Life balance is becoming a crucial issue for many employees. Permitting an employee to work from home periodically is an effective way to meet the needs of employees (and to hold on to them). ■



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