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# the dana report

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A publication of Dana Consulting Group, Ltd. & Jennings Law Firm, Ltd.

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## ABOUT THE FIRMS

Dana Consulting Group, Ltd. and Jennings Law Firm, 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

It's not where you are today that counts. It's where you are headed.

- Arthur F. Lenehan

Discovery consists of looking at the same thing as everyone else and thinking something different.

- Albert Szent-Gyorgyi

I cannot teach anybody anything. I can only make them think.

- Socrates

Route To:

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## ROBS Update

The Wall Street Journal ran an article in April about using retirement plan assets to capitalize a new business. As often happens with articles like this, it only tells part of the story and generally not the truly important part. Here is the bottom line for readers who have an interest in this program. The IRS refers to this as ROBS (for Rollovers as Business Start-Ups) and is an issue that is drawing their scrutiny. The reason for this scrutiny is that ROBS are being used to do things that the law never contemplated. This is certainly nothing new when it comes to tax-savings ideas. Our firm has been involved in many of these kinds of transactions, understands how they need to be structured and what to avoid. If you would like additional information about this program (and it is a perfectly legitimate program when properly done), please call Lee Jennings in our office. ■

## The IRS's Dirty Dozen

Would you like to know what is drawing IRS scrutiny right now? IRS Commissioner Doug Shulman recently issued his "Dirty Dozen" list of tax dodges you should not be engaging in:

- Hiding income offshore
- Identity theft and phishing
- Tax return preparer fraud
- Filing false or misleading tax forms
- Frivolous legal positions or arguments
- Non-taxable Social Security benefits
- Abusive charitable organizations and deductions
- Abusive retirement plans

- Disguised corporate ownership
- Filing phony wage or income related returns that reduce wages to zero
- Misuse of trusts
- Fuel tax credit scams

NOTE: If you know somebody engaging in one or more of the Dirty Dozen and want to report it to the IRS to collect a bounty, you can use Form 3949-A to do that. ■

## Other Areas of Perceived Tax Abuse

On the subject of things the IRS does not want you to do, the IRS is tracking trends in the area of what are called accountable plans. Accountable plans are required for various fringe benefits or business expenses reimbursements. According to Laird MacMillan, senior IRS policy analyst for employment tax compliance, there is a lot of abuse in accountable plans particularly those for business expense reimbursement. To be non-taxable, a reimbursement arrangement must satisfy three conditions: a business connection, substantiation of the expense and amounts reimbursed in excess of the actual expense must be returned within a reasonable time. ■

## Obama's Union Agenda

*The Dana Report* focuses on retirement plan matters but we cover other topics periodically if we don't think our readers may see them elsewhere. One of the Labor Law legal services, we read, reported recently on new regulations issued by the Obama Administration imposing new rules that, among other things, would require certain employers to post work site notices informing employees of their rights to join a

union, even if there is no union now. Even one of the NLRB members expressed outrage and said the new rules would go way beyond anything a plain reading of the law would impose. ■

### **High Deductible Health Plans**

The US Bureau of Labor Statistics has reported a nearly three-fold increase in non-government workers with access to HSAs (health savings accounts). HSAs are only available to employees enrolled in a high deductible health plan (HDHP), which suggests these arrangements are growing in popularity with employers and employees. According to the Bureau, the percent of non-government employees covered in a HSA increased from 5% in 2005 to 14% in 2010. Coverage varied widely among categories. For example, 16% of non-union workers were covered while only 5% of union workers were covered. HDHP participation was higher in smaller employers with 18% participation in employers with one to 49 employees versus 11% in employers with 500 or more employees.

*Our Comment:* Our firm is a small employer, and we adopted an HDHP several years ago. It has been instrumental in allowing us to keep some measure of control over our spiraling health costs. ■

### **Wayward Retirement Assets**

According to John Hancock Retirement Services, about 50% of 401(k) plan participants have retirement assets outside of their current employer's retirement plan. Further, the amount of rollovers that become available EACH YEAR is a staggering \$125 billion. Financial advisors servicing

retirement plans, take note. There is an incredible amount of money out there that is available to be rolled over to retirement plans of your clients. Moreover this is an opportunity to demonstrate your value proposition to your clients and plan participants. Many 401(k) vendors have created special programs to assist financial advisors to identify and recoup these rollovers. Conversely, financial advisors should consider identifying former employees with account balances in their clients' plans and suggest they roll those balances to IRAs with the advisor. ■

### **Roth IRA Scheme Backfires**

The US Tax Court recently took aim at tax shelter scheme that shows some people just never learn. The taxpayer was the holder of several physics degrees and a management certificate for technical personnel (presumably a pretty smart guy). He had amassed a \$1.3 million balance in a regular IRA. His accounting firm, one of the biggest in the US, promoted what it called its "Roth restructure transaction" which apparently converted the regular IRA into a Roth IRA with no taxes being due. The CPA firm charged the taxpayer \$120,000 for the transaction. The CPA firm represented the transaction was "completely legal" but suggested the taxpayer disclose it on his personal return, which he did. The IRS reviewed the transaction and issued notices of deficiency, including large penalties. At trial, the taxpayer argued that since he disclosed the transaction on his Form 1040 the statute of limitations on the transaction began with the filing of that return. The Tax Court indicated that even though he did "disclose" the

transaction he needed to have included IRS Form 5329 with the return. Once past that argument, the Tax Court upheld the IRS's tax assessment, including penalties.

*Our Comment:* It is surprising (to us anyway) that a large and reputable accounting firm would associate itself with this kind of activity. There was a large Texas law firm several years ago promoting abusive tax shelters that resulted in indictments against several of the partners. You also have to wonder about the taxpayer, supposedly a pretty smart person, who should have known the transaction was too good to be true. ■

### **Who is Setting Up New Retirement Plans?**

Almost 180,000 new retirement plans were established from 2003 to 2007, according to a US Government Accountability Office study. The vast majority were by companies with less than 100 employees. 43% of new defined benefit and cash balance plans were established by professional organizations such as doctors, attorneys, engineers, etc. ■

### **Fee Disclosure Rules Update**

New rules by the US Dept of Labor requiring more transparency in the disclosure of fees that are being paid from retirement plans should be finalized soon and become effective on January 1, 2012. This has long been a priority with the Labor Dept and unless some unforeseen delay occurs, the new rules will become effective. The new rules cover disclosures to plan sponsors of fees being charged and disclosures to participants of fees being deducted from their accounts. ■

