Akerman Practice Update

EMPLOYEE BENEFITS

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Hot Employee Benefits Topics

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Common Employee Benefit Issues in Layoff Situations

In the current economic climate, we are seeing many decisions to lay off personnel. In addition to the COBRA subsidy that may be available to certain involuntarily terminated employees (as discussed in prior newsletters in February and March), there are other, less discussed, implications.

With regard to qualified retirement plans, such as Code Section 401(k), profit sharing and pension plans, employer-initiated terminations of employment that occur in one large or a series of smaller, related incidents can result in a plan incurring a "partial termination". A partial termination will lead all participants who are involuntarily terminated to be fully vested in their account balances, regardless of credited years of service and the plan's normal vesting schedule provisions. As a practical matter, many reductions involve laying off some of the most recent hires, so this can result in a significant number of plan participants becoming vested under the retirement plan when they otherwise would not enjoy vesting. The decision of whether a partial termination has occurred must be analyzed based on each situation's unique facts and circumstances. In general, an employer-initiated lay off of 20% is deemed, by the IRS, to be a partial termination, although the presumption is rebuttable if an employer typically has high involuntary turnover rates.

A significant reduction in workforce size may also have consequences to group health plans and some other welfare benefit plans. For example, most contracts governing both fully insured and self-insured plans, include a provision that if enrollment decreases either below or by a certain percentage, the contract either automatically terminates or the rates will be renegotiated. Hence, if your company is contemplating a substantial reduction in force, a review of all health and welfare benefit contracts is advisable.

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Qualified Plan Amendment and Restatement Deadlines Are Approaching

The Pension Protection Act of 2006 ("PPA") became law and brought sweeping pension plan, profit sharing plan, and Code Section 401(k) plan changes three years ago, and qualified plans are already operating in compliance with many PPA provisions. The mandatory legal deadline for all tax qualified plans to adopt written good-faith PPA amendments is the last day of the 2009 plan year. This means that all such plans using a calendar year plan year must be amended by December 31, 2009. In addition, the upcoming plan amendment will likely need to contain some provisions applicable to military personnel, as mandated by the Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act").

After the PPA/HEART Act amendment is adopted, any "pre-approved" defined contribution plans (i.e., master & prototype plans or volume submitter plans) must be restated on a newly approved document reflecting the updated provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). The mandatory legal deadline to adopt EGTRRA restatements for pre-approved defined contribution qualified plans is April 30, 2010. Pre-approved defined benefit plans have not yet started the restatement process.

Finally, April 30, 2010 is also the deadline for plan sponsors of pre-approved defined contribution plans to submit their plans to the Internal Revenue Service for determination letters. Obtaining a determination letter is extremely important, as it is needed for plan sponsors to obtain reliance on their new EGTRRA plan documents.

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In contrast to the deadlines for pre-approved plans described above, individually designed plans have rolling deadlines based on the plan sponsor's employer identification number. Plan sponsors with an EIN ending in 4 or 9 will have an EGTRRA restatement and IRS submission deadline of January 31, 2010.

Health Plans Impacted by Genetic Information Nondiscrimination Act

The Genetic Information Nondiscrimination Act of 2008 ("GINA") governs, among other things, the collection and use of genetic information by employer-sponsored group health plans. GINA is effective January 1, 2010 for calendar year plans. "Genetic information" means information about an individual's or family member's genetic tests, any request for, or receipt of, genetic services by an individual or family member, or a family history of the manifestation of a disease or disorder.

Group health plans are prohibited under GINA from adjusting premiums or contribution levels for the group on the basis of the genetic information of individuals within the group. Similarly, limitations are placed on group health plans' ability to collect genetic information related to an individual prior to that person's enrollment in the plan. Also, group health plans generally cannot require that a participant undergo genetic testing.

In a group health plan context, as it is common for both health risk assessments, wellness programs and disease management programs to request family medical history, GINA will govern the collection and utilization of genetic information that is compiled in this fashion. Employers will want to review their group health plans and their open enrollment materials to ensure that they are in compliance with GINA.

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