

IRS Delays Testing for Fully-Insured Plans

In our last Swerdlin Quarterly, we included an article called, "New Pain for Group Health Care Plans." The article stated that fully-insured group health plans will be subject to certain non-discrimination testing requirements for plan years beginning on or after September 23, 2010. Since the article was written, however, the IRS has issued revised guidelines and postponed the effective date.

IRS Notice 2011-1 provides that fully-insured plans do not have to comply with the non-discrimination rules until further guidance is issued. Accordingly, a sponsor of a fully-insured plan is not subject to the non-compliance excise tax penalties for the years before guidance is issued.



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Dorn's Corner

To continue my conversation on my Declaration for 2011, The Year of the Golden Rule, I started

a program in our office to put my declaration to work. I modified the Golden Rule to add: Treat others as THEY want to be treated. To put this idea into action, we are implementing a program to reach out to many of our clients to find out what THEY want and need from us to provide better service.

We find that customer service these days is going downhill; or, as Clark Howard refers to it: "Customer No-

Service." Some of you may be familiar with Clark Howard who is a consumer specialist and the host of a nationally syndicated radio program.

Going back 30 years ago, one of my reasons for wanting to start my own firm was to provide quality service to the small and mid-market companies who in my opinion did not always get the attention they deserved. It's my impression, as companies and other organizations grow to a massive size, the customer service suffers unless they can avoid becoming bureaucratic. The structure of bureaucratic organizations does not support and even punishes

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Who Shares in the Contribution?

Some profit-sharing plans limit the eligibility for the employer contribution to participants who have worked at least 1,000 hours during the plan year, and who are still employed on the last day of the plan year. Often exceptions are made for those participants who are not employed due to retirement, disability, or death. Although the intent is to exclude certain participants, in some circumstances, plan sponsors are required to give them a contribution.

Top-Heavy Plans

A Top-Heavy plan is one in which more than 60% of the plan assets belong to Key Employees. Key Employees are defined as employees (including terminated or deceased employees) who meet one or more of the following:

1. More than 5% owner of the plan sponsor;
2. More than 1% owner of the plan sponsor whose pay exceeds \$150,000 in 2011; or
3. An officer of the plan sponsor whose pay for 2011 exceeds \$160,000 (indexed for cost-of-living adjustments each year).

If a plan is Top-Heavy, all non-key plan participants employed on the last day of the plan year must receive a minimum employer contribution, regardless of the hours they work during the plan year. This required minimum contribution can be as much as 3% of compensation. To satisfy Top-Heavy requirements, the non-key participants must receive a minimum contribution based on their full year's pay, regardless of the plan's definition of plan compensation.

Top-Heavy rules are often overlooked when employers decide whether or not to make a contribution for the plan year. If the plan is Top-Heavy and at least one Key Employee receives a contribution (including salary deferrals), a minimum contribution is due to each eligible non-key participant for that plan year.

Safe Harbor Contribution

If the plan provides for a 3% Non-elective Safe Harbor Contribution, then all employees who are participants at any point during the plan year, regardless of their hours

worked or their employment status on the last day of the plan year, must receive the 3% Non-elective Safe Harbor Contribution. The plan document may exclude those employees who have not yet completed a Year of Service or reached age 21.

New Comparability a/k/a Cross-Tested Plans

In some profit sharing plans, participants are assigned to groups specified in the plan provisions, and each group may receive a different contribution rate. This method is used to give specific participants (generally owners or executives) a greater contribution rate than that provided to the staff. In order to use this method, the contribution allocation must pass certain non-discrimination tests, one of which is the "Minimum Gateway" Test.

To pass the Minimum Gateway Test all non-highly compensated participants who are eligible must receive a required minimum contribution that can be as much as 5% of eligible compensation. Be aware, if the plan also provides for a 3% safe harbor contribution, any non-highly compensated participant who is receiving a safe harbor contribution must also receive an additional contribution to satisfy the minimum gateway contribution rate. The 3% safe harbor contribution may also be used to help satisfy the minimum contribution requirements for Top-Heavy.

If you are considering making a change to your current contribution allocation formula, or have questions about your current one, please consult your Client Manager. ■

DOL Extends Date

The DOL recently released a statement announcing their intent to extend the deadline for compliance with the new **Fee Disclosure for Service Providers**. This new rule requires that anyone providing service to a **Qualified Plan** must clearly define their fees and fiduciary status in their service agreement. Originally, all existing contracts were to be in compliance by **July 16, 2011**. With the recent extension, service providers now have until **January 1, 2012** to bring their contracts, both existing and new, into compliance with the new regulations.

Q Can a participant request that a hardship distribution check be issued to a creditor?

A No, distributions cannot be assigned.

Q Our plan requires spousal consent for any distribution over \$5,000, but the participant says the spouse cannot be located. What can we do?

A The participant must prove to the Plan Administrator that the spouse cannot be located and their signature obtained. For example, they have been separated for many years and there is no forwarding address. Generally, it is recommended that the Plan Administrator initiate further inquiry to obtain proof from an independent source.

Q When determining whether spousal consent is required, do we look at the total account balance or just the vested balance?

A You use the vested account balance. Many plans contain specific wording that also allows you to ignore any rollover account balances when determining the cash-out threshold.

Q If we make a matching contribution, does it have to be "trued-up" at the end of the year?

A It depends on the plan provisions. If the plan says the match is made on a payroll basis, then it does not have to be trued up. However, if the plan says it is based on annual salary, then the correct match must be calculated in accordance with the formula, even if the actual match is made with each deferral. The results are compared to the actual match contributed and any true-up adjustments are made after the plan year ends.



Julie Isom (left) manning our exhibit at the TD Ameritrade Conference held in San Diego this quarter.



Joanne Swerdlin and Bill Beckley (right) of Miller Industries are all smiles at our Benefits in Brief event.



Mary Butina (above) mans the registration area at our Benefits in Brief event.

Clarifying the Definition of “Late Deposits”

When are the deposits of participant deferrals considered late? The rules have not always been very clear. Generally, the Department of Labor (DOL) requires employers to remit elective deferrals and/or loan payments that were deducted from employees’ pay into the plan’s trust as soon as administratively possible.

The rules state that in no event may salary deferrals and/or loan payments be deposited later than the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash. Many plan sponsors believe they are in compliance if they follow this rule, but they are mistaken. Plan sponsors are required to deposit employee salary deferrals and/or loan payments as of the *earliest date on which such amounts can reasonably be segregated from the plan sponsor’s general assets*.

When the DOL audits 401(k) plans, the Agent looks for a pattern of deposits. If he or she notices that most deposits are made into the plan within a couple of days after the payroll period, the Agent expects ALL deposits to be made within a couple of days. The Agent is likely to consider any deposits made later than this to be a “Late Deposit.”

Early in 2010, the DOL finalized new regulations providing small plan sponsors a safe harbor window in which to make deposits. As long as employee contributions and loan payments are deposited into the plan by the 7th business day following payroll, they are deemed timely. In addition, it is only the deposit, not the allocation and investment of deferrals and loan payments, which must occur within the 7-day period. This 7-day safe harbor window is not available to plans with more than 100



participants as of the first day of the plan year.

If you are concerned about correcting late deposits in your plan, please read the following article. ■

Correcting Late Deposits

The Department of Labor (DOL) views late deposits of participant contributions as a loan from the plan to the plan sponsor. Generally, a loan of plan assets to a plan sponsor is a prohibited transaction and a violation of ERISA’s fiduciary requirements. As such, the plan sponsor and plan fiduciaries can be personally liable for various fines, penalties and judgments, including restoration of lost earnings, penalties under ERISA and an excise tax under IRC § 4975. Fortunately (to the degree anything associated with excise taxes and penalties could ever be considered “fortunate”), there are ways to

correct inadvertent errors and avoid or at least minimize many of these consequences.

Late deposits are a serious issue. Taking active steps to correct the problem as soon as possible can in most cases significantly lessen the sting. Correction can be done formally – through the DOL’s Voluntary Fiduciary Compliance Program (VFCP) – or informally on a plan level without involving the DOL or IRS. Informal correction is faster and quicker, but does not officially foreclose certain filing obligations and possible penalties, excise taxes or participant lawsuits. In contrast, full

compliance with VFCP (including a “No Action Letter” from the DOL) will generally avoid all ERISA and tax code penalties on the late deposits. Regardless of the mechanism, correction will require contributing the correct funds plus interest/lost earnings to participants’ accounts, and may also involve a notice to participants.

Clearly it is always a good idea to review retirement plan deposit procedures to ensure that deposits are consistently made on time. However, should a plan sponsor suspect that a late deposit may have occurred, Swerdlin stands ready to help. ■



Some of our Blue Team members at the charity lunch (Melissa Spencer, Kim Hall, Carol Friend, Kathy Latour, and Susan Petirena).



Tim Bowen was more than ready to enjoy his charity lunch vittles.

What's Happenin'

Congratulations to **Lee Swerdlin** who was promoted to the position of Senior Vice President.

Michele Gresham is serving her fourth year as Secretary on the Board for the Southern Relius Users Group.

Swerdlin & Company moved up from #8 to #5 in the Atlanta Business Chronicle's 2011 Top 20 Employee Benefit Firms.

Anniversaries we celebrate this quarter: **Carol Friend**, 19 years; **Susan Petirena**, 16 years; **Julie Isom** and **Kim Hall**, 14 years; **Kristin Hamilton**, 7 years; **Mary**

Butina, 6 years; **Kirsty Simmons**, 5 years; **Linda Mathews** and **Shenita Spivery**, 4 years; **Christi Koberg**, 2 years; **Tiffany Enoch** and **Tina Gilbert**, 1 year.

We welcome **Christine Fu** this quarter who joined our Actuarial/Plum Team. Also joining us this quarter is **David Benoit**. David has over 15 years of experience in the employee benefits field and serves as our in-house General Counsel and Director of Compliance Services.

On February 2, 3 and 4, **Julie Isom**, **Lee Swerdlin**, and **Patti Williams** attended the TD Ameritrade conference in San Diego.

On February 24, **Cynthia Navan-Clark**, **Glenda Devechio** and **Julie Isom**, were speakers at our annual "Benefits in Brief" seminar held at Maggiano's in Atlanta.

On March 6 and 7, **Lee Swerdlin** attended the ASPPA Sales Summit Conference in Las Vegas.

Our employees have already begun raising money for our Swerdlin Charity Fund. **The Blue Team** hosted a soup & salad lunch on February 9 which raised \$150.

Swerdlin & Company

Actuaries and Employee Benefit Consultants

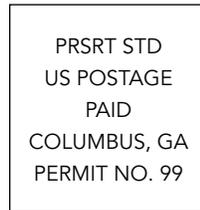
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IRS Delays Testing for Fully-Insured Plans

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While only the IRS issued Notice 2011-1, the Notice states the Department of Labor and the Department of Health and Human Services are in agreement. Although the IRS has given employers and plan sponsors a reprieve, you should take steps during 2011 to review your plan(s) and ensure you make arrangements to have your plan(s) tested, as necessary. Self-insured health plans are also likely to be impacted by these new regulations.

The delay in non-discrimination testing for fully-insured plans does not excuse compliance with the required Code Section 105(h) non-discrimination testing for Health Flexible Spending Accounts (FSAs) or Health Reimbursement Arrangements (HRAs) or self-insured medical, dental, and vision. ■

Dorn's Corner

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service to customers. Many customer service people have time constraints set for how long they can talk to each client. Certainly not all are this way, but too many are.

For more about the bureaucratic stage of an organization, see Dorn's Corner, Swerdlin Quarterly, 3rd Quarter of 2005, where I write about Corporate Lifecycles. You can find our newsletters on our website at www.swerdlin.net.

Now to tie my declaration with some of my beliefs. Quantum Theory proves that there exists a realm of reality where time and space do not exist (called non-locality). At this level all is connected and everything is everywhere and everything happens at the same time. I cannot get my mind around this concept, but I believe it. This is not only my belief, but also a proven scientific fact in physics. Moving beyond science I also believe there exists a realm of pure consciousness, which looks very similar to the "Unified Field" of science. This field is where all forces of nature are unified and the field is in the non-local realm.

Science is working to develop mathematical model(s) for this unification but as yet has not been successful.

I believe that at some level we are all part of this pure consciousness, "residing" in this non-local quantum realm, all connected to each other. Therefore, at some level, when we hurt others, we are hurting ourselves. If all these beliefs are true, the Golden Rule has an even deeper meaning.

Have a wonderful Spring. I'll be back next quarter. ■

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