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97 MILLION REASONS TO REVIEW YOUR BENEFIT PLANS

On December 13, 2000, it was reported that Microsoft Corporation agreed to pay approximately $97 million to settle two class action lawsuits filed by temporary workers who claimed the company improperly classified them as independent contractors to avoid paying benefits available to employees. The individuals designated as independent contractors or "permatemps" by Microsoft performed essentially the same services as Microsoft's regular employees, worked side-by-side with Microsoft's employees in the same office space, received income reported by Microsoft on an IRS Form 1099, and, although classified as independent contractors, had no employees of their own. Because they should have been treated as employees, the "permatemps'" claimed the right to participate in Microsoft's employee stock purchase plan, which allowed employees to purchase stock through payroll deductions at a discounted price. Obviously, this was a terrific benefit, given the way Microsoft's stock price has skyrocketed over the years. The "permatemps" also claimed they were entitled to participate in a tax deferred savings plan offered to Microsoft employees. According to the U.S. Ninth Circuit Court of Appeal, the "permatemps" were really "common law employees" and, therefore, were covered by Microsoft's benefit plans as long as they met the eligibility requirements applicable to other employees. Apparently, this decision led to settlement of the case.

The Microsoft case raises 97 million red flags concerning the critical importance for employers to make sure their independent contractors are really independent contractors. If you don't intend to cover such persons under your benefit plans, you also need to make sure your plans expressly exclude independent contractors from coverage. But the exclusion won't do you any good if the people you have working as independent contractors are really employees. Just designating someone as an "independent contractor" doesn't cut it if the individual really has no independence and is doing the same work as your employees or work that otherwise would be done by your employees.

Additionally, if you use outsourcing services, leased employees, or temporary employee services, and you don't want to provide benefits to those workers, you should review your retirement plans, stock ownership plans, and other benefit plans offered to employees to make sure they're excluded. If not, you could be at risk.

- Thomas P. Hubert

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FEDS CRACK DOWN ON 401(K) FEES THAT AREN'T LEGIT

The above headline appeared above a December 5, 2000 article in *USA Today* regarding who pays qualified retirement plan expenses. It indicates that these expenses are receiving increased scrutiny, both by the Department of Labor (DOL) and the public at large. The article noted that an investigation by the Kansas City DOL office found that 65% of the companies investigated were in violation of laws regarding the allocation of plan expenses to qualified plans.

The Kansas City DOL office recently compiled a list of expenses it believes should be paid by plan sponsors or at least allocated between the sponsor and the plan. The list, which is reproduced below, does not represent the official position of the DOL but does provide some guidance.

1. Plan design for new plan or amendment not required to comply with ERISA (*e.g.*, cash balance redesign).

2. Expenses related to maintenance of tax qualified status (allocate between plan and sponsor based on benefit to plan and sponsor).

3. Determination of Financial Accounting Standards Board (FASB) 87, 88, 106, and 112 liabilities and expenses for financial accounting purposes:

   a. FASB 87 - Employers' Accounting for Pensions.

   b. FASB 88 - Employers' Accounting for Settlements and Curtailments of Defined Benefit Pension Plans and for Termination Benefits.

   c. FASB 106 - Employers' Accounting for Post-Retirement Benefits Other Than Pensions .

   d. FASB 112 - Employers' Accounting for Post-Employment Benefits.

4. Determination of maximum deductible employer contribution.

5. Study to decide plan termination.

6. Analysis of assets recoverable on plan termination.

7. Consultation on establishment and design of successor to terminated plan.

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8. Asset/liability forecasting relating to plan design or financial accounting issue.

9. Financial forecasting - financial liability - tax implications.

10. DOL, IRS, and Closing Agreement Program (CAP) sanctions or penalties.

11. DOL delinquent filer program fee.

12. Nondiscrimination testing (allocate between plan and sponsor).

13. Developing and defining employer's benefits/health care strategies (*e.g.*, benefit design, employer contribution policy).

14. Modeling the impact of proposed legal/regulatory changes on benefit plans and their administration.

15. Preparing for and conducting union negotiations.

16. Any expense for which an employer could reasonably be expected to bear the cost in the normal course of the employer's business or operations.

17. Expenses for which there is more than an incidental benefit to the employer (allocate expense to employer to the extent of the employer's benefit).

Rather than waiting for a DOL audit, you should have your plans reviewed to be sure that only reasonable expenses are being paid from plan assets. Courts can impose penalties on fiduciaries that breach their duties, such as the duty to pay only reasonable expenses from plan assets. The Kansas City cases were settled out of court without penalty, but the sponsors had to reimburse the improper expenses to the plans, plus interest.

- Timothy P. Brechtel

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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