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One Minute Memo™

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A Tale of Caution: Beware of the Prototype Plan Amendment

Many employers use prototype plans as a cost-effective way to implement 401(k) and profit sharing plans. When changes in the law occur, the sponsor of the prototype plan is responsible to amend its documents. In some instances, the changes relate only to the underlying plan document and no action is required by individual employers. In other instances, especially in situations where there are alternative approaches available to an employer, the prototype plan sponsor provides an amendment for the employer to complete, indicating the choices made.

The Caution—Read your prototype amendment carefully; understand the alternatives.

Last year, the IRS issued final regulations on the limit on contributions and benefit accruals for purposes of Section 415 of the Internal Revenue Code. The new regulations modify the definition of "compensation" by adding an option to include amounts paid to a terminated employee if such amounts (1) relate to services performed before termination of employment (including amounts paid for accrued sick time, vacation or other leave and certain deferred compensation payments), and (2) are paid within two and one-half months after the employee's separation or the last day of the plan's limitation year, whichever is later. An employer is permitted, but is not required, to treat this post-employment pay as plan compensation for purposes of determining benefits under the plan.

Recently, we have seen forms of prototype plan amendments that default to a definition of "compensation" that includes post-severance payments for unused sick, vacation or other leave and payments of deferred compensation. To opt out or to elect other options, the employer must check the appropriate boxes on the adoption agreement. If an employer does not currently consider post-termination pay for purposes of salary deferrals or the allocation of matching or profit sharing contributions, then a failure to check the appropriate box on the adoption agreement will require changes to the plan's operation and may result in significant cost to modify the company's payroll and recordkeeping systems.

Employers should carefully review any amendment to their adoption agreements to make certain any default and elective provisions are consistent with the plans' operations. Often there are legal implications associated with plan amendments and employers are encouraged to consult with legal counsel and other advisors regarding the significance of the amendments.

For more information, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our website (www.seyfarth.com/EB).

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