

American Bar Association

Section of Real Property Trust & Estate Law

Qualified and Non-Qualified Retirement Plans: Pitfalls for the Practitioner Representing the Small Business Owner

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“Mundane” Errors in Administering Employee Benefit Plans

- (a) Non-compliant summary plan descriptions (SPDs).
- (b) Unfiled or erroneous annual reports (Form 5500s).
- (c) “Benefit practices” not recognized and treated as an ERISA plan. For example, repeated payments of severance as an employer policy.
- (d) Maintaining a non-qualified “top-hat” plan for one employee or a select group of management or highly compensated employees, without registering the program with the Department of Labor.
- (e) Failing to recognize and manage non-qualified deferred compensation arrangements subject to IRC §409A.

“Serious” Errors in Administering Employee Benefit Plans

- (a) Individuals administering payroll deductions for employees’ 401(k) savings or medical plan payments, but diverting those payroll funds to pay corporate expenses, as a result of financial distress or similar pressures on the small business.

Another variant in the area of contribution failures: non-payment of funds to a multiemployer plan.

“Serious” Errors in Administering Employee Benefit Plans (a) – Examples

(1) Single employer 401(k) plan or medical plan:

- Chao v. Johnson, 36 EBC 1403, 2005 WL 2095109 (S.D. Tex. 2005)
- Chao v. Stuart, 35 EBC 2428, 2005 WL 1693939 (S.D. Tex. 2005).
- Chao v. Docster, 37 EBC 2300, 2006 WL 1593521 (ND NY 2006).

“Serious” Errors in Administering Employee Benefit Plans (a) – Examples (cont’d)

- Chao v. Doyle, 38 EBC 2600, 2006 WL 1644810 (D NJ 2006)
- National Bank & Trust Co. v. Webb, 38 EBC 2649, 2006 WL 1966591 (S.D. Oh. 2006).
- Kenney v. Roland Parson Const. Corp., 28 F.3d 1254, 18 EBC 1892 (DC Cir. 1994).
- U.S. v. Whiting, 471 F.3d 792, 39 EBC 2148 (7th Cir. 2006). (Criminal conviction affirmed.)

“Serious” Errors in Administering Employee Benefit Plans (a) – Examples (cont’d)

(2) Multiemployer plan contributions:

- Trustees of Nat. Elevator Industry Pension, Health Benefit and Educational Funds v. Lutyk, 332 F.3d 188, 30 EBC 1845 (3rd Cir. 2003).
- ITPE Pension Fund v. Hall, 334 F.3d 1101, 30 EBC 1943 (11th Cir. 2003).
- LoPresti v. Terwilliger, 126 F.3d 34, 21 EBC 1716 (2nd Cir. 1997).

“Serious” Errors in Administering Employee Benefit Plans (cont’d)

- (b) Individuals assuming fiduciary duties as a successor, when the predecessor fiduciary may have engaged in one or more fiduciary breaches.
- These situations arose in the “early days” of ERISA, and they continue today, particularly in the context of closely held businesses or other small entities, and most particularly where the key figures are people with dominant personalities.

“Serious” Errors in Administering Employee Benefit Plans (b) – Examples (cont’d)

- Free v. Briody, 793 F.2d 807, 5 EBC 1442 (7th Cir. 1984).
- Chao v. Merino, 452 F.3d 174, 38 EBC 1112 (2nd Cir. 2006).

“Serious” Errors in Administering Employee Benefit Plans (cont’d)

(c) Small business owners dealing with employer stock.

- Many small businesses owners are aware of the fact that qualified plans can be a source of cash for the business.
- The obvious example is the use of ESOPs as a capital funds tool.
- A less obvious example: ordinary 401(k)/profit sharing plans.
- Employer stock can be purchased by the plan for cash that is then transferred to the business. A business’s need for cash can lead to a serious compliance problem for the qualified plan and its fiduciaries if applicable requirements are not met.

Defect Correction Programs Managed by the ERISA Agencies

(a) DOL

- (1) Delinquent Filers Voluntary Compliance Program (DFVC). For annual reports, Form 5500. 60 Fed. Reg. 20874, April 27, 1995; modified 67 Fed. Reg. 15052, March 28, 2002.
- (2) Voluntary Fiduciary Correction Program (VFC). For fiduciary compliance issues. 65 Fed. Reg. 14164, March 16, 2000; modified 67 Fed. Reg. 15062, March 28, 2002; modified 70 Fed. Reg. 17516, April 6, 2005.

Defect Correction Programs Managed by the ERISA Agencies

(b) IRS

(1) Employee Plan Compliance Resolution System (EPCRS). For qualification defects. Several generations, most recently: Rev. Proc. 2006-27.

Includes:

- Self-Correction Program (SCP)
- Voluntary Correction Program (VCP)
- Audit Closing Agreement Program (Audit CAP)

(2) 409A Correction Program.

Limited voluntary compliance program permitting correction of unintentional operational violations. Notice 2007-100.

Defect Correction Programs Managed by the ERISA Agencies

(c) PBGC

- Voluntary Compliance Program (VCP). Incentive for correcting premium underpayments to PBGC. Penalty charge lowered from 5% per month of the outstanding unpaid premium to 1%, if the premium payor voluntarily corrects underpayment before PBGG notification. 59 CFR 2007.8. 64 Fed. Reg. 66383, November 26, 1999; modified for years after 2007, 73 Fed. Reg. 15065, March 21, 2008.