

the dana report

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ABOUT THE FIRMS



Dana Consulting Group, Ltd. and Jennings Law Firm, Ltd. were established to provide employers with a single source of comprehensive legal and consulting services relating to retirement plan and employee benefit matters.

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IRS PURSUING SE TAXES FROM LLCs

In March the IRS initiated a nationwide project targeting the underreporting of self-employment taxes by limited liability company (LLC) owners. This initiative will result in increased allocation of resources to target this issue on audit.

That the IRS chasing SE taxes is nothing new but what has changed are some recent court victories that have apparently emboldened the IRS to get more aggressive.

Owners (called "members") who are active in the business sometimes receive guaranteed payments to reflect their services to the LLC. These guaranteed payments are generally treated as compensation for services rendered and subject to self-employment taxes. [Some LLCs elect to be taxed as corporations and the SE tax does not apply to them.] However, the characterization of owners' distributive share of LLC income is less clear and, at least in the view of the IRS, should also be subject to SE tax, at least in part.

We are reprinting on our website under the Education Center Tab an article in the May issue of the *Journal of Accountancy* (the official publication of AICPA) providing additional guidance on this matter.

Our Comment: The IRS has long challenged the classification of workers as independent contractors as a subterfuge to avoid paying employment taxes on these workers. So this new initiative targeting LLCs and its owners is not anything the IRS is not focused on. Businesses operating as LLCs and their advisors, such as CPAs and attorneys, should take the time to review this matter and consider whether changes are needed in the way LLC earnings are characterized.



WORKPLACE WELLNESS PROGRAMS

Readers of the Dana Report know we like tracking these wellness programs that combine behavioral therapy with outdoor activities, often dubbed wilderness therapy. AT&T has been found liable for \$120,000 for a teenager's horseback riding lessons that her parents apparently did not want to pay for. According to attorney, Ms. Marie Casciari, over half of her benefits litigation now involves equine therapy cases. She defends the lawsuits on the basis that the US health care treatments are too reliant on medication and non-traditional therapies are a better approach. The institute where the teenager received her lessons was not a "certified" equine therapy center but the court did not seem to have an issue with that. They had horses and maybe that was enough.



EPCRS UPDATE

EPCRS stands for Employee Plans Compliance Resolution System and is an IRS program for plan sponsors of qualified retirement plans to correct various errors in their plans, whether plan document errors or operational errors. Some of these errors can be self-corrected and the rest require advance IRS approval. Seeking IRS approval requires making a filing with the Service and paying a fee, plus whatever cost the sponsor incurs to actually correct the error.

The IRS recently increased the fees charged to obtain approval. Employers have been complaining that the higher cost will deter them from seeking approval. The IRS apparently is somewhat sympathetic and is now considering expanding the types of errors that can be self-corrected. We will monitor this matter and continue to update our readers as developments occur.

Our Comment: We caution plan sponsors about self-correcting errors that require formal IRS approval. The IRS only agrees to be bound on self-corrections the Service says can be corrected in this way. We have dealt with the IRS on these kinds of matters for a long time, as well as representing plan sponsors in government audits, and you should NOT expect the IRS to be sympathetic. We agree that self-correcting is better than doing nothing, but the penalties involved if the IRS rejects your self-correction do not, in our view, justify the risk. Plan audits are rare but the pain is significant once they occur.



ERISA LITIGATION UPDATE

Home Depot is now the target of a lawsuit by 200,000 current and former employees over the management of the company's 401(k) plan. The lawsuit accuses the plan's investment committee of failure to monitor investment performance and selecting underperforming funds. The lawsuit also accuses the plan's investment advisor, Financial Engines, of building "cookie cutter" portfolios with no input from participants rather than the customized investment advice they were apparently contracted to provide. Also Financial Engines is accused of paying a portion of its fee back to the plan record-keeper. The investment committee apparently fired Financial Engines after learning of all this but the new advisor simply re-hired Financial Engines back as a sub-advisor. The lawsuit provides detailed information on the inner workings of the plan's investment management and makes for a very interesting read.



PLAN PARTICIPANTS LOOKING FOR ADVICE ON SOCIAL SECURITY

We are reprinting on our website under the Advisor Services tab an article about plan participants who are looking for advice on how to choose when to apply for Social Security. It is well known that participant needs expert advice on selecting the investments in their 401(k) plan accounts.

Our Comment: Servicing retirement plans and their participants requires expertise and experience by dedicated financial advisors. For those advisors looking to expand their book of business, this is a great source of new business. Dana Consulting Group has a number of tools we offer to our partners to obtain new clients and service their existing clients. If you are an advisor and interesting in expanding your clientele, please give Lee T. Jennings (630) 802-7644 in our office.

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