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In This Issue

PEPs - A BOON TO SMALL AND LARGE EMPLOYERS - REALLY?

HOW ARE PLAN SPONSORS REACTING TO COVID-19?

FREEZING DB/CB PLANS

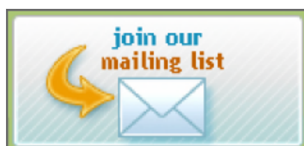
PAYCHECK PROTECTION PROGRAM LOANS AND FORGIVENESS

LABOR DEPT RELEASES NEW ELECTRONIC DISCLOSURE RULE

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.

If you know someone who would like to receive *the dana report*, click the link below.



PEPs - A BOON TO SMALL AND LARGE EMPLOYERS - REALLY?

We have written periodically in the dana report about the hazards of using a multiple employer plan (MEP) for your company's 401(k) plan, or your clients' plans. There have been a lot of problems with these plans over the years and, in response, Congress created a new kind of MEP called a PEP, for pooled employer plan. PEPs are scheduled to become available in 2021.

A recent article in one of the magazines covering the retirement plan industry, primarily from the investment side, touts PEPs as a "boon to small employers." The article even goes on to say large employers will want to move their plans to a PEP.

So before you move your existing plan to a PEP or your clients' plans to a PEP, what should you be thinking about?

- PEPs were created to primarily benefit the companies who will offer these plan arrangements, like the payroll companies and large fund companies. The PEP can file one annual Form 5500 and only one audit of the entire PEP is needed. We have seen several of the large MEPs doing this anyway.

- The "one bad apple" rule goes away. Once again this really benefits the sponsor of the PEP, not the individual employers who sign up. The MEP sponsor never calls up its employer-clients to notify them the entire plan just got disqualified because of the one bad apple rule. The individual employers are never the wiser, unless the IRS audits the plan. There are two articles on our website (www.danaconsulting.com) under the Education Center tab by ERISA attorney, Ary Rosenbaum, you may wish to read.

- MEPs (and soon PEPs) will be marketed as cost-savings programs. The real money in retirement plans is made on the assets, not on plan administration. MEPs were marketed this way and likely PEPs will too, but nothing is free. The cheaper the MEP (or PEP) purportedly gets, something has to suffer. And that something is typically compliance with the rules governing retirement plans. And that is why the one bad apple rule was so problematic. These MEPs were getting out of compliance for various reasons and were not getting fixed. For example, changes in the participating employer's controlled group or changes in HCE status

were not being picked up by the MEP. Payroll does not look at that and unless the participating employer tells the MEP about it, the testing is all wrong. And the participating employer cannot tell the MEP (or the PEP) what it does not understand.

- For financial advisors, somebody at the MEP (or PEP) is likely going to want to cut you out. Why pay you when the MEP (or PEP) can hire one advisor to service the entire MEP (or PEP)? But how much service is a participating employer going to get when the PEP's advisor is servicing hundreds, if not thousands, of participating employers scattered all over the place?

- How much plan design can you expect when you are stuffed into a box with hundreds, if not thousands, of other participating employers? The payroll companies tout their ability to seamlessly integrate the plan with payroll. What if your company has owners who are "self-employed" under the retirement plan rules and your owners receive year-end compensation that is not run through payroll? Well that self-employment income may be being ignored by the payroll company since they don't track it. That short changes those owners on what they can receive under the plan.

- Some MEPs promote their ability to reduce the participating employer's fiduciary risk. To the participating employer, you should read your contract. There are significant fiduciary risks the MEP (and PEP) cannot control since the underlying duties are performed by the participating employer and the MEP has no control over that. Likely your service agreement recognizes all that and really shifts that fiduciary risk back to you.

- The article mentioned at the beginning predicts large employers will flock to PEPs. Do you really think large companies like IBM are going to just hand over their 401(k) plans to a payroll company?

If you would like a copy of the article, please give our office a call. Most of the people quoted in the article already work for MEPs and expect to roll their MEPs into new PEPs.

HOW ARE PLAN SPONSORS REACTING TO COVID-19?

According to ***PlanSponsor*** magazine, a publication tracking the retirement plan industry, relatively few employers are taking action to suspend or reduce employer contributions. A lot of surveyed employers are thinking about it: 25% of companies with less than 500 employees and 43% with 500 or more employees. Among those thinking about it, 12% of surveyed companies with under 500 employees actually did it, and 28% of larger companies who did it.

One problem with these kinds of surveys is that you do not have information on the particular facts of each responding employer. For example, suspending a safe harbor contribution is more problematic than for a non-safe harbor contribution. Also suspending a safe harbor contribution may not really accomplish what you think it does. For example, to suspend a safe harbor contribution, you need to give 30-days advance notice (as well as amend the plan). Once suspended, the safe harbor contribution is only suspended for the remainder of the year. The contribution for the year up to the date of suspension still has to be made. Plus, discrimination testing (the infamous ADP/ACP test) must be performed for the ENTIRE year. Plus, if the plan is top-heavy (and many of these plans are top-heavy), a top-heavy contribution must be made, although you get credit for whatever safe harbor contributions were already made.

The CARES Act created a new emergency distribution option called the "coronavirus-related distributions", or CRDs. The purpose of CRDs is to allow participants who have been adversely impacted by Covid-19 to access their plan accounts. The survey suggests many employers intend to permit their employees to receive these CRDs. Our view is that employers should not do this unless there is a demonstrated need by their employees AND the provision is narrowly tailored to address that demonstrated need. We saw this a couple of years ago with the hurricane-related distributions. These plans are savings plan for retirement and not rainy day funds, although we acknowledge Covid-19 is something really different. However, CRDs are not mandatory and CRDs are not an all-or-nothing option. Employers have considerable discretion on defining the circumstances that they will be available.

FREEZING DB/CB PLANS

We have addressed this earlier, most recently in our April newsletter. Companies sponsoring a defined benefit or cash balance plan should consider amending their plans NOW to eliminate (or reduce) their 2020 contribution credits. This amendment is called a "freeze." We have no idea when this pandemic is going to pass but companies need to be thinking about cash flow during 2021. If their business is experiencing significant disruption in 2020, that may very well roll into 2021 when contributions for 2020 are due.

To freeze the plan, the amendment must be adopted (and employees notified in writing) before participants earn the benefit for 2020. This is generally when the participants work 1,000 hours and that typically occurs during June.

We are contacting all of our DB/CB clients to discuss implementing a freeze. If you would like information about

freezing your plan, or your clients' plans, please call Lee T. Jennings at (630) 802-7644.

PAYCHECK PROTECTION PROGRAM LOANS AND FORGIVENESS

One of the features of the Paycheck Protection Program (PPP) loan program is that some or all of the loan can be forgiven if certain requirements are met, such as use of the loan proceeds.

The PPP is administered by the Small Business Administration (SBA) and they have released the application borrowers must use to determine the amount of the loan that can be forgiven. The application includes instructions but they leave something to be desired. Filling out this application is crucial and it is uncertain how sympathetic the SBA is going to be to applications that are found deficient.

We found a great 27-page article in Forbes Magazine by Tony Nitti, CPA that provides a deep-dive into completing the application. The article can be downloaded for free from our website (www.danaconsulting.com) under the **Education Center** tab. Or you can call me, Lee T. Jennings directly at (630) 802-7644 and I can send it to you.

One of our partners, Supporting Strategies, has been diving into the application and instructions to figure out how an application needs to be properly completed and returned. If you think you need assistance with your own application, feel free to contact Dee Johnson at Supporting Strategies at 847-232-8659.

One of the vexing questions is which retirement plan contributions qualify as an acceptable use of loan proceeds. For example, while qualifying wages for any employee is capped at $100,000, apparently retirement plan contributions based on wages over the $100,000 threshold do qualify. Moreover, apparently some contributions for 2019 can be paid now and qualify.

LABOR DEPT RELEASES NEW ELECTRONIC DISCLOSURE RULE

The US Labor Dept has issued a final rule permitting default electronic delivery of retirement plan disclosures. The new rule permits plan sponsors (or their delegates such as fund companies) to deliver disclosures primarily by electronic media. This is expected to reduce printing, mailing and related costs by an estimated $3.2 billion over ten years. The new rule does permit participants to receive disclosures in paper format, if they choose.

By way of history, the Labor Dept issued a proposed rule last October allowing plan sponsors that satisfy certain requirements to notify plan participants that disclosures, such as the plan's SPD, would be posted to the company's website. Part of the rule included an opt-out election by participants. The Dept received hundreds of comments and requested changes by plan sponsors and fiduciaries, plan service and fund company representatives, and other interested parties.

The final rule creates a "notice and access " model as a basis for electronic delivery. Plan sponsors can still provide disclosures in-person. Sponsors must notify participants about online disclosures, provide information on how to access the disclosures, and inform participants of their right to paper disclosures.

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