VOLUME 74 ◆ NUMBER 2

Employee Benefit Plan Review

Ask the Experts

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Top-Hat Plans and Claims Procedures

Q We sponsor a nonqualified deferred compensation plan that is exempt from many of ERISA's requirements because it is a "top-hat" plan. Are we required to comply with the Department of Labor's new regulations governing claims for disability benefits?

A As your question suggests, the fact that a plan is a "top-hat" plan does not mean that the Employee Retirement Income Security Act ("ERISA") does not apply at all to the plan. Top-hat plans are exempt from many of ERISA's requirements, such as those relating to vesting, funding, and fiduciary duties. However, top-hat plans remain subject to ERISA's enforcement mechanisms, including ERISA's claims procedures rules. In December of 2016, the Department of Labor issued final regulations updating ERISA's claims procedures for claims requiring a determination of disability. The regulations apply to both ERISA welfare plans and pension plans. The regulations became effective for claims for benefits filed on or after April 1, 2018. If your top-hat plan requires that a determination of "disability" be made as part of its benefits eligibility or distribution rules (for example, if a plan distribution is triggered by a participant's disability), then these new regulations apply to your plan. If that is the case, then your plan's written claims procedures should be amended to comply with these new regulations to the extent that they have not already been.

Bond Versus Insurance

Q What is the difference between an ERISA bond and ERISA fiduciary insurance?

A An ERISA bond is a bond that is required by Section 412 of ERISA. Under ERISA's bonding requirement, every plan fiduciary who handles plan funds or other property, subject to limited exceptions, must be covered by a bond. The coverage amount of the bond must be at least 10 percent of the value of the amount of plan assets handled, but the coverage amount is capped at $500,000 (or $1 million if the plan includes employer securities). Only sureties and reinsurers on the Department of the Treasury's approved list may issue ERISA bonds. ERISA bonds generally protect the plan from theft and fraud.

ERISA fiduciary insurance is a product typically underwritten by an insurance company that protects the plan from losses caused by a breach of ERISA's fiduciary duties. A breach of fiduciary duty could result in great harm to the plan or plan participants without involving theft or fraud. As a result, an ERISA bond is unlikely to be a resource for making the plan whole in such cases. While the individual fiduciary who is responsible for the breach would be personally liable for the damages caused by their breach, there remains the practical issues of the plan collecting such amounts from the individual and even whether the individual has the resources to make the plan whole. This is where ERISA fiduciary insurance can be beneficial to a plan. Under an ERISA fiduciary insurance policy, the insurer will make the plan (or the plan participants) whole. ERISA fiduciary insurance can also provide a benefit to the individual fiduciaries themselves by, for example, covering the fiduciaries' legal defense costs in the event that a breach of fiduciary duty is alleged against the fiduciaries. So, while ERISA fiduciary insurance is not required by ERISA, as is an ERISA bond, it may be prudent for a plan sponsor to purchase ERISA fiduciary insurance hand-in-hand with the ERISA bond.

Counting Interns for ACA Purposes

Q We are trying to figure out how many full-time employees we had last year to determine whether we are subject to the Affordable Care Act's employer mandate. We have always had close to (but just under) 50 employees. Last year, we hired three summer interns. If we include the interns, we may be subject to the employer mandate. Two of the interns were unpaid and worked part-time (approximately 20 hours per week). The other intern was paid and worked full-time (approximately 35 hours per week). All three interns worked from mid-June to mid-August. Do we have to include the interns in our employee count and, if so, how do we count their hours?

A The short answer is you would treat the interns like your other employees, and would only count the hours for which the interns were paid or entitled to payment. The longer answer is a bit more complicated.

The Patient Protection and Affordable Care Act ("ACA") requires that certain large employers offer affordable, minimum essential coverage to full-time employees or pay a tax. This employer mandate applies to an "applicable large employer" ("ALE"). An ALE generally is an employer that has employed on average at least 50 full-time employees (including full-time equivalent employees) on business days during the prior calendar year. The ACA sets forth detailed rules on determining whether an employer has the requisite number of employees on a business day. The ACA also imposes certain aggregation rules which require an employer to include employees of related employers in determining whether it is an ALE.[1]

Under ACA rules, a "full-time employee" ("FTE") is an employee who is employed on average at least 30 hours per week with an employer. A "full-time equivalent employee" ("FTEE") is a combination of employees, each of whom individually is not employed on average at least 30 hours per week, who, in combination, are counted as the equivalent of a full-time employee. The ACA sets forth detailed rules for determining who is an FTE or FTEE for purposes of determining whether an employer is an ALE.[2]

Under ACA rules, an "hour of service" is an hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer. An "hour of service" also includes an hour for which an employee is paid, or entitled to payment, by the employer for a period of time in which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. Hours of service do not include service:

- Under a Federal Work-Study Program;
- Outside the United States;
- For other ALEs; and
- Rendered by a "bona fide volunteer" of a governmental agency or tax-exempt organization.

This means that, under ACA rules, assuming your company's interns were not paid or entitled to payment, the hours your unpaid interns worked would not be considered for purposes of determining whether the unpaid interns are FTEs or FTEEs.[3]

There are special rules that apply to seasonal employees that may or may not apply in your company's case. You mentioned that last year was the first year that your company has hired interns. If you continue to hire summer interns, your company may (or may not) qualify for additional relief under the ACA. Under ACA rules, there is a narrow exception for seasonal employees (1) whose customary employment is six months or less, and (2) whose employment begins each year at about the same time, for example, winter ski resort workers. The seasonal employee exception is very fact specific.[4]

Notes

1. *See* Treasury Regulation §§ 54.4980H-1(a), *available at https://www.federalregister.gov/documents/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage*.
2. *See* Treasury Regulation § 54.4980H.
3. We note, however, that federal and state laws impose certain tests on whether and to what extent interns must be paid for wages and hours purposes. *See https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships*.
4. For additional information, see *https://www.irs.gov/affordable-care-act/employers/aca-and-employers-how-seasonal-workers-affect-your-ale-status*. Finally, for additional information on the employer mandate generally, *see* https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act.

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