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Employee Benefits and Executive Compensation

The Benefit of Benefits Blog ›

Our Employee Benefits and Executive Compensation practice represents employers in organizations of all forms, including for-profit businesses, tax exempt organizations, and governmental agencies. We help clients navigate the complex tax and labor law rules surrounding retirement, health and other fringe benefits that organizations provide to their employees and executives. The type of organization affects employer goals and motivations behind offering a particular benefit and determines the types of benefits that may be offered and the rules governing the operation of its benefit plans. Each of the main areas of our employee benefits and executive compensation practice is described below.

The Right Benefits for the Right Employer

Our team helps employers develop and maintain appropriate benefits plans that meet client goals and comply with regulatory requirements. We take a holistic approach, working with the employer's total rewards team, including officers, human resources professionals, third party administrators, investment advisors, insurance brokers and other financial advisors to determine employer objectives and to design a benefit plan to meet those objectives. We counsel for-profit businesses, tax exempt organizations, and governmental agencies on all aspects of employee benefits and executive compensation matters. We help employers understand the complexities of ERISA-governed qualified pension (including multiemployer plans), profit sharing, and 401(k), 457, and 403(b) retirement plans as well as nonqualified deferred compensation plans (including compliance with Code Section 409A); health insurance and other welfare benefits including cafeteria plans, HRAs and HSAs, flexible spending accounts, tuition reimbursement, dependent care assistance and commuter benefits.

Controlled Group Analysis

Under ERISA and the Internal Revenue Code, related companies or organizations can be considered a single employer for qualified plan purposes by complex controlled group, affiliated service group, leased employees and ownership attribution rules and would be tested together for eligibility and nondiscrimination rules. We provide legal services to analyze an enterprise's ownership and operational structure to determine whether entities are considered a single employer. When possible, we will recommend alternative structures to avoid unintended consequences.

Retirement Plans for Tax Exempt Organizations

The motivation for nonprofit, tax exempt organizations for providing retirement benefits to their employees is quite different than a for-profit employer. The classification of a tax exempt organization will also dictate the types of benefits it can provide. For example, generally, only charitable organizations, exempt under Internal Revenue Code section 501(c)(3), and certain educational organizations may provide a Code section 403(b) tax-sheltered annuity plan. Tax exempt organizations can provide executives with deferred compensation plans but they must meet the requirements of Internal Revenue Code section 457. In addition, paying an individual too much compensation (including benefits) can result in penalty taxes being imposed on the organization or its managers and can also threaten an organization's exempt status as prohibited inurement. Our team understands the special needs and unique goals of exempt organizations and we have the experience to guide clients through the myriad of rules that apply to their particular organization.

Governmental Plans

Employee benefit plans of Federal, state, or local governmental agencies escape many of the rules under ERISA and the Internal Revenue Code. However, they are often subject to similar or stricter rules under state law. Our team advises governmental employers on such diverse matters as: the California constitution's ERISA-like fiduciary requirements; the Impairment of Contract doctrine; compliance with PEPRA, the CalPERS statute, and PEMHCA; and Social Security Replacement Plans.

Multiemployer (Union) Plans

We help employers understand the consequences of the underfunded status of union or multiemployer plans. These consequences include the effects of "funding improvement" plans and "rehabilitation" plans adopted by trustees as well as the cost for leaving a plan (withdrawal liability). We then help to develop strategies to mitigate or avoid such consequences.

Executive Compensation

Our team works with clients to design and structure appropriate deferred compensation arrangements including, deferred bonuses, Supplemental Executive Retirement Plans, Excess Benefit Plans, Severance Plans and Phantom Stock or Stock Appreciation Rights (SARs) to meet the requirements of Code section 409A and also avoid current taxation to the worker. Any such arrangement must be carefully structured to comply with ERISA and the Internal Revenue Code to prevent unintended tax consequences. If the arrangement does not meet the requirements of Code section 409A, there are severe tax consequences to the employee or independent contractor earning the compensation. The compensation is taxed when the worker has a vested right to it, plus it is subject to an additional 20% Federal tax. If the worker is subject to California state income tax, he or she will be subject to an additional 20% California tax, as well. Due to the complexity of this area, it is not uncommon to discover that an arrangement does not comply with the requirements under section 409A and the regulations. We also work with clients to correct such noncompliant plans to minimize the effect of noncompliance.

In addition, such employees are often compensated with an equity stake in the business in various ways. Corporations can issue options to buy stock or grants of restricted stock. Limited liability companies can provide restricted membership interests or profits interests.

Executive Compensation techniques can be used to reward performance and loyalty, to ensure executives participate in a change in control of the business, to help fund the succession of the business by one or more key employees, and to permit them to save for retirement in amounts above the limits permitted under tax qualified plans.

Health and Welfare Benefits

The regulation of health benefits is a dynamic area with the passing of the Affordable Care Act and efforts to repeal and replace it. Our team provides a wide variety of legal services to help employers understand the current regulatory environment and to design and implement health and welfare plans that help employers provide sustainable benefits and help employees share the cost of certain benefits on a pre-tax basis. We advise and counsel on the design of health insurance plans, self-insured health coverage and related plans such as cafeteria plans, health reimbursement arrangements (HRAs), Medical Expense Reimbursement Plans (MERPs), Flexible Spending Accounts (FSAs), Health Savings Accounts (HSAs), and retiree health benefits. Welfare plans can also include vacation and leave plans, paid time off (PTO), as well as severance plans.

All of these plans have rules that must be followed to ensure that the benefits provided are done so with the intended tax or other advantages as well as to avoid adverse consequences.

Self-directed IRAs

Many individuals opt for alternative investments in their individual retirement arrangements such as real estate or private notes rather than stocks and bonds. These transactions can be risky as IRAs are subject to prohibited transaction rules and if the IRA enters into a prohibited transaction the entire IRA balance will become taxable to the owner. Our team is adept at analyzing transactions, steering clients away from prohibited transactions and helping to structure the appropriate transactions for the highest efficiency.

Plan Operations

ERISA Compliance

Our team helps employers design, adopt, and operate appropriate tax qualified retirement plans to ensure that they obtain the advantages of tax qualification.

Employers provide employee benefits to attract and retain the best talent for their organization and to capitalize on the associated tax advantages of doing so. Generally, anything of value provided by an employer to an employee as part of the employment relationship will be taxed as income to the employee when provided, unless specifically excluded under the Internal Revenue Code. Qualified retirement plans such as pension, profit sharing, and 401(k) plans have tax advantages by complying with Internal Revenue Code section 401(a), which addresses limits to annual compensation. These advantages include immediate tax deductions to the employer for employer contributions, tax exempt earnings by the plan, and tax deferral for the employees until the benefits are actually received. However, these benefits come at the price of the plan having to meet many complex legal requirements in the written plan document and in operation. These requirements include minimum coverage and participation rules, minimum vesting rules, nondiscrimination rules, limits on the amount of compensation that can be considered under the plan and limits on the overall benefits under the plan. Failing to meet the rules to be a tax "qualified" plan can result in a plan that does not enjoy customary tax advantages.

Once a plan is adopted it must be amended for any changes in the law by certain effective date deadlines to retain its tax advantages. We help clients ensure their plans are properly updated.

Plan Correction

Should a plan fall out of document or operational compliance, our team has the expertise with various government correction plans that permit the failure to be corrected and allow the plan to preserve its tax advantages. Whether it is the self-correction program, the Voluntary Correction Program (VCP) or the Audit Closing Agreement Program (Audit CAP) under the IRS Employee Plans Compliance Resolution System (EPCRS) or the IRS Voluntary Closing Agreement Program, our team can keep plans qualified.

Fiduciary Duties and Prohibited Transactions

Those individuals with discretion over the operation of qualified plan or assets of plans governed by ERISA are subject to certain fiduciary duties and are personally liable for any losses to the plan due to a breach of a fiduciary duty. Likewise, they must be careful not to deal with the assets of the plan in their own interest instead of the exclusive benefit of the employees. Certain transactions involving the plan and certain disqualified persons that raise issues of self-dealing or conflicts of interest are strictly prohibited and must be "undone" to be corrected. Entering into a prohibited transaction will cause the disqualified person to be subject to excise taxes and be personally liable for any losses incurred by the plan. Prohibited transactions include plan contributions not being timely deposited into the plan, permitting the plan to pay unreasonable compensation to any service provider to the plan, and lending money to a disqualified person. Our team can analyze proposed transactions to determine whether they implicate fiduciary duty or prohibited transaction concerns and advise on possible alternatives to avoid the rules.

Mergers and Acquisitions

Employee benefits can present issues in mergers and acquisitions, which are often related to the plans of the acquired entity. Benefit plans should be analyzed as part of the due diligence process of evaluating the transaction and determining how to address the plans should be negotiated and part of the structure of the deal to avoid misunderstanding or unexpected liability after closing. When an employer participates in a multiemployer plan sponsored by a union pursuant to a collective bargaining agreement the possibility of withdrawal liability also arises. Whether the client is the seller or the buyer, our attorneys can assist in the due diligence process and advise on the best solutions for dealing with these issues to provide for a smooth transaction.

IRS Examination and DOL Investigations

Our team represents clients whose plans are under examination (audit) by the Internal Revenue Service and under investigation by the United States Department of Labor to preserve the rights of the employer during the audit and to try to minimize any adverse result of the audit.

Plan Terminations

When an employer no longer wishes to offer an employee benefit plan, whether because the employer is going out of business, being acquired, there are no longer any employees participating in the plan, or for other business reasons, the plan needs to be terminated and the assets of the plan distributed. Often there are notice requirements and a final information return that needs to be filed. Whether a qualified retirement plan, a nonqualified top hat retirement plan, or a welfare plan, our team can assist in ensuring the plan is properly terminated.