ERISA Plan Expenses – Who Pays?

Overview

- In 2001, the Department of Labor ("DOL") issued guidance regarding expenses that may be paid from ERISA plan assets. DOL Adv. Op. 2001-01A (Jan. 18, 2001). This Advisory Opinion and related hypotheticals provide a discussion of the principles applicable to distinguishing settlor from plan expenses.

- Determinations of whether a particular expense should be paid from plan assets is a fiduciary act governed by ERISA's fiduciary responsibility provisions. See ERISA sections 403 and 404.

    - ERISA provides that subject to certain exceptions, the assets of an employee benefit plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participant and beneficiaries and defraying ***reasonable expenses of administering the plan***.

    - Fiduciaries must act prudently and solely in the interest of the plan participants and beneficiaries, and in accordance with the documents and instruments governing the plan insofar as they are consistent with the provisions of ERISA.

    - **Reasonable expenses:** Reasonable expenses of administering a plan include direct expenses properly and actually incurred in the performance of a fiduciary's duties to the plan.

        - Settlor/ plan sponsor functions which relate to the formation of the plan generally are not fiduciary activities governed by ERISA and would not be reasonable expenses.

Expenses which Plans are permitted to pay:

- Plans are permitted to pay the costs associated with maintaining the tax-qualified status of a plan, regardless of the fact that the tax qualified status of the plan confers a benefit on the plan sponsor. Fiduciaries do not have to take into account the benefit a plan's tax-qualified status confers on the employer.

- The DOL views any such benefit derived by the employer/sponsor as an integral component of the incidental benefits that flow to plan sponsors generally by virtue of offering a plan. The Supreme Court has recognized that plan sponsors receive a number of incidental benefits by virtue of offering an employee benefit plan, such as attracting and retaining employees, providing increased compensation without increasing wages, and reducing the likelihood of lawsuits by encouraging employees who would otherwise be laid off to depart voluntarily. The DOL's view is that the mere receipt of such benefits by plan sponsors does not convert a settlor activity into a fiduciary activity or convert an otherwise permissible plan expense into a settlor expense.

- Where a plan is intended to be a tax qualified plan, the implementation of a decision by the employer/sponsor may require plan fiduciaries to undertake activities relating to maintaining the plan's tax-qualified status for which a plan may pay reasonable expenses. Implementation might include drafting plan amendments required by changes in the tax law, nondiscrimination testing, and requesting an IRS determination letter.

Expenses which the Employer/ Plan Sponsor are required to pay:

- The formation of a plan as a tax-qualified plan is an expense which the employer/ plan sponsor must pay.

- If maintaining the plan's tax-qualified status involves a choice of options for amending the plan, the expenses incurred in analyzing the options would be settlor expenses.

- Expenses relating to the decisions regarding the establishment, design, and termination of plans, except in the context of multiemployer plans, generally are not fiduciary activities governed by ERISA, and, therefore, should be paid by the employer/sponsor.

Questions to Consider

An ERISA plan fiduciary should be able to answer the following questions before making the decision to pay an expense:

- Does the plan document permit (or at least not prohibit) the payment of this expense?
- Is the expense (and therefore the goods or services purchased) related to the fiduciary's administration of the plan and sponsor's "settlor" function?
- Is the expenditure prudent and is the amount reasonable?
- Is the service being provided by a party-in-interest or by the plan fiduciary (*e.g.*, the plan sponsor or an affiliate)?

The chart beginning on the following page provides a more detailed overview of plan expenses that may and may not be paid by the plan.

PLAN EXPENSE REIMBURSEMENT

	Expense Payable By the Plan	Expense NOT Payable By the Plan	Comments
1. **Plan-Wide Administrative Services:**			
• Savings plan recordkeeping and communication fees	X		
• Custodial services fees	X		
• Independent fiduciary (e.g., trustee)	X		
• Accounting and audit fees related to Form 5500 preparation	X		
• Submission to IRS to request a determination letter	X		
• Plan amendment required to comply with ERISA or tax law	X		
• Soliciting, evaluating proposals from new and existing vendors	X		If vendor is performing a non-settlor function
2. **Settlor Decisions**			
• Plan design for new plan or amendment not required to comply with ERISA or tax law		X	
• Draft plan documents after design established and after formal action taken to adopt amendment		X	If amendment is not to comply with ERISA or tax law
• Legal and consulting fees associated with termination of plan		X	
3. **Insurance and Bonding:**			
• Fiduciary liability insurance	X		However, if premiums paid by plan, insurer must have recourse against fiduciary for breach (ERISA Section 410); accordingly,

PLAN EXPENSE REIMBURSEMENT

	Expense Payable By the Plan	Expense NOT Payable By the Plan	Comments
			recommend that company pay
• Bonding	X		
4. Investment-related services:			
• External portfolio manager fees	X		
• Sales charges (loads and commissions)	X		
• Investment management agreement termination fees	X		
• Product termination fees	X		
5. Sanctions/Penalties imposed on the plan	X		However, not sanctions or penalties imposed on a plan administrator or other individuals/entities related to the plan
6. Correction of Error			
• Qualification Error (e.g., EPCRS Compliance Fee)		X	
• Fiduciary Error Correction (e.g., fees associated with VFC)		X	
7. Actuarial Services:			
• Form 5500's Reconcile APBO			Depends on purpose; e.g., if to prepare 5500, may be reimbursed by plan; if for settlor function, such as financial accounting for company, may not be reimbursed by plan
• Actuarial valuations			Depends on purpose; e.g., if to prepare 5500, may be reimbursed by plan; if for settlor function, such as financial accounting for

PLAN EXPENSE REIMBURSEMENT

	Expense Payable By the Plan	Expense NOT Payable By the Plan	Comments
			company, may not be reimbursed by plan
• Required contribution calculations	X		
• Strategic contribution calculations		X	
• OPEB estimated disbursements			Depends on purpose; e.g., if to prepare 5500, may be reimbursed by plan; if for settlor function, such as financial accounting for company, may not be reimbursed by plan
• OPEB discussions and revised benefit limits in the 401(h)			Depends on purpose; e.g., if to prepare 5500, may be reimbursed by plan; if for settlor function, such as financial accounting for company, may not be reimbursed by plan
• Asset/liability studies			Depends on purpose; e.g., if to prepare 5500, may be reimbursed by plan; if for settlor function, such as financial accounting for company, may not be reimbursed by plan
• Performance reporting and investment manager searches	X		
• Plan study of options available to comply with laws		X	
• Nondiscrimination testing for tax qualification	X		
• Nondiscrimination testing of proposed plan change		X	
• Determination of	X		

PLAN EXPENSE REIMBURSEMENT

	Expense Payable By the Plan	Expense NOT Payable By the Plan	Comments
minimum funding requirements			
• Determination of FAS87 or FAS106 expense for accounting purposes		X	
• Determination of maximum deductible employer contribution			Depends on purpose; more detail needed
• Participant Communications (e.g., Employee statements, SPD, benefit calculations)	X		
• Asset/liability forecasting relating to pension funding or investment policy	X (investment policy)	X (pension funding)	
• Asset/liability forecasting relating to plan design or financial accounting issues		X	
• Modeling the financial impact of proposed changes in a benefit plan		X	

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