insights

Non-Qualified Deferred Compensation Plans and ERISA

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Non-Qualified Deferred Compensation Plans and ERISA

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Executive Summary

If you have a non-qualified deferred compensation plan, a recent Fifth Circuit decision may cause you to question whether the plan is exempt from the stringent requirements of ERISA.

Tolbert et. al. v. RBC Capital Markets Corporation

Tolbert et.al. v. RBC Capital Markets Corporation involved three former employees of RBC Capital Markets. The ex-employees claimed that the company violated ERISA when it refused, upon their separations from employment, to distribute some of the money in their accounts under the company's deferred compensation plan. The money in the plan consisted of mandatory deferred compensation and company contributions. RBC Capital markets defended on the ground that the plan was not an ERISA-covered pension benefit plan or, if it was, then its distributions were legal under ERISA's special rules for top hat plans.

A top hat plan is unfunded and maintained primarily to provide deferred compensation for a select group of management or highly compensated employees. This type of plan is exempt from various requirements imposed by ERISA, such as fiduciary duties and vesting requirements. A plan with coverage that is broader than a select group of management or highly compensated employees will not qualify for exemption from ERISA.

"[A top hat plan] is exempt from various requirements imposed by ERISA."

Although RBC Capital was granted summary judgment in the district court, the Fifth Circuit reversed noting that nonqualified deferred compensation plan offered by an employer was an "employee pension benefit plan" under the Employee Retirement Income Security Act of 1974 (ERISA) because it resulted in the deferral of income by employees extending to the employees' termination from employment or beyond, under ERISA section 1002(2)(A)(ii).

It is prudent to review non-qualified deferred compensation plans annually, either with corporate counsel or through a qualified vendor. If you currently have a deferred compensation plan in place, key issues to review and language to include in the plan are:

1. That the plan's purpose is to provide non-tax qualified deferred compensation;
2. That participation is limited to a select group of management or highly compensated employees; Although neither the district court nor the Fifth Circuit addressed this issue in *Tolbert*, it is highly important to define the group of participants that are eligible for the plan.
3. That the plan is not intended to provide retirement income;
4. That income deferral is not required to or beyond the termination of employment; and
5. That participants do not control plan investments.

"It is prudent to review non-qualified deferred compensation plans annually."

These are just some of the takeaways from the *Tolbert* decision. For a free, in-depth checklist on non-qualified plans and how to avoid some of the most common pitfalls, email jstoetzner@ebn-design.com.

Jake Stoetzner, JD, and Joe B. Jones welcome questions and comments. Please contact Jake at (785) 838-9800 or jstoetzner@ebn-design.com and Joe at (785) 838-9800 or jjones@ebn-design.com

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Jake offers a diverse combination of legal and financial knowledge to find innovative solutions for banks, corporations and individuals. Jake concentrates on estate and tax issues that challenge successful businesses and executives, in addition to designing and implementing successful benefit strategies. Prior to joining Executive Benefits Network, Jake worked as an attorney for The State of Michigan, focusing on complex civil and criminal matters. He earned his law degree, summa cum laude, from Oklahoma City University School of Law. He is currently admitted to practice in Kansas, Missouri and Texas. Jake earned his bachelor of science in mechanical engineering from The University of Tulsa, where he played football for the Golden Hurricane for four years. He currently lives in Lawrence, KS with his wife, Dr. Kelli Henderson, and their two boys, Cooper and Parker.

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Joe is a twenty seven year veteran of the financial services industry. He spent twelve years associated with the Todd Organization of St. Louis, LLC. He co-founded Executive Benefits Network in 2001 with David Fritz. He has published several articles on Bank Owned Life Insurance that have appeared in the American Banker, Bank News, and Bankers Online. Joe has appeared as a guest instructor for numerous organizations including Securities Institute Association, Robert W. Baird, Stifel Nicolaus, Northwestern Mutual, Mass Mutual, Kansas University Law School, and the University of Missouri-Kansas City Law School. He is a specialist in the areas of tax planning with life insurance. He is a member of the Estate and Business Strategies group and a Financial Representative of Northwestern Mutual. He frequently speaks on the design of corporate owned life insurance for balance sheet enhancement to Fortune 1000 companies. Joe is a graduate of Baker University and the Kansas State Captain of the Association of Advanced Life Underwriters. He is a member of the Society of Financial Services, Kansas University Alumni, and St. John Catholic Church. He lives in Lawrence, Kansas with his wife Nancy. He has three children Nicole, Abby, and Cody.