cmg EMPLOYMENT NOTES

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Safe Administration of Employee Savings Plans

Introduction

Employee retirement and savings plans have become an accepted part of life for medium to large organizations, public and private. Today, due to the availability of plans administered by third parties, many smaller organizations are also providing such plans to their employees. The medium to large organizations have such plans because they are expected to have them. It would be difficult to compete for employees without affording employees the opportunity to participate in both traditional retirement plans and savings plans. Smaller organizations usually offer a limited variety of plans, and rarely are defined benefit retirement plans offered. Defined benefit plans may be of value for a few small businesses. In general, they represent too much liability for small organizations due to the funding and administrative requirements. Because Social Security and private savings cannot provide sufficient retirement income for most Americans, the availability of secure retirement and savings accounts is crucial for the future financial health of most Americans.

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INSIDE THIS ISSUE

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Thoughts from the Editor

Our original plans to release this newsletter in mid-October bring to mind a famous saying about "The best laid plans of men and mice." Unfortunately, a little thing named Hurricane Isabel came along in mid-September and altered those plans. The storm caused quite a bit of disruption for the East Coast and CMG's operations.

Each year during the holidays we are the grateful recipients of many attractive holiday cards and other holiday items like calendars, all bearing the names of our clients and friends. Over the years, we have sent out our share of seasonal cards and other items. However, a few year ago, we took a hard look at the situation and felt that the best thing we could do for our clients and friends was to get our newsletter out and to focus our energy and resources in that direction. We hope you agree.

This issue welcomes Bob Frater, CFP, Vice President of Houston Asset Management, as our contributing editor. Bob's company works with employee savings plans, and his expertise has enriched this issue of *Employment Notes.* There has been a surge in lawsuits recently regarding the administration of employee savings plans, including the best known type of plan, 401(k). Many organizations today have various plans that provide employees with tax sheltered investments and employers with a way to attract and retain the best employees available.

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The Employee Retirement and Income Security Act of 1974 ("ERISA") is the dominant legislation in the employee benefits area. Since it pre-empts most state and local legislation, it provides a level of uniformity across the United States. However, there have been court rulings over the last ten years that afford claimants selective access to state courts on a variety of issues. This has increased the risk for employers.

Recently, the collapse of ENRON and other large corporations has resulted in lawsuits claiming that the employers failed to properly administer their plans. These lawsuits have attracted attention to the fact that 401(k) plans have not provided the security in investments that employees have come to expect. There are two common complaints raised in litigation against these companies. The first is that many employees held their 401(k) accounts primarily in company stock because the employing entities misrepresented their financial status, thus denying employees the knowledge needed to manage their savings plan portfolios. The second claim is that the savings plans were poorly administered, including a failure to offer sufficient investment options for employees.

Small organizations that comprise the majority of the *Employment Notes* readers are unlikely to have an issue of placing company stock in their employees' 401(k) accounts. This is because the small for-profit organizations are usually closely held and the stock is not generally traded, so it is not available for deposit in an employee benefit plan. And, obviously, non-profit organizations do not have privately held stock to trade. The primary exposure then is the administration of the 401(k).

Why Have Savings Plans?

Medium to large organizations usually offer retirement plans and various savings plans. Many small business offer only savings plans. These plans provide an incentive for employees to stay with smaller employers. The plans satisfy employee expectations and provide them a sense of security. The contribution of employers ranges from paying nothing toward the plans, paying just the administrative costs, or matching some percentage of the employee contributions.

Many savings plans provide that the employer will contribute a pool of funds based on the profitability of the entity. In most cases, the plan is structured so that employers do not incur significant expenses to have a savings plan for the employees. Therefore, the plans tend to have a "win-win" profile.

Establishing an Employee Savings Plan

For most small organizations, setting up an employee savings plan will not be a built from scratch production. This model would generally be too expensive for most organizations. Further, most small organizations do not administer the plans in-house and therefore will retain a third party administrator. Packaged products with either integrated administration or a second party providing the administration are the rule, not the exception. Inside the organization, a board of directors' resolution and related enabling paperwork will be required. Usually, a committee consisting of senior members of the organization will be assigned to evaluate the various plan providers.

Finding the Right Plan Providers

The committee should decide on the basic internal parameters of the savings plan before seeking providers. What expenses will the organization fund? What will be the contribution to the plan participants, if any? There are many plan providers. The committee may decide to select a consultant to assist the committee in contacting providers to solicit proposals. It is important to document what steps are taken to select providers in order to avoid claims later that the plan selected was flawed from the beginning of the process. Some factors to consider include:

1. Find providers who are understandable. This is a complex area and you should make sure that the members of the committee understand the providers' proposals.

2. Make sure the proposals incorporate the terms and conditions favorable to your organization and management. There is no reason to select a plan that does not meet all of the organization's needs.

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3. Evaluate the proposals based on the advantages for the organization and the employees. Pay special attention to how much effort will be required from the organization. Will your organization be comfortable working with the providers for a long time into the future? Make sure the committee meets with the persons who will actually provide the services and not just account representatives.

4. Employees vary in their level of sophistication. Establish a plan that will provide them with high quality investment options. It costs no more to get a really good plan. No single provider has the monopoly on good managers. Great investment options help every employee's account to perform at the best possible level.

5. Look for providers who will keep employees up to date on the plan. Make sure the provider selected will provide statements to employees within 30 days of the end of each quarter and afford 24/7 Internet access to their accounts.

6. Compliance with the law is a major concern. Many small organizations' plans are not in compliance. If some proposed providers are not offering to help with annual trustee meetings or Investing Policy Statements, seek other providers.

7. Communication is everything. Providers who are finalists should be willing to conduct enrollment meetings, provide newsletters or articles for your organization's newsletter and take calls from employees. Plan balances will go up and down. Employees may not understand normal market variations. Make sure the selected provider is sensitive to these issues, so that the organization and its employees will receive the service needed.

8. The committee should consider price, but not base the decision on price alone. There are many top-quality providers whose services are competitively priced.

9. Check out the quality of the providers who are finalists for your organization's plan. Examine the long term results of the providers, not just short term successes. Contact at least three current clients of each provider and ask them tough questions about how satisfied they are with the both the performance of the plan products and the administration of the plans.

What Do You Do Once It Is Set Up?

Formal documents must be filed with the IRS once a plan is adopted and employees must receive a Summary Plan Description ("SPD"). These documents must be updated on a regular basis. Some providers will help with most of the required documents, others will only help with preparation of the SPD.

Pension laws change, portfolio managers quit, and your organization's needs change. Make sure your plan provider stays on top of what is happening so that your plan stays up to date. At least once a quarter, a documented meeting of your savings plan committee should meet to evaluate the performance and administration of the plan. At least every three years, a formal evaluation should be conducted, including evaluation of proposals from the current provider and other providers. Again, any such evaluation process should be fully documented.

Properly prepared and administered, an employee savings plan should provide a relatively low maintenance employee benefit for a long period of time.

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We also want to remind all employers that the OSHA Form 300 and 300A have been updated for 2004. Use the 2003 forms for 2003 reporting. The posting period begins February 1, 2004.

Our next issue will deal with the special challenges of one of the oldest of the Federal employment laws, the Fair Labor Standards Act, ("FLSA"). This law has continued to haunt organizations, large and small. We will highlight some current challenges and provide some tips for reducing exposures to FLSA liability.

The CMG family wishes all of you a happy and prosperous New Year!

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