

DOL Clarifies Position on Payment of Plan Expenses

Recently, the U.S. Department of Labor (DOL) issued guidance clarifying its position regarding the types of expenses that can be paid from assets of a qualified plan and those expenses that must be paid by the plan sponsor. In recent audits, regional DOL offices had taken the position that any plan expense that benefits both the plan sponsor and the plan cannot be paid entirely by the plan. This included expenses that provided an incidental benefit to the plan sponsor, such as maintaining the plan's tax-qualified status.

The new DOL guidance rejects this position and reiterates its traditional position that the relevant question in determining whether an expense can be paid from the plan's assets is not whether the expense benefits the plan sponsor, but whether the expense is an administrative or settlor expense. The DOL confirmed that a plan may not pay expenses associated with settlor decisions, but may pay certain reasonable expenses of plan administration, including costs that incidentally benefit the plan sponsor.

The DOL separates qualified plan-related expenses into two categories. Expenses that *must* be paid by the employer (i.e., the plan sponsor) are called "settlor expenses." Expenses that *may* be paid by the plan are called "plan expenses."

Settlor Expenses

Expenses that relate to the formation, rather than the management, of plans are settlor expenses. In general, settlor expenses are expenses arising from voluntary activities relating to the establishment, design, and termination of a plan. For example, this would include expenses arising from:

- Deciding what type of qualified plan to provide and its specific design.
- Preparing the initial plan documents and requesting an initial IRS letter of determination.
- Voluntarily amending a plan to provide for a design or structural change (e.g., the costs of amending the plan to provide for a loan program or a plan spin-off are settlor expenses).
- Making a decision to terminate the plan.

These types of expenses cannot be paid by the plan. The plan sponsor must pay them because the decisions relating to the actual sponsorship of a plan are, in part, dictated by the employer's business needs, such as the need to attract and retain employees. In addition, expenses related to the preparation of FAS 87 or FAS 88 reporting cannot be paid from plan assets since this activity is driven by the plan sponsor's own financial reporting needs.

*Republished December 2004 to reflect Prudential Financial's acquisition of CIGNA's retirement business.

Plan Expenses

Expenses that are administrative in nature are considered plan expenses. Plan expenses are expenses that are:

- Necessary,
- Connected to the operation of the plan,
- Reasonable in amount, and
- Authorized in the plan document to be paid by the plan.

Plan expenses include reasonable expenses related to:

- Plan design revisions required by a new law or regulations and obtaining an IRS determination letter on such revisions.
- The preparation of Form 5500 and associated Schedules.
- Communicating plan information to participants and beneficiaries.
- Performing routine nondiscrimination testing.
- The preparation of actuarial valuations to determine ERISA funding requirements.
- Benefit calculations.

Since these types of expenses arise only after an employer has made the decision to sponsor a qualified plan and are incurred specifically in connection with the plan's operation, they may be paid by the plan, as long as this payment is permitted under the terms of the plan document. A plan that is silent as to the payment of reasonable administrative expenses may pay such expenses. Where a plan document indicates the employer will pay such expenses, the plan may be amended to allow for payment of the expenses on a prospective basis. However, the expense to amend the plan must be paid by the employer.

The expenses listed above are simply examples of expenses and their typical classification as either settlor or plan expenses. These lists are not all inclusive. Many expenses do not fit clearly into one category or the other. For this reason, plan sponsors must make the final determination regarding payment of plan-related expenses only after consulting the plan's legal counsel.

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