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LOREN D. STARK COMPANY

Shared Employees

In the event an individual is employed by two or more entities, the qualified plan coverage requirements are not entirely clear. If the individual's services are performed as an independent contractor, and those guidelines are well established, there are no issues, i.e., that individual is not an employee for qualified plan purposes. When the true nature of the relationship is not absolutely ascertainable, the plan document should exclude an employee who has been classified as an independent contract. For example, the plan would exclude independent contractors who are determined to be employees. (See the Microsoft case on this point.)

In the event an individual is employed by two or more entities, and those entities are members of a controlled group, IRC Sec. 1563, or and Affiliated Service Group (ASG), IRC Sec. 414(m), such an employee is treated as employed by one (1) entity for purposes of satisfying the eligibility requirements of the plan. Once the ASG or controlled group status of the entities is established, there are no questions concerning the application of the coverage requirements. Likewise, in the event an individual is employed through a Professional Employee Organization (PEO) or Professional Service Association (PSA) (i.e., a leased employee [IRC Sec. 414(n)]), the coverage requirements are well established.

However, in the case of an individual who is not an independent contractor, not employed by an ASG or controlled group, and is not a leased employee, but is employed by two or more entities, (i.e., shared, by means of some arrangement not covered by the rules set forth above), the coverage requirements become unclear.

Prior to the enactment of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) creating the Affiliated Service Group (ASG) rules and leased employee rules and prior to Employee Retirement Income Security Act of 1974 (ERISA) establishing the 1,000 hour rules, the IRS addressed the concept of shared employees. Revenue Rule 73-447 established the IRS's position that shared employees of two non related employers in a **common facility** were to be considered as full time employees of both employers in spite of the fact that they were part time for each. Note: The concept of part time and full time was later replaced by the 1,000 hour standard of ERISA. The logical extension of the conclusion of Revenue Rule 73-447 post ERISA would be that shared employees in a common facility being paid for 1000 or more hours by unrelated two or more employers would be considered for coverage for nondiscrimination purposes by any plan maintained by any such employers.

The IRS was mandated by the terms of IRC Sec. 414(o), to provide rules to prevent avoidance of the nondiscrimination requirements of a qualified plan by the use of separate organizations, employee leasing or other arrangements. In response to this mandate, the IRS published Proposed Reg. 1.414(o)-1(f) entitled "Services Performed by Shared Employees". Although this Proposed Reg. has been withdrawn, it's conclusion might be acceptable to the IRS if it's provisions were written into a qualified plan document. A summary of this Proposed Reg. as it applies to shared employees is as follows:

1. A **Shared Employee** is a person who performs services as an employee for two or more businesses at one or more shared business premises; and

2. The total hours paid for by a **business** for all Shared Employees **performing the same type of service exceed** 1,000; then

3. Such employees are the shared employees of such businesses and must be considered as employees for nondiscrimination coverage requirements of any qualified plan maintained by such businesses.

The Proposed Reg. provided examples, which are summarized as follows:

Example (1) - Five doctors employ only one receptionist in their common area who is paid for 1,500 hours of work per year. Since no doctor received services from the receptionist of more than 1,000 hours, the receptionist is not a shared employee.

Example (2) - Three doctors share three nurses and since the nurses collectively work for each doctor more than 1,000 hours, these nurses are Shared Employees.

Conclusion

Until the IRS provides guidance, the taxpayer can only do the math. If the rules of the withdrawn Proposed Reg. provide a better result than the pre ERISA rules, the following procedure is available:

1) Draft a plan document including the appropriate definition of Shared Employees.

2) Submit the plan document to the IRS for a determination letter.