Verrill

Identifying Plan Assets in ERISA Health & Welfare Plans

by Samuel J. Baldwin on April 5, 2021

Last month, we advised readers of this blog to consider efforts to formalize the fiduciary governance of their health and welfare benefit plans. In that post, we described some of the reasons that employers have historically paid more attention to fiduciary compliance for retirement plans than health and welfare benefit plans, including the fact that even large, self-funded health plans do not typically accumulate significant long-term assets.

However, a welfare benefit plan may still have plan assets, and identifying plan assets is a critical step in proper plan administration.

Determining whether a welfare benefit plan holds plan assets – *i.e.*, money that belongs to the plan rather than the employer – is important for determining how a number of requirements apply to the plan. For example, the determination affects whether assets are required to be held in trust, how to apply the exclusive benefit and prohibited transaction rules, and even whether ERISA applies to the plan at all. Unfortunately, identifying plan assets in a welfare benefit plan is not always straightforward.

What are welfare benefit plan assets?

ERISA does not contain a comprehensive definition of "plan assets." The Department of Labor (DOL) regulations provide that participant and beneficiary contributions paid to the employer or withheld from employee pay are always plan assets (DOL Reg. § 2510.3-102(a)(1)). This includes pre-tax contributions made through a cafeteria plan, after-tax contributions made by employees, and COBRA, FMLA, retiree, and similar after-tax premium payments made by participants and beneficiaries. Employee and beneficiary contributions are plan assets whether or not they are segregated from employer assets (DOL Adv. Op. 92-24A). In addition, all or a portion of amounts received from insurance companies – such as refunds, dividends, and medical loss ratio rebates – may also constitute plan assets if the plan is the policy holder, premiums are paid from plan assets, or the plan document addresses ownership of such amounts.

It can be frustratingly unclear, however, whether employer assets used to pay for welfare benefits are plan assets. The process of determining when employer assets are considered plan assets requires consideration of where the assets are held and any restrictions on use of the assets, as well as contracts, legal instruments, employer intentions, and representations made to participants and beneficiaries that might bear on whether the plan has a legal interest in the assets.

Over the years, the Department of Labor has issued a number of advisory opinions that provide some guidance on when employer assets are considered plan assets. The general rule is that employer assets used to pay for benefits under an ERISA welfare benefit plan become plan assets if the plan acquires an interest in the assets based on “ordinary notions of property rights” (DOL. Adv. Op. 93-14A). An employer might intentionally grant the plan an interest in the employer’s assets, for example by placing the assets in trust for the benefit of a plan or stating in the plan document that particular funds belong to the plan. However, an employer may also inadvertently grant an interest in its assets to a plan, and a plan can acquire an interest in certain employer assets even if those assets are not segregated from the remainder of the employer’s general assets.

Use of separate bank accounts

The use of a separate account to pay for benefits can be especially nettlesome. In some cases, it is obvious that segregated funds are plan assets (*e.g.*, where an employer establishes an irrevocable trust for the exclusive benefit the plan). Not all assets that are held in trust are plan assets, however. In DOL Adv. Op. 93-14A, the Department of Labor concluded that assets in a revocable trust over which the employer maintained clear control were not plan assets.

Of greatest concern to most employers is the determination of whether amounts held in a separate bank account that is used solely to pay for plan benefits are considered plan assets. Using a designated bank account to pay benefits under a plan is a common arrangement adopted for administrative and accounting convenience. However, there is a surprising lack of clarity as to when this type of segregation results in amounts in the account being considered plan assets.

In Adv. Op. 92-24A, the Department of Labor said, “the mere establishment of an account in the name of the employer to be used exclusively in administering the plan would not create a beneficial interest in the plan” in the absence of “other actions or representations which would manifest an intent to contribute assets to a welfare plan.” But if the segregated funds are held in a bank account “in the name of the plan,” they will likely be considered plan assets (DOL Adv. Op. 94-31A). Unfortunately, the Department of Labor has not provided additional guidance on what it means for a bank account to be established “in the name of the plan.” A cautious approach would be to avoid giving the bank account a name that suggests the funds may belong to the plan.

State law may provide guidance on ownership interests in bank accounts, but generally an employer who does not want assets to become plan assets should ensure that a bank account used exclusively for paying welfare benefits is established under the employer’s EIN, is treated as part of the employer’s assets for general accounting purposes, and is subject to claims of the employer’s general creditors.

Accounts maintained by Third-Party Administrators (TPAs)

Another scenario that can result in the unexpected conversion of employer assets to plan assets is an account maintained by a group health plan's third-party administrator that is used to pay claims. Some employers that sponsor a self-funded group health plan transfer funds to an account with their third-party administrator, which the third-party administrator then uses to make payments to providers and plan participants.

Without affirmative steps to document employer control over the assets in the account, this arrangement can easily result in amounts in the account being treated as plan assets. Even if transfers to the account are only made in the amount needed to pay claims, with no asset accumulation, the Department of Labor has suggested that these accounts may constitute plan assets because the arrangement "may suggest to participants that there is an independent source of funds securing payments of their benefits under the plan" (DOL Adv. Op. 92-24A).

If an employer uses an account maintained by a third-party administrator to pay benefits and does not want assets in the account to become plan assets, efforts must be made to reserve employer control over amounts in the account, such as providing in writing that the assets in the account may be returned to the employer and are subject to claims of the employer's general creditors.

Other potential pitfalls

DOL advisory opinions outline a number of additional ways in which a plan might acquire an interest in an employer's assets, including contracts or other legal instruments that give the plan a beneficial interest in the funds (DOL Adv. Op. 99-08A), and communicating to participants that certain funds will be used exclusively for plan benefits (DOL Adv. Op. 93-14A). If the summary plan description or other participant communications identify an account or other assets that are to be used exclusively to pay for plan benefits, it is very likely that the assets will be considered plan assets.

Takeaways

Identification of potential sources of plan assets is crucial for proper plan administration. For example, without a clear understanding of whether assets belong to the plan, inadvertent prohibited transactions and violations of the exclusive benefit rule may result.

When plan assets have been identified, employers must ensure that these assets are handled properly and all ERISA requirements for plan assets are met. For example, plan assets are generally required to be held in a trust.[1] In addition, decisions involving plan assets, such as selection of plan service providers, will be subject to the fiduciary standards under ERISA – including the exclusive benefit and prohibited transactions rules (discussed here).

To avoid unintended plan assets, employers should maintain clear control over all funding sources for welfare benefits, and take care to ensure that participant communications, contracts, and other documents related to the plan do not designate assets as exclusively available to pay benefits or otherwise give the plan an interest in employer assets.

Please contact a member of Verrill's Employee Benefits & Executive Compensation Group for assistance if you have questions about how these rules apply to your welfare benefit plans.

---

[1] Under a longstanding DOL policy, the DOL will not enforce the trust requirement in instances where participant contributions are applied under certain conditions only to the payment of premiums for certain fully-insured benefits, and in instances where participant contributions are made under a cafeteria plan and benefits are paid directly out of the general assets of the employer (DOL Technical Release 92-01).

Samuel J. Baldwin
Associate
(207) 253 4532
email