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## NONDISCRIMINATION RULES TO APPLY TO INSURED HEALTH BENEFITS

While self-insured health plans have been subject to nondiscrimination rules for years, these rules did not previously apply to insured arrangements. For example, an employer could maintain health insurance benefits for a limited group of top executives or provide different levels of insurance for different employees or share insurance costs differently with different groups of employees.

The Patient Protection and Affordable Care Act ("PPACA") changes all this by making fully-insured employer provided health plans subject to nondiscrimination testing. The extension of the nondiscrimination rules to insured arrangements is effective for plan years beginning on or after September 23, 2010 (typically, January 1, 2011).

Excepted from the rules are so-called "grandfathered plans" which were in existence on March 23, 2010, when PPACA was signed into law. However, grandfathered protection is lost if you make certain significant changes to your plan. For example, if you increase co-pays beyond certain minimal adjustments, grandfathering protection is lost.

Under the new nondiscrimination rules, fully insured group health plans need to meet two requirements. First, a health


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## IN-PLAN TRANSFERS TO ROTH ACCOUNTS NOW PERMITTED

Under the recently enacted Small Business Jobs Act of 2010, 401(k) plans can now be amended to provide that amounts that are available for distribution can be transferred into a Roth account under the same plan. Thus, if you have a retirement account in a 401(k) plan -- whether an employee 401(k) contribution account, a profit sharing account or other employer contribution account -- and you want these assets to grow on a tax-free basis even upon distribution from the plan, you now can accomplish this by providing for Roth transfers.

As in the case of a transfer from a traditional IRA to a Roth IRA, you will be taxed on the transferred


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## Succession Planning: Is an ESOP Right For Your Business?

An Employee Stock Ownership Plan ("ESOP") is a powerful succession planning option for business owners. With the use of an ESOP, a business owner (1) receives payment for his stock (thereby diversifying his financial portfolio); (2) defers, or even eliminates, the tax on the sale proceeds; and (3) retains control over his business after the ESOP transaction. Moreover, an ESOP's after-tax return on investment to the stockholders of the company will typically exceed the after-tax return to the stockholders if the company is sold to a third party.

A business owner should consider an ESOP if his or her company meets the following criteria:

- The company has EBITDA (including stockholder compensation) of at least $1,500,000;
- The company employs at least 15 full-time employees;
- The company's gross revenues have been fairly stable and consistent over the last several years; and
- The company has a non-highly-leveraged balance sheet.

The type of industry makes little difference in whether an ESOP is appropriate, except that professional practices are less likely to adopt an ESOP than companies in other industries. ■

*Our office has structured and closed numerous ESOP transactions over the last five years. If you would like more information on this unique succession planning technique, please contact Robert B. Danziger, Esq. or Jay Fenster, Esq.*

## In-Plan Transfers to Roth Accounts Now Permitted

*(Continued from page 1)*

amount at the time of transfer. Under a special rule applicable to transfers made in 2010 only, instead of taking the amount into income in 2010, you can include the conversion amount in income in equal parts, half in 2011 and half in 2012. After the conversion is made, the Roth account accumulates on a totally tax-free basis (subject to certain minimal holding period requirements). Thus, amounts held in the account and all future investment earnings are not taxed during the accumulation period or when they are ultimately distributed from the account.

Moreover, Roth accounts can later be transferred or rolled over tax-free to a Roth IRA. Roth IRAs are not subject to lifetime minimum distribution rules. Therefore, the assets need not be withdrawn once you attain age 70½. As a result, they can grow on a tax-free basis and compound for an extended period of time. Thus, they are an excellent tool with which to accomplish your estate planning goals.

Only amounts that are available for distribution can be transferred to a Roth account. In the case of monies held in a 401(k) account, this generally limits transfers to individuals who have attained age 59½. However, depending on plan design, other plan accounts or parts thereof may be distributable much earlier than that. Many of the plans that we design provide for some or all non-401(k) amounts to be distributable after two years or after you have participated in the plan for five years. ■

*If you are interested in amending your plan to allow for Roth transfers or want to discuss it, please call Jay Fenster, Esq. or Andrew E. Roth, Esq.*

## NONDISCRIMINATION RULES TO APPLY TO INSURED HEALTH BENEFITS

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plan cannot discriminate in favor of highly compensated individuals as to eligibility to participate. Generally, under this rule a plan must benefit at least seventy percent of all employees or a nondiscriminatory classification of employees. For this purpose part-time, seasonal and certain other employees may be excluded.

Second, a plan cannot discriminate in favor of participants who are highly compensated individuals as to benefits that are provided. Accordingly, benefits that are made available to highly compensated individuals must be made available to all other plan participants and their dependents. Different levels of benefits such as co-pays, deductibles, and/or provider networks cannot be offered to highly compensated participants if those same levels of benefits are not offered to all other participants.

Health plans that do not comply with the new requirements may face excise taxes of $100 per day for each employee whose benefits are not in compliance, capped at ten percent of the cost of the group health plan or $500,000, whichever is less. This is quite different from a discriminatory self-insured plan where the penalty is additional income tax payable by the highly compensated individuals.

*What to do?*

The first step is to review your health plans to see if they are discriminatory. If they are, then a determination has to be made as to whether they are grandfathered. If a plan is discriminatory but is grandfathered, a cost/benefit analysis will have to be made to decide how important (and costly) it may be to resist a change in order to maintain grandfathering. For example, if your broker suggests that you change your insurance policy because your policy will be subject to a very steep premium increase, you will have to evaluate whether it is better to change the policy and lose your grandfathering or, in the alternative, stay with the current policy, maintain grandfathering and pay the premium increase.

If you do have a discriminatory plan that is not grandfathered, you might consider eliminating it or eliminating the discriminatory feature. Alternatively, the best approach might be to expand coverage, but to pass on a larger portion of the premium cost to employees. Under either approach, you might want to make cash payments to executives, in lieu of lost benefits, and perhaps gross them up for their increased tax liability. ■

*To discuss how these new rules apply to your situation, please contact Jay Fenster, Esq. or Ira Langer, Esq.*

## ALERT: GOVERNMENT PROVIDES FINANCIAL ASSISTANCE TO EMPLOYERS

The Early Retiree Reinsurance Program, sponsored by the U.S. Department of Health and Human Services, provides financial assistance to employers paying for post-retirement health benefits for retirees younger than age sixty-five. This program applies to both private businesses and public entities.

For more information, please go to www.healthcare.gov/news/factsheets/early_retiree_reinsurance_prgram.html. ■

*Our actuaries have performed countless calculations for financial statements for post-retirement health benefits, both in the private and public sectors. Please call Andrew E. Roth, Esq. with any questions you may have.*

## Estate Planning Update

With the year nearly over, the uncertainty regarding the federal estate tax still exists. While a number of House and Senate bills reforming estate taxes have been introduced this year, no permanent solution has yet been enacted. The common wisdom is that between now and the end of the year, there will be some finality… hopefully.

Despite Congress' inaction, there are a couple of planning techniques which bear consideration this year.

Each individual can make gifts of $13,000 of assets ($26,000 if you are married) each year without any gift tax. There is an additional gift tax exemption that should also be considered. All payments of tuition or medical bills by a donor can be made over and above the $13,000 (and $26,000) exemption as long as the payments are made directly to the institution. In other words, an individual can write a check for $13,000 (or $26,000) to a grandchild and, in addition, pay a $30,000 tuition bill as long as the check is written to the pre-school/private school/college and not to the grandchild. That individual can also pay medical and dental bills (including the orthodontist's bill) for a grandchild provided that the check is issued directly to the physician or hospital.

In addition, any gifts that exceed the previously-described annual gift tax exclusion will exhaust part of your $1,000,000 lifetime gift tax exclusion. A significant benefit to making such large gifts is to remove the appreciation on the gifted assets from the donor's estate. In 2010, an *extra* advantage is that the gift tax rate is at a historic low of 35%, which is 20 percentage points lower than 2011's slated 55% gift tax rate. Therefore, for individuals who are interested and capable of making large gifts, it makes sense to consider transferring assets to the next generation and paying gift tax *now* at a lower rate rather than holding the assets and having your heirs pay estate tax at a higher rate and on assets which have since appreciated. ■

*Please call Michael Markhoff, Esq. with any questions.*

## In Our Firm

*Congratulations to Michael Markhoff*

We are thrilled to announce that Michael Markhoff has been named by New York *Super Lawyers* Magazine as one of the top attorneys in New York in 2010 in the area of Estate Planning and Probate. Only five percent of the lawyers in the state are named by *Super Lawyers*.

Michael and Harris Markhoff have also been selected by their peers for inclusion in *The Best Lawyers in America® 2011* (Copyright 2010 by Woodward/White, Inc. of Aiken, SC). Michael was selected in the field of Trusts and Estates and Harris was selected in the fields of Trusts and Estates and Corporate Law. Selection to *Best Lawyers* is based on an exhaustive peer review survey by more than 39,000 leading attorneys throughout the United States.

This publication is intended for general information purposes only. It is not intended to constitute individual legal advice to any specific client.

If you would like to receive this newsletter by email, please email Paula Peck at ppeck@dmlawyers.com

## Cash Balance Plans: How to Increase Your Tax-Deductible Plan Contributions

A "Cash Balance Plan" is the integral component of an innovative retirement plan design which allows you to make substantially larger tax-deductible contributions than those permitted under profit-sharing and similar defined contribution plans (DC Plans). Cash Balance Plans provide for easily understandable individual account balances not otherwise available under a defined benefit pension plan. Each plan participant has his or her own account balance that is credited annually with a contribution and a specified rate of return.

Ideal candidates for Cash Balance Plans are businesses with two or more owners who may have different ages. In a Cash Balance Plan, similar or varying contributions can be made on behalf of each owner independent of their ages, and each owner will know the exact amount of the contribution attributable to him.

When a Cash Balance Plan is combined with a DC Plan, the combination of the two plans gives the business owner both an increased tax deduction and a substantial amount of flexibility as to each year's contributions.

The Table below illustrates how you can make an increased tax-deductible plan contribution to a Cash Balance Plan (see row D) even after contributing the maximum $49,000 to a DC Plan. (Row A plus Row B equals the maximum $49,000).

The Table shows one example of an allocation maximized for the owner; the assumption is that the staff contribution will be as low as IRS rules permit, and the owner's compensation is at least $245,000.

| | **Type of Plan or Plan Feature** | **Contribution Amount for Owner** |
|---|---|---|
| A. | Profit-Sharing Plan – Employer Discretionary Contribution | $32,500 |
| B. | 401 (k) Salary Reduction Plan - Employee Discretionary Contribution | $16,500 |
| C. | Additional "Catch-Up": Owner over Age 50 | $ 5,500 |
| D. | Cash Balance "Add-on" Plan - [On top of Employer's DC Plan] | $43,450 |
| E. | Total Contribution: Owner under Age 50 [A+B+D] | $92,450 |
| F. | **Total Contribution**: Owner over Age 50 [A+B+C+D] | **$97,950** |

Note also that depending upon the level of staff compensation, the Cash Balance amount that can be contributed for the owner [Column "D", above] may be even larger.

When a business owner needs a substantially larger tax deduction, a stand-alone Cash Balance Plan is the answer. Depending on the business owner's age, contributions can range from $75,000 to $200,000 (or more) each year. If the facts warrant it, we can even add on a DC Plan that will provide the owner with an *additional* $31,000 to $36,700 (depending on the owner's age). However, such plans require careful analysis and preparatory actuarial studies.

The most important factor is to ensure that the cost for covering the staff does not outweigh the benefit of the plan to the business owner. A thorough analysis of employee data combined with creative planning concepts often result in a successful outcome for the business owner. Obviously, it would be foolhardy for a business owner to think of proceeding without the benefit of such an in-depth analysis.

Proper design, implementation and administration of Cash Balance Plans can dramatically increase contributions on behalf of business owners. The increases range up to an additional $40,000 (or more in many cases), even when the business owners are already fully funding contributions under their existing DC Plans. The increases can even be up to $200,000 (or more) when a stand-alone plan is used. If you want to make a plan contribution for yourself in excess of $49,000, a Cash Balance Plan is the answer.■

*If you have any questions regarding Cash Balance Plans, please contact Ira Langer, Esq. or Andrew E. Roth, Esq.*