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**Section 409A Deadline Looms**

**No Extensions Anticipated**

The final deadline for amending all deferred compensation plans to comply with Code Section 409A is **December 31, 2008**. All deferred compensation plans must be reviewed, and in most cases, updated by that date.

Code Section 409A is a very broad statute, and it impacts many arrangements that are not traditionally considered "deferred compensation." Therefore, it is important to review all compensation arrangements well before the **December 31 deadline**.

To get started on reviewing and updating your Code Section 409A arrangements, please call Don Mazursky (404.888.8840), David Putnal (404.888.8836), Glenn Infinger (404.888.8845), Toby Walls (404.888.8870), or Teri King (404.888.8847).

**CONFLICT OF INTEREST FOR FIDUCIARIES WHO REVIEW AND PAY BENEFIT CLAIMS**

The Employee Retirement Income Security Act of 1974 ("ERISA") grants wide latitude to plan fiduciaries who decide benefit claims. Courts generally will uphold these decisions unless the court determines that they are "arbitrary and capricious."

**Supreme Court Ruling on Conflict of Interest.** However, the U.S. Supreme Court recently determined in *Metropolitan Life Ins. Co. v. Glenn* that some claims decisions are not entitled to this level of deference. Specifically, ERISA claims fiduciaries that make benefit claim determinations **and** pay claims from their general assets operate under a conflict of interest.

*Consider, for example, the plan sponsor of a self-insured health plan that also reviews claims for benefits. The plan sponsor's determination that no benefits are due under a claim for benefits would have a direct financial benefit because it would not need to pay for the denied benefits.*

This financial conflict of interest is not the only factor the courts must examine to determine whether to uphold a fiduciary's claim decision, but it is another way for participants to challenge these decisions.

**How to Minimize the Appearance of a Conflict.** Though the Supreme Court did not create any bright-line rules for evaluating conflicts of interest, there are several steps that claims fiduciaries can take to minimize the appearance of a conflict.

- A written claims determination policy that creates a fair and objective claims determination process is essential.
- The claims determination policy should separate the decision making fiduciary from those interested in the company's finances. The claims fiduciary (whether an individual or a committee) should not include any person who is associated with the company's financial matters.
- Experts (*i.e.*, doctors) used to review claim files should be instructed in writing to be fair and impartial.
- Management checks can be imposed that penalize inaccurate decision making. For example, if a claim proceeds to litigation, the claims fiduciary's performance can be judged, at least in part, on whether the court agrees with the claims fiduciary's decision.
- Evidence should not be ignored, and the decision of the claims fiduciary should be explained in full. For example, in the *Glenn* case, the plan administrator failed to provide all medical reports to the hired expert, and it failed to explain why it rejected the benefit determination of the Social Security Administration.

**Conclusion.** Following the Supreme Court's decision in *Glenn*, claim denials by conflicted claims fiduciaries are likely to be tried more often. However, following the guidelines described above should help prevent additional litigation and should provide for fair claim determinations.

If you have questions about this issue or would like assistance in evaluating your administrative claims procedure, please contact Randall Constantine (404.888.8877), Ed Johnson (404.888.8875), or Megan E. Gideon (404.888.8849).

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