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Employee Benefits - Review of Plan Identifies Defects, Implements Corrections and Avoids Penalties

With new compliance requirements being issued regularly, a public corporation with a 401(k) plan numbering over 9,000 participants and assets amounting to over \$162 million requested our Employee Benefits group's assistance. We reviewed not only the corporation's plan document for regulatory compliance, but also reviewed the human resources department and plan administrator's day-to-day operation of the 401(k) plan to ensure conformity with the fiduciary and tax-qualification requirements. Our Employee Benefits group audited fiduciary actions beginning with the plan-related board of director's resolutions and ending with the plan administrator's enforcement of those resolutions. The corporation initiated the review when it began to suspect that the plan was not in compliance with certain provisions required by both the Internal Revenue Service (the "IRS") and Department of Labor.

In our review, the Employee Benefits group identified both fiduciary and plan document violations. These errors stemmed from the dereliction of duty by the plan's third party administrator, a "TPA," (a company retained to handle the plan's compliance duties). The plan's TPA failed in its duties and never notified the corporation that the plan failed its nondiscrimination tests for the past three plan years. In order for a 401(k) plan and its participants to retain related tax benefits, the plan must pass the nondiscrimination tests set forth by the IRS each year. These tests ensure that lower paid employees have meaningful participation in the 401(k) plan. Failure to pass these tests or to correct for the test failures places a 401(k) plan's tax qualification (which allows participants to defer money in pre-tax and to transfer amounts to other tax-deferred vehicles) in jeopardy. Although the corporation may contract with an outside service provider to handle these compliance tests, ultimately it is the corporation as plan sponsor who is responsible for correcting these problems.

Our Employee Benefits group audit found that the third party administrator not only failed to inform the corporation of the plan's failure to pass the nondiscrimination testing but, furthermore, also failed to inform the company within the time allowed by the IRS to correct these errors without significant penalty. These errors, along with other fiduciary and plan document violations, amounted to a correction of \$1 million to be paid by the corporation. However, our experience working with retirement plans (both from conception through correction) along with our extensive background analyzing plan failures and designing regulatory-compliant corrections, allowed us to negotiate a settlement that enabled the corporation to retain the plan's tax qualification and required a correction amount less than would otherwise be required. The IRS praised our Employee Benefits group for devising a creative and equitable solution mutually beneficial for the 401(k) participants and the corporation as plan sponsor.

Employee Benefits - Review of Plan Identifies Defects, Implements Corrections and Avoids Penalties, Continued

This case illustrates the benefits of retaining the right counsel to address a highly specialized problem. Employee Benefits law is not just a specialty of law, but is actually a subspecialty of tax law (considered a specialized area of law itself) which developed as the retirement plan requirements and employee benefits rules became more and more and more complicated. In this area a client receives a more efficient and personalized solution for its fiduciary and 401(k) plan's problems with our Employee Benefits group's many years of experience.

