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Utica Physicians' Association, Ltd.

UPAL ADOPTS NEW COMPLIANCE FEE

TO ADDRESS LATE DEPOSIT OF 401(K) CONTRIBUTIONS

Effective March 1, 2011, UPAL is adopting a new fee chargeable to retirement plans participating in the UPAL Retirement Program. This fee will only be incurred by Plan Sponsors which fail to comply with Department of Labor requirements for timely depositing employee salary deferral contributions in the retirement plans they sponsor. The fee will be $250.00 for each payroll failure.

Below describes the background and compliance considerations leading to the assessment of this compliance fee.

Background

Most retirement plans participating in the UPAL Retirement Program are Profit Sharing Plans with a 401(k) salary deferral feature.

U.S. Department of Labor Regulations require all employers (UPAL medical practices) who maintain 401(k) plans to deposit their employees' salary deferral contributions no later than 7 business days (3 days for large plans) from when following the contributions were withheld from employees' paychecks. The Department of Labor also regards the date of deposit as the date of receipt of contributions on behalf of the plan.

If the employer fails to meet the above deadline, the contributions in question will be deemed to have become "plan assets." Because it is a violation of ERISA for an employer to have custody of plan assets, plan fiduciaries will have committed various breaches of fiduciary duty. These serious fiduciary breaches include: failure to maintain plan assets in trust; allowing plan assets to inure to the benefit of the employer; self-dealing in plan assets; and failure to act for the exclusive purpose of providing benefits to plan participants and beneficiaries.

Late deposit of 401(k) contributions also constitutes a "prohibited transaction." A prohibited transaction is subject to a ten percent excise tax, which is administered by the Internal Revenue Service. This tax is to be voluntarily reported and paid by an employer on IRS Form 5330 (Return of Excise Taxes Related to Employee Benefit Plan). The excise tax is assessed on the amount involved in the prohibited transaction and, in the case of late deposit of 401(k) contributions, the amount involved is deemed to be the interest or other amount contributed to participant accounts by the employer as compensation for the late deposit.

The Department of Labor requires an employer to "correct" a late contribution of 401(k) contributions by making an additional contribution to the accounts of affected employees to compensate them for lost earnings.

Section 501(l) of ERISA requires a fiduciary to pay a penalty equal to 20 percent of the amount recovered by the Department of Labor for fiduciary breaches, either by settlement or in court proceedings. This penalty can be waived by the Department of Labor, and is unlikely to be assessed unless the late deposit of 401(k) contributions is discovered by the Department of Labor on audit.

In the case of UPAL plans, these penalties are small in nature. Sometimes pennies. Nonetheless, to maintain compliance of the offending plan, UPAL calculates the earnings and penalties and advises the practice. Then, upon receipt, applies those amounts to the participants' accounts. All of this added service takes valuable staff and management time.

UPAL Compliance Service

As part of its compliance service to participating plans, UPAL monitors the timeliness of receipt of plan salary deferral contributions. Most UPAL medical practices are compliant. However, being late with the deposit of employee deferrals into the Plan triggers the reporting and penalty calculations.

UPAL staff is spending increasing amounts of time on this regulatory compliance activity. This includes maintaining the log, processing the contributions, checking to see dates posted, calculating lost earnings and interest on lost earnings and filing of paperwork. In addition, management time is expended in the oversight and review of this process and the penalty calculations.

New Fee

To encourage compliance and to deter Plan Sponsors, UPAL will no longer underwrite the expenses incurred when plan sponsors fail to comply with the DOL regulations. Effective March 1, 2011 UPAL has adopted a separate fee for providing this set of special services in the amount of $250.00 per payroll failure.

UPAL will continue to work with Plan Sponsors to insure compliance, but in the event some remain unwilling to comply, they will now pay the cost of rendering this additional set of services to maintain compliance of their plan as mandated by the DOL and IRS.

The very best insurance against incurring this additional fee is to comply with government regulations by timely remitting employee deferral amounts.

Questions

If you have any questions about or wish to discuss the compliance fee, contact Kent Butcher, President/CEO, or Lea Ann Nunley, Vice President for Retirement Plan Services, at 918/747-5585.