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Retirement Plan Enrollment and Termination Issues – Beyond Scratching the Surface

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Case Study I: Participant Enrollment Issues

- On January 1, 2017, BigCo, a company with 40 employees, acquires all of the stock of LittleCo, a company with 10 employees.
- LittleCo has never offered its employees any type of retirement plan program. Almost all of LittleCo's employees are NHCEs.

Case Study I: Participant Enrollment Issues

- BigCo offers its employees a 401(k) Plan with an automatic enrollment feature: 3% elective deferral and a 3% match. Employees are automatically enrolled as soon as administratively feasible following their date of hire. The Plan provides for participation by all employers in BigCo's controlled group.
- On July 1, 2017, an employee of LittleCo asks about the Plan's eligibility rules, wondering whether she is eligible to participate. At this time BigCo. realizes it has failed to automatically enroll LittleCo employees in the Plan.

Case Study I: Participant Enrollment Issues

- BigCo quickly sets-up 3% payroll withholding for the 10 LittleCo. employees, and is able to have deferral contributions withheld from their next paycheck. BigCo then contacts the Plan recordkeeper and requests accounts be established for the 10 employees.
- Elective deferrals are deposited into the new accounts within 10 days and, pursuant to the terms of the 401(k) Plan, they are invested in the Plan's qualified default investment alternative ("QDIA").

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Issue One – Improperly Excluded Employees

- Improperly Excluded Employees – Failure to implement automatic contribution feature
  - Elective Deferral Correction
  - Match Correction

Issue Two – Delinquent Deposit of Employee Deferrals

- Delinquent deposit of employee deferrals is a prohibited transaction
  - Self-correction
  - Correction under voluntary fiduciary correction program
  - Payment of excise tax
- Form 5500 Schedule H reporting
- Potential operational error

Issue Three – Failure to Provide Automatic Enrollment Notice

- Notice requirements for automatic enrollment plans under PPA (and Code) were not followed
  - DOL penalties
  - Remedy and impact
- Plan fiduciary lost reliance on ERISA 404(c)(5) protections
  - QDIA disclosures
  - Remedy and impact

Issue Four – Potential ADP and ACP Testing Issues

- Plan cannot include include QNEC or match in ADP and ACP testing
  - Potential reduction of the ADP and ACP
  - Order of correction under EPCRS

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Case Study II: Plan Termination Issues

- SlowCo. is a company with 75 employees. It sponsors a 401(k) Plan with a generous 6% matching contribution and a 5-year graded vesting schedule.
- Per the Plan's written terms, forfeitures are to be reallocated among participants in the year following the year in which they arise.
- In 2015, SlowCo encounters difficult financial times and lets go 20 employees, all of whom participated in the Plan, and these employees take distributions of their accounts. All unvested amounts are placed in the Plan's forfeiture account.

Case Study II: Plan Termination Issues

- In 2017, SlowCo is still struggling financially when it receives a purchase offer from GrowCo. The purchase takes place effective April 2, 2017. The next day, SlowCo's former owners sign resolutions terminating the SlowCo Plan, effective March 30, 2017. SlowCo remains a wholly-owned subsidiary of GrowCo.
- The former owners used forfeiture amounts to pay for professional consulting fees associated with (i) whether and how to terminate the Plan, (ii) the preparation of Plan amendments related to Plan termination and **not** required law changes, (iii) the preparation of plan termination resolutions, and (iv) the final Plan audit. The remaining forfeiture amounts were allocated among participant accounts.

Case Study II: Plan Termination Issues

- Effective May 1, 2017, almost all of the SlowCo employees are transitioned to GrowCo (a few took employment elsewhere) and become immediately eligible to participate in its 401(k) Plan. Soon thereafter, GrowCo allows the balances of the employees who transitioned to GrowCo be rolled over to its Plan.

Issue One – Partial Plan Termination in 2015

- Partial Plan termination (rebuttable presumption)
  - Restoration of forfeitures
  - Fiduciary obligations with respect to terminated participants

Issue Two – Use of Forfeiture Account

- Potential operational error
  - Plan's terms governing use of forfeitures must be followed
  - Correction and impact
- Permissible versus impermissible use of forfeitures
  - DOL guidance: settlor vs. reasonable administrative (fiduciary) expenses
  - Potential fiduciary liability

Issue Two – Use of Forfeiture Account

- Voluntary Fiduciary Correction (VFC) Program available
  - Application Steps
  - Impact of no-action letter from DOL

Issue Three – Successor Plan Rule and Impermissible Rollovers

- Significance of date of termination
  - GrowCo Plan as a "successor plan"
- Is there anything SlowCo could have done differently?
- What can or should SlowCo and GrowCo do prospectively?

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