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# The RETIREMENT TIMES

November 2018

## How and When to Pay Plan Expenses with Plan Assets

*Tom Bastin, JD, LLM, AIF, CEBS, Managing Director, Southeast Region*



Some retirement plan expenses can be paid for with plan assets — but many can't. Which are the “reasonable and necessary” retirement plan expenses that can be paid out of plan assets?

Generally, services required to maintain the plan's compliance and administration can be paid from plan assets. Obvious examples include the annual nondiscrimination testing and preparation of the annual Form 5500. Another example is a plan amendment or restatement that is required because a legislative change.

Optional services generally cannot be paid out of plan assets. One clear example is costs for projections that are optional and benefit the company, not the plan participants.

Some service fees may not be easy to classify. Fees for resolving plan corrections — such as delinquent deferral remittances or contributions determined with a definition of compensation not supported in your plan document. In the event of an



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incorrect test result, regardless of who was at fault, the law ultimately holds the plan sponsor responsible for the proper maintenance of the plan. As a result, the plan sponsor cannot shift the financial burden for the corrections to the plan. All in all, it's perfectly acceptable and common to charge reasonable and necessary transaction-based and recordkeeper administrative fees to participants. However, it is critical to ensure that similarly situated participants are treated the same. It would be discriminatory and, therefore not allowed, for non-highly compensated employees to pay administrative fees while highly compensated employees did not.

If you are unsure whether a specific fee can be paid from plan assets, please contact us. We'll happily talk through the particulars of your situation to help you arrive at an appropriate decision.

#### **About the Author, Tom Bastin**

Tom uses his expertise in plan design, administration, recordkeeping, compliance, investment analysis, fee analysis, vendor benchmarking, fiduciary governance and participant education to help plan sponsors and participants reach their retirement goals. PlanAdvisor ranked Tom one of the "Top 100 Retirement Plan Advisers" in 2013 and 2015. Financial Times ranked him one of the "Top 401 Retirement Advisers" in 2015. Tom earned a Bachelor of Arts at Purdue University, a Juris Doctor at Nova University and an LL.M. in Taxation Law from the University of Miami.

## **Don't Let Your Retirement Plan Turn from Benefit to Liability**

A retirement plan is important to your business—and to all the employees relying on it for income later in life. However, mistakes and confusion can turn retirement plans from an attractive benefit into a liability.

A properly administered retirement plan avoids unnecessary costs and administrative problems, and ultimately mitigates liabilities for plan fiduciaries. The IRS recommends periodic plan reviews as part of proper administration and recently released a short bulletin with helpful tips and information about how to create and implement a retirement plan checkup.

A plan checkup should include a review of your plan documents and communications. A comprehensive review will confirm that the plan's current terms are being administered correctly and that the current plan language still makes sense and isn't unnecessarily limiting based on practical administrative considerations. Unintentional fiduciary breaches typically involve administration issues like delinquent deferral remittances, a definition of compensation that's inconsistent with the definition expressed in the plan document, missed participant notifications or misinterpreted eligibility provisions (such as confusing "hours of service" with "elapsed time").

These errors can be time-consuming and costly to resolve — but when recognized early, it's easier and less costly to resolve them. The IRS and the DOL offer voluntary correction programs to help you. Under certain circumstances, a company may self-correct administrative errors internally without informing the IRS, based on their self-correction program.



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There is no substitute for proper administration of your retirement plan, but some document language is cryptic. Accidents can go unnoticed, and most plans can benefit from assistance in interpretation to ensure proper administration of the provisions in their plan document.

A second perspective can be invaluable. For assistance reviewing your plan, please contact us.

## **Hey Joel! – Answers from a recovering former practicing ERISA attorney**



Welcome to Hey Joel! This forum answers plan sponsor questions from all over the country by our in-house former practicing ERISA attorney.

### **Can I avoid an audit by splitting my employees into two plans?**

*- Fingers Crossed in Florida*

Dear Fingers,

There are some organizations out there promoting this approach. Here is the problem: There is no regulation indicating a situation in which two separate plans would be acceptable so you can avoid an audit. There are plenty of regulations regarding control groups, affiliated service groups, etc., indicating this is not acceptable. Upon audit by either the IRS or DOL you have zero guarantee they won't disallow all 5500s filed without an audit subjecting both companies to penalties (IRS \$25 per day, DOL \$1,100 per day) for late filing since no audit was included. Both the IRS and DOL will ask questions



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pertaining to ownership of all entities by the owners of the company that is audited. In other words, they are going to discover there is a second plan.

In addition, under the Prudent Man Standard of Care you will need a strong reason for separating plans and exposing participants to higher costs as a result (all the 403(b) fee lawsuits center around recordkeeper consolidation in order to achieve cost savings in addition to fund consolidation to obtain lower cost share classes). Thus, I would not go this route receiving a legal opinion the plan sponsor can rely upon given the potential for thousands of dollars of fines. The legal opinion should be made out to the plan sponsor and not the TPA or advisor marketing the approach. The plan sponsor needs someone they can turn around and sue when this blows up on them.

Uncrossing Fingers,

*Joel Shapiro*



#### **About Joel Shapiro, JD, LLM**

As a former practicing ERISA attorney Joel works to ensure that plan sponsors stay fully informed on all legislative and regulatory matters. Joel earned his Bachelor of Arts from Tufts University and his Juris Doctor from Washington College of Law at the American University.

*If you have a question for Joel, please send it to Grinkmeyer Leonard Financial. Maybe it will be featured in a future issue!*



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