



Gratitude All Around

I hope this newsletter finds you well and enjoying the transition to spring weather. Here's hoping that it continues!

It is no secret that I turned the ripe old age of 50 last Fall. And to put the proverbial "cherry on top" of what turned out to be a month-long birthday celebration, I was honored by the Midwest Division of the American Cancer Society (ACS) with the 2014 Spirit of Hope Award on October 24 at the ACS Legacy Ball.

While it was a tremendous (and humbling) honor to be recognized for my 20 years of volunteerism – it doesn't signal the end of my involvement with the ACS. In fact, I plan to use this award as motivation for another 20 years of service with the ACS!

With more than 400 people in attendance that night, we exceeded \$310,000 in donations for the Hope Lodge and all of the other wonderful ACS programs that benefit cancer research, cancer patients, and their caregivers! Remember that the American Cancer Society is the *only* non-profit organization

in the world dedicated to fighting *all* types of cancer; for *all* cancer patients and caregivers; *all* the time.

My thanks to those of you who were able to attend and/or provide financial support to the ACS. I wouldn't be able to devote significant time and treasure to the ACS without our clients, associates, family and friends. It meant a lot to me to receive support from so many of you. If you, or your company, are interested in getting more involved with the ACS, please let me know and I will make the connection for you – or you can simply visit: www.Cancer.org

At MCR, we are also grateful for the improving economy. Business owners once again have the opportunity to work "on" their business – instead of just "in" their business. As a result, business is booming here and I hope the same is true for you. The most common issue we are helping companies with right now is how to design and implement effective long-term compensation plans that link their key

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What the heck is ERISA... and why should I care?!?

Well, since you asked... ERISA stands for the Employee Retirement Income Security Act of 1974 (as amended) – and it applies to most forms of retirement and deferred compensation plans offered by employers in the United States.

ERISA was enacted by Congress to provide protection to employee groups who are participating in benefit plans provided by their employers. ERISA requires funding of the promised benefits; it does not allow for benefit plans to discriminate in favor of highly-paid employees; it provides the legal framework for establishing who is responsible for making sure the promised benefits are delivered, annual reports are filed, etc.; and it determines how employees can file complaints under these kinds of plans.

The confusion about ERISA comes from the fact that different sections of the law and regulations apply (or don't apply) to qualified retirement plans [401(k), pension plans, etc.] as opposed to nonqualified deferred compensation (409A) plans – like those that we have helped our clients design and implement. Importantly, *properly structured* nonqualified deferred compensation plans are not subject to many of the ERISA rules regarding funding, reporting and fiduciary liability. Please notice the emphasis on **Properly Structured** in the previous sentence...

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Through some industry contacts – and clients – we’ve learned about a court case that was decided against an employer by the Fifth Circuit U.S. Court of Appeals. In what was supposedly a straight-forward, nonqualified voluntary deferred compensation plan (where participants could elect to contribute salary or bonus to the Plan on a pre-tax basis), the Fifth Circuit overturned a lower court ruling in favor of the Company because the Plan document in question was poorly drafted and unclear as to how ERISA should apply.

I’m not a lawyer, but after 27 years of being around lawyers and the specific legal issues related to this industry, I can tell you that “bad facts make bad law!” And this case [*Tolbert v. RBC Capital Markets Corp.*, #13-20213 (5th Cir. July 14, 2014)] is chock full of bad facts for employers that aren’t careful about how their deferred compensation plans are drafted and documented. I won’t bore you with the

details, but suffice it to say that it is imperative that you work with attorneys that are experienced in not only IRC 409A plans, but also ERISA plans and how these separate pieces of law work together – and apart – in relation to nonqualified deferred compensation plans.

I have seen some poorly drafted plan documents in the past few months that were written by attorneys without much (or any) specific experience in this area. And, just like in the court case mentioned above, any company with an improperly drafted plan document could be exposed to litigation from disgruntled employees, penalties for not properly maintaining an employee pension plan, and other horrors too



numerous to mention here!

As mentioned earlier, at MCR we don’t practice law. However, with a quick 5-10 minute review, we can tell if your plan document is likely to comply, or if there are issues that should be clarified for everyone’s protection. We can also recommend good ERISA / 409A lawyers in the Twin Cities that can help make sure you don’t run afoul of these rules. ✦

Electronic Filing for “Top Hat” Plans Registration Statement

The U.S. Department of Labor (DOL) recently issued proposed regulation §2520.104-23(c), which would require that future one-time registration statements for top hat plans (i.e., nonqualified deferred compensation plans) be filed electronically. The proposed regulation is another step in the DOL’s efforts to accommodate the exchange of information electronically. These statements have always been open to public inspection and the new electronic filing system will not change that.

Nonqualified deferred compensation plans avoid having to file annual Form 5500 with the DOL by complying with the filing of a one-time registration statement within 120 days of Plan adoption. This process has historically

been done by registered mail – and I often joked that they are in the crate next to the “Ark of the Covenant” in a vast warehouse somewhere in Washington, D.C. 😊 (*that’s for all of you Indiana Jones fans out there*).

Electronic filing will make it easier for companies to comply with the process when adopting new plans.

While the final regulation is pending, the DOL has provided means to voluntarily file these statements electronically with the launch of its web-based filing system for the registration notice. The instructions for this filing and a link to the actual online filing, can be found on the DOL website at: www.dol.gov/ebsa/efiletophatplanfilinginstructions.html ✦

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employees to the profitable growth of the business.

For many of these companies, underlying this effort is a desire for owners to create an environment that is conducive to leadership transition – without having to sell the company. If you find yourself (or your company) in a similar situation, please consider attending our upcoming “Business Succession without Selling” breakfast seminar on May 6, 2015. I am thankful to Mike Frommelt (principal of Keystone Search) for his continued partnership in producing this event.

If there is any way we can be of service to you and your company, please don’t hesitate to contact me. ✦

