Co-op Retirement Plan

To: Participating Employers in the Co-op Retirement Plan

From: United Benefits Group

Re: Coverage of Employees and Related Organizations

We receive a lot of questions about which employees must be covered under the Co-op Retirement Plan. In this memo, we'll talk about the Plan and federal Tax Code requirements for employee coverage. We'll then describe the consequences that can occur when any of your eligible employees – or the employees of certain organizations that are related to yours – are not enrolled in the Plan. Before we get to those topics, however, let's briefly talk about why your organization needs to be concerned with these issues.

Why These Issues Are Important

These are important issues because much is at stake if the Plan's terms are not followed or the Tax Code's coverage requirements are not met. If you fail to enroll an eligible employee as discussed below, you risk a costly lawsuit brought by the employee who should be enrolled. Moreover, if the Plan's terms are not followed or there's a failure to follow the coverage rules discussed in this memo, the Plan could be disqualified with respect to all employers participating in the Plan. If that happened, employers would lose the tax advantage of immediately deducting contributions, many employees would be immediately taxed on the value of their accrued benefits, and the Plan's trust would be taxed on all earnings (in other words, it would lose its tax-exempt status). Thus, the stakes are high for employers and employees alike.

Coverage of All Employees, Including Leased Employees

The Plan generally requires that all of your organization's "common law employees" participate in the Plan once they satisfy the Plan's eligibility criteria (which require that the employee attain age 21 and work – or be expected to work – at least 1,000 hours in a year). The determination of whether an individual is a common law employee depends on each situation's specific facts, but your organization will generally be considered the common law employer of those individuals for whom it provides primary direction and control over the details of their work for your organization. This is the same group of individuals who should be receiving a W-2 from you. But your decision to provide a W-2 or a 1099 is not conclusive; the actual *relationship* between your organization and the individual is. Thus, if someone is providing services to your organization, and your organization is controlling that work, he or she is likely your common law employee and should be enrolled in the Plan, regardless of whether your payroll system treats him or her as an employee or something else (like a "contract worker" or an "independent contractor"). Please contact us if you have questions about any of these individuals.

The Plan also requires that you enroll any individual meeting the Plan's eligibility requirements who, under the following sentence, has become a "leased employee" of your organization. A "leased employee" is an individual who is an employee of another employer, but who works under the direct control of your organization pursuant to an agreement (which need not necessarily be in writing) for at least a year. That's right – if you have leased an employee from another organization for at least a year, he or she is considered an employee of yours for Co-op Retirement Plan eligibility purposes. Please let us know immediately if any leased employees are providing services to your organization. You can reduce risk and make it easier to fix any potential problems if you let us know as soon as possible.

Related Organizations

The Federal Tax Code includes rules that require each employer participating in the Plan to cover a minimum number of its employees in the Plan and that prevent an employer from covering a disproportionate number of highly compensated employees. These rules might be simple enough if they applied only to a participating employer, but they are more complicated because they apply on a "controlled group" basis. What is a controlled group? This is overly simplistic, but it essentially includes: (i) an employer; (ii) any subsidiary organization that is at least 80-percent owned by the employer; (iii) any parent organization that owns at least 80 percent of the employer; *and* (iv) certain other organizations that have the same common parent or ownership group as the employer.

If your organization is a stand-alone cooperative and you've enrolled all your common law employees who meet the Plan's eligibility criteria (including leased employees, as discussed above), you meet the Tax Code's requirements. If, however, your organization is part of a controlled group, and *any* employees in that controlled group are not enrolled, you may cause the Plan to fail the Tax Code's coverage requirements. For example, your organization may cause the Plan to fail the coverage requirements if it owns 80 percent or more of a convenience store that has been set up as a separate company, and all of the store's eligible employees are not enrolled in the Plan. The requirements may also be failed if your organization is wholly owned by another organization, and that organization is not a participating employer. If you are aware of any organizations related to your organization that have not enrolled their employees in the Plan, please let us know as soon as possible.

Conclusion

As we've noted above, these issues can trigger severe financial consequences if not addressed. We'd be happy to discuss any questions you might have about this memo. Please feel free to contact us at your earliest convenience.