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LEGAL ALERT

December 7, 2011

Proposed New Enforcement Procedures and Reporting for MEWAs

The Department of Labor (DOL) has issued proposed regulations to implement its new enforcement authority for multiple employer welfare arrangements (MEWAs) and revised reporting requirements for MEWAs. The DOL has also proposed revisions to Form 5500 and the Form M-1 for MEWAs.

A MEWA is typically a self-insured group health arrangement under which a number of otherwise unrelated employers provide health benefits to their employees. There have been a number of instances in which MEWAs have failed or been shut down by regulators because they are financially unsound, lack necessary administrative expertise or have been established or operated fraudulently. The Patient Protection and Affordable Care Act (PPACA) made several changes to the Employee Retirement Income Security Act (ERISA) to address these ongoing issues with MEWAs, including giving DOL new enforcement authority under section 521 of ERISA, revising the MEWA reporting requirements under section 101(g) of ERISA and providing for new criminal penalties under section 519 of ERISA. The DOL has proposed regulations to implement several of these changes.

- The proposed new enforcement rules provide procedures for the DOL to issue cease and desist orders to MEWAs, without prior notice or hearing, or summary seizure orders if a MEWA appears to be in a financially hazardous condition. Related rules establish procedures for a hearing before an administrative law judge to decide a challenge to a cease and desist order issued by the DOL.
- A companion proposal would authorize enhanced reporting by MEWAs, including revisions to Form 5500 and revisions to Form M-1. MEWAs generally would be required to register with DOL before operating in a state or be subject to substantial penalties. These proposed changes would also require MEWAs that are ERISA plans subject to the Form M-1 filing requirements to file a Form 5500 Annual Return/Report, regardless of plan size. This proposal is said to impose the least possible burden on legally compliant MEWAs and "entities claiming exception" from the MEWA rules as collectively bargained plans, while effectuating DOL's responsibility to take enforcement action against fraudulent or abusive MEWAs.
- The proposed regulations were published in the December 6, 2011 Federal Register. Comments on the proposed rules are due by March 5, 2012. There are no express effective dates proposed.

While the objective of these rules is to police fraudulent or otherwise abusive arrangements in the marketplace, as discussed above, a bona fide welfare plan covering employees of multiple members of a business enterprise sometimes can also be a MEWA, depending on the ownership, control and other structural relationships in that enterprise. The consequences of the proposed reporting rules in those circumstances should be carefully considered, e.g., where it is discovered after the fact that such a MEWA innocently and unintentionally came into being. The proposed new M-1 filing requirements, however, preserve the rule that a MEWA used as a temporary arrangement following a change of control of businesses, such as a merger or acquisition, is not required to file Form M-1.

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