October 13, 2010

Retiree Health Plans - Beware of What you Wish for

Our September 28th blog entry discussed retiree-only plans and that to solidify their exemption from the ACA employers should put those benefits into separate ERISA plans. For months, some attorneys have been hammering away at the Departments regarding this issue (but I'm not sure why). Well, now the Departments have addressed the issue, and while it is still inconclusive, I don't think the end result looks pretty.

Today, the Departments issued another round of guidance - called Part III on the DOL website. The Departments state that they are analyzing the separate versus one ERISA plan issue for the retiree only exemption, and said that they intend to solicit comments and publish guidance on this issue in 2011.

Until guidance is issued, the Departments state they will treat plans as satisfying the exemption from HIPAA and the Affordable Care Act for plans with less than two participants who are current employees. It is unclear if this means they intend to treat separate retiree-only benefit options as exempt (even if not a separate ERISA plan), but I think that is the intention. To the extent future guidance on this issue is more restrictive with respect to the availability of the exemption than this interim relief, the guidance will be prospective, applying to plan years that begin some time after its issuance.

Even if the Departments allow a seperate retiree benfit option to maintain the exemption under Part 7 of ERISA and CHapter 100 of the COde, this does not prevent an employer's retirees from suing the sponsor on this issue. A seperate ERISA plan still is the best way an employer can solidify the exemption.

http://www.dol.gov/ebsa/faqs/faq-aca3.html