Kilpatrick

SEPTEMBER 28, 2010

Retiree Only Plans - Time is Running Out

The so-called "retiree-only" plan exception has been around since HIPAA was passed back in 1996. However, it has taken on new importance now that a retiree-only plan can also be exempt from the provisions of the Affordable Care Act. But, what is this amorphous being? In the past some employers have claimed that this exception applies at the benefit option level even if retiree options are wrapped together with active employee options in the same ERISA plan. This position is certainly harder to maintain under the proposed DOL regulations defining a "plan" for Part 7 purposes. But, clearly if an employer wanted to have any comfort on this issue - not only from DOL audits, but also plaintiffs seeking to sue alleged retiree plans - it would structure the retiree benefits in a separate ERISA plan. This was confirmed last week during the ABA Section of Tax meeting that I attended in Toronto. Representatives from Treasury confirmed that the determination of a retiree-only plan is a facts and circumstances analysis. If the plan is a separate ERISA plan, then it should meet the exception. But, if it is not a separate ERISA plan, an employer would have to accumulate a lot of facts and circumstances in an attempt to show it was a separate plan. My question has always been why choose that route when a better route is available with certainty. Retiree benefits should be placed into seperate ERISA plans to avoid the Affordable Care Act requirements.