Church Plan Exception Can Be Difficult

By Rich Glass, JD

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The theory behind the "Church Plan Exception" is simple: Bona fide tax-exempt religious organizations are not subject to ERISA and COBRA when providing health plan benefits to their employees. This rule's application is not as straightforward as one might think, however.

The difficulty often lies in the infrequency that issues with the church plan exception arise and the rule's extension beyond traditional church organizations. For example, the church plan exception can apply to non-Christian institutions, like a Muslim mosque or a Jewish synagogue. Also, various institutions — like hospitals, community centers and schools — are often affiliated with religious organizations. Whether the church plan exception applies to them requires a close look at the definition and a review of the relevant facts.

Under §4980B of the tax code, church plans are exempt from COBRA, along with small employers and governmental plans. The ERISA regulations define a church plan as one that is established and maintained for its employees or beneficiaries by a church or a convention or association of churches. A church plan does not include a plan that benefits employees who work in an unrelated trade or business.

Three-part Church Plan Test Used in *Polk* Case

- Did the religious institution have an official role in corporate governance?
- Did the organization receive financial assistance from the religious institution?
- Was there denominational requirement for any employee or customer?

As a starting point, some church plans may use ERISA-based templates in creating plan documents and summary plan descriptions that spell out the plan's benefits for employees. These templates will often include ERISA-related boilerplate and the standard, required COBRA statement, which explains how and when COBRA applies. Do accidental COBRA and ERISA references cause a plan to lose the church plan exception?

Case Law on the Church Plan Exception

About a decade ago, a court concluded that such references did not constitute a waiver of the exception. The rationale was simple in that case, *Tucker v. Ochsner Health Plan*: Other courts had come to the same conclusion when faced with similar facts regarding COBRA's governmental plan exclusion.

When is a non-religious organization like a hospital sufficiently connected with a religious organization such that its health plans are exempt from COBRA? Code Section 414(e) requires the organization to be tax-exempt and controlled by or associated with a church or convention of churches.

This is not always a simple thing to prove. In *Polk v. Dubuis Health System,* the employer was a health care provider with certain religious affiliations. It did not offer COBRA for an employment termination qualifying event because it thought it was exempt from COBRA.

The court disagreed because Dubuis failed to show a strong enough connection to a church or convention of churches. Specifically, the court applied a three-part test. (See sidebar.)

The sole corporate member of Dubuis was Christus Health, which was also a tax-exempt organization established by the Sisters of Charity of the Incarnate Word. Christus

See *Exception*, p. 6

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Another Case Says, 'No Harm, No Foul'

Plan administrators should make sure that their COBRA notification procedures are up to date with applicable law and are designed to provide accurate notices on a timely basis to all qualified beneficiaries. If a mistake is made and no harm has occurred to the qualified beneficiary, courts will generally be lenient in letting the administrator off the hook — but not always. Therefore, the best defense is a well-designed system.

Here's another case where an employer/plan administrator that admittedly failed to send a COBRA election notice on a timely basis was able to avoid penalties because the qualified beneficiary was not harmed by the notice failure. Although some courts will still penalize the administrator for a COBRA notice failure, notwithstanding the lack of harm; this court let the administrator off the hook. The case is *Golez v. Kerry, Inc*., 2008 WL 5411493 (N.D. Calif., Dec. 29, 2008).

Facts of the Case

Reynaldo Golez worked for Kerry, Inc. until he was terminated from employment in March 2007. (COBRA provides that a termination or reduction in hours of employment is a qualifying event that entitles qualified beneficiaries to up to 18 months of COBRA coverage. See ¶1122 of the *Guide*.) However, he did not receive a COBRA election notice until Aug. 21, 2007 — several months late. Under COBRA, an employer has 30 days from the qualifying event date to notify the plan administrator, who then must provide a COBRA election notice within 14 days. (See ¶1312 and ¶1314.) Golez sued Kerry for notice violations under both COBRA and California continuation coverage law. (A plan administrator that violates COBRA's notice requirements may, in a court's discretion, be liable for up to $110 a day from the notice failure date. See ¶1520. Section 2807 of the California Labor Code provides that employers must notify former employees of the availability of continuation coverage for medical, surgical or hospital benefits, and use a standardized form from the California Department of Health Services.)

See *No Harm, No Foul*, p. 7

Exception (continued from p. 5)

elected one-half of the members of the Dubuis governing board. Three board members were members of a religious order. However, there was no denominational requirement for any employee or customer of Dubuis, and the governing board operated autonomously without any formal control by any religious organization. As a result, the court ruled that a church plan had not been established.

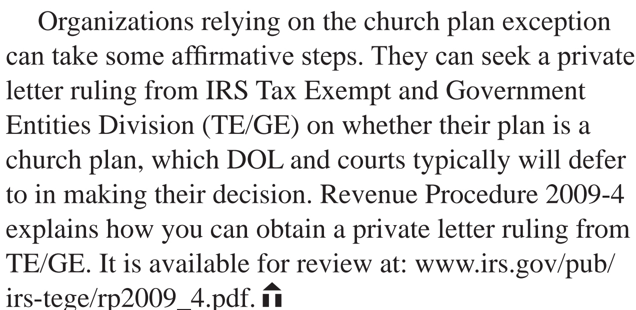
There was a different outcome in a case decided last year, *Coleman-Edwards v. Simpson.* An elementary school was operated by the Concord Baptist Church of Christ. The school principal was covered by a health plan and ultimately lost her job. She sued the senior pastor, the church and a few others, including the U.S. Department of Education, for a variety of legal claims. One of the claims was that Concord Baptist never offered her COBRA.

The court examined the church plan exception and determined that it did indeed apply in this case. The school was not a separate entity from Concord Church, but merely an extension of its programs. The plan in question was the same one that covered church employees. The senior pastor was involved in the school's direction, including all hiring and firing decisions and establishing disciplinary rules for all school employees.

Correcting Mistakes Can Be Arduous Task

Correcting a mistaken application of the church plan exception requires correction under purview of either the U.S. Department of Labor (DOL) or a court, if a lawsuit has been filed. It can be an arduous task and can cast both the organization and its affiliated church in a bad light.

Hospitals, schools and other organizations with religious affiliations often assume their plans are exempt from ERISA and COBRA. This can be a dangerous assumption. Perhaps the nature of the relationship has changed over the years and the exception no longer applies. Or perhaps the assumption was based initially on other faulty assumptions.



IRS Can Determine Status

Organizations relying on the church plan exception can take some affirmative steps. They can seek a private letter ruling from IRS Tax Exempt and Government Entities Division (TE/GE) on whether their plan is a church plan, which DOL and courts typically will defer to in making their decision. Revenue Procedure 2009-4 explains how you can obtain a private letter ruling from TE/GE. It is available for review at: www.irs.gov/pub/irs-tege/rp2009_4.pdf.

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