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Why aren't more lawyer's covered by pension plans?

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The maximum federal income tax bracket is now 39.6 percent. For lawyers prudent enough to have accumulated investment real property or other sources of passive income, either through their own efforts or through picking the right parents or spouses, there may be another 3.8 percent tax on unearned income. There is also a California income tax of as much as 13.3 percent on income above \$1,000,000. Granted the California tax is deductible as long as you are not subject to the alternative minimum tax, which will make the 13.3 percent only $(100 \times 39.6 = 60.4 \text{ \AA} - 13.3 =) 8.03$ percent or $(100 \times (39.6 + 3.8) = 56.6 \text{ \AA} - 13.3 =) 7.53$ percent, for a total of either $(39.6 + 8.03 =)$

47.63 percent or $(39.6 + 3.8 + 7.53 =) 50.93$ percent. And that is without Social Security (FICA), unemployment (FUTA) and disability (SDI).

In this environment it is surprising that so few lawyers, whether operating as sole proprietors or in small to medium-size firms, are covered by pension plans. The tax benefits should be well known: a deduction for the contribution; growth on the assets can be achieved without being subjected to tax; the lawyer, as participant, does not pay taxes until a withdrawal is made; withdrawals can be delayed until April 1 of the year after age 70 and a half.

Virtually unknown is the fact that if the lawyer/participant does not need the funds accumulated in the pension trust, it is possible, despite the "required minimum distribution" rules, to pass the funds on to the lawyer's heirs, meaning the deducted contributions will not be taxed during the lawyer's lifetime (meaning the tax deferral might be five decades or more). In addition to the tax benefits, of special interest to lawyers should be the creditor protection benefits: the assets in a pension trust can be protected from all but three creditors: the U.S. government, e.g., the IRS; spousal support orders; and child support orders. Notable as a creditor that does not have access to pension trust assets: the California Franchise Tax Board. Of course the most well-known example of the creditor protection for retirement benefits is O.J. Simpson. He had two pension plans - the National Football League Players' Association plan and the plan sponsored by his own loan-out corporation - neither of which was available to satisfy the \$33.5 million judgment in favor of the Brown and Goldman families.

How do we explain the low level of participation by lawyers in pension plans? This is primarily due to a number of misunderstandings regarding the most important type of pension plans, defined benefit pension plans ("DBPPs"). DBPPs are the most important type because they permissibly discriminate in favor of three types of employees: (i) older; (ii) higher paid; and (iii) longest-term. In most law practices the lawyer/proprietor is likely to be in at least two, often all three of those categories: older than most of the other employees; higher paid; and likely to be with the business until it ends. In addition to that permissible discrimination, DBPPs are more important than other types of retirement plans because the contribution is not limited to a specified dollar amount. Compare a profit sharing plan, of which a 401(k) is merely one special type. The annual contribution cannot exceed roughly \$51,000. By contrast, the cost -

Questions and Comments

NEWS RULINGS VERDICTS

Tuesday, February 26, 2013

U.S. Court of Appeals for the 9th Circuit Auto purchaser plaintiffs cannot keep would-be class action in state court, 9th Circuit rules

Jockeying over class action venue issues got the 9th U.S. Circuit Court of Appeals' attention Monday as auto purchaser plaintiffs tried but failed to keep their case in consumer-friendly state court.

Labor/Employment

Sonoma County retirement benefits dispute heads back to district court

A ruling from the 9th Circuit Court of Appeals gives the retirees' association a second chance to prove the benefits in questions were vested rights, following suit with at least four other state and federal appellate rulings.

Judges and Judiciary

ABA report recommends disclosure of social media 'friends'

If an attorney or witness in a case is "friends" with the judge on a social media website like Facebook, the judge should consider disclosing it, a new opinion from the American Bar Association suggests.

Government

Prison officials buried critical report, plaintiffs claim

State officials "buried" a report by a consultant who was critical of the prison system's suicide prevention program, according to a filing by plaintiffs in a case accusing California of providing inadequate care to inmates.

Environmental

Oyster farm to remain open pending appeal, 9th Circuit rules

A 9th Circuit motions panel granted an emergency request to keep Marin County's Drakes Bay Oyster Co. open for business while its lawyers appeal a closure order.

Government

State Supreme Court appoints two judges

The California Supreme Court has appointed Justice Ignazio J. Ruvolo, presiding justice of the Court of Appeal, 1st District Court of Appeal, and Judge Thomas M. Maddock of the Contra Costa County Superior Court, to the state's Commission on Judicial Performance.

Criminal

Engineer gets three months in prison for trade secrets theft

A federal judge on Monday sentenced a Silicon Valley project engineer convicted of stealing trade secrets from his former employer to three months in prison.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Education

La Verne law school picks dean

which becomes the deductible contribution - for a DBPP for that same lawyer participant might be \$250,000.

First there is a perception that the cost of covering the rank and file employees will be so high that the lawyer/proprietor will be better off taking the money that would otherwise go into the pension plan, paying tax on it, and pocketing what is left. In virtually every situation we examine that is not the case. Second, there is a perception that once contribution has been established, that level of contribution must be continued. Again, nothing could be further from the truth. Defined benefit pension plans are extremely flexible when it comes to contributions, arguably more flexible than profit sharing plans and 401(k) plans. Third, there is a perception that pension plans cannot buy real estate. Absolutely false. Pension plans can, and often do, buy real estate. Fourth, even those who understand that pensions can buy real estate believe that pensions cannot use debt to buy real estate without generating "UBTI" (unrelated business taxable income). UBTI is designed to prevent otherwise tax-exempt entities (charities and pensions) from competing with for-profit entities. It would be unfair if Quaker Oats could sell cereal for less than Kellogg's if the former was owned by the Quaker church. To prevent that, in this hypothetical, the Quaker church would have to pay tax on the cereal company income because it would be "unrelated" to the church's tax-exempt purpose. One special type of UBTI occurs when a tax-exempt entity uses debt to buy property. However, there is a special exemption that permits pensions to buy real estate using debt without creating UBTI. Fourth, there is the perception that maintaining a DBPP is expensive. Judge for yourself: for a two lawyer practice with three employees, the cost of setting up the plan in the first year might be \$4,500 and the annual maintenance cost might be the same. In exchange for a \$250,000, most people would not view that as expensive. Fifth, there is a belief that all that is needed is to hire an actuary to "run some numbers." Actuaries are necessary members of the planning team. So is the CPA. However, pensions are legal documents governed by Federal tax and labor law. A tax lawyer experienced with pension law should be in charge of the planning team to get the best economic result

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In light of the excellent tax and creditor benefits for lawyers, how can we best dispel the misunderstandings so that more lawyers take advantage of DBPPs? Education is, of course, the key. The planning should begin early in the year. March is not too early to begin the analysis for a plan that is to be effective for the 2013 calendar year. It can take a month or more to go through the two rounds of calculations that are often necessary to develop the best plan design.

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The University of La Verne College of Law announced its new dean Monday, more than a year after its former head resigned amid struggles with the school's American Bar Association accreditation.

Obituaries

Nossaman litigator dies after cancer battle

Veteran litigator Terry C. Leuin, a partner at Nossaman LLP, died on Feb. 18 after battling cancer. He was 66.

Litigation

Judge issues sanctions in use-of-force case

A federal judge issued sanctions ruled the L.A. Sheriff's Department failed to preserve certain videotapes of deputies removing inmates from their cells, a violation of the department's own policy.

Law Practice

Sheppard Mullin adds two attorneys in LA and SF

Sheppard, Mullin, Richter & Hampton LLP added two lateral partners this week in its San Francisco and Los Angeles offices.

Corporate

Foreign corporations get better deal upon dissolution

At the end of the day *Greb* is unfavorable to California corporations, which can be sued without time constraint after dissolution, unlike corporations formed under the laws of another jurisdiction. By **Dan Jacobson**

Tax

Why aren't more lawyer's covered by pension plans?

In this environment it is surprising that so few lawyers, whether operating as sole proprietors or in small to medium-size firms, are covered by pension plans. The tax benefits should be well known. By **Bruce Givner and Owen Kaye**

Trusts & Estates

Beware the pitfalls of estate planning during a divorce

If a matter has not been finalized with a judgment and a spouse dies, then the parties are treated as if they are still married. By **Aaron Dishon and Marc Garelick**

Banking

Decision gives lenders a new duty of care to borrowers

Lenders now may be liable for unreasonably failing to review a borrower's request for a loan modification. By **Alfred M. Clark**

Trusts & Estates

Remainder beneficiaries granted standing in revocable trust dispute

With this ruling, the question is settled that remainder beneficiaries do have standing to seek redress of harm to their interests and they do have the right to compel an accounting of "revocable" trust. By **Denise E. Chambliss**

Judicial Profile

Richard H. DuBois

Superior Court Judge San Mateo County (Redwood City)

Environmental

Flurry of bills over CEQA reform stir debate

Legislators, including the head of the California Senate, have introduced a flood of bills to reform