

Law Offices
Prusky Law Associates, P.C.
A Professional Corporation

Byron R. Prusky
ALSO MEMBER OF
DC, MD, NJ, NY and VA BARS

Lorraine C. Gioioso, Paralegal
Lynne B. Shugarts, Paralegal
Sally E. Taub, Paralegal

Baltimore Telephone
(410) 889-1818

620 TWO PENN CENTER PLAZA
PHILADELPHIA, PA 19102
(215) 563-6000
FAX (215) 563-6100

July 17, 2002

New Jersey Office
Woodland Falls Corporate Park
200 Lake Drive East, Suite 204
Cherry Hill, NJ 08002-1171
(856)795-6224
(856)667-6644

Washington, DC Tel.
(202)872-1818

SPONSOR MEMO

GREATER METROPOLITAN MULTIPLE EMPLOYER PLAN & TRUST

RE: §419A(f)(6) Regulations - REG-165868-01 - Published July 11, 2002

The much-anticipated regulations interpreting the 10-or-more employer welfare benefit plan rules under §419A(f)(6) were issued by the Treasury Department on July 10, 2002, and published in the Federal Register on July 11, 2002.

These rules are effective for the first taxable year beginning after July 11, 2002, which for calendar year taxpayers will be the year 2003. For fiscal year taxpayers, any taxpayer with a fiscal year beginning August 1, 2002 or later will be subject to these new rules.

The regulations are proposed, and provide for a comment period followed by a hearing. Written comments must be received by the Treasury Department prior to October 9, 2002, and requests to speak at the public hearing scheduled for November 5, 2002 must be received no later than October 15, 2002.

The publication of this guidance comes 18 years after passage of the law in DEFRA 1984, and the regulations purport to be an interpretation of existing law. Unfortunately, as will be seen from the analysis set forth in the article attached, the regulations delve into the area of new legislation, which is not part of the Treasury or IRS function, but rather comes within the purview of Congress. It is believed that this overreaching will be pointed out in the comments and public hearing on the subject, over the next several months.

The regulations are an attempt to define "experience rating", the only two words in the Internal Revenue Code that preclude the protection of the §419A(f)(6) exception to the general deduction limits of §419 and §419A.

The regulations provide a 5-part test to describe when a plan violates the experience rating concept. These characteristics are:

Prusky Law Associates, P.C.

Sponsor Memo
July 17, 2002
Page -2-

1. Plan assets allocated among the participating employers through a separate accounting for individual employers;
2. Amounts charged under the plan would differ among the employers in a manner that is not reflective of differences in risk or rating factors commonly taken into account by insurers;
3. The plan does not provide for fixed welfare benefits for a fixed coverage period for a fixed price;
4. The plan charges an unreasonably high amount for the covered risk; and
5. The plan provides for payment of benefits upon triggering events other than illness, personal injury or death of an employee or family member, or the employee's involuntary termination of employment.

The enumeration of these characteristics goes far beyond a definition of experience-rating, and provides a whole set of new rules, which are more properly the subject of legislation rather than interpretive regulations.

Treasury also provides a definition of "employer", as including controlled groups, affiliated service groups and leased employees. This is particularly troubling, since there is no provision in the Code having to do with what employees are properly included as to each employer, and this appears to be a gratuitous definition having no roots in either the Code or these regulations.

These regulations clearly overreach their stated purpose, in an attempt by the Treasury Department to define the law rather than interpret the law. For this reason, we believe that these regulations will ultimately be found to be invalid and illegal.

We will be attempting to demonstrate to the Treasury Department in the next several weeks why these regulations should be withdrawn, and we will be suggesting alternative methods of accomplishing the definition of experience rating in a more traditional manner. It is our belief that a clear and concise definition of experience rating was furnished by the United States Supreme Court in United States v. American Bar Endowment, 477 U.S. 105,107 (1986), cited with approval in Booth v. Commissioner, 108 TC 524 (1997), a case specifically dealing with welfare benefit plans. That definition is stated by the Supreme Court to be "The essence of experience rating is the charging back of employee claims to the employer's account."

Until these regulations are modified, finalized or repealed, it is incumbent upon all plan sponsors to inform their prospective new members

Prusky Law Associates, P.C.

Sponsor Memo
July 17, 2002
Page -3-

of the existence of these proposed regulations. Only after a thorough analysis of the situation can a proper decision be made as to whether or not to enter into participation in the plan.

PRUSKY LAW ASSOCIATES, P.C.

By: _____
Byron R. Prusky

BRP:b