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PRT Non-Qualified Plan v. ERISA-Qualified Plan

Safeguarding retirement assets utilizing a Private Retirement Plan ("Plan") is a must, but doing so with an Employee Retirement Income Security Act ("ERISA") qualified plan is not always an easy feat as such requires strict compliance with a substantial amount of statutory regulations. Fortunately, "a review of the legislative history accompanying the enactment of C.C.P. § 704.115 reveals that ERISA qualification is not the sole basis for exemption under California law. In pertinent part, the legislative history provides: '... The exemption under the new law applies to all plans, annuities, and accounts that are provided for in the Internal Revenue Code [...]'." (*In re Witwer (Bankr. C.D. Cal. 1992) 148 B.R. 930, 939, aff'd (B.A.P. 9th Cir. 1994) 163 B.R. 614.*) Thus, both qualified and non-qualified Plans enjoy the exemption protection of CCP § 704.115(b). The major difference between these two types of Plans is that non-qualified Plans fall outside the scope of ERISA and are therefore more easily maintained. Even the IRS advises employers and participants to "[b]e aware that the law and regulations in the retirement plans area frequently change. Make sure your plan document and determination letter, if applicable, are up to date." ([https://www.irs.gov/retirement-plans/a-guide-to-common-qualified-plan-requirements#return.](https://www.irs.gov/retirement-plans/a-guide-to-common-qualified-plan-requirements#return))

If you would like the benefits of exemption protection for your retirement assets without the hassle of continuously ensuring your Plan complies with the constantly changing ERISA regulations, establishing a customized Private Retirement Trust ("PRT") pursuant to CCP § 704.115(b) maybe the best fit for you. Unlike qualified-ERISA plans in which employers design a single Plan for numerous employees despite considerable differences in each employee's retirement goals, the PRT is not a one size fits all type of Plan. Each PRT is designed specifically for the individual participant in connection with a non-qualified Plan thereby avoiding being subject to the rules, restrictions, prohibitions and penalties of ERISA.

"ERISA specifies when you must be allowed to become a participant, how long you have to work before you have a non-forfeitable interest in your benefit, how long you can be away from your job before it might affect your benefit, and whether your spouse has a right to part of your benefit in the event of your death." (U.S. Department of Labor, Employee Benefits Security Administration. FAQs about Retirement Plans and ERISA.) Without these obstacles, the PRT can be custom tailored to suit the particular objectives of each employee with the only requirement of maintaining compliance with the terms of the employer's Plan. For example, "[a]bsent at least one employee beneficiary, a pension plan is not ERISA-qualified." (*In re Stern (9th Cir. 2003) 345 F.3d 1036, 1041; internal citation omitted.*) For purposes of ERISA, however, "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse [...]." (29 C.F.R. § 2510.3-3). Fortunately, a PRT that utilizes a non-qualified Plan is not subject to this narrow definition of an "employee". Rather, a wholly owned corporation that establishes a retirement plan with a single shareholder, director, trustee

and participant qualifies for the full exemption under CCP § 704.115 (a)(1) or (a)(2). (*In re Cheng*, 943 F.2d 1114, 1116 (9th Cir.1991).) This means that a single individual or a married couple can enjoy the same exemption protection of their retirement assets that is made available to large corporations that have numerous employees as well as the money and resources to deal with ERISA regulations.

ERISA-qualified plans also require plan sponsors to meet a number of federal requirements regarding funding. In contrast, another key feature of a non-qualified Plan is that there are no statutory funding limits. Instead, funding is only limited to what can be *proven up as necessary* for retirement. This provides an opportunity for even those persons that are close to retirement age to preserve and protect the amount of assets necessary to fund their retirement. Further regulations imposed by ERISA include rules regarding vesting, participation, and the accrual of benefits.

The hardships imposed on an employer that result from using a qualified Plan are vast and constraining. If you want your retirement plan to fit like a glove rather than being squeezed into an ERISA-qualified plan, contact us today to explore your exemption protection potential.