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EMPLOYEE BENEFITS DEVELOPMENTS OCTOBER 2012

Hodgson Russ Newsletter
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Practices & Industries

Employee Benefits

RULINGS, OPINIONS, ETC.

2013 Benefit Limits Announced

The Internal Revenue Service and Social Security Administration have announced the cost of living adjusted dollar limits applicable to benefit plans. A listing of key limits follows: 2013 LIMIT 401(k)/403(b)/457 plan maximum elective deferral $17,500 401(k)/403(b)/457 catch-up $5,500 Defined contribution maximum annual addition $51,000 Defined benefit maximum annual pension $205,000 Qualified plans maximum compensation limit $255,000 Highly compensated employee $115,000 IRA limit $5,500 IRA catch-up $1,000 SIMPLE limit $12,000 SIMPLE catch-up $2,500 Social Security taxable wage base $113,700

Guidance Provided on Geographic Diversification and Single Property Transactions

Under the Employee Retirement Income Security Act of 1974 (ERISA) Section 406 (a)(1)(A), a fiduciary may not allow a plan to engage in a direct or indirect sale, exchange, or lease between a plan and a party in interest such as the sponsor of the plan. ERISA Section 408(a) provides an exemption for the acquisition, sale, or leasing of "qualifying employer real property" under certain conditions. Qualifying employer real property is defined as parcels of employer real property involving a substantial number of parcels that are dispersed geographically.

The Department of Labor (DOL), in an advisory opinion, provided some guidance on the method of applying the standard of geographically dispersed in cases where a transaction involves a single parcel of property. The DOL was asked whether a contribution to a plan of a single parcel of property might be a prohibited transaction because a single parcel could not by itself meet the geographic dispersion requirement. Similarly, the DOL was asked whether the sale by a plan of a single parcel would fit within the geographic dispersion requirement.

The DOL advised that whether a property is qualifying employer real property is determined by considering the plan's holdings in employer real property immediately after the transaction involving the property. Thus, in terms of a contribution of property, the question of whether a property is dispersed geographically is looked at when the parcel is combined with other parcels held by the plan. Similarly, with respect to a sale of a parcel, the determination is made by looking at the remaining parcels held in the plan after the sale. (DOL Advisory Opinion 2012-05A)

Final Regulations Issued on Use of Corporate Aircraft for Entertainment

The Internal Revenue Service (IRS) recently finalized rules on the use of business aircraft for entertainment. Proposed regulations issued in 2007 tightened the tax deductions for the personal use of corporate aircraft for entertainment travel by executives.

Despite criticism from commentators and numerous requests for modifications, the IRS made few changes to the proposed rules. Addressing various public comments on those rules in the preamble, the IRS explained its denial of numerous requests for revisions. The final regulations continue to disallow deductions under Internal Revenue Code Section 274(a) for fixed costs not directly related to an individual flight, fail to provide a safe harbor alternative to determining actual expenses that would be based on charter rates, and continue to permit businesses to compute depreciation expenses on a straight-line basis for all of the taxpayer's aircraft and all taxable years in calculating expenses subject to disallowance. With respect to depreciation, the final rules provide a transition rule for aircraft placed in service before the election and clarify that for any taxable year "the sum of the allowable depreciation and the depreciation disallowed will not exceed 100 percent of basis," regardless of the year in which the straight-line election is made. Various proposed rules allocating costs to flights are generally retained in the final rules despite requests for revisions, and a number of clarifications of the allocation rules are offered. (T.D. 9597)

CASES

Multiemployer Pension Plan's Critical Status Does Not Preclude Employer Withdrawal

In March 2008, the trustees of the Local 138 Pension Trust Fund determined that the fund had entered into critical status as defined under the Pension Protection Act of 2006 (PPA). Once a multiemployer plan falls into critical status, it must adopt the rehabilitation plan in order to improve its funding status.

The fund expected that the rehabilitation plan and other alternatives or options available to the employers and the collective bargaining units would not be determined until late 2008. F.W. Honerkamp Company, Inc. had two collective bargaining agreements that were due to expire, which provided for participation in the fund. Honerkamp and the collective bargaining units agreed to extend the terms of the agreements until the terms of the fund's rehabilitation plan were known. Under PPA, if an employer and the collective bargaining unit do not agree to an alternative approach offered under the rehabilitation plan, they must comply with the default option under the rehabilitation plan. After notification of the terms

of rehabilitation plan, Honerkamp and the collective bargaining units agreed to withdraw from the fund in 2009.

The trustees of the fund brought suit claiming that the amendments enacted by PPA did not allow for voluntary withdrawals in this situation. Rather, the trustees claimed that while the fund remained in critical status, employers and the collective bargaining units must remain in the fund and contribute under the rehabilitation plan. The U.S. Court of Appeals for the Second Circuit affirmed the lower court decision, holding that PPA did not impose any limitations on the ability of an employer and a collective bargaining unit to withdraw from a multiemployer plan. The Second Circuit found that there was no distinction in the legislative history of PPA between voluntary and involuntary withdrawals and that some provisions of PPA indicate that withdrawal could occur from a multiemployer plan in critical status and noted that the Pension Benefit Guaranty Corporation recognized that withdrawal could occur in this situation when it issued regulations under PPA. (*Trustees of the Local 138 Pension Trust Fund v. F.W. Honerkamp Co.*, 2nd Cir. 2012)

IRS Discontinues Plan Use of IRS Letter Forwarding Service

The Internal Revenue Service (IRS) has a program under which the IRS will forward a letter to a missing individual on behalf of a private individual or government agency if this action is for a humane purpose and there is no other way to relay the information to the individual. Under Revenue Procedure 94-22, an individual, company, or organization that controls assets due a taxpayer—including plan administrators, sponsors of qualified retirement plans, or qualified termination administrators of abandoned plans under the Department of Labor's Abandoned Plan Program attempting to locate missing plan participants—had been allowed to make a written request to the IRS to use its letter-forwarding program. Under recently issued guidance, the IRS will no longer provide letter-forwarding services to locate a taxpayer who may be owed assets from an individual, company, or organization, including qualified retirement plans. As noted by the IRS in its new guidance, several alternative missing person locator resources, including the Internet, have become available to plan sponsors since Revenue Procedure 94-22 was published.

The new restrictions on the scope of the IRS letter-forwarding program apply to requests postmarked on and after August 31, 2012. Plan sponsors should review their plan language and administrative procedures for locating missing plan participants and make appropriate adjustments in light of the new restrictions on the letter-forwarding program. (Rev. Proc. 2012-35)

Retirees Are Not Entitled to Lifetime Benefits

In a recent case, the U.S. Court of Appeals for the Sixth Circuit was called upon to decide whether Acument Global Technologies, Inc. could terminate medical and life insurance benefits provided to retired employees under the terms of a collective bargaining agreement (CBA). In a split decision, the three-judge panel, consisting of two circuit judges and a district judge, ruled that the CBA did not create unalterable lifetime (vested) health care and life insurance benefits. The Sixth Circuit's ruling was premised on the finding that Acument had unambiguously reserved the right under the terms of the CBA to amend, modify, suspend, or terminate the plan. This language, the court reasoned, is incompatible with a promise to create vested, unchangeable benefits. The lone dissenting judge did not agree that the so-called "reservation-of-rights" clause was unambiguous and would have remanded the case to the lower court for consideration of extrinsic

evidence to determine the intent of the parties on the issue of vesting. The key to the decision and the lesson for employers who wish to retain the right to amend or terminate benefits provided under a CBA is that the reservation-of-rights clause was part of the same document that contained the promise of retiree benefits and not in a separate benefit plan document or summary plan description. (*Witmer v. Acument Global Technologies, Inc.*, No. 11-1793, 6th Cir. 2012)

Liquidated Damages Due on Accelerated Withdrawal Liability

When an employer withdraws from a multiemployer plan, the plan sponsor is required to notify the employer of the amount of any withdrawal liability and the schedule for liability payments, and it must demand payment in accordance with that schedule. An employer may seek review of its liability and the schedule of payments; however, payments must continue to be made according the payment schedule during the pendency of any review. If an employer defaults in its payments, the plan sponsor may accelerate the employer's withdrawal liability. In the case of unpaid withdrawal liability, a multiemployer fund is entitled to recover, among other amounts, an amount equal to the greater of 1) interest on any unpaid contributions or 2) liquidated damages provided for under the plan, generally not in excess of 20 percent of the amount of unpaid contributions.

E & L Development, Inc. was a participating employer in the Central States, Southeast and Southwest Areas Pension Fund before it completely withdrew from the fund as of October 4, 2008. On August 12, 2010, the fund notified E & L that its withdrawal liability was $1,076,391.08 and that it could discharge its liability in a lump sum or monthly payments of $8,718.08, beginning September 2010 and ending May 2028. On September 17, 2010, the fund notified E & L that payment was past due. The notice provided that if payment was not received within 60 days, the fund would accelerate E & L's withdrawal liability. E & L made no payments.

The fund brought suit for the $1,076,391.08 withdrawal liability and liquidated damages of $215,278.22 (i.e., 20 percent of $1,076,391.08), as well as other amounts. E & L did not contest the withdrawal liability amount or other amounts, but argued that liquidated damages should be limited to 20 percent of the unpaid installments payments, not the entire withdrawal liability amount. This argument would have the effect of reducing E & L's liquidated damages to $33,273.60.

The court rejected E & L's argument. It noted that the fund complied with all procedural requirements in accelerating the withdrawal liability. Once the withdrawal liability had been properly accelerated, the total withdrawal liability amount represented the unpaid contributions referred to under the statute, not simply the unpaid installments. Accordingly, the fund was entitled to liquidated damages equal to $212,278.22. (*Cent. States, Southeast & Southwest Areas Pension Fund v. E & L Development, Inc.*, N.D. Ill. Aug. 15, 2012)

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