EMPLOYEE BENEFITS DEVELOPMENTS MAY 2011

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Practices & Industries

Employee Benefits

RULINGS, OPINIONS, ETC.

Technical Release Extends Claims and Appeals Non-Enforcement Grace Period for Certain Provisions

The Department of Labor (DOL) recently issued Technical Release 2011-01, extending the non-enforcement period relating to certain interim procedures for internal claims and appeals under the Patient Protection and Affordable Care Act (PPACA). As previously reported, PPACA contains a number of new provisions affecting the claims and appeal procedures of non-grandfathered health plans. The new claims and appeals provisions that apply to non-grandfathered plans include:

1) Expanding the scope of adverse benefit determinations eligible for internal claims and appeals to include rescissions of coverage.

2) Requiring plans to make urgent care determinations as soon as possible, but no later than 24 hours after receipt of the claim.

3) Providing claimants with information regarding their claims, including: evidence considered, rationale for denials at the internal appeal stage, and reasonable opportunities to respond to such evidence or rationale.

4) Clarifying conflicts of interest so that decisions relating to hiring, compensation, or termination of a claims adjudicator or medical expert are not based upon the likelihood that that individual will support the denial of benefits.

5) Providing notices in a culturally and linguistically appropriate manner.

6) Providing notices to claimants that contain additional information, such as: information sufficient to identify the claim involved; the reasons for an adverse benefit determination; a description of the standard used in denying the claim; a discussion of the decision; a description of the available internal appeals process; and contact information for an applicable office of health insurance customer assistance.

7) Providing that, if a plan fails to strictly adhere to all the new requirements, the claimant will be deemed to have exhausted the plan's internal claims and appeals process and the claimant may initiate any available external review process or remedy available under the Employee Retirement Income Security Act of 1974 (ERISA) or state law.

Under PPACA, these provisions applying to non-grandfathered plans became effective as of the first day of the plan year beginning on or after September 23, 2010. However, last September, the DOL issued Technical Release 2010-02 stating that the DOL, Department of Health and Human Services, and the Treasury Department (collectively, the Departments) would not take enforcement action regarding some of these new claims and appeals provisions until July 1, 2011, so long as the health plan could demonstrate a good faith effort was made to implement the new standards.

Technical Release 2011-01 removes the "good faith effort" requirement for provisions one through seven listed above, and grants an extension to the enforcement grace period for provisions two, five, and seven. The enforcement grace period also applies to the automatic disclosure of diagnosis and treatment information pursuant to provision six. For the claims and appeal provisions granted relief under this new guidance, the non-enforcement grace period is extended to the first day of the plan year beginning on or after January 1, 2012. Claims and appeal provisions not included in this relief became effective for non-grandfathered health plans on the first day of the plan year beginning on or after September 23, 2010 and will be subject to enforcement by the Departments as of July 1, 2011. Non-grandfathered plans should continue to work quickly to implement these new standards because, although the Departments have implemented a non-enforcement grace period, the Technical Releases do not address the rights of private parties in litigation. (DOL Technical Release 2011-01)

CASES

Failure to Update Inactive Plan Leads to Plan Disqualification

For a second time in recent months, the Tax Court has ruled that a qualified retirement plan, in this case a profit sharing plan, may be disqualified and its tax-exempt status retroactively revoked for defects relating a failure to timely amend the plan document to reflect statutory changes. The court rejected arguments that the plan had discontinued receiving contributions, had become a "repository trust" and, therefore, was a terminated plan that did not need to be amended for changes required by various statutes enacted in 2000 and 2001. The court held that the mere discontinuance of contributions and the barring of new participants were not sufficient to demonstrate that the plan had been terminated. The case serves as a reminder that until a plan is formally terminated and the plan assets are fully liquidated, required amendments still must be made and adopted on a timely basis. (*Christy & Swan Profit Sharing Plan v. Commissioner*, Tax Ct. 2011)

Supreme Court Will Not Hear Case Involving ERISA's Whistleblower Provision

In August 2010, we reported on a Federal Court of Appeals decision involving complaints made by a director of human resources about her employer's administration of the company's medical plan and the employee's claim that she was improperly discharged as a result of these complaints. The case did not involve a formal Department of Labor inquiry, audit, or other formal proceeding of any sort. The director of human resources claimed, among other things, that her objections about how employees were enrolled in a discriminatory manner in a medical plan led to her discharge. The discharged employee filed a lawsuit in which she claimed the benefit of the ERISA "whistleblower" provision protecting against a discharge that is based on a proceeding under ERISA. In a decision that is consistent with the position of the Second Circuit Court of Appeals (covering New York), the Third Circuit Court of Appeals ruled the whistleblower protection does not apply to unsolicited complaints, unless there is a formal proceeding in which the employee participates. A petition was filed to have the U.S. Supreme Court consider whether ERISA allows an employer to terminate an employee who makes unsolicited, informal complaints concerning ERISA violations, but the Supreme Court declined to do so in this instance. (*Edwards v. A.H. Cornell and Son Inc.*, 3d Cir. 2010, cert. denied S. Ct. 2011)

Posthumous Abandonment Order Cannot Trump Surviving Spouse's Rights

The U.S. District Court for the District of Connecticut recently granted a motion to dismiss in favor of a retirement plan that provided a pre-retirement survivor annuity to an estranged spouse. In this case, the participant had originally named his sister as his designated beneficiary. When he later married, by process of law, his new spouse became entitled to receive the survivor benefit. After the participant died, his sister claimed that she was entitled to the retirement benefit because the spouse had abandoned the participant prior to his death. The court rejected this argument, stating that although it may be possible for the participant's sister to obtain a posthumous order of abandonment, such an order would not constitute a valid spousal waiver and would not defeat the surviving spouse's rights. The court noted that if the participant did not want his wife to be his beneficiary, he could have sought her voluntary waiver, entered into a separation agreement, or divorced her. (*Thomas v. Community Renewal Team Inc.*, D. Conn. 2011)

Oral Agreement Not Sufficient to Modify Plan Contribution Obligation

It is important for employers to recognize that an oral agreement to modify a plan obligation, even when it is acknowledged by both the parties, may not be enforceable when current plan provisions contradict the oral agreement. In 2001, an employer reached an oral agreement with a union that the employer's obligations to contribute to a multiemployer pension plan would end when the relevant collective bargaining agreement (CBA) was scheduled to expire five years later. That agreement was never put into writing. After the CBA expired, the employer sent notice to the plan that it was withdrawing from the plan and discontinuing its contributions. The plan took the position that additional contributions were owed for the period between the termination of the old CBA and the effective date of the new CBA. The employer refused to make those contributions and the plan filed suit. The federal trial court that heard the case granted summary judgment in favor of the plan, so the employer appealed. On appeal, the Court of Appeals for the Seventh Circuit affirmed the trial court's

decision and found that the terms of the CBA obligate the employer to make the disputed contributions. The court noted that ERISA requires benefit plan terms to be "established and maintained pursuant to a written instrument." Also, the Labor Management Relations Act requires the detailed basis for making benefit plan payments to be described in a written agreement. In this case, the court concluded that the written "evergreen clause" in the CBA required the employer to continue making contributions until such time as the parties entered into a new agreement or terminated negotiations. The court ultimately concluded that the 2001 oral agreement did not operate to change the terms of the CBA, and that the oral agreement contradicting the employer's written contribution obligations under the CBA is unenforceable. (*Central States, Southeast, and Southwest Areas Pension Fund v. Auffenberg Ford*, Inc., 7th Cir. 2011)

No Fiduciary Breach in Switching Default Investment

Before statutory and regulatory rules were developed for Qualified Default Investment Arrangements (QDIAs), many plans utilized money market or stable value accounts as the default investment if a participant failed to provided requested investment directions. In the absence of rules on QDIAs, plan fiduciaries were concerned about potential liability if a default investment produced loss in principal for the participant. To provide guidance, the Department of Labor issued regulations under statutory provisions that describe QDIAs. The statute requires a QDIA to include "a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both." While a participant-directed plan, such as a typical 401(k) plan, is not required to have a QDIA, the use of a QDIA as a default investment in the absence of participant direction provides liability protection to plan fiduciaries. In a case that vindicates the actions of plan fiduciaries in setting up a QDIA and transferring default investments from a fixed income stable value fund to the plan's new diversified QDIA, a court has denied the claim of participants that the transfer of accounts from a stable value fund to the plan's new QDIA, where the transfer resulted in a short-term loss to the participant account balances, was a breach of fiduciary duty. The use of QDIAs in participant-directed plans has become more widespread. This decision will help minimize the concern that the use of a diversified QDIA in a bear market poses a fiduciary risk when compared to a money market fund or stable value fund. In setting up a QDIA, plan administrators must take care to observe the annual notice requirements in order to preserve the fiduciary liability protection. (*Bidwell v. University Medical Center, Inc.*, W.D. Ky 2011)

Asset Sale Exception to Multiemployer Withdrawal Liability Upheld

Underfunded multiemployer pension plans assess "withdrawal liability" to a contributing employer if the employer ceases to contribute to the plan either wholly (a "complete withdrawal") or where there is a 70 percent or more reduction in contributions (a "partial withdrawal"). When an employer sells all the assets of a business that had been contributing to a multiemployer plan, the contributing employer will cease its plan contributions, resulting in a withdrawal from the plan. However, a special statutory rule in ERISA Section 4204 allows an employer who has ceased contribution to a multiemployer plan as a result of a sale of assets to avoid the imposition of withdrawal liability if (1) the buyer of the assets has an obligation to contribute to the plan at the same rate the seller had before the sale, and (2) the buyer posts a bond with the plan to cover an amount of up to three plan years' of average contributions. The bond must remain in place for five years after the sale and must be payable to the plan if the buyer withdraws from making plan contributions or fails to make its required plan contributions at any time during those five years. The seller of assets remains secondarily liable for

withdrawal liability if the buyer withdraws during these five years and does not pay its assessment of withdrawal liability, if any. The asset sale exception to withdrawal liability is available only where a cessation of plan contributions occurred "solely because" of the asset sale. In one of the rare instances where a court has ruled on the "solely because" rule as applied to the use of the asset sale exception to withdrawal liability, the U.S. Court of Appeals for the Seventh Circuit upheld an arbitrator's ruling that an asset sale qualified for the exception from payment of withdrawal liability even though earlier actions taken by the contributing employer resulted in reduced plan contributions as a result of plant closures and layoffs. The court determined that the statutory exception would not apply where an employer had deliberately set out to withdraw from a plan in stages and attempted to use the asset sale exception only for the last stage. In this case, however, there was no evidence that plant closings and layoffs in the 1990s were part of an integral plan to withdraw from a multiemployer plan with an asset sale in 2004 that was designed to avoid payment of withdrawal liability. (*Central States, Southeast and Southwest Areas Pension Fund v. Georgia-Pacific LLC*, 7th Cir. 2011)

"Good Faith" Clause Does Not Limit Discretionary Authority of Administrator

A district court in North Carolina recently reaffirmed the principle that decisions made by a plan administrator are entitled to deferential review if the plan grants discretionary authority to the administrator. The court rejected a former employee's argument that the administrator's discretionary authority to determine his eligibility for benefits under a company severance plan may be limited because the plan provides that the administrator must act "in good faith" when making decisions. Noting that the employee would have the court first make a determination of whether the administrator acted in good faith before determining the appropriate standard of review, the district court found that, on the contrary, the phrase "made in good faith" confers discretionary authority on the administrator and limits review to determining whether the administrator's interpretation of the plan was reasonable and in good faith. On a related issue, the court found that the employer failed to comply with the procedural requirements of the Employee Retirement Income Security Act of 1974 when it denied the employee's claim for benefits by not giving a written explanation of the denial and appeal procedures. However, the court held that the appropriate remedy for the violation was not an award of severance benefits, as requested by the employee, but the remand of the case to the plan administrator for a reconsideration of the employee's claim for benefits. (*Dippel v. Philips Products Inc.*, W.D.N.C. 2011)

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