EMPLOYEE BENEFITS DEVELOPMENTS JUNE 2010

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Practices & Industries

Employee Benefits

RULINGS, OPINIONS, ETC.

EFAST2: All-Electronic Filing System Is Coming

The DOL has issued a set of Q&As on its website to address the new electronic filing requirements that apply to the filing of Form 5500. Pension and welfare plans that are required to file annual reports on Form 5500, including welfare plans (medical plans, life, long-term disability) with 100 or more participants as well as virtually all retirement plans, 401(k)s, ESOPs, etc., must file the Form 5500 electronically through EFAST2 for the 2009 plan year and thereafter. To assist plan administrators with the new filing requirements, a set of questions and answers has been issued and posted on the DOL website.

The new filing system replaces the EFAST system. With limited exceptions, the new filing systems will apply to all filings in 2010, including amended filings for plan years that precede 2009. Generally, a 2009 Form 5500 has a filing deadline of the last day of the seventh month following the end of the plan year. This is July 31 for calendar year plans. Anyone who is responsible for a Form 5500 filing should review this set of Q&As before beginning the filing process.

A few highlights from the Q&As:

- Filers may use approved third-party software for the filing or the DOL's "IFILE" software. The IFILE system is more limited in its use compared to third-party software: It can be used only to transmit single filings, it does not transfer information from an integrated data source, and only one individual can access or work on aparticular filing.
- The new filing system does not include a Schedule SSA as has been required in the past. Old Schedule SSAs should not be attached to the 2009 annual report for a retirement plan.
- Draft returns should not be submitted. Once a return is "submitted" under the new system it is then filed. Returns should be validated and checked for errors first

before being submitted.

- Required audit reports must be submitted as PDF files attached to the electronic filing.
- Specific instructions should be reviewed for the procedures to include a plan administrator signature on the Form 5500 as a part of the filing.

Health Care Reform Update — Government Agencies Issue Grandfather Plan Regulations

The U.S. Internal Revenue Service (IRS), Department of Labor (DOL), and Department of Health and Human Services (HHS) have jointly issued long-awaited guidance in the form of interim final regulations detailing the requirements for maintaining grandfather plan status. The regulations also explain the operation of the special effective date rules applicable to collectively bargaining plans, and they provide important guidance regarding retiree-only plans. The interim final regulations are effective for plan years beginning on or after September 23, 2010. In an upcoming client briefing we will provide a detailed explanation of this important guidance.

CASES

A Steady Diet of Stock Drop Cases

ederal courts continue to process a steady diet of so-called "stock-drop" cases — generally involving plaintiff claims of fiduciary breaches related to a significant drop in the share value of employer stock held as an investment in a retirement plan such as a 401(k) plan. In a recent case handled by a Georgia federal trial court, the judge followed what seems to be a growing trend that favors plan fiduciaries by dismissing plaintiffs' fiduciary breach claims on a motion to dismiss. The defendants included the employer's pension committee and individual members of that committee. Plaintiffs claimed defendants breached their fiduciary duties by allowing plaintiffs to purchase shares of employer stock in a defined contribution retirement plan. The employer's stock value suffered a dramatic drop in value in connection with the worldwide economic recession during 2008 and 2009. The defined contribution retirement plan included a provision requiring employer stock to be included as an investment option. The court noted that none of the defendants had the discretion or authority to eliminate employer stock as an investment option under the plan. As a result, the judge ruled that the defendants could not be liable for a breach of fiduciary duty with respect to the retention of employer stock as an investment option under the plan. The court's additional rulings include a presumption that the plan committee and its members acted prudently by following the plan terms and offering employer stock as an investment option. In this case, the plaintiffs failed to allege facts sufficient to overcome that presumption. (*In re ING Groep, N.V. ERISA Litigation*, N.D. Ga. 2010)

Early Retirement Incentive Program Discriminates Against Older Workers

The U.S. District Court of Minnesota recently held that the Minnesota Department of Corrections' (DOC) early retirement program violated the Age Discrimination in Employment Act (ADEA). The Equal Employment Opportunity Commission filed a motion for summary judgment alleging that an "age 55 cliff" provision, found in several DOC collective

bargaining agreements (CBAs), impermissibly discriminated against older workers. Under the terms of the CBAs, an employee with three years of service who retires during the pay period of his or her 55th birthday is eligible to receive a continuation of the employer's contribution toward the employee's health and dental insurance premiums until the employee reaches age 65. An employee who does not reach three years of service until age 56 does not have this option, nor does any employee who is older than 55 when he or she retires. Because age is the only distinguishing trait when determining eligibility for the early retirement benefit, the court determined that the early retirement incentives are facially discriminatory and, as such, violate the ADEA. The court held that the claimants are entitled to damages in the amount of the health and dental insurance premiums that the DOC would have paid absent the illegal early retirement incentive program from 2001 to the present. The lesson here is that employers who currently maintain, or plan to offer, early retirement incentive programs should design their programs so that eligibility for retirement incentives is not based solely on age, but rather is based on service and age, and that incentives are not impermissibly eliminated with increasing age. (*EEOC v. Minnesota Dep't of Corrections*, D. Minn. 2010)

Inherited IRAs Exempt From Bankruptcy Estate? Maybe; Maybe Not.

What is an inherited IRA? It is the IRA a non-spouse beneficiary receives upon the death of the IRA holder. Unlike a spousal beneficiary, the non-spouse beneficiary must maintain an inherited IRA in the name of the decedent for the benefit of the beneficiary. What is at stake? When the beneficiary files for bankruptcy protection, are the assets of the inherited IRA part of the bankruptcy estate and available to pay claims of creditors? Or is the inherited IRA exempt from the bankruptcy estate and free from creditor claims? Recent court cases have differing answers. While protection of qualified plan accounts is governed by federal law, protection of IRAs is largely a matter of state law. Many states offer creditor protection. When it comes to inherited IRAs, however, some courts are unwilling to extend that protection. The result may depend on whether the federal or state bankruptcy exemptions are applied. Two recent cases highlight the conflicting outcomes. In a decision by the Bankruptcy Court for the Eastern District of Texas (*In re Chilton*, E.D. TX, 2010), the court found that the inherited IRA was not an exempt asset. In contrast, the Bankruptcy Appellate Panel in the Eighth Circuit (*Nessa, In re Nancy*, Bktcy 8th Cir., 2010) held an inherited IRA was exempt because it was exempt from taxation and therefore represented retirement funds. Beneficiaries of inherited IRAs should seek specific advice regarding the protection of the account in a bankruptcy proceeding; and even then, depending on where they are located, the answer may not yet have been decided.

Supreme Court Overturns "One-Strike-and-You're-Out" Ruling

In 1998, the U.S. Supreme Court decision in *Firestone Tire & Rubber Co. v. Bruch* (489 U.S. 101) firmly established the principle that a plan administrator's interpretation of a plan's provisions will receive judicial deference as long as the plan reserves to the administrator the discretionary authority to interpret the plan. Overturning a decision by the U.S. Court of Appeals for the Second Circuit, the Supreme Court recently affirmed the principle of deferential review when it held that a court must give deference to an Employee Retirement Income Security Act (ERISA) plan administrator's revised interpretation of an ambiguous plan provision even if the administrator's first interpretation was found to be unreasonable. Rejecting the lower court's "one-strike-and-you're-out" approach to deferential review, the court held that just because the plan administrator in this case made a "single honest mistake" in its first interpretation of the correct method for calculating

benefits for rehired retirees who had previously taken lump-sum distributions, the administrator did not lose its right to deferential review of its alternative interpretation. The principle that a court can overturn the administrator's interpretation only if the interpretation is unreasonable applies even if the administrator is making a second attempt at interpreting the provision. (*Conkright v. Frommert*, S. Ct. 2010)

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