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FEATURE ARTICLES

COLUMNS

Something for Everyone!

This month's issue of *Employee Benefit Plan Review* contains something for everyone! The "Focus" section alone includes articles covering pay equity, overtime laws, wellness program testing, and student-athletes under the Fair Labor Standards Act. Our "Feature" article explores mid-year changes to safe harbor plans. And we have much more!

Safe Harbor Plans

For many years, plan sponsors, service providers, and practitioners have debated whether mid-year amendments to "safe harbor plans" are permissible given the limited available guidance on this issue. The Internal Revenue Service has issued additional guidance that specifies permissible mid-year amendments to safe harbor plans (including both 401(k) and 403(b) plans), the time at which updated safe harbor notices and election opportunities are required, and the type of mid-year amendments that are prohibited. In our "Feature" article, "What's Safe to Change Mid-Year in Your Safe Harbor Plan?," Lori L. Shannon and Kathleen O'Connor Adams, counsel at Drinker Biddle & Reath LLP, discuss the guidance.

Pay Equity

Our first "Focus" article, "EEOC Seeks to Tackle Pay Equity with Proposed EEO-1 Pay Data Requirement," by Colin L. Barnacle and Kara M. Ariail, attorneys at Holland & Knight LLP, discusses a U.S. Equal Employment Opportunity Commission proposed rule that would require all private employers with more than 100 employees, as well as all federal contractors and first-tier subcontractors with 50 or more employees, to include compensation data by race, ethnicity, and sex in their annual EEO-1 reports.

Overtime Laws

Two years ago, President Obama signed a Presidential Memorandum directing the U.S. Department of Labor (DOL) to update the regulations regarding white-collar workers. Last year, the DOL announced its proposed regulations, which call for sweeping changes that would more than double the minimum annual salary employers must pay white-collar employees (from $23,660 to $50,400) to exempt them from overtime pay. Angela M. Duerden, of counsel at Wilson Elser Moskowitz Edelman & Dicker LLP, discusses what to expect in 2016 in our next "Focus" article, "Big Changes Are Coming to Overtime Laws in 2016."

Wellness Programs and the ADA

In another "Focus" article, "Flambeau Inc. Wellness Program Testing Falls within ADA Safe Harbor," Amy M. Gordon, Michael T. Graham, Kristin E. Michaels, and Susan M. Nash, partners at McDermott Will & Emery LLP, explain a decision by a federal judge in the Western District of Wisconsin ruling in favor of Flambeau, Inc., and against the Equal Employment Opportunity Commission, in holding that Flambeau's medical exams as part of its wellness program and self-insured medical plan did not violate the Americans with Disabilities Act.

Student-Athletes under the FLSA

The U.S. District Court for the Southern District of Indiana, in concluding that student-athletes at the University of Pennsylvania are not employees under the Fair Labor Standards Act (FLSA), has dealt another blow to legal arguments that student-athletes should be paid as employees, dismissing a complaint against the National Collegiate Athletic Association (NCAA) and 123 member schools. In their article, "Court Rules That Student-Athletes Are Not Employees under the FLSA," Vernon M. Strickland and David J. Santeusanio, attorneys at Holland & Knight LLP, discuss the decision, which is particularly helpful to the NCAA and colleges because the court expressly recognized the principle of amateurism in college sports.

And More...

In this issue we also have our usual columns, "Ask the Experts," "From the Courts," and "Regulatory Update," by Marjorie M. Glover and David Gallai of Chadbourne & Parke LLP, Norman L. Tolle of Rivkin Radler LLP, and Mark S. Weisberg of Thompson Coburn LLP, respectively. This month we also have a "Special Report" titled, "Administrative Technology—What You Need to Know," by Perry S. Braun, a Contributing Editor for *Employee Benefit Plan Review* and the Executive Director of Benefit Advisors Network and its sister organization, National Benefits Center.

Enjoy the issue!
Steven A. Meyerowitz
Editor-in-Chief
May 2016

Submit questions to Employee Benefit Plan Review via *email to* smeyerowitz@meyerowitzcommunications.com. *Answers by the columnists,* Marjorie M. Glover *and* David Gallai, *may appear in an upcoming issue.*

403(b) Plan Catch-up Contributions

Q We sponsor a 403(b) plan and we have an employee who is eligible to make both "age 50" catch-up contributions and the "15 years of service" special 403(b) catch-up contributions. To the extent that this employee makes catch-up contributions but does not exhaust both limits, does it matter against which limit we apply those catch-up contributions?

A Yes, it does. The regulations under Internal Revenue Code Section 403(b) provide that, to the extent that an employee who is eligible for both types of catch-up contributions makes a catch-up contribution, those contributions are first applied against the special 403(b) catch-up contribution limit. Only after that limit is exhausted will any further catch-up contributions be applied against the age 50 catch-up contribution limit.[1] Because the special 403(b) catch-up contribution limit is *not* an annual limit, it is important that plan sponsors and administrators track when and how much of that limit is applied. When the limit on special 403(b) catch-up contributions is met for a participant, the participant may not make further special 403(b) catch-up contributions to the plan. This is in contrast to the age 50 catch-up contribution limit, which is available in full each year when the participant reaches the qualifying age. Finally, note that the special 403(b) catch-up contribution may only be offered by "qualified organizations," which include certain educational organizations, hospitals, health and welfare service agencies, and church-related organizations.[2] We assume that your company satisfies the definition of a "qualified organization."

Employer Contributions to SEP and Simple Plans

Q My company does not currently sponsor any retirement plans, and we are interested in doing so. We are a small company, so we are looking for a plan that has fewer administrative requirements than a 401(k) plan, such as a SIMPLE or SEP individual retirement account (IRA) plan. What are the employer contribution requirements for SIMPLE and SEP IRA plans?

A A **Savings Incentive Match Plan for Employees (SIMPLE) IRA** plan must provide employees with a salary reduction option pursuant to which they may choose between cash or contributions to the plan (subject to certain annual limits on the dollar amount that may be contributed by salary reduction, generally $12,500 for 2016). The employer must make either a 100 percent matching contribution on the employee's salary reduction contribution (subject to a maximum of 3 percent of compensation for the calendar year) or a 2 percent nonelective employer contribution.

The 3 percent cap on matching contributions is not optional; an employer is not permitted to make matching contributions to the plan of more than 3 percent of an employee's compensation.

If the employer provides a 2 percent nonelective contribution instead of making a matching contribution, the 2 percent nonelective contribution must be made for all eligible employees, even those who did not make any salary reduction contributions. No other contributions are permitted under a SIMPLE IRA plan. The 2 percent nonelective contribution is based on an eligible employee's "compensation" which is capped at $265,000 for 2016.

All contributions are made to the employee's SIMPLE IRA, which is owned and controlled by the employee.

A **Simplified Employee Pension (SEP) IRA** plan is funded solely by employer contributions. Employees cannot make salary reduction contributions or any other types of employee contributions to a SEP IRA plan. All contributions are made to the employee's SEP IRA, which is owned and controlled by the employee.

Under a SEP IRA plan, the employer has discretion to determine the amount of the employer contribution each year. Employer contributions must be based on a definite written allocation formula and must not discriminate in favor of highly compensated employees.

An employer does not have to make contributions every year. The maximum annual contribution that an employer may make to a SEP IRA plan for 2016 is the lesser of 25 percent of each employee's "compensation" or $53,000. The amount of "compensation" that is taken

into account under the SEP IRA plan cannot exceed $265,000 for 2016.

Most SEP IRA plans (including the Internal Revenue Service (IRS) model Form 5305-SEP) require the employer to make allocations to employees on a proportional basis, meaning that the contribution is equal to the same percentage of salary for each employee (for example, all eligible employees receive an employer contribution equal to 5 percent of "compensation"). There is a limited exception to this rule when a "permitted disparity formula" is used for allocating contributions among eligible employees (this formula cannot be used with the IRS model Form 5305-SEP).

SEP IRA plan contributions are subject to the "top-heavy" rules. Under these rules, the annual contributions for highly- compensated employees cannot exceed a certain percentage of the total contributions for all employees for that year. However, a SEP IRA plan will be deemed to satisfy the top-heavy rules for any year in which each employee receives the same percentage of "compensation" as a contribution (with no extra contribution for highly compensated employees under a "permitted disparity formula").

Each of the $12,500, $265,000, and $53,000 dollar limits noted previously are subject to potential cost-of-living adjustments in future years. Your company may not sponsor both a SIMPLE and a SEP IRA plan at the same time.

Participant Loans

Q Our company's 401(k) plan offers participants the ability to take out a plan loan or a hardship withdrawal. I have heard that if a participant would like to take a hardship withdrawal, he or she must take out a plan loan first. Is this correct?

A Generally, yes. Certain plans such as 401(k) plans and 403(b) plans may permit loans to participants. If a plan does provide for hardship withdrawals, it must meet certain requirements under the Internal Revenue Code and related Treasury Regulations. For a distribution from a 401(k) plan to be deemed to be on account of hardship, it must be made on account of an immediate and heavy financial need of the employee, and the amount must be no more than the amount necessary to satisfy the financial need. The need of the employee includes the need of the employee's spouse or dependent.[3]

In determining whether a hardship distribution is necessary to satisfy an immediate and heavy financial need,

(1) As noted previously, the distribution may not exceed the amount of the need, including any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution, and
(2) The participant must not have other resources available to satisfy the financial need.

This is generally a facts and circumstances test.[4] Employers may generally rely upon a participant's representation that the hardship needs cannot be relieved through other resources, unless the employer has actual knowledge to the contrary (for example, that a participant may take out a plan loan).[5]

The Treasury Regulations provide a safe harbor that many 401(k) plans incorporate. This safe harbor provides that a distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if:[6]

(1) The employee has obtained all other currently available distributions and loans under the plan (and under all other plans maintained by the employer); and
(2) The employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least six months after receipt of the hardship distribution.

Assuming your company's 401(k) plan has adopted this safe harbor, the participant must first take out a loan from your company's 401(k) plan. If the participant does receive a hardship withdrawal from your company's 401(k) plan, he or she should not be permitted to make elective deferrals to the plan for at least six months.

Notes

1. *See* Treas. Reg. § 1.403(b)-4(c)(3)(iv).
2. *See* Treas. Reg. § 1.403(b)-4(c)(3)(ii).
3. *See* Treas. Reg. § 1.401(k)-1(d)(3)(i).
4. *See* Treas. Reg. § 1.401(k)-1(d)(e)(iv)(A) and (B).
5. *See* Treas. Reg § 1.401(k)-1(d)(e)(iv)(C).
6. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iv)(E).

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What's Safe to Change Mid-Year in Your Safe Harbor Plan?

Lori L. Shannon and Kathleen O'Connor Adams

For many years, plan sponsors, service providers, and practitioners have debated whether mid-year amendments to "safe harbor plans" are permissible given the limited available guidance on this issue. The concern has been that a mid-year amendment could cause a plan to lose its safe harbor status, which would subject the plan to nondiscrimination testing requirements. Fortunately, the Internal Revenue Service (IRS) issued additional guidance in Notice 2016-16 that specifies permissible mid-year amendments to safe harbor plans (including both 401(k) and 403(b) plans), the time at which updated safe harbor notices and election opportunities are required, and the type of mid-year amendments that are prohibited.
Notice 2016-16 permits…

- Mid-year amendments to plan provisions that do not impact the content of the safe harbor notice; and
- Certain mid-year amendments to plan provisions that impact the content of the safe harbor notice (which generally do not change the safe harbor contribution provisions), but only if an updated safe harbor notice and election opportunity is provided to participants.

But prohibits…

- Mid-year amendments that directly impact safe harbor contributions (other than the current exception for nonelective safe harbor contributions); and
- Mid-year amendments to increase matching contributions or add discretionary matching contributions, except in limited circumstances.

What Is a 'Safe Harbor Plan'?

A safe harbor plan is a plan that includes a cash or deferred arrangement that is not subject to certain nondiscrimination testing requirements under the Internal Revenue Code (Code). Specifically, safe harbor plans are not subject to nondiscrimination testing under Code Section 401(k) (ADP testing) or Code Section 401(m) (ACP testing) (and, in some cases, the "top-heavy" plan requirements under Code Section 416) because safe harbor plans satisfy certain other requirements under the Code and the Treasury Regulations. These requirements generally relate to contribution levels, vesting provisions, continuity of specific plan provisions for the entire 12-month plan year, and participant safe harbor notices.

The participant safe harbor notice requirements are generally satisfied if eligible employees are provided with a notice that meets certain content and timing requirements. The required content includes information about the plan's safe harbor contributions, any other plan contributions, the type and amount of compensation that may be deferred under the plan, procedures for making deferral elections, distribution and vesting provisions, and specified contact information.

Prior to Notice 2016-16, Were Mid-Year Amendments to Safe Harbor Plans Permitted?

Generally, safe harbor plans must adopt the plan provisions necessary to satisfy the safe harbor requirements prior to the first day of the plan year. Those provisions must remain in effect for the entire 12-month plan year. Certain exceptions to this rule existed prior to Notice 2016-16, including in the following situations:

(1) Plans with a short first or final plan year;
(2) A change in plan year; or
(3) A mid-year adoption of safe harbor nonelective contributions (provided that required notice was given).

Any other mid-year amendment to safe harbor plan provisions was thought to potentially cause a plan to lose its safe harbor plan status, resulting in the need for nondiscrimination testing. Therefore, the possibility of losing safe harbor status historically has deterred plan

sponsors from making any mid-year plan amendments. This was true even when such amendments did not directly impact the provisions necessary to satisfy the safe harbor plan status.

What's New in Notice 2016-16?

Notice 2016-16 clarifies that mid-year amendments to safe harbor plans do not result in a loss of safe harbor plan status if

(1) The amendment is not prohibited under the Notice, and
(2) Participants are provided with an updated safe harbor notice and an election opportunity when the amendment affects the content of the safe harbor notice.

A mid-year amendment to a safe harbor plan, which does not affect the content of the safe harbor notice and is not prohibited, does not require an updated safe harbor notice and does not affect the safe harbor status of the plan.

When Do Updated Notice and Election Opportunity Requirements Arise?

In the case of a mid-year amendment to a safe harbor plan that affects the content of the safe harbor notice (and is not a prohibited amendment), the plan will not lose its safe harbor status if an updated safe harbor notice is provided. The notice must describe the mid-year change and be given to employees within a reasonable period of time before the effective date of the amendment. In general, the "reasonable period" requirement is deemed satisfied if the updated notice is provided at least 30 days, and not more than 90 days, prior to the effective date of the amendment. It is important to note that information regarding a mid-year change can be provided with the pre-plan year annual safe harbor notice. In such case, no updated safe harbor notice is required because notice of the change has already been provided to employees.

Each employee who receives an updated safe harbor notice must be given a reasonable opportunity, after receipt of the notice and before the effective date of the notice, to change his or her contribution elections. Generally, a 30-day election period for making or changing deferral elections is considered reasonable. However, in some cases, the election period cannot be provided before the effective date of the change. Under these circumstances, the election opportunity must begin as soon as practicable after the employee is provided with the notice. The election opportunity ends no later than 30 days after the date that the amendment is adopted.

From a practical standpoint, safe harbor plans that allow participants to make contribution election changes at any time may not be affected by this requirement.

Which Mid-Year Changes Are Prohibited for Safe Harbor Plans?

Notice 2016-16 provides that certain mid-year plan changes are prohibited and will affect safe harbor status. Those changes include:

- A change to increase the number of completed years of service required for an employee to become vested in safe harbor contributions under a qualified automatic contribution arrangement (QACA);
- A change to reduce the number of employees eligible to receive safe harbor contributions (which is not otherwise specifically permissible);
- A change to the type of safe harbor plan; and
- A change to increase matching contributions, add discretionary contributions or change the definition of compensation used to determine matching contributions, unless
  (1) the amendment is adopted at least three months prior to the end of the plan year,
  (2) is retroactive for the entire plan year, and
  (3) the updated safe harbor notice and election opportunity are provided.

What Are Some Examples?

Mid-Year Plan Amendments That Do Not Require an Updated Safe Harbor Notice

- An amendment to change the plan entry date from monthly to quarterly for employees who are not yet participants in a plan; and
- An amendment to add a statute of limitations to the claims procedures in a plan.

Mid-Year Plan Amendments That Require Updated Safe Harbor Notices and Election Opportunities

- An amendment to increase the amount of nonelective contributions;
- An amendment to permit in-service withdrawals at age 59-1/2; and
- An amendment to permit installments as a form of distribution.

Mid-Year Plan Amendments That Are Prohibited

- An amendment to change from a QACA safe harbor plan to a traditional safe harbor plan;
- An amendment to change from immediate vesting to two-year cliff vesting in a QACA safe harbor plan; and
- An amendment to add discretionary matching contributions to a plan that is adopted on the last day of a plan year.

What's Next?

The IRS requested comments by April 18, 2016, on additional guidance that may be needed regarding mid-year changes to safe harbor plans. In particular, specific comments were requested in regard to mid-year changes that relate to plans involved in corporate transactions and plans that include an eligible automatic contribution arrangement. Plan sponsors now have some flexibility in making mid-year amendments to safe harbor plans, but should remain mindful of the guidelines for such amendments, in order to avoid a loss of safe harbor status, which would subject the plan to nondiscrimination testing requirements.

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EEOC Seeks to Tackle Pay Equity with Proposed EEO-1 Pay Data Requirement

Colin L. Barnacle and Kara M. Ariail

Recently, seven years after President Obama's historic signing into law of the Lilly Ledbetter Fair Pay Act, the U.S. Equal Employment Opportunity Commission (EEOC) took a significant step toward enforcing the Obama Administration's stated mission to close the gender wage gap through the federal Equal Pay Act and other federal and state equal pay laws focused on pay equity in the workplace. The EEOC announced and released a proposed rule[1] that would require all private employers with more than 100 employees, as well as all federal contractors and first-tier subcontractors with 50 or more employees, to include compensation data by race, ethnicity, and sex in their annual EEO-1 reports.

The Proposed Rule

The proposed rule was published in the on Feb. 1, 2016, for a 60-day comment period ending on April 1, 2016. Moreover, because the changes will amend the EEO-1 report, the EEOC will hold a public hearing at a time and date to be determined. If ultimately approved, the new rule would take effect with the EEO-1 reports due on or before Sept. 30, 2017. There would be no change for the upcoming EEO-1 reports due by Sept. 30, 2016.

As currently written, the proposed changes will require covered employers to report W-2 compensation data and hours worked for all employees across the already existing 10 EEO-1 job groups, and then into 12 pay bands—the same pay bands used by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics (OES) survey. The 12 proposed pay bands are:

1. $19,239 and under
2. $19,240–$24,439
3. $24,440–$30,679
4. $30,680–$38,999
5. $39,000–$49,919
6. $49,920–$62,919
7. $62,920–$80,079
8. $80,080–$101,919
9. $101,920–$128,959
10. $128,960–$163,799
11. $163,800–$207,999
12. $208,000 and over

The proposed rule would provide company-wide compensation data for the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) to, according to EEOC Chair Jenny R. Yang, "focus agency investigations, assess complaints of discrimination, and identify existing pay disparities that may warrant further examination." Likewise, Secretary of Labor Thomas E. Perez emphasized that "[the agency] expect[s] that reporting this data will help employers to evaluate their own pay practices to prevent pay discrimination in their workplaces. The data collection also gives the Labor Department a more powerful tool to do its enforcement work."

As noted in the proposed rule, the EEOC and OFCCP plan to develop statistical tools that would be available to staff members on their computers to use the EEO-1 pay data for identifying pay disparities warranting agency follow-up and potential investigation.

Potential Trouble for Employers

The proposed new regulations pose a variety of problems for employers, not the least of which is the expected administrative burden of developing new compensation software systems and formats that will allow for the reporting of W-2 compensation data in the EEOC's requested format, that is, by job group and within the new 12 pay bands. Employers are also uneasy about the confidentiality of their disclosed compensation data and the practical difficulty of tracking and reporting hours for "exempt" employees.

Significant trepidation also exists around the broad nature of both the EEO-1's existing 10 job groups and W-2 compensation data. For example, a director of finance and a director of community relations may both have director titles, but vastly different levels of experience, education, and other key factors may be required for the two jobs. There may also be significant pay differences based on seniority, competitive

marketplace factors, location, and other material variables. Reporting W-2 compensation data in broad strokes—by generic EEO-1 job categories and 12 pay bands—may not be very meaningful when the goal is exposing pay discrimination.

What Employers Should Do to Prepare

First and foremost, interested employers were encouraged to submit comments within the designated public comment period (on or before April 1, 2016) in order to help shape the final regulation in a manner more mindful of the concerns noted herein.

Second, and most important, there is ample time for employers to self-audit their pay practices prior to handing pay data over to the EEOC or OFCCP. However, any comprehensive proactive pay audit should be conducted only in a cautious, calculated manner, following all required steps to assure its coverage under the attorney-client privilege so that its conclusions are protected from disclosure. Employers should also be prepared to take action to rectify any discrepancies that cannot be explained by legitimate, job-related factors. It is extremely risky from a liability standpoint for an employer to conduct an unsupervised, unprivileged compensation self-audit, and then fail to take appropriate action to address any findings.

Note

1. *https://www.federalregister.gov/articles/2016/02/01/2016-01544/agency-information-collection-activities- revision-of-the-employer-information-report-eeo-1-and*, last accessed April 10, 2016.

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Big Changes Are Coming to Overtime Laws in 2016

Angela M. Duerden

On March 13, 2014, President Obama signed a Presidential Memorandum directing the U.S. Department of Labor (DOL) to update the regulations regarding white-collar workers. In June 2015, the DOL announced its proposed regulations, which call for sweeping changes that would more than double the minimum annual salary employers must pay white-collar employees (from $23,660 to $50,400) to exempt them from overtime pay. The DOL also proposed raising the minimum salary level for highly compensated employees from $100,000 to more than $120,000 per year.

Along with the proposed regulations, the DOL requested public comment on other issues that will likely have a significant impact on employers, including

(1) A proposed mechanism for automatically adjusting the standard salary levels,
(2) Whether nondiscretionary bonuses should be included in calculating the standard salary threshold (currently, employers may not include such bonuses in these calculations), and
(3) Whether the white-collar duties tests should be modified along with the proposed salary increases (similar to California laws requiring employees to spend a majority of their time performing exempt duties).

Conservative estimates indicate that approximately five million currently exempt, salaried employees may be affected by the DOL's proposed increased salary threshold. Moreover, the DOL estimates that as a result of these proposed changes, employers could pay additional costs of between $239.6 million and $255.3 million per year.

Public Comments Hint at the Hardships Employers May Face

Between the publication of the proposed regulations in the *Federal Register* and the end of the time period for comments on Sept. 4, 2015, the DOL received more than 250,000 comments regarding the proposed changes. Many employees noted their approval regarding the proposed increase to the salary threshold; however, many employers expressed significant concerns. Numerous employers and trade associations pointed out potential flaws in the proposed regulations, including that

(1) The proposed increases do not take into consideration the unique needs of different industries,
(2) A rigid duties test would run counter to the realities of the modern workplace, and
(3) Pay fluctuations in various geographic regions would have a disproportionately negative impact on employers in states with a lower cost of living.

The comments made clear that certain industries, especially hospitality, food service and retail, would be significantly impacted by these changes. Many employers also noted that they would be required to reclassify current managerial employees to nonexempt workers under the proposed regulations.

When Should We Expect the Final Rule?

On Nov. 20, 2015, the Office of Management and Budget published its Fall 2015 Unified Agenda and Regulatory Plan (Plan). According to the timetable[1] in the Plan, the final rule is slated for publication in July 2016. However, at the annual conference of the American Bar Association's Labor & Employment Law Section, Solicitor of Labor M. Patricia Smith appeared to indicate that the DOL's final revised regulations may be issued later than expected—in late 2016—leaving employers to speculate as to the timing of the final regulations.

What Should Employers Do?

Regardless of whether the regulations will be released in mid- or late 2016, employers should be prepared for these changes and

understand the significant impact they will have on their businesses. Employers of all sizes and in all industries should review their job descriptions to determine whether they accurately reflect employees' job duties and the skills necessary to perform each job, paying close attention to the duties necessary to fall within the various overtime exemptions.

Employers should also conduct a self-audit to determine what changes they may need to make to employee classifications. At a minimum, employers should identify those employees in exempt positions who currently fall near or below the proposed salary threshold of $970 per week, as well as those who currently fall under the "highly compensated" exemption.

After the employer has gathered this information, it should determine a plan of action for complying with the new regulations. This may include increasing minimum salaries for exempt employees or reclassifying employees as nonexempt, hourly workers. Employers should also have a plan in place to communicate these changes to employees, who may be resistant to the changes imposed by these new rules, and to train their managers regarding the implications of the new regulations.

Note

1. *http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1235-AA11*, last accessed April 10, 2016.

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Flambeau Inc. Wellness Program Testing Falls within ADA Safe Harbor

Amy M. Gordon, Michael T. Graham, Kristin E. Michaels, and Susan M. Nash

A federal judge in the Western District of Wisconsin has ruled in favor of Flambeau, Inc. (Flambeau) and against the Equal Employment Opportunity Commission (EEOC) in holding that Flambeau's medical exams as part of its wellness program and self-insured medical plan did not violate the Americans With Disabilities Act (ADA).

Background

In October 2010, Flambeau established a "wellness program" for its employees who wanted to enroll in Flambeau's health care plan for the 2011 benefit year. The wellness program had two components, a health risk assessment and a biometric test. The health risk assessment required each participant to complete a questionnaire about his or her medical history, diet, mental and social health, and job satisfaction. The biometric test was similar to a routine physical examination, and included a height and weight measurement, a blood pressure test, and a blood draw. The information gathered through the wellness program was used to identify the health risks and medical conditions common among the plan's enrollees. Except for information regarding a participant's tobacco use, the health risk and medical condition information was reported to Flambeau in an aggregate report, so that Flambeau did not know any individual participant's results.

Flambeau used this gathered information to estimate the cost of providing health coverage to its employees, set participant premiums, evaluate the need for stop-loss insurance, adjust the co-pays for preventive exams, and adjust the co-pays for certain prescription drugs. Aside from this, Flambeau also engaged in other wellness-related activities, such as sponsored weight-loss competitions, modified vending machine options, and other "organization-wide changes" aimed at promoting health. Nevertheless, Flambeau's employees continued to suffer from nutritional deficiencies and weight management problems.

For the 2011 benefit plan year, which was the first year the wellness program was in place, Flambeau promoted its new wellness program by giving employees a $600 credit if they participated and completed both the health risk assessment and the biometric test. For the 2012 and 2013 benefit plan years, Flambeau eliminated the $600 credit and instead adopted a policy of offering health coverage only to those employees who completed the wellness program. Participating in the wellness program was not a condition of continued employment at Flambeau, but Flambeau offered company-subsidized health coverage under its benefit plan only to wellness program participants.

For the 2011 benefit plan year, a Flambeau employee participated in the wellness program, enrolled in Flambeau's health plan, and received the $600 credit. However, for the 2012 benefit plan year, which was the first year participation in the wellness program was required, this employee failed to complete the wellness program's assessment and tests by the established deadline. Consequently, Flambeau discontinued this employee's health coverage and gave the employee the option of paying the COBRA rate for continued coverage through 2012. The employee declined because he thought the coverage was too expensive without the company provided subsidy.

After losing his coverage, the employee filed a union grievance, a complaint with the U.S. Department of Labor (DOL), and a complaint with the EEOC. After discussions with the DOL, Flambeau agreed to reinstate the employee's health coverage as long as the employee completed the plan's required testing and assessment and made his premium contributions. When the employee agreed, his health coverage was reinstated retroactive to Jan. 1, 2012. Despite the compromise reached by the employee and Flambeau, the DOL and the EEOC filed a lawsuit on the employee's behalf, asserting that Flambeau's plan's medical testing requirement violated ADA Section 12112(d)(4)(A)'s ban on employer-mandated medical examinations.

The Lawsuit

The EEOC's civil action against Flambeau alleged a violation of 42 U.S.C. § 12112(d)(4)(A) of the ADA, which generally prohibits employers from requiring their employees to submit to medical examinations by conditioning participation in their employee health plan on completing a "health risk assessment" and a "biometric screening test." Flambeau responded that although requiring employees to complete the health risk assessment and biometric screening might violate ADA Section 12112(d)(4)(A) in some circumstances, in this case the assessment and testing requirement fell within the ADA's "safe harbor," which provides an exemption for activities related to the administration of a bona fide health benefit plan.

Flambeau contended that completing the assessment and test was not the type of "required" exam prohibited by ADA Section 12112(d)(4)(A). Flambeau only required employees to complete the assessment and test if they wanted to participate in the company's health benefit plan. Flambeau further contended that when viewed from this perspective, the assessment and testing were entirely voluntary and therefore not prohibited by ADA Section 12112(d)(4)(A).

The Court's Ruling

The court ruled that Flambeau's use of the information it gathered from the wellness program testing fell squarely within the scope of the ADA safe harbor because it was used to assist Flambeau with underwriting, classifying, or administering risks associated with the health benefit plan. Flambeau's consultants used the data gathered through the wellness program to classify plan participants' health risks and calculate Flambeau's projected health plan costs for the benefit year. The consultants also provided recommendations to Flambeau regarding what it should charge plan participants for maintenance medications and preventive care, and suggested charging cigarette smokers higher premiums. After identifying the risks through the wellness program, Flambeau also used the information to purchase stop-loss insurance as a hedge against the possibility of unexpectedly large claims.

The court also stated that although the EEOC may be correct in arguing that the ADA's safe harbor provision may not be appropriate for examinations that are part of a stand-alone wellness program, in the *Flambeau* case, the program was tied to the administration of the group health plan's insurance risks. The judge also disagreed with the EEOC's assertion that Flambeau was using the safe harbor provision as a "subterfuge" against the ADA's protections that bar employers from requiring workers to be examined or to provide disability-related information, as the tests were not shown as being used as part of discriminatory acts.

Next Steps

In light of this decision and the EEOC's proposed regulations on bona fide wellness programs, employers may want to examine their wellness programs, particularly their stand-alone wellness programs, to ensure they comply with the ADA and other legal compliance requirements.

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Court Rules That Student-Athletes Are Not Employees under the FLSA

Vernon M. Strickland and David J. Santeusanio

In another blow to legal arguments that student-athletes should be paid as employees, the U.S. District Court for the Southern District of Indiana recently concluded that student-athletes at the University of Pennsylvania (Penn) are not employees under the Fair Labor Standards Act (FLSA).

Background and Decision Highlights

The court in *Gillian Berger, et al, v. National Collegiate Athletic Association, et al*,[1] dismissed a complaint by Penn student-athletes against the National Collegiate Athletic Association (NCAA) and 123 NCAA member schools. The court dismissed without prejudice the claims against the NCAA and all of the other defendants for lack of subject matter jurisdiction, concluding that the plaintiffs could not plausibly suggest that they have standing to sue any entity other than Penn as their purported employer. The court also held that, as a matter of law, the plaintiffs' participation in an NCAA athletic team at Penn does not make them employees of Penn for FLSA purposes. The court, therefore, dismissed with prejudice the claims against Penn.

The putative class action was brought by three individuals who are or were members of the women's track and field team at Penn. They did not receive, and were not eligible for, athletic scholarships because Penn and Ivy League schools do not offer athletic scholarships. The student-athletes argued that they were employees under the FLSA and therefore were entitled to at least the federal minimum wage for all hours spent performing as a student-athlete.

The student-athletes argued that the 2010 U.S. Department of Labor's "Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act" (Intern Fact Sheet)—setting forth a test and criteria to determine whether interns are employees—should be applied to determine whether student-athletes are employees. The court analyzed the Intern Fact Sheet, the U.S. Supreme Court opinion in *Walling v. Portland Terminal Co.*,[2] and more recent opinions from appellate courts. The court concluded that:

(1) The Intern Fact Sheet is not intended to apply to student-athletes;
(2) The courts have determined that the Intern Fact Sheet, though perhaps persuasive in some instances, did not apply to all interns in all situations; and
(3) There is no test that applies equally to interns and student-athletes.

The court reasoned that the test for determining who is an employee requires a more flexible approach than the approach announced by the Intern Fact Sheet. The correct approach, the court concluded, considers the totality of the circumstances. And the proper inquiry in making such a determination for student-athletes must consider the true nature of the relationship between student-athletes and the university.

Examining the nature of that relationship, the court noted the following important facts:

- The country has a "revered tradition of amateurism in college sports," as recognized by the U.S. Supreme Court in *NCAA v. Board of Regents of Univ. of Oklahoma* (1984)—a tradition that the court noted was an "essential part" of the economic reality between student-athletes and Penn;
- Generations of students have vied to be a part of the athletics tradition with no thought of any compensation;
- The Department of Labor has never taken any action to apply the FLSA to student-athletes, though there are thousands of such unpaid athletes on college campuses each year; and
- The Department of Labor has expressly taken the position that a student's participation in interscholastic athletics, even though he or she may receive minimal payment for participation in such activities, does not create an employment relationship.

What the Ruling Means

In the midst of student-athlete litigation, the *Berger* decision is an important win for

the NCAA and colleges, which have consistently argued that student-athletes should not be compensated. The decision is particularly helpful to the NCAA and colleges because the court expressly recognized the principle of amateurism in college sports, which has been a key litigation argument in defending student-athlete claims for compensation and other employee rights.

This is the latest in a series of legal wins for the NCAA and colleges on the issues of student-athlete compensation and attempts to classify student-athletes as employees.

In August 2015, the National Labor Relations Board (NLRB or the Board) dismissed a petition by Northwestern University scholarships football players seeking to unionize. The student-athletes argued that their receipt of scholarships in exchange for participating in football made them employees under the National Labor Relations Act. Although that NLRB decision did not address whether scholarship football players were, in fact, employees under the NLRA, the Board declined to exercise jurisdiction in the case because of the composition and structure of the Football Bowl Subdivision college football league (which comprises mostly public colleges and universities over which the Board cannot assert jurisdiction), and the Board concluded that it would not promote stability in labor relations to assert jurisdiction in that case.

In September 2015, the U.S. Court of Appeals for the Ninth Circuit in *O'Bannon* struck down a district court's order requiring that Division I men's football and basketball programs establish a system to pay student-athletes deferred compensation of up to $5,000 per year. Efforts to change aspects of the student-athlete experience continue at a number of levels, including the NCAA, conferences, universities, and in the legislature.

Notes

1. 1:14-cv-01710-WTL-MJD (S.D. Ind.).
2. 330 U.S. 148 (1947).

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Norman L. Tolle

U.S. Supreme Court Holds That ERISA Preempts Vermont Law Requiring Health Plan Disclosures

The U.S. Supreme Court has ruled that a Vermont law that required disclosure to a Vermont state agency of payments relating to health care claims and other information relating to health care services was preempted by the Employee Retirement Income Security Act of 1974 (ERISA) as it applies to ERISA plans. Vermont had enacted its law—applicable by its terms to health plans established by employers and regulated by ERISA—in an effort to maintain an all-inclusive health care database.

Almost 20 other states had or were implementing similar databases, and now are not permitted to do so.

As the Court explained in its decision, Liberty Mutual Insurance Company maintained a health plan that provided benefits in all 50 states to more than 80,000 employees, their families, and former employees. The plan was self-insured and self-funded, and it qualified as an "employee welfare benefit plan" under ERISA. Liberty Mutual, as the plan sponsor, was both a fiduciary and plan administrator.

The plan used Blue Cross Blue Shield of Massachusetts, Inc., as a third-party administrator, managing the processing, review, and payment of claims for Liberty Mutual. In its contract with Blue Cross, Liberty Mutual agreed to "hold [Blue Cross] harmless for any charges, including legal fees, judgments, administrative expenses and benefit payment requirements,… arising from or in connection with [the plan] or due to [Liberty Mutual's] failure to comply with any laws or regulations."

In August 2011, Vermont issued a subpoena ordering Blue Cross to transmit to a state-appointed contractor all the files it possessed on member eligibility, medical claims, and pharmacy claims for Vermont members. The penalty for noncompliance, Vermont threatened, would be a fine of up to $2,000 a day and a suspension of Blue Cross's authorization to operate in Vermont for as long as six months.

Liberty Mutual, concerned in part that the disclosure of confidential information regarding its members might violate its fiduciary duties under its plan, instructed Blue Cross not to comply. Liberty Mutual then filed an action in the U.S. District Court for the District of Vermont. It sought a declaration that ERISA preempted application of Vermont's law and its governing regulation to the Liberty Mutual plan and an injunction forbidding Vermont from trying to acquire data about the Liberty Mutual plan or its members.

The district court granted summary judgment to Vermont. It concluded that Vermont's reporting scheme was not preempted by ERISA. Although the Vermont law "may have some indirect effect on health benefit plans," the district court reasoned that the effect was "so peripheral" that it could not be considered "an attempt to interfere with the administration or structure of a welfare benefit plan."

The U.S. Court of Appeals for the Second Circuit reversed. It ruled that "one of ERISA's core functions—reporting—[could not] be laden with burdens, subject to incompatible, multiple and variable demands, and freighted with risk of fines, breach of duty, and legal expense."

The dispute reached the Supreme Court, which agreed with the Second Circuit.

The Supreme Court commenced its analysis by noting the "terse but comprehensive" ERISA preemption clause. ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." It decided that Vermont's law was preempted by ERISA as a law that governed, or interfered with the uniformity of plan administration and that had an impermissible "connection with" ERISA plans. It reasoned that ERISA plans had to keep detailed records so compliance with ERISA's reporting and disclosure requirements could be "verified, explained, or clarified, and checked for accuracy and completeness." The records to be retained had to "include vouchers, worksheets, receipts, and applicable resolutions." The Court observed that "reporting, disclosure, and recordkeeping" were "central to, and an essential part of, the uniform system of plan administration contemplated by ERISA."

The Court noted that Vermont's law governed plan reporting, disclosure, and, by necessary implication, recordkeeping. It said that

these matters were "fundamental components of ERISA's regulation of plan administration," adding that differing, or even parallel, regulations from multiple jurisdictions "could create wasteful administrative costs and threaten to subject plans to wide-ranging liability."

Accordingly, the Court decided that Vermont's reporting regime intruded on "a central matter of plan administration" and interfered with "nationally uniform plan administration," and therefore, that ERISA's express preemption clause required invalidation of the Vermont statute as applied to ERISA plans. [*Gobeille v. Liberty Mutual Ins. Co.*, 2016 U.S. Lexis 1612 (March 1, 2016).]

Courts Uphold Plan Administrator's Ruling That Payment Was Not Includable in Employee's Average Monthly Earnings

In 2006, Theodore Ingram was employed by Union Pacific Railroad and living in Los Angeles. On July 1, 2006, he was hired to be the Superintendent of Transportation of the Terminal Railroad Association of St. Louis, and he moved to St. Louis.

Ingram retired from Terminal at the end of 2010 and became eligible for retirement benefits under Terminal's Pension Plan for Nonschedule Employees (the Plan).

At the time Ingram retired, Section 5.1(a) of the Plan provided that retirement benefits were calculated based on "1.5% … of the Average Monthly Earnings of the Participant," defined in Section 2.6 as the average monthly earnings in the five consecutive calendar years in which Ingram's earnings were the highest. Section 2.14 of the Plan excluded taxable "reimbursements or other expense allowances and fringe benefits" from the definition of Average Monthly Earnings.

The Plan rejected Ingram's contention that his Average Monthly Earnings should include the July 2006 "Sign On Bonus" he received of $142,737.20 (the July 2006 payment), concluding that the July 2006 payment was an excludable moving expense allowance. Including that amount in the calculation apparently would have increased Ingram's Average Monthly Earnings by 17.2 percent.

Ingram subsequently sued the Plan under the Employee Retirement Income Security Act of 1974 (ERISA), alleging that it had erroneously determined his pension benefits by excluding the July 2006 payment from his pension-qualifying earnings.

The U.S. District Court for the Eastern District of Missouri granted summary judgment in favor of the Plan, concluding that under an abuse of discretion standard of review, the administrator's decision was reasonable. Ingram appealed to the U.S. Court of Appeals for the Eighth Circuit.

The circuit court affirmed.

In its decision, it noted that the administrative record included statements and affidavits by the persons who had negotiated the July 2006 payment: Ingram and Terminal's president, Billy Broyles. According to the circuit court, Ingram stated that he initially had objected to Terminal's job offer to him on two grounds: that it was a substantial "cut in pay" and because of the absence of relocation or moving expenses. The circuit court said that Broyles refused to offer more salary, said Terminal had no relocation expense policy, and asked what Ingram needed to accept the job offer, and that Ingram replied that he needed $83,000 after taxes "to make the move financially feasible." The circuit court said that Broyles then instructed his team to determine a reasonable amount "to compensate [Ingram] for the costs of moving."

The Eighth Circuit found that the resulting payment of $142,737.20 ($85,000 after taxes) was "no doubt intended to address both issues raised by Ingram, the cut in pay and the costs of relocating from California." The parties could have agreed to classify the payment, for retirement benefit purposes, as taxable salary, a taxable relocation expense allowance, or some combination of the two, the circuit court said. In the absence of any agreement, it continued, the administrator for the Plan had to make the discretionary decision, some years later, whether to classify the payment as taxable salary or a taxable expense allowance under Section 2.14.

Because either interpretation was reasonable, the circuit court found that substantial evidence supported the Plan administrator's decision that the July 2006 payment was a taxable expense and not taxable salary. [*Ingram v. Terminal Railroad Ass'n of St. Louis Pension Plan for Nonschedule Employees*, 2016 U.S. App. Lexis 1454 (8th Cir. Jan. 29, 2016).]

ERISA Claims Were Filed About 30 Years Too Late, Circuit Court Rules

Dennis Bond joined Marriott International, Inc., in 1973 as an assistant sales manager at the Airport Marriott in St. Louis and eventually rose to become the

general manager of the Marriott Pavilion in St. Louis until his resignation in 1992. From 1976, when he was promoted to director of sales and marketing of the City Line Avenue Marriott in Philadelphia, until he left Marriott, Bond occupied positions eligible for "retirement awards" under Marriott's deferred stock incentive plan (the Plan), a tax-deferred program it created in 1970, prior to the enactment of the Employee Retirement and Income Security Act of 1974 (ERISA).

Bond received retirement awards from Marriott in 1976 and 1977 (as director of sales and marketing), in 1978 and 1979 (as regional director of marketing), and in 1988 and 1989 (as general manager of the St. Louis Marriott). In total, Bond was awarded 1,344 shares of Marriott stock through retirement awards. He voluntarily resigned from Marriott on Oct. 19, 1991, two years before his awards would have fully vested. In 2006, Marriott paid Bond all of his vested shares.

Michael Steigman joined Marriott in 1973 as an assistant restaurant manager for the Capriccio Restaurant at the Los Angeles Marriott and eventually served as the general manager of the Marriott in Bloomington, MN, and of the Miami Airport Marriott. Steigman received retirement awards from Marriott in 1974 and 1975, both prior to ERISA's effective date. In 1978 and every year thereafter, Steigman elected to receive pre-retirement awards under the Plan. Marriott granted Steigman 693 shares of Marriott stock under the retirement award program between 1978 and 1989. Shortly after he left the company in 1991, Steigman signed a release, and Marriott paid him all of his vested shares.

In January 2010, Bond and Steigman sued Marriott, alleging that the Plan was subject to ERISA and that the Plan violated ERISA's vesting requirements. The parties moved for summary judgment on whether the claims were barred by the statute of limitations.

The U.S. District Court for the District of Maryland decided that the claims of Bond and Steigman were timely because Marriott had never formally denied any of their claims. In so ruling, the district court apparently adopted their position that Marriott's answer to their federal complaint had triggered the commencement of the limitations period.

Marriott appealed to the U.S. Court of Appeals for the Fourth Circuit. The circuit court agreed with Marriott that the district court had erred in finding the claims brought by Bond and Steigman were timely.

In its decision, the Fourth Circuit explained that, except for breach of fiduciary duty claims, ERISA contained no specific statute of limitations and that, as a result, it had to look to state law to find the most analogous limitations period. It then said that Maryland's three-year statute of limitations for contract actions applied.

The circuit court examined when the three-year statute of limitations had begun to run in this case. It explained that, in most instances, an ERISA cause of action did not accrue until a claim for benefits had been made and formally denied. In this case, however, the circuit court said that a different test had to be used because the "formal denial" rule was "impractical to use."

Instead, the circuit court declared, the "clear repudiation" rule should be used, which made the claims by Bond and Steigman untimely. The circuit court pointed out that a prospectus in 1978 "plainly stated" that retirement awards did not need to comply with ERISA's vesting requirements. It added that the prospectus explained that, "inasmuch as the Plan is unfunded and is maintained by the Company primarily for the purpose of providing deferred compensation for a selected group of management or highly compensated employees," the Plan was a top hat plan "exempt from the participation and vesting, funding and fiduciary responsibility provisions" of ERISA.

According to the circuit court, this language "clearly informed" Plan participants that the retirement awards were not subject to ERISA's vesting requirements—contrary to the assertion by Bond and Steigman that they were. This language, moreover, was included in prospectuses distributed in 1980, 1986, and 1991.

Because Marriott had informed Bond and Steigman in 1978 that the Plan was exempt from ERISA's vesting requirements, and because they had waited more than 30 years to file suit, their action was untimely under Maryland's three-year statute of limitations for contract actions and Marriott was entitled to summary judgment in its favor, the Fourth Circuit concluded. [*Bond v. Marriott Int'l, Inc.*, 2016 U.S. App. Lexis 1499 (4th Cir. Jan. 29, 2016).]

Failure to Exhaust Administrative Remedies Dooms Suit for Disability Insurance Benefits

Unum Group issued two disability insurance policies governed by ERISA to James L. Moss, a urologist. Moss subsequently alleged that he suffered from osteoarthritis and that his condition prevented him from performing urological surgery. He filed a claim with Unum for total disability benefits under the policies.

Unum denied the claim on June 5, 2009. Unum's denial letter notified Moss that if he wanted to appeal Unum's denial of his claim, he was required to submit a written appeal within 180 days.

On June 30, 2009, Moss's attorney called a Unum representative and verbally informed him that he

disagreed with Unum's decision. Then, on July 16, 2009, Moss' attorney mailed copies of Moss' paychecks to Unum. However, Moss did not file a formal written appeal.

On Dec. 10, 2009, Unum sent Moss another letter reiterating its denial of his claim for benefits. The Dec. 10, 2009, denial letter again informed Moss that he had 180 days to file a written administrative appeal.

Moss never filed an administrative appeal. Instead, Moss filed a lawsuit against Unum, in which he argued that attempting to exhaust his administrative remedies would be futile. The U.S. District Court for the Western District of Louisiana rejected Moss' futility argument and dismissed the case without prejudice.

On April 16, 2013, after the district court dismissed his suit, Moss asked Unum to allow him to file an administrative appeal. Unum responded that it was unable to review the claim because Moss submitted his appeal request far beyond the 180-day deadline.

Moss filed a second suit against Unum on Oct. 21, 2013. The district court ruled that Moss had failed to exhaust his administrative remedies by failing to file a timely administrative appeal and dismissed the case with prejudice.

Moss appealed the district court's order dismissing his second suit against Unum to the U.S. Court of Appeals for the Fifth Circuit.

The circuit court affirmed the district court's decision.

The circuit court explained that a claimant seeking benefits from an ERISA plan first must exhaust available administrative remedies under the plan before bringing suit to recover benefits. This included, the circuit court said, filing a timely administrative appeal. Because Moss had not filed a timely administrative appeal, the circuit court ruled the district court had properly dismissed his case.

The Fifth Circuit was not persuaded by Moss' argument that he did not have to file an administrative appeal because Unum's alleged bad faith in denying his claim for disability benefits constituted a "special circumstance" that excused him from that requirement. It said that if a claimant could avoid the exhaustion requirement simply by alleging that the plan administrator had denied the claim in bad faith, "then no claimant would ever be required to exhaust administrative remedies before filing suit." [*Moss v. Unum Group*, 2016 U.S. App. Lexis 1789 (5th Cir. Feb. 3, 2016).]

Circuit Rejects Former Employees' Bid for Lifetime Healthcare Benefits

Between 1983 and 2005, Moen Inc. and its predecessor corporation entered into a series of (usually) three-year collective bargaining agreements (CBAs) with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its local affiliate. Each agreement offered two types of health-related benefits to individuals who retired from Moen's plant in Elyria, Ohio: (1) hospitalization, surgical, and medical coverage, and (2) Medicare Part B premium reimbursements, which compensated retirees for the expenses of participating in the federal government's medical insurance program.

Employees who retired between Aug. 8, 1983, and March 1, 1996, along with their dependents, received "[c]ontinued hospitalization, surgical and medical coverage … without cost." If the retirees were over age 65, the company also reimbursed the full cost of their Medicare Part B premiums, and it did the same for retirees' spouses over age 65. Employees who retired on or after March 1, 1996, along with their dependents, received hospitalization, surgical, and medical coverage upon payment of a co-premium. "The co-premium amount for the retiree," the CBAs provided, "will be frozen at the co-premium in effect at [the] time of retirement." If over 65, these retirees (plus their over-65 spouses) received Medicare Part B premium reimbursements at specified rates.

The last CBA was terminated in 2008 when Moen shut down its Elyria operations. The union and its local affiliate entered into a "Closure Effects Agreement" with Moen, providing that healthcare coverage "shall continue" for retirees and their spouses "as indicated under the [final] Collective Bargaining Agreement." The plant closed in December 2008.

After the plant closed, Moen continued to provide the same healthcare benefits to its retirees for a while. In March 2013, the company decreased the benefits available for retirees in response to "recent Medicare improvements" and "more effective supplemental benefit plans," as well as the federal government's imposition of an excise tax on high-cost "Cadillac plans" through the Patient Protection and Affordable Care Act.

After the changes, Medicare-eligible retirees no longer received healthcare coverage or Part B premium reimbursements, and the company shifted non-Medicare-eligible retirees to a healthcare plan that required higher out-of-pocket payments.

Seven retirees and the union sued Moen in response. The retirees argued that their healthcare benefits had "vested" under the CBAs and the plant closing agreement, prohibiting Moen from changing their coverage.

The U.S. District Court for the Northern District of Ohio certified a class of "all Moen healthcare benefits

plan participants" who had retired from the Elyria plant and who were not covered by an earlier settlement agreement. The class included about 200 individuals.

The parties filed motions for summary judgment, and the district court granted the plaintiffs' motion. It concluded that the CBAs and the plant closing agreement required Moen to offer the same healthcare benefits to the retirees for life. The court also granted $776,767.19 in attorneys' fees and costs to the plaintiffs.

Moen appealed to the U.S. Court of Appeals for the Sixth Circuit, which reversed. In its decision, the Sixth Circuit ruled that the CBAs did not provide unalterable healthcare benefits for life to the Elyria retirees and their dependents. In so ruling, the circuit court relied on the recent Supreme Court decision in *M&G Polymers v. Tackett*, 135 S.Ct. 926 (2015), to "orient" the appeal. In that case, the Supreme Court instructed the circuits to interpret collective bargaining agreements "according to ordinary principles of contract law" and directed the circuits not to "place a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."

The circuit court pointed out that the key provisions of the 2005 CBA, similar in relevant part to the earlier CBAs, stated:

> Continued hospitalization, surgical and medical coverage will be provided without cost to past pensioners and their dependents prior to March 1, 1996.
>
> . . .
>
> Effective March 1, 1996, future retirees will be covered under the new medical plan. The co-premium amount for the retiree will be frozen at the co-premium in effect at time of retirement.
>
> . . .
>
> Future retirees as of [January 1999] will be reimbursed for Medicare Part B for employee and spouse at Medicare Part B $45.50/$91.00.

It then declared that "nothing in this or any of the other CBAs" said that Moen had "committed to provide unalterable healthcare benefits to retirees and their spouses for life."

The circuit court conceded that Moen offered retirees healthcare benefits and that it "may have wished that business conditions and stable healthcare costs (hope springs eternal) would permit it to provide similar healthcare benefits to retirees throughout retirement." However, the circuit court ruled, the parties had never signed a contract to that effect.

The circuit court also said that not only did the CBAs fail to say that Moen committed to provide unalterable healthcare benefits for life to retirees, but that everything the CBAs said about the subject "was contained in a *three-year* agreement"—which, the circuit court observed, was "well short of commitments for life." According to the circuit court, contractual obligations ceased, in the ordinary course, "upon termination of the bargaining agreement."

The Sixth Circuit also noted that each of the last three CBAs had stated that "continued" healthcare benefits to "past pensioners"—that is, former employees who had retired under prior CBAs—would continue. In the circuit court's view, there would have been no need to "continue" such benefits if prior CBAs had created vested rights to such benefits.

Finally, the circuit court rejected the plaintiffs' argument that the plant closing agreement guaranteed lifetime healthcare benefits by stating that benefits "shall continue." The Sixth Circuit reasoned that this argument ignored the context of the relevant language, which stated that healthcare benefits "shall continue…*as indicated under the [2005] Collective Bargaining Agreement*." (Emphasis added.) Simply put, the circuit court concluded, the 2005 CBA did not provide for vested benefits. [*Gallo v. Moen Inc.*, 2016 U.S. App. Lexis 2118 (6th Cir. Feb. 8, 2016).]

Applying Five-Factor Test, Circuit Court Upholds Decision That Worker Was Independent Contractor

In 2009, John Ateeq and Mykhaylo Kalyn started Media Net, L.L.C., a contracting company that performed installation services for DirecTV. Media Net hired satellite technicians and installers to install satellite television systems and to perform repairs for DirecTV customers. Media Net classified these technicians and installers as independent contractors.

Steven Eberline alleged that he was an installer who had been improperly classified as an independent contractor and that he had received no overtime payments even though he was an employee who had worked more than 40 hours per week.

Eberline sued Media Net, asserting that he was entitled to recover lost wages under the federal Fair Labor Standards Act (FLSA). The U.S. District Court for the Southern District of Mississippi conditionally certified a collective class for discovery purposes. Following discovery, the parties moved for summary judgment. The district court found that genuine issues of material

fact existed as to whether Eberline, and those similarly situated, were employees or independent contractors of Media Net.

The case proceeded to a jury trial. The jury ruled that Eberline failed to prove that he was an employee of Media Net.

Eberline appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed.

In its decision, the circuit court explained that, in determining whether a worker qualified as an employee under the FLSA, it focused on whether, as a matter of economic reality, the worker was economically dependent on the alleged employer or, instead, was in business for himself or herself. The circuit court added that five factors guided this assessment:

(1) The degree of control exercised by the alleged employer;
(2) The extent of the relative investments of the worker and the alleged employer;
(3) The degree to which the worker's opportunity for profit or loss was determined by the alleged employer;
(4) The skill and initiative required in performing the job; and
(5) The permanency of the relationship.

The Fifth Circuit ruled that a reasonable jury could conclude that the evidence on the first element weighed in favor of independent contractor status. It pointed out that there was testimony that installers were able to adjust their own work schedule based on customers' needs; that there were no repercussions for late arrivals; that installers could determine how many days they worked, which days they worked, and what time slots they were available to work; and that they could refuse assigned installation jobs with no penalty.

The circuit court reached the same conclusion with respect to the second factor: the relative degree of investment. It pointed out that there was testimony that installers were required to provide their own vehicle and all of their installation tools and supplies and that Media Net owned only a couple of computers related to the installation business, rented its office space, and routed calls through two persons in the Ukraine. In the circuit court's view, a rational jury could have concluded that Eberline's individual investment outweighed that of Media Net.

The circuit court's conclusion was the same with respect to the third factor: a worker's opportunity for profit or loss. It pointed out that there was testimony that installers could determine the days and times that they were available to work; that there also was evidence that installation jobs were assigned based on an individual installer's efficiency rate on previous jobs; and that installers could leave individual business cards and perform other services for customers at lower rates. A reasonable jury, the circuit court declared, could find that this factor weighed in favor of independent contractor status, too.

Next, it found that workers exhibited the type of skill and initiative typically indicative of independent contractor status, explaining that installers could receive more installation jobs, and thus more profits, based on their efficiency; that they could profit from performing custom work; that they could perform additional services for customers; and that they could control the days that they worked. Accordingly, it said, a reasonable jury could conclude that Eberline "exercise[d] significant initiative" as an installer, a finding weighing in favor of independent contractor status.

Finally, the circuit court looked at the "permanency of the working relationship" and noted that testimony indicated that the length of the relationship between Media Net and its installers was indefinite. As a result, it said, "no reasonable jury could have concluded that this factor favored independent contractor status."

The Fifth Circuit concluded, however, that four factors favored independent contractor status and, accordingly, that the jury's conclusion that Eberline was not Media Net's employee was supported by legally sufficient evidence. [*Eberline v. Media Net, L.L.C.*, 2016 U.S. App. Lexis 1030 (5th Cir. Jan. 21, 2016).]

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Mark S. Weisberg

Department of Labor Issues Guidance on Social Investing

The issue of whether (and the extent to which) ERISA plans may make investment decisions that take into account what might be described as non-economic factors has been of great importance since the enactment of ERISA. As you might imagine, plans sponsored by certain unions might prefer investments that they believe will benefit their members or their industry, or a plan sponsored by an employer that holds certain values may want to avoid investing in companies that are viewed as having positions contrary to those values. Or, a plan may simply believe that "social considerations" should be fair game when making investment decisions. During the fourth quarter of 2015, the Department of Labor (DOL) issued helpful new guidelines on this topic.

The Past

Prior DOL guidance on socially responsible investments essentially provided that an ERISA plan could take into account non-economic factors when making investment decisions only if there was a tie when it came to comparing the risk and return criteria of the other possible investments. So, in DOL Interpretive Bulletin 1994-01 and Advisory Opinion 98-04A, and in related formal and informal guidance, the DOL consistently prohibited fiduciaries from being motivated by other objectives unless the desired investment was better than, or equal to, the alternatives.

Of course, as is often the case, developments in the investment industry outpaced this regulatory framework. Put simply, the investment alternatives available for those interested in social investing have grown dramatically over the years. This shows that there is at least some basis for this type of investing and perhaps even a financial argument in favor of responsible investing (which is beyond the scope of this column).

Importantly, the 2008 guidance, in particular, set forth a framework pursuant to which it was rather difficult to prove that a responsible investment was on par with the alternatives. The guidance itself indicated that it would be "rare" for such investments to exist. This guidance had a significant chilling effect on fiduciaries, so much so that most fiduciaries stopped considering social investment opportunities. In fact, the new DOL guidance even states that the 2008 guidance "unduly discouraged fiduciaries" from considering these alternatives.

Interpretive Bulletin 2015-01

The primary purpose of the new guidance was to step back from the 2008 guidance and create a framework to support alternative investments. Here is an excerpt from the preamble to the guidance:

> An important purpose of this Interpretive Bulletin is to clarify that plan fiduciaries should appropriately consider factors that potentially influence risk and return. Environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices. Similarly, if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote. Fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors. When a fiduciary prudently concludes that such an investment is justified based solely on the economic merits of the investment, there is no need to evaluate collateral goals as tie-breakers.

So, the DOL is clearly sending a signal to ERISA fiduciaries that they need not take social investments off the table, merely because

they create a fiduciary risk. Then, the guidance goes on to provide that the "social" factors may actually have a positive economic effect—in other words, they could be more than just a tie-breaker.

The Future

What does this mean for the future of retirement plan investing? Let's put aside defined benefit plans, as the investment decisions are, at least at large corporations, generally driven by financial concerns and not by employee relations. However, on the 401(k) side, a number of potential opportunities would seem to exist. As mentioned earlier, it is not hard to conceive of employees of a particular religious affiliation who would like to be able to invest their 401(k) account balances in a mutual fund that invests in a manner that is consistent with their religious beliefs. Because such investments are now available outside of 401(k) plans, certain participants in the past may have felt compelled to *not* contribute to a 401(k) plan and risk losing access to their preferred form of investment.

Similarly, firms that have adopted an environmentally friendly culture may want to offer an environmentally friendly investment option in their 401(k) plans. Moreover, these types of investments, or just more socially driven choices generally, would likely make 401(k) plan participation more attractive for the millennial generation. And all human resources professionals realize that this group is an important target for increased 401(k) plan participation.

Investment committees must still bring a rigorous due diligence process to the selection (and monitoring) of socially responsible investments. Just like any investment alternative, it will often be prudent to have an outside investment advisor weigh in on the suitability of the investment, and on the process of the committee in selecting the investment. There are, of course, many unanswered questions as well. For example, is an environmentally friendly alternative a type of asset class, to be analyzed just like an emerging markets fund (or even a timber fund) might be analyzed? Or will these environmentally friendly funds be placed with, for example, other growth (or value) funds in the plans line-up.

Certainly, given the growth in the size and the number of these types of funds, there will be increased attention placed on them. And, as always happens, the law and the investment industry will need to develop the tools to support the inclusion of these funds in more 401(k) plans. Developments in this area should be interesting to monitor.

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Perry S. Braun

Administrative Technology—What You Need to Know

Stop and think for a moment the degree to which technology has changed nearly every aspect of our lives. We used to pay bills and send letters through the mail, book vacations using travel agents, shop only in brick-and-mortar stores, conduct research using encyclopedias, or use a paper map to help navigate and provide directions.

It should come as no surprise then that technology is also having a dramatic impact on the benefits industry. Technology is fundamentally changing our industry. Fast forward to the end of the story. Every agency wants to remain relevant. In order to do so, an agency will have to have a well thought out technology strategy. Part of the strategy is factoring in the two significant outcomes of technology. First, it redefines the role of the advisor with the client, and second, it integrates various issues so that the agent has a significant role within the client's business.

Technology: Important to the Client's Business

Let's examine the impact of technology from two stakeholder perspectives: the first is from the client's perspective and the second is from the agency's.

It starts with building a competitive employee benefits program for a client. Pre-Affordable Care Act (ACA) brokers and advisors spent their time putting together recommendations on how to solve the cost issues related to providing a competitive employee package. The process involved canvassing the market (procurement) to determine which carriers are the best fit for the goals of the project and from there, built a competitive benefits program.

Today, there has to be consideration of marketplace exchanges and other mechanisms that can bring employees more product choices and tools that provide information to select the correct products for an employee's budget and risk tolerance while simplifying the process of enrolling. Each of these goals can be achieved if technology is adopted.

Pre-ACA, the role of the advisors—and perhaps a measurement of their success—was to manage the expenses of the employee benefit program within the budget established based on the recommendation of the advisor. Today, the employee benefit program may have other success criteria including providing choice and creating an efficient process for sharing information to make decisions (self-service features) and selecting and enrolling in the product.

The conversation with clients became far more complex with the implementation of ACA. It has evolved from designing a competitive employee benefits program to focus on compliance activities related to the Affordable Care Act.

Compliance conversations are dominating the time an employer and advisor spend in consultation with one another. The best practices of high performing agencies demonstrate that they have built a team of experts dedicated around the topic. The team's activities, in broad terms, can include any of the following:

- Audit of gaps in documentation and reports,
- Development of an action plan to address gaps, and
- Implementation of the plan.

The problem is that the advice provided may not work if the client's administration and technology infrastructure are not able to fully implement the recommendation. Due to this deficiency in the administration and technology within the client's environment, the advisor will need to recommend a technology plan to address the deficiencies. So the conversation evolves to include payroll companies, benefit administration systems, time-and-attendance systems, and ACA compliance reporting and measurement systems.

The primary goal is to build a simple, streamlined paperless system that can deliver information, which assists the employer in managing its business more effectively, meeting the reporting requirements outlined in the ACA, and building a system that improves employee decision-making tools and self-service features.

The process to follow is different from a procurement process in a classic "old school"

brokerage assignment, because this is a consultative approach. In summary, this is a process of identifying the issue, defining the requirements, evaluating the companies against the requirements, and monitoring the implementation, including testing and monitoring system performance over the first month.

As time moved forward from pre-ACA through post-ACA, the conversations have advanced with the client from starting with designing a competitive employee benefits program to solving for compliance issues related to the Affordable Care Act to developing a strategy around human resource administration and technology infrastructure and systems to efficiently execute on the other two topics.

The role of the agency and agent have evolved from a procurement relationship to one that that designs and creates a more efficient business infrastructure that not just manages expenses for the client, but also mitigates risk for the client.

At this stage, technology creates and supports an environment that simplifies the client's administration of its activities and supports the following business goals;

- Identify and address areas in which the business can mitigate risk;
- Manage expenses with useful and useable information;
- Streamline the process of moving information from employee and employer to vendors and third parties that are in need of the information; and
- Implement tools that provide information to advance an employee self-service environment.

The conversations continue to evolve within an employer for agencies that have moved through this evolution. The remaining topic of conversation relates to human resource or human capital management, as it may be referred to in some circles.

This conversation places the advisor into the role of assisting the client align its culture and goals with recruiting and attracting employees. In this case, the advisor is working with leadership in many areas of the business. Technology is both the enabler and the integrator for the agency/agent to deliver services to the client in the four topical areas mentioned previously. Those areas include:

- Employee Benefits,
- Compliance,
- Human Resource Administration and Technology, and
- Human Resource or Human Capital Management.

Technology enables the agent to deliver the service in scalable ways for the client. The agent can then develop many different areas of service to create tremendous and consistent advantages over an agency/agent that does not have these tools and expertise. This allows an agent or agency to differentiate its business model.

Technology: Important to an Agency's Business Model

An agent/agency's business model is a second area in which technology is extremely important. Information is critical to running a business, working with a team or a client. The correct technology strategy can assist the agency manage its business more efficiently and scale the cost of activities like marketing, advertising, or training. It is also a key component in attracting the millennials into the industry as they have grown up with technology. Their method of conducting business is very different from the individuals that have been in the business for a long time.

Therefore, if your agency is going through a transformation and recruiting talent, take into account the work habits of the personnel you are recruiting. If you are recruiting younger talent into the firm, take a look at the technology support you have in place and determine whether it is helping or hurting your recruiting process.

Conclusion

To remain relevant as an advisor in the future, it is important to recognize and accept that the business issues clients face are integrated and very complex. Tactical business problems can be solved by focusing on—and addressing—one or more of the following areas: people issues, process issues, or technology issues.

Clients need an advisor who can identify and address all three areas with them. Technology is an integrator and enabler in the context that it becomes part of the solution but can be an expensive proposition if not effectively and efficiently implemented and managed.

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