EMPLOYEE BENEFITS DEVELOPMENTS OCTOBER 2015

Hodgson Russ Newsletter
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Attorneys

Peter Bradley

Michael Flanagan

Richard Kaiser

Ryan Murphy

Practices & Industries

Employee Benefits

Agency Guidance

IRS Issues Rule Requiring Inpatient Care for Minimum Value Plans. The Internal Revenue Service (IRS), consistent with prior regulations from the Department of Health and Human Resources (HHS), issued supplemental proposed regulations requiring employer sponsored health plans to provide substantial coverage for inpatient hospitalization and physician services in order for health coverage to qualify as minimum value. Under the Affordable Care Act (ACA), applicable large employers must offer their full-time employees affordable, minimum value health coverage. Failure to do so will expose the employer to a penalty under the shared responsibility payment provisions of the ACA, if the full-time employee receives a premium tax credit through a health care marketplace. A plan provides minimum value only if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent. The IRS regulations, like HHS's regulations, states that a plan provides minimum value only if the plan's share of the total allowed cost of benefits provided to an employee is at least 60 percent *and* the plan provides substantial coverage of inpatient hospital and physician services. These regulations are proposed to apply for plan years beginning after November 3, 2014. However, for purposes of potential penalties under the shared responsibility payment provisions of the ACA, the changes to the minimum value regulations do not apply before the end of the plan year beginning no later than March 1, 2015, to a plan that fails to provide substantial coverage of inpatient hospital and physician services, provided the employer had entered into a binding contract or had begun enrolling employees before November 3, 2014.

PBGC Issues Final Regulations on Reportable Events. Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) generally requires the plan administrator and each contributing sponsor of a defined benefit pension plan to notify the Pension Benefit Guaranty Corporation (PBGC) of certain corporate and plan events that may serve as an indicator that the pension plan or the employer is experiencing financial difficulty. In certain circumstances, waivers are available for these reportable events.

The PBGC recently issued final regulations that establish a new system of waivers for specified reportable events. Among other waivers, the final regulations establish a low-default risk safe harbor waiver and a public company waiver where the contributing sponsor is a public company that timely files an SEC Form 8-K disclosing the event [other than as part of an SEC Form 8-K Item 2.02 (Results of Operation and Financial Condition) and Item 9.01 (Financial Statements and Exhibits)].

The final regulations also modify the definition of certain reportable events. Of particular note, the loan default reportable event has been updated to require reporting when a lender waives or agrees to amend any covenant in a loan agreement, the effect of which is to cure or avoid a breach that would trigger a default under the agreement. Further, because many credit agreements and other corporate agreements include provisions relating to reportable events, it is recommended that affected plan administrators and contributing sponsors consult their ERISA advisor regarding the changes made by the final regulations.

The final regulations are applicable to post-event reports for reportable events occurring on or after January 1, 2016, and to advance reports due on or after January 1, 2016.

2016 Benefit Limits Announced. The Internal Revenue Service and Social Security Administration have announced the cost of living adjusted dollar limits applicable to benefit plans. The limits for 2016 remain unchanged from 2015. A listing of key limits is set out below:

2016 Limit

401(k)/403(b)/457 plan maximum elective deferral

$18,000

401(k)/403(b)/457 catch-up

$6,000

Defined contribution maximum annual addition

$53,000

Defined benefit maximum annual pension

$210,000

Qualified plans maximum compensation limit

$265,000

Highly compensated employee

$120,000

IRA limit

$5,500

IRA catch-up

$1,000

SIMPLE limit

$12,500

SIMPLE catch-up

$3,000

Social Security taxable wage base

$118,500

Cases

Withdrawal Liability for Purchaser of Assets. Generally, as a matter of law, a purchaser of assets is not liable for the liabilities of the seller of the assets unless the purchaser assumes the liability. However, with regard to imposition of withdrawal liability, there is increasing focus on successor liability for a purchaser of assets. In the past, some courts have been willing to impose liability on a purchaser of assets under Federal Labor Law for liability for delinquent contributions. Two recent circuit court decisions have found that purchasers in assets sales may also be liable for withdrawal liability obligations.

In a recent U.S. Court of Appeals for the Seventh Circuit decision, a non-union electrical contractor purchased the assets of a company that performed engineering construction and installation-related services. The seller, as part of its collective bargaining agreement, had made contributions to a multiemployer pension fund. Following the sale of its assets, a withdrawal from the multiemployer pension fund occurred because the seller made no further contributions to the plan. The selling entity did not challenge the assessment of withdrawal liability and did not make payments on the withdrawal liability. The multiemployer fund filed suit and named the purchaser of the assets as a defendant under the theory of successor liability. The Seventh Circuit found that the purchaser had notice of the potential liability for withdrawal liability based on the record presented in the case that purchaser had explored seller's potential liability. The Seventh Circuit also found that imposing successor liability on the purchaser was not unreasonable on the basis that the purchaser could have protected itself in the transaction by seeking indemnification from the seller or by paying a lower purchase price for the assets. Therefore, the Seventh Circuit remanded the case to the district court to determine whether the factual situation of continuity was present. *Tsareff v. ManWeb Servs., Inc.* (7th Cir., 2015).

A subsequent case in the U.S. Court of Appeals for the Ninth Circuit reached a similar decision. In this case, a floor covering entity sold its assets. The purchaser obtained a lease for the store and the warehouse, used similar signage, and was familiar with the customers of the selling entity. The Ninth Circuit found that successor liability could apply in this situation to impose withdrawal liability. Here, the Ninth Circuit explained in its remand to the district court the conditions necessary to be reviewed in determining whether successor liability was appropriate in this particular situation. The court identified various factors, including:

1. Market Share. The Ninth Circuit stated that instead of looking at the composition of the workforce as the primary factor, an examination of the market share received from the selling entities customers was a better indication for successor liability.
2. Workforce Continuity. In this context, the court said that an appropriate test should be whether a majority of the new entities workforce once worked for the old employer. This is a slightly different focus than whether a majority of the workers at the selling entity now work for the new entity.
3. Similarity in Ownership and Operations. Here the court indicated that there should be an emphasis on substantial continuity as measured by former customers, retained by the purchasing entity. *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.* (9th Cir., 2015).

In light of the two circuit court decisions, purchasers of assets should be especially careful where the selling entity may incur withdrawal liability. The courts had been quick to state that a purchaser can protect itself through indemnification and negotiation of a lower purchase price. However, these may be difficult to obtain because of the financial condition of the selling entity or due to the potential contingent nature of withdrawal liability.

Multiemployer Plan Update: Two 'Alter Ego' Doctrine Cases; Two Different Outcomes. Two recent cases involving multiemployer pension funds applied the "alter-ego" doctrine with two different outcomes.

One of those cases, involving a claim for employer contributions, describes the "alter-ego" doctrine as a judge-made doctrine that "allows courts to treat two companies as the same entity when necessary to prevent either of them from manipulating its corporate form to evade its labor obligations." In that case, employer 1 entered into a labor agreement with a union that required employer 1 to contribute $10.00 per hour to the union's pension fund, a *defined-benefit* pension fund. Employer 2 entered into a separate labor agreement with the same union, under which it was obligated to make contributions of an identical amount to the union's *defined-contribution* plan. During the same time period, and in in the same city, employer 1 and employer 2 were working on separate parking garage projects in different parts of the city. Employer 2 made all plan contributions as required by its separate contract with the union. The trustees of the union pension fund, however, allege that employer 2 used equipment and vehicles bearing employer 1's name and logo, and that employer 1 and employer 2 shared a foreman and supervisors, who sometimes told employer 2's employees to perform work for employer 1. The trustees of the fund argued that employer 1 and employer 2 are in fact the same company, and that employer 2 also should be required to contribute $10.00 per hour worked to the union pension fund as required by the labor agreement employer 1 entered into with the union.

A federal district court dismissed the claim of the fund trustees. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision. Because the union "negotiated contracts with both of the employer defendants," the court found that it had "no reason to set aside" the union's judgment as to which type of plan was in the best interests of its members. The court noted that it is the union and not the fund that represents its members, and that the union itself had not raised objections of its own to the arrangement. Accordingly, the court declined to apply the alter-ego doctrine in the case. *Bd. of Trustees of the Local 17 Iron Workers Pension Fund v. Harris Davis Rebar LLC* (6th Cir. 2015).

The other case involved a withdrawal liability claim. In that, three construction companies closed their business operations (the closed entities). Because the closed entities had employed union workers and were contributing to a multiemployer pension fund, they were subject to withdrawal liability of $4.25 million in connection with the cessation of their business operations. The closed entities, however, never paid their withdrawal liability, and the owner of the closed entities started and ran a new company (newco) that used non-union employees to perform work that predominantly is of the same type that was performed by the closed entities. The pension fund sued the closed companies as well as newco for payment of the withdrawal liability.

In granting the pension fund's motion for summary judgment, the court held that newco "is indeed the alter ego of the [closed] companies and is therefore responsible for the withdrawal liability owed by the [closed] companies." The court concluded that "there is no genuine issue of material fact that [newco] is the alter ego of the [closed entities] for ERISA purposes, and that the record "establishes an intent to evade union obligations." The court also concluded that "similarity of business purposes, management, operations, equipment, customers, supervision, and owners" also provided overwhelming support for a finding that newco was an alter ego of the closed entities. Accordingly, the court ruled that newco was liable to the pension fund for the unpaid withdrawal liability as well as liquidated damages, interest and reasonable attorney's fees and costs. *Bd. of Trustees of the Heat & Frost Insulators Local N,o. 33 Pension Fund v. D & N Insulation Co.* (D. Conn. 2015).

Post-*Tackett* Decisions on Retiree Health Care Vesting. In September, 2015, a federal court within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit – the U.S. District Court for the Eastern District of Michigan, Southern Division – handed down decisions in two separate lawsuits challenging an employer's attempt to reduce or terminate retiree health benefits. In each case, the Michigan district court had an opportunity to consider how the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett* (U.S., 2015) should be applied in determining the vested status of retiree healthcare benefits.

Background

In *Tackett*, the Supreme Court expressly overruled the Sixth Circuit's longstanding decision in *UAW v. Yard-Man, Inc. Yard-Man*, and its progeny had established a series of inferences and rules of construction to aid the courts within the Sixth Circuit's jurisdiction in determining whether retiree benefits had vested. Those inferences and rules of construction led courts to rule in favor of retirees even where the collective bargaining agreements at issue were silent or ambiguous on the issue of vesting. In *Tackett*, the Supreme Court unanimously held that courts must apply ordinary principles of contract law in determining the vested status of retiree benefits, and that pro-vesting inferences and rules of construction were inconsistent with this standard.

The *Reese* Decision

In August 2007, well before *Tackett,* the court in *Reese* had ruled in favor of the retirees, holding that they were entitled to lifetime health care benefits under the terms of the collective bargaining agreement. In concluding that the parties intended to confer lifetime benefits on the retirees, the court relied on contract language tying eligibility for health care benefits to eligibility for pension benefits. The *Reese* court reasoned that because pension benefits are presumed to last for life, and because eligibility for health care benefits was linked to eligibility for pension benefits, the health care benefits, like pension benefits, were intended to last for life. The court also relied on the fact that the collective bargaining agreement contained express durational clauses for other categories of benefits, but not for retiree health care benefits, thereby ascribing no weight to the general durational clauses contained in the contracts.

Some five years later, when *Tackett* was handed down, *Reese* was still pending on the separate issue of whether retiree benefits could be reduced or altered. Citing *Tackett*, the company made a motion to have the retiree's complaint dismissed on the grounds that the initial decision in 2007 was wrong under the legal standard mandated by *Tackett*. This time, the *Reese* court agreed with the company, ruling that the reasoning employed by the court in 2007 was not compatible with *Tackett* because *Tackett*: 1) requires a clear manifestation of intent showing that the parties intended to confer lifetime benefits, 2) admonishes courts not to ignore general durational clauses, and 3) requires courts to "consider the traditional contract principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" The court also stated that it could find no reason in law or logic to suppose that eligibility for health care benefits (which, for administrative convenience, is often tied to eligibility for pension benefits) has anything to do with the duration for which health care benefits will be afforded. *Reese v. CNH Am., LLC* (E.D. Mich., 2015)

Of significance is the court's view of how *Tackett* changed the rules governing the analysis of whether parties intended to create lifetime retiree benefits. Here is what the court wrote:

- Where a CBA is silent or ambiguous about the duration of retiree health care benefits, courts may no longer infer that the parties intended to confer lifetime benefits based on the context of labor-management negotiations.
- Courts may no longer infer that the parties intended to confer lifetime benefits based on the nature of retiree benefits.
- Courts may no longer categorically refuse to apply general durational clauses to retiree benefits.
- Courts should give effect to the traditional contract principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.
- Courts should give effect to the traditional contract principle that ambiguous writings should not be construed to create lifetime benefits.
- To conclude that the parties intended to confer lifetime benefits, there must be a clear manifestation of intent, grounded in the contractual language, to confer lifetime benefits.

The *Kelsey-Hayes* Decision

In a separate case, the same district court (different judge) sided with the retirees, ruling that the *Tackett* standard compelled the conclusion that the collective bargaining agreement evidenced an intent to vest retiree benefits. The court found that the terms of the collective bargaining agreement included a provision that provided that health care benefits for retirees "at the time of retirement shall be continued" and that a similar provision for retiree spouses clearly manifested an intent to confer lifetime benefits. The court ruled that a subsequent plant closing agreement did not extinguish the retiree health care obligations based on a provision in that agreement that retiree health care benefits would survive to the extent vested "under applicable law and benefit plans (including those provisions contained in collective bargaining agreements)." The court found that the plant closing agreement provided that employees eligible to retire as of the closing would "participate in" and "be eligible to receive retiree medical" benefits. The court also found that the agreement granted some employees "one year of additional credited and vesting service" and provided that if the additional year would allow them to retire under the pension, they would be eligible to receive retiree medical. According to the court, this negotiated promise of future retiree health care is contractual proof that the parties specifically intended that retiree health care survives the initial collective bargaining agreement and the plant closing. *Auto Workers v. Kelsey-Hayes Co.* (E.D. Mich., 2015)