"Exciting" Employee Benefit Developments for Employers and their Non-ERISA Counsel

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The legal landscape relative to the Employee Retirement Income Security Act of 1974, as amended ("ERISA")[1] and other benefit-related matters is in a constant and complex state of change. This article highlights some of the most significant recent developments for employers' and their attorneys' general awareness.

Employers are responsible for the legal compliance of the plans that they maintain for their employees (even though it may seem at times that such responsibility is actually undertaken by vendors hired to assist in administering a plan). Many issues may require action by employers maintaining employee benefit plans to avoid potentially severe adverse consequences in the form of liability to plan participants and/or the imposition of government monetary sanctions.

The Affordable Care Act

Even most non-ERISA experts have heard the news that the Affordable Care Act ("ACA") was struck down in its entirety as unconstitutional in December 2018.[2] The case was brought by several states and private individuals seeking a declaration that one aspect of the ACA (the "individual mandate," which generally requires individuals to have health insurance or pay a tax) was unconstitutional. Further, that the remainder of the ACA was not severable, and thus could not survive. The decision was sweeping in its scope; the matter was subsequently stayed and appealed to the Fifth Circuit.

What does this really mean? The answer is not yet clear. For now, employers subject to health care reform are advised to continue to comply with the ACA. In most cases, existing plans are already in compliance and suddenly unwinding those plans, or portions thereof, would be difficult in any event. The bottom line here is to stay tuned; particularly, before taking any action to avoid compliance given the stay and the appeal.

The U.S. Department of Labor fiduciary rule was in the works for about a decade and was finally made effective in April 2017. The fiduciary rule generally expanded the definition of who is a "fiduciary" under ERISA[...]the fiduciary rule was struck down in its entirety by the Fifth Circuit in March 2018.[4]

Department of Labor fiduciary rule

The U.S. Department of Labor fiduciary rule was in the works for about a decade and was finally made effective in April 2017. The fiduciary rule generally expanded the definition of who is a "fiduciary" under ERISA. The goal was to include more individuals and entities that provide investment advice. The details were set forth in approximately 1,000 pages of regulations.[3]

The fiduciary rule was struck down in its entirety by the Fifth Circuit in March 2018.[4] Unlike the ACA, it is clear that this is really the end for the fiduciary rule, at least from an ERISA/U.S. Department of Labor perspective. The rule will likely live on in the form of new SEC rules still under development (which makes sense, since the rule was mostly aimed at investment professionals) and various state law initiatives.

In the meantime, the take home here for employer plan sponsors is that their long-existing fiduciary responsibilities remain in place and are unaffected by the demise of the fiduciary rule. The fiduciary rule did not have much of an effect on plan sponsors; it was aimed at those giving investment advice.

Under already existing law, generally anyone with discretionary authority over plan matters is, and will remain, a fiduciary.[5] The standard to which fiduciaries must adhere is to act in the best interest of plan participants and ensure a plan pays only reasonable expenses.[6] Fiduciaries are also required to act as a prudent expert would in the same situation.[7] This means that company fiduciaries should retain appropriate expert advice to assist them in making decisions.

The reasonable expense element has been, and will continue to be, the subject of class action litigation, which has resulted in multi-million dollar settlements and judgments against fiduciaries. Importantly, fiduciaries are personally liable, and not only for their own acts, but those of co-fiduciaries. A key takeaway regarding plan expenses is that the fees a plan pays need not be the cheapest;

however, appropriate assessments should be ongoing. Indeed, there is a spectrum of efforts that might be undertaken in this regard depending on the plan.

403(b) plan document restatements

ERISA plans are required to exist on written plan documents detailing the many provisions governing their operation. Most plan documents are 100-plus pages and they are essentially contracts. There are many rules insofar as plan documents are concerned, such as when and how they may or must be amended, and when they need to be "restated" (*i.e*., written onto a new document reflecting IRS approval for a new generation document—roughly every six years). The rules vary for different types of plans—401(k), defined benefit, 403(b), and so on.

In 2018, the IRS formally approved specimen documents for Internal Revenue Code (the "Code") Section 403(b) plans. 403(b) plans are similar to 401(k) plans, except they are maintained by tax-exempt entities. For various reasons, 403(b) plans seem to have a high incidence of legal noncompliance. One particular area of 403(b) plan noncompliance involves plan documents. Many plans do not have plan documents or their plan documents are flawed. There is currently a window open that will close on March 31, 2020, during which 403(b) plan sponsors (*i.e.*, employers) may restate their plans onto these new preapproved documents and obtain protections not only going forward but for some past legal violations.[8] This opportunity should not be missed.

New hardship distribution rules

The ubiquitous 401(k) plan normally allows participants to elect to defer their own compensation, and also allows employers to make matching and/or profit sharing/nonelective contributions. 401(k) plans may, but are not required to, allow employees to seek distributions on account of a financial hardship.[9]

The 401(k) regulations impose several requirements on the ability to obtain hardship distributions: generally, that there is an immediate and heavy financial need and that the amount of the distribution is not in excess of the amount necessary to satisfy that need.[10] And there is substantially more regulatory detail. That detail was modified by the Bipartisan Budget Act of 2018 and subsequent proposed IRS regulations.[11] The changes generally allow hardship withdrawals to be made: 1) without first taking out a plan loan; 2) without suspending an employee's future deferrals for six months; and 3) by including earnings on previous 401(k) contributions.

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More guidance is expected, including final IRS regulations. Most plans have implemented the foregoing changes from an administrative standpoint. The IRS will identify a date in the future by which actual retroactive plan amendments will need to be adopted to conform the plan terms to the plan operations. Failure to adopt amendments by that deadline will result in qualification failures.[12] Also, as a practical matter, plan participants should be notified of these administrative changes as soon as possible (although, the legal deadline for such notifications is over a year away).

Electronic delivery of plan notices and disclosures

ERISA and the Code require many notices and disclosures to plan participants, depending on the type of plan. Some examples include summary plan descriptions, summary material modifications, annual fee disclosures, quarterly fee disclosures, safe harbor notices, summary annual reports, "QDIA"[13] notices, automatic enrollment notices, *etc*.

The news here is that there is no news. While employers and their record keepers/administrators would love to simply shoot these documents out via email or post them on a website, those are not currently viable options (although, it happens with great frequency – at the employer's risk).

The U.S. Department of Labor is concerned that not everyone has the ability or the inclination to receive important information via smart phone and/or email. Accordingly, despite ongoing pressure from various sources, the rules remain as they have been: hand delivery, first class U.S. mail, or compliance with existing electronic delivery regulations (which are not as simple as many would like, but are workable).[14] This issue is definitely getting attention and it seems likely that there will be some progress soon; however, resulting changes will probably not enable companies to simply send out a text or an email advising a participant where he/she can go to search for different notices.

Economically targeted investments

The U.S. Department of Labor released guidance in 2018 in the form of Field Assistance Bulletin ("FAB") 2018-01 addressing the fiduciary implications associated with plans choosing economically targeted investments ("ETIs"). ETIs are generally investments associated with collateral social policy objectives separate and apart from the investment return objectives. Examples might include investments that promote environmental or union-related causes.

The gist of FAB 2018-01 is that ETIs are permissible and will not be subject to criticisms relating to fiduciary breaches if the environmental, social, and governance factors aimed at by the ETI are merely a tie breaker when choosing an ETI instead of a comparable investment option. That is, investment returns should not be sacrificed to promote such factors, but all else being equal, choosing an ETI over a similarly forecasted investment is acceptable.

Lost plan participants

Very often, individuals leave employment and are then able to obtain a distribution or affect a rollover from their former employer's plan. In most plans, if the balance is over $5,000, a terminated participant may decide to leave the money with that plan. However, most plans require that if the amounts are under $5,000, the amounts will be automatically paid out to the former employee, or automatically rolled over to an IRA, if an affirmative election to receive payment or effect a rollover is not made. In either case, it is important for plan sponsor employers to understand the choices they have made here (as reflected in their plan documents) and to carry them out. Failure to do so is a qualification failure.

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Many plans choose these cash out provisions but fail to implement them. In relation to this issue, there is an increased U.S. Department of Labor focus on finding "lost" participants. The legal parameters are still in flux, but we know quite a bit.

First, if a plan provides for automatic cash out and/or rollovers of amounts under $5,000, that must occur or it will constitute a qualification failure for which the IRS may impose monetary sanctions among other undesired consequences.

Second, it is in the best interest of plan sponsors to find lost participants so those participants can receive required notices, and/or move their funds. In both regards, the current guidance indicates that a plan sponsor should undertake (and document) the following efforts to locate lost participants:[15] 1) attempt to contact lost participants by certified mail; 2) check related company and plan records for lost participant contact information; 3) contact lost participant designated beneficiaries; and 4) use free internet search tools to locate lost participants.

There are also a number of paid search services that may be helpful and are low cost (about $15 per participant).

The bottom line here is to comply with your plan terms if you have small balance cash-out provisions (or get rid of them, which you can), and attempt to distribute funds using the above steps to find any lost participants who are missing. The lost participant issue might also come up in the context of a plan termination.

Deferred compensation

This is not a new development; however, it is an issue of the utmost importance – particularly given that it is often not recognized (and such non-recognition can have disastrous effects).

In summary, deferred compensation will exist when there is a promise to pay an employee compensation in a later taxable year. This will generally require compliance with Internal Revenue Code Section 409A (yes, very scary; no one likes to hear "409A" uttered). Many employers seek to pay employees in a manner that will constitute deferred compensation. Long story short, 409A compliance is achievable, as is structuring an arrangement to avoid 409A coverage. The key is recognition and following through with the intent to comply or legitimately avoid 409A.

The issue often sneaks into employment or separation agreements that inadvertently trigger 409A and/or contain terms that make them an ERISA covered plan (*e.g.*, by promising a terminating executive or founder payment of $X for Y years following his or her "retirement"). The bottom line here is that there are ways to avoid 409A and ERISA coverage, but simply promising future payments to an employee will usually not do it.

Conclusion

Employer plan sponsors have numerous responsibilities relative to keeping an eye on the ever-changing world of employee benefits and the associated ever-changing complicated laws. It is critical that employers recognize their responsibilities and the changes to ensure legal compliance, avoid lawsuits, and prevent undesired governmental scrutiny of plan matters. The foregoing barely scratches the surface but hopefully will provide employers and their counsel with heightened awareness and helpful information relative to some of the developing issues.

Endnotes

1. 29 U.S.C. § 1001, *et. seq.*
2. *Texas v. United States*, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018).
3. 81 Fed. Reg. 20,946 (Apr. 8, 2016).
4. *Chamber of Commerce of Am. v. U.S. Dep't of Labor*, 2018 WL 3301737 (5th Cir. 2018).
5. 29 U.S.C. § 1002(21).
6. 29 U.S.C. § 1104(a).
7. *Id.*
8. IRS Rev. Proc. 2017-18.
9. Treas. Reg. § 1.401(k)-1(d)(3).
10. *Id.*
11. 83 Fed. Reg. 56,763 (November 14, 2018).
12. A qualification failure will generally exist when plan documents are not timely updated to reflect changes in the law, or when a plan's terms do not match a plan's operations. The consequences include government imposed monetary sanctions and perhaps other corrective actions such as additional employer contributions to a plan.
13. Qualified default investment alternatives. *See* Labor Dept. Reg. § 2550.404c-5.
14. *See* Labor Dept. Reg. § 2520.104b-1(b) and (c).
15. Dept. of Labor Field Assistance Bulletin No. 2014-01.

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