Summer 2016

Employee Benefits for Employers

jackson|lewis
Preventive Strategies and Positive Solutions for the Workplace®

TABLE OF CONTENTS:

A Note from the Editor

Welcome once again, dear readers. Our summer 2016 issue offers a number of interesting items from the world of employee benefits. As this edition's lead essay, we present Melissa Ostrower's update on the Department of Labor's final rule regarding fiduciary status of investment advisers under ERISA. Joshua Rafsky, a new arrival to our Chicago office, has contributed an overview of the Affordable Care Act's prohibitions on transgender discrimination. Another Chicago practitioner, Natalie Nathanson, graces this edition as our "Featured Lawyer." As usual, we round out the newsletter with a survey of significant developments in ERISA and employee-benefits law. We hope you enjoy it!

- Charles Seemann

What the New Fiduciary Rule Means for Plan Sponsors and Fiduciaries

By Melissa Ostrower

On April 8, 2016, the Department of Labor published its final rule on who is a fiduciary as a result of giving investment advice under the Employee Retirement Income Security Act of 1974 (the "New Fiduciary Rule") as well as related exemptions. Although the New Fiduciary Rule is targeted mainly at the providers of investment advice, it contains a number of provisions that are relevant to sponsors and fiduciaries of qualified retirement plans (*e.g.,* 401(k) plans and traditional pension plans).

Below is a general overview of the New Fiduciary Rule highlighting the aspects of the rule that plan sponsors and fiduciaries should review. The New Fiduciary Rule is scheduled to take effect in April 2017 (although there are a number of cases making their way through the courts challenging the New Fiduciary Rule). However, plan sponsors and fiduciaries should start considering the impact of the New Fiduciary Rule on their plans in order to ensure timely compliance.

General Overview

Under the New Fiduciary Rule, a person is considered to be rendering investment advice with respect to a plan if such person provides for a fee or other compensation, among other things, a "recommendation" regarding the advisability of holding certain investments or how such investments should be invested after being rolled over to an individual retirement account or distributed.

A "recommendation" means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the recipient engage in or refrain from taking a particular course of action. The determination of whether a "recommendation" has been made is an objective rather than subjective inquiry. This definition casts a wide net in order to bring most investment advice provided to plans under the fiduciary definition.

The publishing of the New Fiduciary Rule was accompanied by a new "Best Interest Contract Exemption" (the "BICE"), as well as amendments to certain other exemptions. The BICE allows investment fiduciaries to receive compensation in connection with their advice, as long as the requirements of the BICE are met, without running afoul of prohibited transaction rules. Among other things, the BICE requires that all advice be in the best interest of the plan. Another exemption, PTE 84-24, provides exemption relief in connection with the sale of fixed rate annuity products sold to plans.

Issues for Plan Sponsors to Consider

Does the New Fiduciary Rule Apply to Advice with Respect to All ERISA Plans?

The New Fiduciary Rule *does* apply to recommendations to retirement plans such as 401(k) plans, pension plans, and individual retirement accounts. It also applies to recommendations to health savings accounts that frequently accompany high deductible health plans. However, the Department of Labor clarified that the New Fiduciary Rule *does not* apply to recommendations regarding health or disability insurance policies, term life insurance policies, or other assets to the extent that they do not include an investment component.

Participant Education

The New Fiduciary Rule describes four broad categories of non-fiduciary educational information and materials that may be provided without constituting a "recommendation." These include providing: (i) plan information; (ii) general financial, investment, and retirement information; (iii) asset allocation models; and (iv) interactive investment materials. Additionally, the New Fiduciary Rule allows educational asset allocation models and interactive investment materials provided to participants in plans to reference, subject to certain requirements, specific investment alternatives. This will allow plan sponsors to provide tailored and valuable investment information to plan participants without becoming subject to the New Fiduciary Rule. Ultimately, the New Fiduciary Rule provides helpful guidance to plan sponsors regarding

how they can effectively educate participants in their plans, without that advice being considered fiduciary in nature.

Platform Providers

The New Fiduciary Rule provides that generally a platform provider (*i.e.,* a vendor that makes available a variety of investment options that can be offered under a plan) will not be considered to be making a recommendation by marketing or making available to a plan fiduciary a variety of investments to be offered under the plan. The platform provider does not need to take into account the individualized needs of the plan or participants to take advantage of this relief, subject to certain requirements. Thus, the platform provider will not necessarily be making available investment options that are in the best interests of plan participants. Plan sponsors should be aware of this exemption so that they understand and appreciate the platform vendor's potential non-fiduciary status vis-à-vis the plan.

Plan Sponsor Employees

The New Fiduciary Rule also provides that employees of the plan sponsor (or an affiliate) who provide advice to a plan fiduciary or participant are not fiduciary advisers, so long as the employees do not receive compensation beyond the employees' normal compensation. This exclusion is intended to clarify that accounting, human resources and financial employees are not deemed fiduciary investment advisers merely for performing routine duties, such as preparing reports and providing recommendations.

The exclusion also covers employee-to-employee communications about the plan, subject to certain technical conditions, such as where an employee of the plan sponsor provides advice to another employee of the plan sponsor in his or her capacity as a participant or beneficiary of the plan, provided the person's job responsibilities do not involve the provision of investment advice or investment recommendations, among other requirements. Notably, the exclusion does not extend beyond employees of the plan sponsor and its affiliates (for example, it does not extend to call center employees who are not employees of the plan sponsor).

Seller's Exemption

Communications in arm's length transactions with plan fiduciaries who have at least $50 million in assets (plan or non-plan) under management are not considered fiduciary investment advice under the New Fiduciary Rule. The Department of Labor noted that such fiduciaries have a high degree of financial sophistication and thus do not need the protections provided in the New Fiduciary Rule. Essentially, it appears that the Department of Labor believes that certain sophisticated plan fiduciaries should be able to interact with financial advisors without causing all communications with the advisor to be fiduciary in nature.

However, the exclusion does have a number of requirements. An advisor must inform the plan fiduciary that the adviser is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, and must inform the plan fiduciary of the existence and nature of the adviser's financial interests in the transaction.

Ultimately, sophisticated plan fiduciaries with significant assets under management should be aware of this exemption and understand that subject to certain independence and disclosure requirements, advisors can provide investment advice to the plan fiduciaries in a non-fiduciary capacity.

Key Takeaways

Although the New Fiduciary Rule is not primarily directed at plan sponsors and fiduciaries, such plan sponsors and fiduciaries should be aware of how the New Fiduciary Rule affects them. Plan sponsors and fiduciaries should understand which service providers are acting in a fiduciary capacity with respect to the plan and which are not. Service providers who are not fiduciaries with respect to the plan are generally subject to a much lower standard of care. An understanding of which vendors are acting as fiduciaries is thus crucial for plan sponsors and fiduciaries to carry out their fiduciary duties in accordance with ERISA.

The New Fiduciary Rule is almost certain to provoke many plan service providers to make significant revisions to advisory and other service agreements. Accordingly, plan fiduciaries should be prepared to undertake a thorough review of revised vendor agreements to ensure the new terms are consistent with the best interests of the plan and plan participants.

Finally, plan sponsors and fiduciaries should be sure that they understand the New Fiduciary Rule and whether changes need to be made to the plan or plan practices. As this is an evolving area of the law, plan sponsors and fiduciaries should stay tuned for new developments.

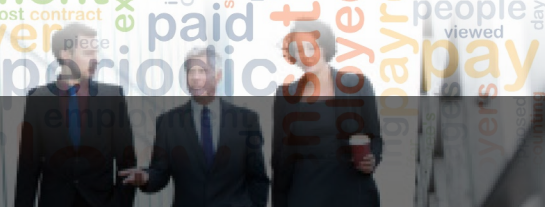
Does Your Health Plan Have a Gender Identity Problem?

The Answer May Surprise You

By: Joy Napier-Joyce, Michelle Phillips, and Joshua Rafsky

Since the enactment of the Patient Protection and Affordable Care Act (the "ACA"), employers have been confronted with numerous questions. Do we have to provide our employees with health care coverage? What benefits does our health care coverage have to provide? What types of penalties do we face for failing to provide coverage or for having non-compliant coverage? What are our reporting requirements? The list goes on and on.

While employers may be aware of many of the compliance issues the ACA presents, they may not be aware that the ACA contains a nondiscrimination clause. Section 1557 of the ACA prohibits discrimination on the basis of sex, age, race, color, national origin, and disability with respect to health care and health coverage. An employer may be mistaken in thinking, "This is no big deal because my company's health care plan does not discriminate." For instance, if the employer's plan contains



a categorical exclusion for gender transition services, including, but not limited to, hormone therapy, behavioral health services, or gender affirmation surgery (collectively referred to as "gender transition services"), the U.S. Department of Health and Human Services ("HHS") says the plan violates Section 1557.

HHS Said What?

Recently, HHS issued a final rule implementing Section 1557.[1] Among other things, the rule prohibits discrimination based on someone's gender identity, including discrimination against transgender individuals. A transgender individual is defined as an individual whose gender identity differs from the sex assigned to that person at birth.[2] The rule would prevent a group health plan or other covered entity from taking the following actions that are considered discriminatory against transgender individuals:[3]

- Denying or limiting coverage, or imposing additional cost sharing or other restrictions, for services that are normally or exclusively limited to a person's sex to a transgender person whose sex at birth, gender identity, or recorded gender is different than the one for which the services are normally provided.
- Having a categorical exclusion for all health services related to gender transition.
- Denying or limiting coverage, or imposing additional cost sharing or other restrictions, for specific services related to gender transition if that denial or limitation results in discrimination against a transgender individual.

The rule applies to every health program or activity that receives federal financial assistance provided or made available by HHS (known as "covered entities"), including group health plans and health insurers, as well as other programs and entities, such as government health insurance exchanges. This broad application likely would cover most fully insured group health plans. It also could include some wellness programs, "excepted benefits" (such as limited scope dental and vision plans) and long term care coverage.

Would the Rule Apply to My Company's Self-Insured Plan?

What about self-insured group health plans? Does the rule apply to them as well? The answer is "maybe." There are two ways in which the final rule could apply with respect to the actions of a self-insured group health plan.

First, a self-insured group health plan is subject to the final rule if it receives federal financial assistance from HHS. That would make it a "covered entity" and directly liable for violations of the rule.

Second, the actions of a self-insured group health plan could subject the plan sponsor to liability if (1) the plan sponsor is a health insurer or health care provider, (2) the plan sponsor receives federal funding and a primary objective of that money is to fund the plan sponsor's employee benefit plan, or (3) the plan sponsor is not primarily a health insurer or health care provider, but it operates a health program or activity that receives federal funding (but only with respect to employees that work on that program).[4]

What If the Plan's Third-Party Administrator is a Covered Entity?

In the preamble to the proposed version of the rule issued in 2015, HHS stated that an in-

surance company covered by the rule would be covered not only with respect to the plans it issues, but also when it acts as third-party administrator ("TPA") for an employer-sponsored group health plan.[5] This raised substantial concern that a self-insured plan could become subject to the rule simply by virtue of its third-party administrator being a covered entity.

HHS addressed this concern in the preamble to the final rule. It is not the intent of HHS to make the rule apply to an employer or a plan simply because a covered third-party administrator is subject to the rule. Furthermore, a third-party administrator is not subject to Section 1557 liability simply because the plan's design is discriminatory.[6]

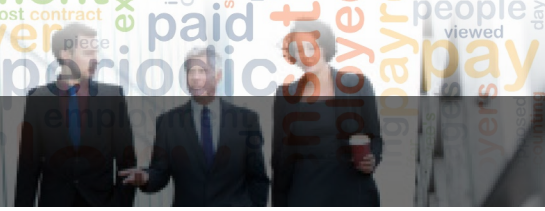
For instance, if the plan has a categorical exclusion for gender transition services, this would not subject the TPA to liability unless the TPA had authority or discretion over plan design. HHS could go after the employer and/or the plan if either are otherwise subject to the rule, but it could not seek redress from the TPA. A TPA would be liable, however, if its own actions are discriminatory, such as if it threatened to expose a participant's transgender status to the participant's employer.[7]

Neither My Company Nor Our Plan is a Covered Entity. Are We in the Clear?

It is important to keep in mind that the rule does not stand in isolation, but rather is part of a burgeoning movement toward greater equality for the LGBT (lesbian, gay, bisexual, and transgender) community by the federal government. HHS is moving in step with other federal agencies that are strengthening and expanding protections for LGBT individuals, and it is coordinating its actions with those agencies.

There will be situations where HHS does not have authority to deal with actions that are considered discriminatory under the rule. For instance, HHS would not have authority to go after an employer that is not a covered entity who sponsors a self-insured group health plan that is not a covered entity, even if that plan has a discriminatory benefit design. In that instance, HHS has indicated it will refer or transfer the matter to the U.S. Equal Employment Opportunity Commission ("EEOC").[8] HHS also will coordinate with the Office of Personnel Management ("OPM") in the handling of claims related to discrimination in health benefits provided to federal employees.[9] Therefore, it is important to understand how other federal agencies analyze sex discrimination claims related to transgender individuals.

In 2011, the U.S. Equal Employment Opportunity Commission announced a Strategic Enforcement Plan for 2012-2016, which established the enforcement of certain emerging areas, including, but not limited to, LGBT rights and pre-hire inquiries.[10] In 2012, the EEOC ruled that it is a violation of Title VII of the Civil Rights Act for an employer to discriminate based on transgender status.[11] More recently, the EEOC issued a new fact sheet to remind employers that discrimination based on transgender status is sex discrimination that violates Title VII, regardless of whether a contrary state law requires people to use bathrooms based on their sex assigned at birth.[12] Other federal agencies, such as the



Occupational Safety and Health Administration, the Department of Labor, the Office of Federal Contract Compliance Programs, and OPM have also provided guidance on how employers should treat transgender employees.[13]

With respect to public education, the U.S. Departments of Justice (the "DOJ") and Education (the "DOE") issued a "Dear Colleague" letter giving significant guidance on how those departments will apply the sex discrimination protections of Title IX of the Education Act of 1972 to transgendered students.[14] The Departments noted their interpretation that discrimination based on gender identity is impermissible sex discrimination is consistent with the way federal courts and other federal agencies interpret federal laws that prohibit sex discrimination.[15]

Cases dealing with allegations of sex discrimination against transgender individuals have also made it to the federal court system. For instance, the U.S. Court of Appeals for the Fourth Circuit recently overturned a lower court's dismissal of a transgender student's Title IX sex discrimination claim because the lower court did not give appropriate deference to the DOE's regulatory opinion that a school generally must treat transgender students consistent with their gender identity.[16]

The DOJ is now embroiled in two lawsuits with the State of North Carolina (one filed by the United States and the other filed by North Carolina) over North Carolina's recently passed HB-2 law. The North Carolina law prohibits municipalities from enacting their own anti-discrimination laws and came about after the City of Charlotte passed a nondiscrimination ordinance that allowed transgender people to use restrooms aligned with their gender identity.[17] The U.S. government is alleging, among other things, that HB-2 causes the State to engage in impermissible sex discrimination under Title VII and Title IX.[18]

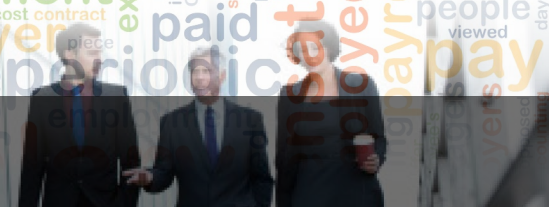
The point of this discussion is not to provide an exhaustive list of all governmental action aimed at ending discrimination against transgender individuals. Rather, it is to help employers understand the trend toward greater employment-related protections for transgender individuals in order to allow you to prepare and respond in a way that is beneficial both to your company and your employees.

What Does This All Mean for My Company's Benefit Plans?

The final rule goes into effect on July 18, 2016. There is a delayed applicability date until the first day of the first plan year beginning on or after January 1, 2017, for health insurance or group health plan design changes (*e.g.,* covered benefits, limitations, restrictions, and cost-sharing). A failure to comply could subject the company and/or the plan to potential lawsuits, administrative actions and damages, as well as the need to take remedial actions to correct violations.

Here are some issues to consider when analyzing whether a plan complies with the rule or if changes are needed:

1. Does the plan contain a categorical exclusion of coverage for gender transition services? If so, consider taking it out. Such an exclusion is deemed discriminatory under the rule. Even if not subject to the rule, the EEOC or other federal agencies may consider a potential action.



2. If the plan does not have a categorical ban, determine if it contains exclusions that may be deemed discriminatory. The rule does not require a plan to cover any particular service related to the gender transition process, but a plan cannot provide coverage in a discriminatory way. For example, impermissible discrimination may occur when a health plan denies a claim for a hysterectomy that the participant's doctor says is medically necessary to treat gender dysphoria, but allows hysterectomies in other circumstances. Also, keep in mind that coverage related to gender transition is not limited to one of the approximately 29 types of surgical procedures. It also could include hormone therapy and psychotherapy (and a range of other services, depending on the circumstances).

3. Furthermore, a plan cannot contain exclusions from coverage for sex-specific services based on a person identifying as transgender. For example, a plan could run afoul of the rule if it denies a transgender woman the ability to get a medically appropriate prostate exam simply for identifying as a transgender woman or being classified by the plan as female. Similarly, a plan could not deny medically necessary ovarian cancer treatment to a transgender man simply for identifying as a transgender man or being classified by the plan as male.

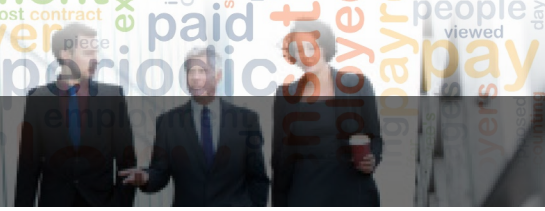
4. The rule contains notice requirements with which covered entities must comply. Covered entities with at least 15 employees will need to create grievance procedures and appoint at least one employee to coordinate efforts related to Section 1557 compliance. Now is the time to figure out how to comply with these requirements and who will be the company's point of contact.

5. HHS declined to decide whether discrimination based on a person's sexual orientation is a form of sex discrimination.[19] Note, however, that it would be unwise to assume this means that such discrimination is legally permissible. First, HHS noted the rule would cover sex discrimination related to sexual orientation where the evidence establishes the discrimination is based on gender stereotypes. Second, HHS will continue to monitor the evolving law around sexual orientation discrimination and enforce Section 1557 in light of those developments. Furthermore, the EEOC and some courts already have held that a prohibition on sex discrimination includes discrimination based on sexual orientation.

6. HHS declined to adopt a blanket religious objection exemption excusing a covered entity from compliance with the rule. However, it recognizes that there may be covered entities with strong religious objections to providing certain services, so the rule contains an exemption from compliance with requirements of the rule that violate applicable federal statutory protections for religious freedom. The interplay of the rule and federal statutory religious protections undoubtedly will be the subject of litigation. It is safe to assume though that HHS will give careful scrutiny to any failure to comply with the rule based on religious objection.

7. While this article focuses on how the rule applies to claims of discrimination related to transgender/gender non-conforming individuals, the rule prohibits discrimination against other protected classes. Accordingly, employers should ensure compliance with all aspects of the rule with respect to all protected individuals.

Every plan is different, and so will be the path to compliance. Plan sponsors are urged to consult with counsel to determine how to proceed. Jackson Lewis attorneys are available to assist with this review.



ENDNOTES

[1] 45 C.F.R. § 92.1 *et seq.*

[2] 45 C.F.R. § 92.4.

[3] 45 C.F.R. § 92.207(b)(3)-5.

[4] 45 C.F.R. § 92.208.

[5] 81 Fed. Reg. 31428.

[6] *Id.* at 31432. *See also Tovar v. Essentia Health*, No. 16-100 (D. Minn. May 11, 2016) (purported third-party administrator not liable for plan design that allegedly violated Section 1557 because TPA did not set the terms of the plan or have control over the coverage the plan provided).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 31432-33.

[10] "EEOC Releases Aggressive Strategic Enforcement Plan Focused on Discrimination in Hiring and Recruitment," *available at* http://www.jacksonlewis.com/resources-publication/eeoc-releases-aggressive-strategic-enforcement-plan-focused-discrimination-hiring-and-recruitment.

[11] *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 12, 2012). This case was followed by *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Mar. 27, 2015), in which the EEOC ruled that (1) denying an employee access to the restroom that conforms to the employee's gender identity is impermissible sex discrimination in violation of Title VII, (2) an employer cannot condition this right on the employee having undergone gender reassignment surgery, and (3) and it is not sufficient to only provide the employee with access to a single user restroom.

[12] "EEOC Stresses Title VII Bars Discrimination against Transgender Workers, Including Regarding Bathroom Access," available at http://www.jacksonlewis.com/publication/eeoc-stresses-title-vii-bars-discrimination-against-transgender-workers-including-regarding-bathroom-access.

[13] *Id.*

[14] "U.S. Departments of Justice and Education Issue 'Significant Guidance' on Transgender Rights under Title IX," available at http://www.jacksonlewis.com/publication/us-departments-justice-and-education-issue-significant-guidance-transgender-rights-under-title-ix.

[15] *Id.*

[16] *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. April 19, 2016).

[17] *See* "North Carolina Legislation Removes LGBT Protections and Possible Wrongful Termination Claims," *available at* http://www.jacksonlewis.com/publication/north-carolina-legislation-removes-lgbt-protections-and-possible-wrongful-termination-claims.

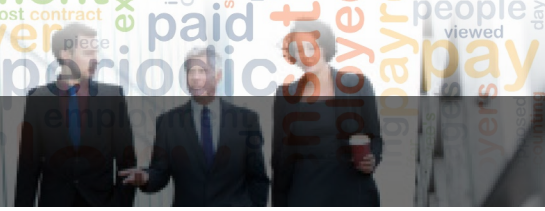
[18] "Justice Department Files Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals," *available at* https://www.justice.gov/opa/pr/justice-department-files-complaint-against-state-north-carolina-stop-discrimination-against.

[19] 81 Fed. Reg. 31390.

Recent Developments

Supreme Court 'Punts' Contraceptives Case

The Supreme Court remanded *Zubik v. Burwell*, 136 S. Ct. 1557 (May 16, 2016) — and the six cases consolidated with *Zubik* — to the circuit courts for reconsideration in light of supplemental briefing ordered by the Court following oral argument. The Court directed the lower courts to afford the parties the opportunity to reach a compromise approach that accommodates petitioners' religious exercise while also ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage. Petitioners — primarily religiously-affiliated nonprofit organizations — allege the requirement to provide notice to the government for religious objections to the provision



of no-cost contraceptive coverage under employee health plans, as required by the Affordable Care Act and its regulations, substantially burdens the exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993.

Supreme Court Addresses Statutory Standing, Signals Application to ERISA

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (May 16, 2016), the Supreme Court held that plaintiffs alleging statutory violations must show concrete — but not necessarily tangible — injury to maintain suit in federal court. The Court remanded the case for additional consideration, noting that the Ninth Circuit's standing analysis ignored the "concreteness" requirement for standing. A concrete injury is required for standing, the Court stated, "even in the context of a statutory violation," and "bare procedural violation[s], divorced from any concrete harm" will not satisfy the injury-in-fact requirement. Notably, the Court has signaled that it will apply *Spokeo* (which involved Fair Credit Reporting Act claims) to ERISA actions. In *Pundt v. Verizon Commc'ns Inc.*, No. 15-785 (May 23, 2016), the Court vacated the Fifth Circuit's holding that plaintiffs lacked standing, and remanded for reconsideration in light of *Spokeo*.

Psychiatrists Lack Statutory Standing

In *American Psychiatric Ass'n v. Anthem Health Plans, Inc.*, No. 14-3993, 2016 U.S. App. LEXIS 8797 (2d Cir. May 13, 2016), two individual psychiatrists and three professional associations sued several health insurers under the Mental Health Parity and Addiction Equity Act of 2008 and ERISA, alleging that they were reimbursed at a lower rate than providers of other healthcare services, which could disadvantage patients with mental-health disorders. Affirming the district court, the Second Circuit held that although the psychiatrists had constitutional standing to sue for personal financial loss, they lacked statutory standing under ERISA for two reasons. First, ERISA explicitly specifies who may sue — participants, beneficiaries, or fiduciaries — so third-party healthcare providers could not advance a "prudential," or common law, theory of standing over and above the language of the statute. Second, the psychiatrists did not hold valid assignments of their patients' claims for benefits under ERISA § 502(a) because there was no evidence that the assignments were made in consideration for the provision of healthcare services. The Second Circuit also held that the professional associations could have no standing where their individual members lacked standing.

'Alternative Action' Pleading Standard Applies to Private ESOP Claims

A federal district court dismissed ERISA claims related to losses suffered in an Employee Stock Ownership Plan (ESOP), applying the Supreme Court's recent decision in *Fifth Third Bancorp v. Dudenhoeffer*, which involved an ESOP holding publicly traded stock, to claims against fiduciaries for an ESOP holding stock in a private company. In *Hill v. Hill Brothers Construction*, No. 3:14-CV-213, 2016 U.S. Dist. LEXIS 40225 (N.D. Miss. Mar. 28, 2016), plaintiffs argued that the pleading standards of *Dudenhoeffer* applied only to publicly-traded companies, not a closely held company like Hill Brothers Construction (HCB). The North-

ern District of Mississippi rejected plaintiffs' attempt to distinguish *Dudenhoeffer*, holding that plaintiffs must allege some "alternative action" that the HCB fiduciaries could plausibly have taken.

Second Circuit Limits 'Substantial Compliance' Defense

A recent Second Circuit decision appears to have curtailed the "substantial compliance doctrine," which protects ERISA defendants from minor or technical errors in claims processing. In *Halo v. Yale Health Plan*, 819 F.3d 42 (2d Cir. 2016), the district court excused a plan's failure to comply with Department of Labor claims-handling regulations on the theory that the plan administrator had made a substantial effort to communicate with the claimant regarding her claims. The Second Circuit vacated this finding, and remanded for a determination whether the plan could show its errors were both inadvertent *and* harmless. In remanding, the court also instructed the district court to admit additional evidence if the plan's compliance failings adversely affected the development of the administrative record.

2017 Limits for HSAs and High Deductible Plans

In Revenue Procedure 2016-28, the IRS announced the dollar limits applicable to health savings accounts (HSAs) and high-deductible health plans (HDHPs) for 2017. The annual HSA contribution limit for self-only coverage is increased slightly from 2016 to $3,400. The limit for family coverage remains the same at $6,750. The HDHP minimum annual deductibles also remain the same at $1,300 (self-only) and $2,600 (family). Similarly, the HDHP annual out-of-pocket maximums remain the same at $6,550 (self-only) and $13,100 (family). Effective for plan years beginning in 2016 or later, guidance under the Affordable Care Act requires all non-grandfathered health plans to apply an embedded out-of-pocket maximum to each individual enrolled in family coverage. This means that, in 2017, if any one individual in a HDHP has healthcare expenses (such as deductibles, co-insurance and co-payments, but not including premium expenses) in excess of $6,550, the plan must cover any additional expenses *that individual* incurs during the 2017 plan year, even if the family out-of-pocket maximum has not yet been reached.

New VCP Submission Kit Released for Plan Sponsors Who Missed April 30th Deadline

Sponsors of pre-approved defined contribution retirement plans were generally required to sign new plan documents by April 30, 2016, in order to incorporate changes required by the Pension Protection Act of 2006. If a plan sponsor failed to sign a new plan document by the required deadline, the plan sponsor's retirement plan is technically no longer entitled to tax-favored treatment. In order to correct this failure, a plan sponsor will have to submit to the IRS for a Voluntary Correction Program (VCP) compliance statement. There is a user fee associated with VCP submissions, which is determined based on the number of participants in a plan. A recently released VCP submission kit indicates that if a plan sponsor sends the VCP submission to the IRS by April 29, 2017, this user fee will be reduced by 50 percent. For more details, see our blog post.

PBGC Proposed Rule: Reduced Penalties for Late Premiums

The Pension Benefit Guaranty Corporation (PBGC) is proposing to reduce the penalties for late premium payments in an effort to reduce costs and make it easier for plan sponsors to maintain traditional pension plans. The PBGC currently uses a two-tiered penalty structure that rewards self-correction. If a delinquency is corrected before the PBGC notifies a plan sponsor, the penalty is equal to 1 percent of the late payment amount for each month the payment is late (with a maximum penalty equal to 50 percent of the late payment amount). If the correction is made following PBGC notification, a higher rate of 5 percent per month applies (with a maximum penalty equal to 100 percent of the late payment amount). The proposed rule would reduce all of the above-described penalties by 50 percent. In addition, for sponsors who receive notification of a late payment from the PBGC, but have a good payment history and pay within 30 days following the notification, the PBGC will reduce the penalty by 80 percent. The proposed changes will apply to both single-employer and multiemployer pension plans and will apply to late premium payments for plan years beginning in 2016 or later.

Additional Agency Guidance on ACA

The federal agencies charged with issuing guidance on the Affordable Care Act (ACA) recently released an additional set of Frequently Asked Questions (FAQs), which provides clarification of the coverage requirements for certain medical expenses, including the cost of bowel preparation medications prescribed in connection with recommended colonoscopies, patient costs and services furnished in connection with an approved clinical trial, the cost of treatment for an opioid use disorder, and the cost of all stages of breast reconstruction in accordance with the Women's Health and Cancer Rights Act. The FAQs also address, among other topics, whether a plan may retroactively rescind coverage for a teacher who submitted her resignation during the summer, the interaction between reference-based pricing and the calculation of participant expenses toward an out-of-pocket maximum, and certain calculations and disclosure requirements under the Mental Health Parity and Addiction Equity Act.

No ERISA Pre-Emption for Emotional Distress Claim

A federal district court in California held that a benefits claimant stated a viable claim against a claims administrator for intentional infliction of emotional distress, based on allegations of intentional delay, intimidation, and accusations that the claimant was falsely claiming disability. In *Kresich v. Metro. Life Ins. Co.*, 2016 U.S. Dist. LEXIS 45503 (N.D. Cal., Apr. 4, 2016), the defendant moved for judgment on the pleadings, arguing that ERISA preempted the intentional-infliction claim. The court denied the motion, emphasizing that the plaintiff's claim was not based on the denial of benefits, but rather was based on allegations of harassment and oppressive conduct wholly independent of any duty or legal remedy under ERISA.

Featured Lawyer: Natalie Nathanson

By William H. Payne

Chicago principal Natalie Nathanson was flooded out of the best day of Jazz Fest in New Orleans this year, but she's still in a good mood. Last year, Ms. Nathanson came to Jackson Lewis from Fortune Brands Home & Security, Inc., where she was Senior Counsel, bringing over a decade of employee benefits experience with her, and in her own words, her first year at Jackson Lewis has been "awesome."

Getting washed out of Jazz Fest didn't discourage you from going back, did it? Absolutely not! I'm already looking forward to next year. I went to Tulane University for undergrad, and I met my husband at Tulane.

Are you a big music fan? Yes. I listen to anything from Frank Sinatra, to Taylor Swift, to Johnny Cash to Cowboy Mouth from New Orleans. When I was at Tulane, I'd go to Jacque-Imo's restaurant and then down to the Maple Leaf to see Rebirth Brass Band. Sometimes, Jacque-Imo himself would be there, and we went often enough that we were recognized as regulars.

What's the best thing about your first year at Jackson Lewis? We have great clients, both large and small, who bring us interesting and dynamic issues. Combined with our down-to-earth culture and the amazing knowledge base and collegial atmosphere in the Employee Benefits practice, I'm happy at my desk each day.

Coming from an in-house counsel position, what insights can you offer into being outside counsel? A business team does not necessarily want a lengthy explanation of how the IRC § 417(3)(e) rate affects the calculation of benefits — they just want a practical answer to help them accomplish their goals. Of course, sometimes in-house counsel needs to know exactly what the risks are. A benefits lawyer, for example, may want more details, but there's a fine line.

How would you explain employee benefits practice to a bright group of, say, eight-year olds? I actually had to do this for Career Day at my old firm. I brought down a copy of the code and the regulations to show to the kids, so they could see that small font. I said, "These are the rules. In a nutshell, I help people try to follow these rules."

If you could learn something brand-new this year, what would it be? I'd like to learn to be fluent in a foreign language. I know some Spanish, poorly. The other night I was watching *"Narcos,"* about the famous Colombian drug lord Pablo Escobar, and I was convinced I could understand everything without the subtitles. But no, when I turned them off, I couldn't understand anything.

Media...

- **Patty Diulus-Myers** comments on a Pittsburgh lawsuit involving a same-sex spouse benefits case in the *Pittsburgh Tribune Review's* **"**Retired Gateway teacher sues for same-sex spouse benefits."
- **Lisa deFilippis** and **Michelle Phillips** comment on Affordable Care Act implications of the on-going transgender rights battles in *Bloomberg BNA's* "Courts Begin to Address Transgender Rights Under the ACA."
- **Joe Lazzarotti** comments on privacy issues for workplace wellness plans that feature "wearables" in *Business Insurance*'s "Wearables for wellness fit right in."
- **Randy Limbeck's** blog post on forfeiture accounts was quoted in *Napa Net's* "Could Your 401(k) Be Disqualified by a Forfeiture Account?"
- **Melissa Ostrower** comments on recently released guidance on health insurance opt-out programs in "IRS Releases 'Much-Needed' Employer Healthcare Opt-Out Guidance," published by *Tax Notes*

Staying current of changing laws, regulations, trends, and strategies is a challenge. Jackson Lewis can help. Subscribe to our blog, the Benefits Law Advisor Workplace (at http://www.benefitslawadvisor.com/), and have updates written by experienced attorneys sent to your inbox, or follow us on Twitter (at https://twitter.com/jacksonlewispc).

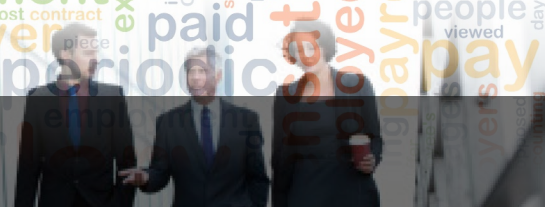
Honors...

Five Jackson Lewis Attorneys Recognized As 2016 'Most Powerful Employment Attorneys'

Congratulations to Firm Chairman Vincent A. Cino and Principals René E. Thorne, Neil Dishman, Maurice G. Jenkins, and Richard F. Vitarelli, who have been named to *Human Resource Executive* magazine's "Most Powerful Employment Attorneys" list for 2016. Produced in partnership with Lawdragon, the list recognizes employment lawyers who stand out for their ability to guide employers through constantly evolving workplace laws. Selections are based on editorial research completed by *Human Resource Executive* and Lawdragon, as well as input from clients, peers, colleagues, and judges. Attorneys are assessed on experience, career accomplishments, professional leadership, client recommendations, and impact within his or her firm and on the legal profession.

Jackson Lewis Earns Top-Tier Ranking in 2016 Legal 500

We are pleased to announce that the Firm has been recommended as a Top-Tier Firm in the **Labor and Employment – Labor-Management Relations** category in the 2016 edition of *The Legal 500 United States*. The Firm was also recommended in the **Immi-**



gration, Labor and Employment Disputes – Defense and **Workplace and Employment Counseling** sections of the Labor and Employment category. In addition, attorneys throughout the Firm were recommended in various practice groups (for a listing of all recommended attorneys in the respective practice groups, click here). *The Legal 500 United States* is an independent guide providing comprehensive coverage on legal services and is widely referenced for its definitive judgment of law firm capabilities.

Jackson Lewis Named a 'Most Recommended Law Firm'

We are pleased to announce that the Firm has again been included in The BTI Consulting Group's "Most Recommended Law Firms." Jackson Lewis is one of only 25 firms that have been included for more than five years in a row in the report, which lists the law firms corporate counsel are most willing to bet their reputation on and recommend to their peers. "Jackson Lewis has received a multitude of accolades over the last several years, but knowing we are a firm that our clients would recommend to their peers is the ultimate compliment," said Firm Chairman **Vincent A. Cino**. For more information on this year's rankings, visit http://www.bticonsulting.com/themadclientist/2016/6/8/the-most-recommended-law-firms-2016.

Jackson Lewis and Its Attorneys Ranked in 2016 Chambers USA Guide

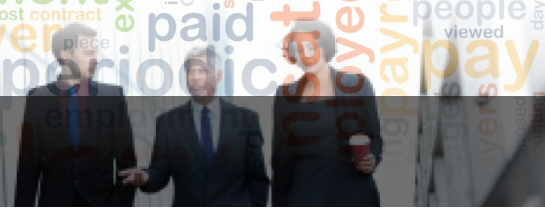
We are pleased to announce the Firm has been recognized in the 2016 edition of *Chambers USA: America's Leading Lawyers for Business*, a prestigious annual guide which ranks leading law firms in the United States. In addition to the Firm's national and statewide rankings, Jackson Lewis attorneys earned individual recognition as **Leaders in Their Field** and **Recognized Practitioners.** For a list of those individually recognized, click here.

Attorneys from our Employee Benefits practice include:

- Kelvin C. Berens
- Jewell Lim Esposito
- Randal M. Limbeck
- Andrew C. Pickett
- Charles F. Seemann, III
- René E. Thorne

Success Story

Jackson Lewis recently assisted an employer to prevail in an arbitration involving a new twist on withdrawal liability calculations. Robert Perry represented an employer in a withdrawal liability dispute arising from a multi-employer plan's attempt to include Pension Protection Act surcharges and rehabilitation plan increases to the determination of our client's withdrawal liability installment payment amount. Arbitration resulted in an award that eliminated these amounts from the installment payment calculation, resulting in a reduction of the client's aggregate payment obligation by approximately $15 million dollars. For de-



tails on the dispute and the ensuing arbitration, please see our article, Arbitrator Slashes Annual Withdrawal Liability Payments in Underfunded Multiemployer Pension Plan Dispute.

Upcoming Seminars

Jackson Lewis Employee Benefits Webinar: *Designer Defenses: What you can do today to prevent benefits litigation tomorrow*

SEPTEMBER 16

René Thorne and William Payne

Hot Button Issues in Employee Benefits

SEPTEMBER 22

Stephanie Zorn

For more on what our attorneys are up to in the coming months, go to www.jacksonlewis.com/events

EDITORS:

PRACTICE CHAIR :
Joy Napier-Joyce
Baltimore Office
(410) 415-2028
Joy.NapierJoyce@jacksonlewis.com

Charles F. Seemann III
New Orleans Office
(504) 208-5843
Charles.Seemann@jacksonlewis.com

William H. Payne, IV
New Orleans Office
(504) 208-5891
William.Payne@jacksonlewis.com

Kellie M. Thomas
Baltimore Office
(410) 415-2029
Kellie.Thomas@jacksonlewis.com

Kenneth C. Weafer
Albany Office
(518) 649-9647
Kenneth.Weafer@jacksonlewis.com

Joshua Rafsky
Chicago Office
(312) 803-2561
Joshua.Rafsky@jacksonlewis.com

Mail regarding your subscription should be sent to contactus@jacksonlewis.com

or

Jackson Lewis P.C.
666 Third Avenue
New York, NY 10017
Attn: Client Services

Please include the title of this publication.