Fall 2016

Employee Benefits for Employers

jackson lewis

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A Note from the Editor

This issue arrives at a very busy time in the benefits world. As most benefits professionals already know, the Internal Revenue Service announced it would no longer provide individualized determination letters. In our lead piece, Raymond Turner offers practical insights into this "missive gap" and suggests ways employers might cope with the IRS decision. Following up on recent reports in these pages, Paul Friedman reviews some of the pitfalls of withdrawal liability and suggests ways employers can avoid associated exposure. Our Recent Developments section highlights important changes in the benefits landscape, including summaries of significant items buried in the dizzying array of regulatory guidance. As always, our Featured Lawyer segment turns the spotlight onto notable practitioners at the firm. This time, our own Rob Perry reveals his opinions on ERISA, Manhattan life, and the travails of being a Mets fan. We hope you enjoy it!

- Charles Seemann

The 'Missive Gap'

Employers to Cope Without Updated Plan IRS Determination Letters

By Raymond P. Turner

The old veiled curse, "May you live in interesting times," which is frequently attributed to the Chinese, is, as is so often the case, being fulfilled by the Internal Revenue Service ("IRS") for those employers that sponsor and maintain individually designed qualified retirement plans ("IDPs"), such as 401(k), profit-sharing, or traditional defined benefit pension plans. Beginning January 1, 2017, no IDP determination letter applications will be accepted by the IRS except:

1. for new plan adoptions,
2. upon plan termination, and
3. in certain other general circumstances to be announced by the IRS, but which, we are told, will include "significant law changes,

> new approaches to plan design and the inability of certain types of plans to convert to pre-approved plan documents."

Instead, plan sponsors of existing IDPs that get updated, as all such plans regularly must, will generally be forced to rely, *without IRS approval of an employer's specific amendment efforts*, on timely adoption of annually published "required amendments" for which model amendments may or may not be issued by the IRS.

This monumental change, partly prompted by government budget constraints that have precluded sufficient plan review time for agents, was first announced by the IRS in 2015, later expanded upon in a January 2016 notice, and most recently detailed in Revenue Procedure 2016-37, which was issued on June 29, 2016, by the Service.

The Beast and Its Potential Bite

Before delving into details of this new, severe rationing of determination letters, employers should stop and review precisely what kind of animal their qualified plan is, the risks and exposures associated with maintaining it, and how those risks and exposures are *currently* dealt with.

Most private employers know that their plan is an entity (usually a trust) governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which grants participants and beneficiaries certain special rights and protections for their accrued benefits, such as mandated vesting or "nonforfeitability." But your company's qualified plan is, in fact, also a tax exempt entity under the Internal Revenue Code (the "Code"). Therefore, so long as it meets the requirements for "qualification," the plan is entitled to (i) a federal income tax exemption on the income earned in the trust or other funding vehicle for the plan, (ii) tax deductions for employer contributions to the plan (including for benefits that have not yet vested), and (iii) very favorable tax consequences on distributions to participants and beneficiaries from the plan, including the ability in most cases to roll over tax free a distribution to another tax qualified plan or individual retirement account ("IRA").

The "catch" is that your plan's tax qualification or exemption and its entitlement to all of the tax benefits that flow from it are dependent upon strict compliance with complex plan document requirements and strict compliance in operation with all of the requirements of the Code, Treasury Regulations, IRS administrative interpretations, and all of the detailed written terms of the plan. No other tax exempt entity recognized by the Code is subject to such stringent exemption conditions.

Failure to meet, for any short period of time, any of these intricate document and operational requirements is, under established tax law and IRS regulations and guidance, sufficient grounds for disqualification of the plan, assessment of income tax on the plan's trust for all open tax years (usually the last three), as well as assessment of taxes on employers for disallowed deductions and on distributees of plan benefits who may have received a rollover or other qualified plan tax benefit on that distribution. Moreover, the longstanding IRS position is that any document or operational failure, even one occurring long before the currently open years for tax assessment, disqualifies the plan for all future years and up to the present year unless and until corrected.

Current Management of Qualified Plan Risks

The current regulatory scheme for qualified plans greatly alleviates and makes manageable these harsh disqualification risks. *Operational* violations, *i.e.,* not following the law or plan terms, if discovered before an IRS plan audit, can normally be effectively and economically dealt with through the Employee Plans Compliance Resolution System ("EPCRS"), which includes the possibilities both of self-correction of certain operational errors and of obtaining IRS approval of a proposed correction through a Voluntary Correction Program ("VCP") application to the IRS.

Managing the "document risk," the risk of disqualification arising from a non-tax-compliant plan provision or the absence of a required provision, has long been subject to an even more favorable regulatory mechanism. Through voluntary, but highly advisable, timely applications to the IRS, employers have been able to obtain generally "seamless" reliance from IRS determination letter approvals of their IDP documents as they are periodically amended for new statutory and regulatory requirements and changes. Under the current regime, established in 2005, employer plan sponsors have been entitled to apply for a new determination letter every five years on a staggered timetable depending upon the last digit of their Employer Identification Number. Certain tax or legal changes arising during the five-year period and requiring document amendments are addressed through an "interim amendment" system that permits generous retroactive adoption of any new interim requirements. Moreover, even if an employer fails to adopt a required amendment on time or fails to timely make its five-year application for a new letter, the EPCRS system has afforded "nonamender" relief for such plans.

Coping with Far Less IRS Document Feedback

Under the new system, which was partly put into effect in 2015 but which will more fully apply in 2017, not only will "seamless" document insurance and reliance from updated determination letters generally go away for plan amendments and restatements, but the new normal for IDPs will likely be extensive periods of plan life between initial plan adoption and plan termination in which plan sponsors will need to rely upon their judgment and that of their counsel and other plan advisors with respect to their compliance with new IRS plan document maintenance requirements. Some of the newly announced features provide employers some comfort, but the reality is that the maintenance of an IDP plan document in the future will likely entail inherently more employer risk and exposure than it has in the past.

The IRS has begun deleting the standard language of recently issued determination letters that states the sponsor may rely on the determination letter until the ending date of the next five-year amendment period. This may give the false impression to an employer-sponsor that a newly issued letter has an unlimited life and will remain "current" for the plan indefinitely. It actually means that under the new scheme, the letter will not cover the tax compliance of any new amendments made or document deficiencies that arise in the future. Instead, the sponsor will need to rely on its careful and timely compliance with a new system of annually published required amendments and changes.

Counsel have traditionally not issued opinion letters on plan documents or specific plan document language mainly because of the availability of the IRS determination letter update procedures that could effectively cover all or almost all of the life of an IDP. While we probably will not see formal opinions of counsel taking the place of updated determination letters, the advice of benefits lawyers will likely become even more important to the updated documentation of qualified plans, as well as to issues relating to operational compliance with newly adopted plan language.

The June 29th Revenue Procedure announces that the IRS will annually publish a required amendments list ("RAL"). We are assured that items will be included on the RAL generally only after IRS guidance with respect to the item has been provided in Treasury Regulations or in other guidance published in the Internal Revenue Bulletin ("IRB"). However, model amendments to comply with the new requirement may or may not be issued with respect to a given required plan document change. Moreover, an item may be included on the RAL in other circumstances, such as when a statutory change is enacted and it is anticipated that no guidance will be issued.

In general, a remedial plan amendment must be adopted for the IDP by the end of the second calendar year that begins after the year in which the RAL is published that includes the requirement plan document change. A special transitional rule provides that the plan document qualification change as to which the current applicable remedial amendment period has not yet expired as of January 1, 2017, must be adopted by December 31, 2017. Apparently, the new rules will *not* continue the current practice of permitting an employer to adopt a "good faith" amendment pending certain final amendment deadlines occurring after more detailed IRS guidance has been issued.

To complement the annual RAL publication, the IRS will also annually issue an "Operational Compliance List" ("OCL") that will identify *operational changes* that must be observed by plans pending the retroactive adoption of the plan changes specified in the RAL.

In order to coordinate the new determination letter changes with plan correction procedures, a recent comprehensive IRS update of EPCRS in Revenue Procedure 2016-51, released September 29, 2016, makes certain changes, including (i) elimination, effective for 2017, of the requirement to submit a determination letter application to the IRS when correcting qualification failures that include a plan amendment and (ii) providing that a determination letter need not be "current" to satisfy the prerequisites for self-correction of "significant" failures under the procedures.

IRS Plan Audits

IRS plan audits will present new challenges and risks for employers. Such audits frequently turn up qualification failures, the most minor of which may qualify for relatively painless self-correction under EPCRS, but many of which will require financial correction *and* the payment of a negotiated tax sanction. Currently, unless a plan has negligently failed to take advantage of the existing determination letter update system, the normal issue encountered in IRS plan audits is that of *operational* compliance with qualification requirements or plan terms. With the new system, however, one can foresee more controversies between agents and plan counsel regarding the wording of plan amendments that have been adopted because they have been specified on an annual RAL, particularly amendments for which no IRS model language has been provided or adopted by the plan sponsor.

In determination letter application proceedings, counsel frequently argue with IRS agents over specific wording demanded by agents that often seems idiosyncratic, duplicative, implied, unnecessary, or picayune. Under the new regime, one can hope and expect that the IRS will be more lenient when particular plan language adopted to comply with a requirement on an annual RAL comes under the microscope in a plan audit.

New Issues for Mergers and Acquisitions

This new plan "missive gap" will likely give rise to particular new concerns and complications in the area of mergers and acquisitions involving IDPs sponsored by either or both of the acquirer or acquired or target entities. It is not clear, for example, what comfort will be available to plan sponsors that wish to accept rollovers of distributions from a plan of an acquired company once the availability of a current and up-to-date determination letter, as we have noted, has largely gone away. Of course, this concern may also arise in other transactions apart from company acquisitions. Moreover, because plans generally inherit the qualification flaws of those plans whose assets they directly receive and accept, we could see a diminished willingness of parties in an acquisition transaction to merge an IDP or accept direct plan-to-plan transfers from or to an IDP. In light of the importance to both employers and to the IRS of more simplified and streamlined employee benefits vehicles for employees, we expect that these company and plan merger and acquisition issues will be addressed by the IRS.

What Employers Need to Do Now

In light of the looming monumental curtailment of the issuance of updated determination letters, employers should take the following steps in order to manage their current and future document risks:

1. *The Last Five-Year Cycle*. If your employer EIN ends in "1" or "6," then by all means take advantage of the last five-year remedial amendment cycle ("Cycle A") to be recognized. This means restating *and* filing for an updated determination letter by January 31, 2017. It is unknown when another interim determination letter will be available under the new rules.

2. *Pending Determination Letter Requests*. Any other existing or pending requests for determination letters to the IRS should, of course, be pursued and completed, unless this is no longer possible for timing or other reasons. This includes any determination letter applications that are coupled with requested "nonamender" relief under a VCP application under the EPCRS system.

3. *New Required Amendments*. Review with counsel all new legally required provisions that will need to be adopted by the new extended transitional retroactive remedial amendment deadline of December 31, 2017.

4. *Pre-Approved Plan Migration*. Consider moving from an IDP to a pre-approved prototype or volume submitter plan. The IRS is continuing, with minor modifications, the six-year remedial amendment cycle for pre-approved plans. For sponsors desiring to convert, the April 30, 2016, deadline for an existing IDP sponsor to adopt an IRS pre-approved plan has been extended one more year, to April 30, 2017. Clearly, severe government budget constraints aside, the IRS desires more employers to move to such plans, and pre-approved plans have become acceptable and sufficiently adaptable for many larger employers who desire a more customized 401(k) plan. We can expect that providers of such documents and the IRS should cooperate in producing and approving ever more flexible pre-approved plans to accommodate employers with special qualified plan document requirements who might have opted for an IDP under the old regime.

5. *Upcoming Entity or Commercial Transactions*. Consider carefully with counsel the impact of these rules upon any pending or anticipated company acquisitions or sales of stock or assets, loan agreements/facilities, or other transactions for which representations or warranties regarding the current qualified status of your sponsored IDP may be required or expected. The effect on business transactions and commerce of the general unavailability of a "current" determination letter will begin to be felt sooner than one might expect.

Avoiding the Pitfalls of the Multiemployer Pension Plan Amendments Act

By Paul A. Friedman

Successfully navigating the murky and oft-uncharted world of ERISA can be a daunting task. It is even more difficult to deal with ERISA's progeny, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

The MPPAA was enacted to deter employers from withdrawing from multiemployer-defined benefit pension funds (MPPAA Funds) by imposing a significant financial penalty upon contributing employers to MPPAA Funds that "withdraw" from those funds. The penalty, known as the withdrawal liability, is often in amounts that are multiples of an employer's contributions to a pension fund.

Dealing with MPPAA has been described as "trying to get your arms around mercury." Due to the negative funding status of a significant number of MPPAA Funds, a company's risk of exposure to withdrawal liability has increased significantly. MPPAA imposed fiduciary duties in addition to those in Section 404 of ERISA upon trustees of MPPAA Funds. The negative funding situation has compelled trustees of all MPPAA Funds to pursue even more aggressively their assessment and collection of withdrawal liabilities. Failure of those trustees to do so can expose them to breach of fiduciary duty claims.

Withdrawal Liability

This article identifies and addresses the dangerous "traps" of MPPAA that employers will confront immediately after an assessment of withdrawal liability and suggests practical strategies to preserve an employer's ability to contest its withdrawal liability.

As social legislation that is purposefully "employer unfriendly," MPPAA contains unwieldy and often incomprehensible time limits. Failure to meet those time limits can preclude an employer from contesting its withdrawal liability assessment.

The Demand Letter

Upon learning that an employer has withdrawn from an MPPAA Plan, ERISA Section 4202 requires that the Plan:

1. Determine the amount of the employer's withdrawal liability;
2. Notify the employer of the amount of the withdrawal liability; and
3. Collect the amount of the withdrawal liability from the employer.

Request for Review

Therefore, the first notice from a pension fund will be the Demand Letter, which likely will be sent by certified or registered mail. The purpose of the method of service is to memorialize the date of receipt of the Demand Letter. An employer has 90 days from receipt of the Demand Letter to request review of the determination and to identify any inaccuracy in the determination. Failure to timely make that request, known as the Section 4219(b)(2)(A) letter, will deprive an employer of the ability to contest any aspect of the assessment. The matter will become a collection case with the employer having no defenses.

Unlike the strict 90-day time period imposed upon an employer, the time limit for a pension fund to respond is "more relaxed." Section 4219(b)(2)(B) provides that a pension plan may respond "... after a reasonable review of any matter raised ...."

Interim Payments Demand

The Demand Letter will identify withdrawal liability both as a "lump sum amount due" and "interim payments." The Demand Letter will seek the first interim payment typically to be paid within 60-to-90 days after receipt. Contrary to normal concepts of American jurisprudence, MPPAA is a "pay as you dispute" statute. Congress required that employers make interim payments, even as they dispute the withdrawal liability assessment, to ensure the viability of MPPAA Funds.

An employer that fails to make interim payments will be declared to be in default, which permits a pension fund to commence an "interim payments lawsuit." An employer cannot win an interim payments lawsuit and, additionally, will become liable for the Fund's attorneys' fees.

Arbitration is Exclusive Forum to Dispute Withdrawal Liability

Congress determined that the exclusive forum for resolution of withdrawal liability disputes is arbitration. ERISA Section 4221(a) states unequivocally that any dispute over withdrawal liability will be resolved through arbitration. District courts lack subject-matter jurisdiction to address those issues. Arbitration is the

"Congressionally mandated dispute resolution mechanism under the MPPAA." The commencement of an action in district court will not protect an employer.

Deadline to Initiate Arbitration

The deadline by which arbitration must be commenced, not surprisingly, is unclear. It is the earlier of either:

1. 180 days from an employer's Section 4219(b)(2)(A) request for review; or
2. 60 days from the pension plan's Section 4219(b)(2)(B) response.

It is therefore easy to see why a pension fund might delay responding. By lulling an employer into waiting for a response, a pension fund might cause the employer to miss the 180-day deadline. Despite the motivation of the pension fund, the employer would be precluded from disputing its withdrawal liability assessment.

If the pension fund responds, the employer must initiate arbitration within 60 days from receipt of that response. A number of employers that missed that deadline by simply a few days have been prevented from contesting their withdrawal liability.

Controlled Group Liability

In an effort to prevent employers from escaping withdrawal liability by the structuring of various business interests, Congress determined that all businesses associated with a withdrawn employer in a controlled group relationship were each deemed to be jointly and severally responsible for withdrawal liability. This is despite the structure of the businesses as corporations, partnerships, and sole proprietorships. If a controlled group member is not protected by a corporate shield, personal liability can be imposed despite the corporate format of the withdrawn employer.

Due to the expansive liability, a pension fund typically will request information about any controlled group members with the Demand Letter. Employers that fail to provide that information also can be the subject of a lawsuit by the pension fund — which they cannot win.

Suggestions

Failure to respond appropriately and timely after receipt of a Demand Letter can be critical. The provisions of MPPAA were intended to protect the pension funds at the expense of contributing employers. Missteps in the beginning can doom an employer's ability to contest its withdrawal liability.

An employer that contributes to an MPPAA Plan must be proactive. The following steps are suggested:

1. Recognize the existence of withdrawal liability in expanding your business by mergers or acquisitions.
2. Remain aware of the amount of the potential withdrawal liability by requesting an estimate on an annual basis. Under Section 101(l)(1)(A), an MPPAA Plan is obligated to provide the estimate of withdrawal liability. It may charge a fee for the production of the estimate. That response typically must be provided within 180 days after the request.
3. Remain aware about the structure of controlled group members to avoid personal liability.
4. Upon receipt of the Demand Letter, immediately contact an attorney experienced in MPPAA matters to guide your next steps.

Withdrawal liability can be devastating to an employer and, if appropriate safeguards have not been utilized, can create havoc upon personal assets. However, there are ways to reduce the possibility of that occurring if an employer understands the pitfalls and moves proactively.

– Previously published in Wolters Kluwer's *Employment Law Daily* –

Recent Developments

Increased Civil Penalties for Reporting/Disclosure Violations

The U.S. Department of Labor's interim final rule adjusts ERISA's civil penalties for inflation and raises certain penalties significantly, including a daily penalty of up to $2,063 for a plan's failure to timely file Form 5500. Other enhanced penalties include those available for failure to issue benefit statements to former pension plan participants (up to $28 per day) and failure to provide automatic enrollment notices (up to $1,632 per day). The new rule, published on June 30, 2016, applies to penalties assessed after August 1, 2016, for violations that occurred after November 2, 2015.

First Circuit: "Float" Income Not Plan Assets

The First Circuit Court of Appeals has ruled that "float income" earned while participant distribution requests are processed is not a plan asset in *In re Fidelity ERISA Float Litigation*, 2016 U.S. App. LEXIS 12874 (1st Cir. July 13, 2016). A putative class of plaintiffs alleged that float income – interest earned on funds removed from retirement plans pending distribution to participants – should have been credited to the plans, rather than used by defendants to defray expenses. Writing for the court, former Supreme Court Associate Justice David Souter observed that plaintiffs did not claim entitlement to float income, nor did they contest the plan's distribution process, wherein funds were placed in disbursement accounts (where they earned interest) before being distributed. Although it affirmed dismissal of the plaintiffs' ERISA claims, the court reserved judgment on whether other theories not raised by the plaintiffs might be available.

IRS Proposes Regulations Clarifying ACA Reporting

The IRS recently issued further guidance that clarifies the obligations of an ACA reporting entity (such as a plan sponsor) for soliciting the taxpayer identification numbers (TINs) of individuals covered by a plan or policy. Reporting entities may report the birth date of a covered individual if a TIN is not available after reasonable efforts are made to obtain it. Penalties would be waived for missing TINs if a reporting entity acts in a responsible manner by initially soliciting an individual's TIN when an account is "opened" (*e.g.,* at the time the reporting entity receives a substantially complete application for new coverage), and then doing a second and third solicitation if necessary. The proposed regulations also clarify that TIN solicitations made to the responsible individual (*i.e.,* the individual who enrolls him or herself and others in coverage) would generally be treated as TIN solicitations of every covered individual on the policy or plan; however a reporting entity must solicit TINs separately for any individual *added* to a policy or plan *after* the above-described TIN solicitations in order to avoid penalties.

Proposed Regulations on Health Insurance Opt-Out Payments

The IRS has proposed regulations clarifying how opt-out payments by employers (i.e., cash payments given to employees who opt out of their employer-sponsored health insurance plans) will be treated for purposes of calculating the affordability of employer-provided health insurance (as required under the Affordable Care Act). Generally, opt-out payments must be taken into account when determining affordability. This could cause otherwise affordable coverage to become unaffordable. However, opt-out payments that are made only after the employee provides reasonable evidence that he or she has obtained minimum essential coverage (including coverage for any tax dependents) from another source would not be taken into account when determining affordability. See our blogs regarding opt-out payments and the affordability calculation, here and here.

Michigan Medical Records Law Not Preempted by ERISA

A Michigan law imposing recordkeeping and disclosure requirements on group health plan sponsors and third-party administrators was not preempted by ERISA, according to the Sixth Circuit Court of Appeals in *Self-Insurance Institute of America v. Snyder*, 827 F.3d 549 (6th Cir. 2016). The U.S. Supreme Court had vacated the Sixth Circuit's earlier ruling and remanded the case for further consideration in light of *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936 (2016) (holding that ERISA preempted a Vermont law imposing various reporting requirements on health insurers). In reaffirming dismissal, the Court determined that the Michigan statute imposed only burdens ancillary to its tax-collection goals, and thus did not directly regulate employee benefit plans or interfere with ERISA's regulatory scheme. In harmonizing its holding with *Gobeille*, the Court stated, "[t]hough [the law] does touch upon reporting and recordkeeping, the thrust of the [Michigan law] is to collect taxes—not to amass data."

Plan Reimbursement Takes Priority over Attorney Fees

In *G. Dallas Horton & Assocs. v. Harris*, 2016 U.S. Dist. LEXIS 98800 (D. Nev. July 28, 2016), a district court held that a health plan had priority over a participant's attorney in a dispute over the proceeds of a personal-injury settlement. The court relied on a plan provision giving the plan first priority on overpaid plan funds. It ordered full reimbursement of the medical expenses paid out by the plan.

Proposed Changes to IRS Form 5500

The IRS, U.S. Department of Labor, and Pension Benefit Guaranty Corporation have jointly proposed changes to the annual Form 5500 that nearly all employee pension and welfare benefit plans subject to ERISA's requirements must complete. The proposed changes include modernizing the financial information filed by plans to improve the reliability of, and transparency about, plan investments and other financial transactions; updating the fee and expense information on plan service providers, with a focus on harmonizing annual reporting requirements with the DOL's service provider disclosure requirements; enhancing the mine-ability of data filed to allow the Form 5500 and its schedules to be fully processed electronically; eliminating the reporting exception for group health plans with less than 100 participants; adding a new "Group Health Plan Information" schedule to collect additional compliance information on group health plans; and including new compliance questions regarding plan operations, service provider relationships, and financial management of plans. The comment period for these changes is open through December 5, 2016. The changes, if adopted, would generally apply for plan years beginning on or after January 1, 2019.

"Church Plan" Cases Petition for Review

In three cases, religiously affiliated healthcare providers have petitioned the U.S. Supreme Court to review the applicability of ERISA's exemption for "church plans." According to the lower courts in each of the cases, church-affiliated pension plans are ERISA-exempt *only* if the church "established" the plan. Petitioners have emphasized that these decisions from the Third, Seventh, and Ninth Circuits directly contradict dozens of private rulings and other guidance from the relevant federal agencies and conflict with decisions from other circuits. These petitions seek relief from decisions in *Kaplan v. St. Peter's Healthcare Sys.,* 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network,* 817 F.3d 517 (7th Cir. 2016); and *Rollins v. Dignity Health,* 830 F.3d 900 (9th Cir. 2016). Proceedings in each of these cases have been stayed pending Supreme Court consideration.

Enforcement of Forum-Selection Provisions

The Eighth Circuit joined several sister circuits in rejecting Department of Labor arguments that forum-selection provisions in plan documents are unenforceable. In *In re: Lorna Clause*, No. 16-2607, *petition for writ of mandamus denied* (8th Cir. Sept. 27, 2016), a disability-benefits claimant brought suit in Arizona, where she had worked. The district court transferred the case to a Missouri court based on forum-selection provisions in the plan. After the plaintiff applied to the Eighth Circuit for a writ of mandamus, the DOL filed an amicus brief arguing the forum-selection clause was inconsistent with ERISA, and thus unenforceable. Although the Eighth Circuit's disposition remains the majority view, a recent district court decision (*Harris v. BP Corp. N. Am. Inc.*, 2016 U.S. Dist. LEXIS 89593 (N.D. Ill. July 8, 2016)) refused to enforce a forum-selection provision as contrary to ERISA's purpose of protecting participant rights.

Featured Lawyer: Robert Perry

By William H. Payne

Rob Perry is a Principal in the New York City office. Since joining the firm in 1997, Rob's practice has focused on employee benefits and executive compensation matters, with more recent emphasis on matters involving withdrawal liability from multiemployer plans. We caught up with Rob recently to discuss his practice and other pursuits.

You have an LL.M. in tax from NYU, but you're a lifelong benefits lawyer? I had a misguided notion about being a tax lawyer, but I learned about benefits consulting early on from a relative. There's something appealing about the hyper-technical world of employee benefits. I started out in a general-practice firm as "The ERISA Lawyer," but benefits law has expanded so much, no one can do it all anymore. At Jackson Lewis, I can specialize in my area and rely on other practice group members to share knowledge.

You're also a lifelong New Yorker – what are the pros and cons? There's a wealth of experiences to be had here in the city. I raised my children in Manhattan, where they were exposed to a lot of different cultures and interesting opportunities. It's also not easy. It can be very expensive to live here and a huge nuisance. I sometimes dream about escaping Manhattan life, but then I remember I don't have to drive anywhere.

Your Jackson Lewis biography page mentions pinball . . . ? Yeah, I used to own a bunch of pinball machines and was fairly active in the pinball community.

The pinball community? Pinball has its own culture: There are leagues, bars, and online forums discussing machines and parts. I used to have pinball machines in my office, and in my living room. When I first met my wife, fortunately, she wasn't put off by the pinball machines. Of course, they're not there anymore.

If you had to draft your own Department of Labor or treasury regulation implementing ERISA, what would it do? I would rewrite Title IV of ERISA, which governs withdrawal liability. I think it needs a whole rewrite. Title IV was written in response to some pension failures in the steel industry, and it's not impartial at all. Employers are given very few defenses because plans and participants are basically assigned a "holder-in-due-course" status. Litigation under Title IV as currently constituted is an uphill battle for an employer.

Speaking of uphill battles, you mentioned that you are a Mets fan? Yes, my father and his brothers ran a business in Queens, five minutes from Shea Stadium. So, I've had an affiliation with the Mets and the Jets from birth. Past performance to date has not been stellar. If only they had built the factory in the Bronx, then I could have been a Yankees and Giants fan. But as I tell my kids, losing builds character! And hope springs eternal....

Media...

- **René Thorne** and **Charles Seemann** discuss recent lawsuits filed against prominent universities for financial mismanagement of employee retirement plans and investment options in "Prestigious Colleges Defend Retirement Plan Management," published by *Bloomberg BNA*

- **Joseph Lazzarotti** comments on the Affordable Care Act-compliant health plan in "Lawsuit against Dave & Buster's challenges reducing employee hours to avoid health insurance mandate," published by *ABA Journal*

- **Melissa Ostrower** comments on guidance on health insurance opt-out programs in "IRS Releases 'Much-Needed' Employer Healthcare Opt-Out Guidance," published by *Tax Notes*

- **Lisa deFilippis** and **Michelle Phillips** discuss transgender medical benefits in "Transgender bias case against Dignity Health could set off religious freedom clash," published by *Modern Healthcare*

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

Honors...

We are pleased that our Employee Benefits attorneys were selected for inclusion in the 2017 edition of ***The Best Lawyers in America©***: Mark Attwood, Kathleen Barrow, Brian Goldstein, Jay Adams Knight, Randal Limbeck, Joy Napier-Joyce, Andrew Pickett, Mark Ross, Charles Seemann, Stephen Silvestri, and René Thorne.

In addition to "Best Lawyers" designation, Charles Seemann was named the *Best Lawyers'* 2017 New Orleans Employee Benefits (ERISA) Law "Lawyer of the Year." Only a single lawyer in each practice in each community is honored as the "Lawyer of the Year." We congratulate Charles on this accomplishment!

Natalie Nathanson has been elected as the President of the Chicago Downtown Chapter of the Worldwide Employee Benefits Network (WEB).

Upcoming Seminars

OCTOBER

- ***EPCRS: Hot Topics & Rev. Proc. Updates*** and ***Case Studies: Our Most Complicated Retirement Plan Audits***, Jewell Lim Esposito at the 2016 ASPPA National Conference (50th Anniversary), Maryland
- ***What You Need to Know Right Now About Your Employee Benefits Plans***, Natalie Nathanson and Joshua Rafsky at Jackson Lewis' Chicago office's Half Day Symposium, Illinois
- ***Labor Pains: What Employers Should Know About DOL Investigations***, Charles Seemann at the Louisiana Chapter of the Association of Corporate Counsel

DECEMBER

- ***What You Need to Know Right Now About Your Employee Benefits Plans***, Natalie Nathanson at Jackson Lewis' 2016 East Coast Women's Employment Law Conference, New York

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

Webinars

- Higher Education Institutions Beware: New ERISA Class Action Lawsuits on the Rise (archived)
- Designer Defenses: What You Can Do Today to Prevent Benefits Litigation Tomorrow (archived)

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