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Employee Benefits

FOR EMPLOYERS

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We are excited to present the latest edition of *Employee Benefits for Employers*. Our lead piece by Paul Friedman explores the interesting world of multiemployer pension plans, and the precarious state in which many of those plans exist today. Our second article, written by several members of our practice group, explores the impact of various employee benefits changes arising from the recent Tax Cuts and Jobs Act. Our featured lawyer is René Thorne from our New Orleans office, who tells us about her active ERISA litigation practice (and provides a few tips on places to check out if you are ever in the Crescent City). As always, we highlight recent developments in the employee benefits world that may be of interest and the recent activities and upcoming events of our practice group members. We'd like to thank you for taking the time to read this issue!

— Joshua Rafsky

View from Jackson Lewis: The Curious Odyssey of the Multiemployer Defined Benefit Pension Fund

Paul Friedman*

A few months ago a doctor friend of mine was gloating about his wife's 401(k) plan. His wife, a retired executive with a major insurance company, had seen the balance in her 401(k) plan increase by $500,000 due to the recent upswing in the stock market. Knowing that my practice involved multiemployer defined benefit pension funds, or as he characterized them, the "union plans," he stated "I guess the union plans are having a good time also due to the surge in the stock market."

Sadly that was the same day that a large multiemployer pension fund in critical and declining status under the Pension Protection Act of 2006 had convinced the Treasury Department to approve its application to reduce core benefits subject to a vote of the participants. Upon hearing this news, my friend was incredulous and assumed that the cause involved illegal actions by the union and trustees. What else could cause a huge discrepancy between the performance of his wife's 401(k) plan and the pension fund but thievery and mismanagement? Didn't those funds invest in the same stock market as did his wife and have competent financial advisors to protect their assets?

Unfortunately, many contributing employers to these funds have the same level of understanding of the operations of multiemployer defined benefit pension funds as does my doctor friend. This lack of knowledge by contributing employers often results in disaster. Some employers that have contributed for decades still do not understand much about the funds.

To the general public they are often confused with MEWAs — multiple employer welfare associations among unrelated companies that band together to achieve better economies of scale in purchasing affordable medical coverages.

In addition, although these funds are retirement funds like 401(k) and profit sharing plans, they operate differently. The 401(k) plan and profit sharing plans are defined contribution plans (DC Plans). In a DC Plan the amount of the contribution is defined. Each participant has his own account, and under Section 404(c) of ERISA, has the ability to make his own investment choices from a vetted for prudency menu of investments. A participant's account is not dependent on the gains or losses of other participants. Therefore, my friend's wife relying upon her well-paid financial advisor, scored a major gain.

In contrast, the concept of multiemployer defined benefit funds (also known as Taft-Hartley Funds) was created by Section 186 of the National Labor Relations Act of 1947. It was the product of Senator Robert Taft of Ohio, the son of former President and Chief Justice William Howard Taft, and an opponent of John L. Lewis, the foremost labor leader of that time. The Taft-Hartley Act prohibited the payment of monies from employers to union-related entities with one notable exception.

Section 186 permitted monies to be paid from employers to funds for the benefit of union workers with two major provisos: the obligation had to be in writing; and the funds were required to be jointly and equally administered by both employer and union representatives. These individuals known as trustees had an overriding duty to administer the funds solely for the benefit of the employees/participants. The Taft-Hartley Fund model preceded the passage of the Employee Retirement Income Security Act of 1974 (ERISA) by twenty-seven years.

Unlike 401(k) plans, Taft-Hartley Funds typically receive contributions from employers with collective bargaining agreements with local unions. For example, the majority of employers that contribute to the Trucking Employees of North Jersey Welfare Fund-Pension Fund maintain collective bargaining agreements with Teamsters Local Union 560. Including the contribution provision in a collective bargaining agreement satisfies the writing requirement of Section 186. Many of these funds have thousands of contributing employers. Hence the term "multiemployer."

These funds are also "defined benefit funds" rather than defined contribution funds. That means that the amount of a participant's retirement benefit is defined or set by the fund. To be entitled to a benefit, an employee/participant must have had contributions made on behalf of his work for at least five years. Upon the attainment of five years, the participant becomes "vested" in a benefit. This means that the fund has an absolute obligation to pay that participant an annuity commencing upon his retirement.

A participant can "accrue" or earn additional vesting credits by having contributions made for additional years of work. Hence, although a participant with five years of credit and a participant with thirty years of credit will both be vested, the latter has earned a larger payout.

Unlike a defined contribution plan, participants do not have individual accounts in a defined benefit fund or a proprietary right to any assets in the fund. Rather, once vested a participant has a right to receive an annuity commencing upon retirement.

The assets of a defined benefit are held in the corpus of a trust. The corpus is funded by two sources: contributions from employers in accordance with collective bargaining agreements; and return on investment. A fund is best understood by analogizing it to a teapot with two spigots. One spigot represents contributions being paid into the fund and the other represents the payment of vested benefits out of the fund to participants.

The goal is to ensure that the contributions and the return on investment are sufficient to pay the vested benefits. If so the fund is fully funded. If not, the fund is underfunded meaning that a portion of vested benefits (VB's) are unfunded becoming "UVB's" (unfunded vested benefits). A fund that remains in an underfunded status will eventually run out of money.

Underfunding is a significant issue today. Many of these funds have been underfunded for years and are running out of money. A major fund, the Central States Pension Fund, has approximately 8 to 9 years before it becomes insolvent and will require the intervention of the Pension Benefit Guaranty Corporation (PBGC).

The state of these pension funds has less to do with mismanagement by the trustees and more to do with the manner in which pensions benefits have been calculated. Enrolled actuaries calculate the amount of a benefit using historical trends. Unfortunately, these trends which cover decades do not reflect current economics. Trustees must invest in conservative investments. The two most conservative investments are cash with no return and certificates of deposits (CDs). Currently short term CD's are paying 1% interest. However, based upon historical data actuaries use investment returns of 6.5% to 7.5% in their calculations. It is little wonder why these funds are underfunded! Additionally the actuaries use outdated mortality tables. In 1974, the year of the passage of ERISA most participants typically died within a few years of retirement. In 2018, it is not unusual for retirees to live for twenty or more years into retirement, putting a serious drain on the assets of the funds.

In 1980, Congress passed the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) which sought to shift the obligation to pay for underfunding upon contributing employers that had nothing to do with the administration of the funds. This was accomplished by imposing monetary penalties upon employers that ceased to contribute to a fund regardless of the reason for cessation of contributions.

Congress' goal was to have the penalties serve as a deterrent to employers to cease contributing to a pension fund by "withdrawing." Aptly named as withdrawal liability, the penalty imposed upon employers is often a multiple of its historical contributions. Withdrawal liability is imposed regardless of the reason for the withdrawal. Some of them are beyond the control of the employer such as decertification by a bargaining unit and a disclaimer of interest by a union.

A decertification occurs when employees decide that they no longer want to be represented by a union. To do so, members of the bargaining unit will file a petition with the National Labor Relations Board seeking an election to end the relationship with the union. If a simple majority of employees votes the union out, the employer has incurred withdrawal liability.

Similarly, a disclaimer will trigger a withdrawal liability. In this situation, a union would typically decide that the bargaining unit does not justify the expense of having a union business agent service the shop. After the union disclaims interest in representing the bargaining unit, the employer will be deemed to have withdrawn from the fund. In neither situation did the employer have any involvement in the decision.

Ironically, almost half a century after the passage of ERISA which was intended to protect these very funds, in some cases the participants in those funds are no better off than they were when unscrupulous trustees mismanaged, squandered or simply stole their assets.

Clearly, the federalization of benefits law has created a hierarchy to prevent blatant mismanagement of these funds. The Department of Labor, Employee Benefits Security Administration (EBSA) investigates allegations of mismanagement of pension funds and resolves them civilly. In other cases, liable individuals will face criminal penalties and the involvement of the Department of Justice.

Funds must file annual returns (Form 5500s) detailing the expenditures and revenues of the funds. Auditors must file financial reports for funds with more than 100 participants. A federal common law of pensions has been developed by the federal courts so that the vagaries and inconsistencies of state trust law are no longer an issue.

With all these protections and developing case law why then are these funds facing extinction. Underfunding has been known to exist for decades. However, successive administrations have "kicked the can down the road" and hoped these funds do not "crater" on their watch.

However, the "day of reckoning" may be coming soon. It has been calculated that the Central States Pension Fund will become insolvent within nine years. At that point, the PBGC is required to step in and ensure payments to affected retirees, albeit in a reduced amount. Unfortunately, experts project that the PBGC has insufficient assets to handle the demise of one multiemployer pension fund, the Central States Pension Fund.

Disturbingly, when funds attempt to avail themselves of legislation that could provide some relief, politicians have blocked those efforts. Recent federal legislation permitted funds that fell in the "critical and declining" status to apply to the Treasury Department for permission to reduce core benefits subject to a vote of the participants. After the Central States Pension Fund applied to the Treasury Department to do so in an effort to delay insolvency, a group of Senators led by Senator Warren of Massachusetts publicly objected in an open letter to the Department of Treasury. Thereafter, the application was rejected leaving the Central States Pension Fund with nine years before insolvency.

The state of these funds will not improve in the future without the meaningful intervention of Congress. If not addressed and corrected, this issue could result in a catastrophe for retirees who relied upon ERISA to protect their lives post-retirement.

2018 Tax Reform

By Raymond P. Turner, Monique Warren, Alec Nealon, Melissa Ostrower, Bruce H. Schwartz, and Stephanie O. Zorn

The Tax Cuts and Jobs Act, signed by President Donald Trump on December 22, 2017, contains various changes related to employee benefits, seven of which are summarized here. (See our blog's *2018 Tax Reform Series* for more in-depth discussions on these changes.)

A Change to Participant Loan Rollovers

One welcomed qualified plan change under the Act is the extension of the period within which a participant may pay the amount of an "offset" of an outstanding plan loan to another qualifying plan or IRA to accomplish a tax-free rollover of the loan offset amount. The change became effective January 1, 2018.

Distributing a plan loan offset occurs when a participant's accrued benefit is reduced (or offset) to repay the loan, under the plan terms. Distributing a plan loan offset amount may occur in many circumstances, such as where the plan terms require that if the participant's request for a distribution occurs, a loan be repaid immediately or treated as in default. The new rule applies to unpaid accrued loan amounts offset from the participant's plan account at plan termination or at or after severance from employment if the plan provides that the accrued unpaid loan amount must be offset at such time. As of January 1, 2018, the deadline to rollover the offset is the filing due date (including extensions) for the participant's tax return for the year in which the loan offset amount arises. The Act extends the rollover period from 60 days to as much as 21 months.

The change means that a qualifying participant will have significantly more time to accumulate from other sources an amount equal to the accrued and outstanding unpaid principal and interest on any plan loan treated as an offset and pay and roll over such amount to another qualifying plan or IRA.

This tax-free rollover treatment does not apply to any offset amount under a loan already deemed to be a distribution taxed under the Internal Revenue Code (and reportable on Form 1099-R) either because its terms did not comply with the Code or because it remained in default past the plan's default cure period.

Employee Fringe Benefits

The Act changes the taxability and deductibility of several employee fringe benefits beginning January 1, 2018. Employer payment or reimbursement of an employee's business expenses (so-called working condition fringe benefits) will continue to be tax-free to the employee and tax deductible by the employer. The other affected fringe benefits are tax-free to the employee or tax deductible by the employer, but not both simultaneously.

The employee fringe benefits affected by the Act are summarized below:

Employees Can No Longer Deduct Unreimbursed Business Expenses

Miscellaneous itemized deductions are no longer allowed. If an employer reimburses an employee for a business expense, the reimbursement is tax-free to the employee, but not tax-deductible by the employer. If the employer does not reimburse the employee's business expense, the employee can no longer claim a tax deduction for the expense.

Moving Expenses

An employee can no longer deduct moving expenses and an employer may not pay or reimburse an employee's moving expenses tax-free. The employer may treat payment or reimbursement of an employee's moving expenses as W-2 wages and deduct the payment as a compensation expense.

Qualified Transportation Benefits

A "qualified transportation fringe" benefit is defined as:

- Transportation in a commuter highway vehicle for travel between the employee's residence and place of employment;
- Transit passes;
- Qualified parking; and
- Qualified bicycle commuting reimbursement.

Employers may still provide tax-free qualified transportation fringe benefits to employees (although qualified bicycle commuting reimbursements may not be provided tax-free), but it may not deduct those expenses. In contrast, if an employer treats the transportation fringe benefits as taxable W-2 wages to the employee, the employer may deduct the expenses of providing those benefits.

Other Commuting Benefits

The Act provides that an employer may not deduct any expense for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer for travel between the employee's residence and place of employment, except for ensuring the employee's safety. This benefit remains taxable to the employee.

Entertainment Expenses

The Act provides that an employer may not deduct expenses for entertainment, amusement, or recreation or any facility used in connection with such activity for the benefit of employees, such as an in-house work-out facility. The Act also prohibits deduction for amounts paid for membership in clubs organized for a business, pleasure, recreation, or social purpose. These changes apply to entertainment expenses regardless of the activities' relevance to the employer's trade or business.

An employer may still deduct expenses for goods, services, or facilities treated as W-2 wages to the employee. An employer may deduct expenses paid to reimburse an employee under a reimbursement or other expense allowance arrangement that can be treated as tax-free to the employee under the applicable plan rules, *e.g.*, an employment agreement.

Expenses for Employer-Operated Eating Facilities Only 50% Deductible

The Act does not change the rules for determining whether the value of meals provided to an employee at an employer-operated eating facility can be treated as tax-free to the employee; however, it does change the amount that is deductible by the employer.

- Section 132(e)(2) of the Code provides that the value of the meals can be tax-free to the employee if:
    - The facility is on or near the employer's business premises;
    - The facility's annual revenue equals or exceeds its direct operating costs; and
    - The facility operates without discriminating in favor of highly compensated employees.
- Section 119 of the Code provides that the value of meals furnished to an employee can be tax-free to the employee if the meals are provided on the employer's business premises and are provided "for the convenience of the employer," *e.g.*, a requirement of employment is to purchase meals from the employer-provided facility on the business premises.

The Act now imposes a 50% limit on deducting food or beverage expenses to employees at an employer-operated eating facility. These expenses will be 0% deductible after December 31, 2025.

Definition of Tangible Personal Property for Tax-Free Employee Achievement Awards

The Code permits an employer to make a tax-free award of tangible personal property to an employee for length-of-service or safety achievement, subject to certain conditions and dollar limits. The Act codifies the definition of "tangible personal property" to state that tangible personal property does not include:

- Cash, cash equivalents, gift cards, gift coupons, or gift certificates; or
- Vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items.

Arrangements that confer only the right to select and receive tangible personal property from a limited array of items pre-selected or pre-approved by the employer qualify as tangible personal property.

Employer Tax Credit for Paid Leave

The Act provides employers a tax credit for offering paid Family and Medical Leave Act (FMLA) leave to employees – at least for 2018 and 2019.

New section 45S of the Code provides a tax credit to employers that voluntarily offer up to 12 weeks of paid FMLA leave annually to qualifying employees under a written policy. The leave benefit amount must be at least 50% of the employee's normal pay. The tax credit is 12.5% if the leave benefit amount equals 50% of normal pay. The 12.5% credit increases incrementally (up to a maximum of 25%) to the extent the leave benefit exceeds 50% of normal pay. A qualifying employee is employed by the employer for at least a year and who is paid no more than 60% of the "highly compensated employee" dollar amount annually (*i.e.*, $72,000 for 2018).

To claim the tax credit, the written policy must provide full-time qualifying employees at least two weeks (annually) of paid FMLA leave and provide part-time qualifying employees a proportionate amount of paid family leave (based on the part-time employee's expected work hours). The policy must also specify the leave benefit (*i.e.*, at least 50% of normal pay). Employers that provide paid family and medical leave for employees who are not covered under the FMLA (an employer with a more generous leave policy than required under the FMLA) also must include a non-retaliation provision in the policy. The employer policy must ensure the employer will not interfere with restrain, or deny the exercise of or the attempt to exercise any right provided under the policy. Note that the credit does not apply to paid leave mandated under state or local law.

The credit is set to expire after December 31, 2019, without further congressional action.

Executive Compensation Changes for Publicly Held Entities

The Act significantly changed the taxation of executive compensation arrangements through its amendment of Section 162(m) of the Code. These changes require publicly held employers, and certain other companies not previously subject to Section 162(m), to revisit their executive compensation arrangements and make adjustments in 2018 and beyond.

Expansion of Application of 162(m) Limitation and Repeal of Performance-Based Compensation Exclusion

An employer may deduct reasonable compensation for personal services as an ordinary and necessary business expense. Section 162(m) limits the deductibility of compensation paid to a covered employee of a publicly held corporation to no more than $1 million per year. The Act eliminates a prior exception permitting the deduction of performance-based compensation within the meaning of Section 162(m) that exceeds $1 million.

For purposes of the $1-million limit, the Act expands the definition of a publicly held corporation to include additional securities registrants. The Act also expands covered employees to include the chief financial officer and any previous covered employee still receiving payments, even if payments are made to the employee's estate.

The Act contains an exemption for remuneration provided under a written, binding contract that was in effect on November 2, 2017, and not materially modified in any respect on or after such date.

Employer Action Items

The elimination of the performance-based exception affords publicly traded employers new flexibility to be more creative in structuring their performance-based executive compensation arrangements. These employers are no longer constrained by strict requirements under the performance-based compensation exception in setting and approving performance goals. They can adjust performance goals at the conclusion of a performance period that increase compensation payable where appropriate.

Employers must also reevaluate their performance metrics to consider the impact of the reduction of the corporate tax rate to 21%. Employers must ensure that any results or modifications do not materially affect pre-November 2, 2017, arrangements.

Publicly traded employers must review all of their executive compensation arrangements and compensation committee charters in 2018 to consider what revisions may be required or appropriate given the changes made by the Act. Companies that have publicly traded debt and some foreign private issuers, not previously subject to Section 162(m), must determine whether the amended Section 162(m) applies to them.

Excise Tax on "Excess" Compensation and "Excess Parachute Payments" Paid by Tax-Exempt Employers

Starting in 2018, tax-exempt organizations are subject to a 21% excise tax on:

- Remuneration exceeding $1 million paid to a "covered employee" in a tax year, and
- Any "excess parachute payment" paid to a covered employee.

A "covered employee" includes any active or former employee who is one of the five highest-compensated employees of the organization for the current tax year, or was a covered employee in any prior year beginning in 2017 (the "covered employee" status is permanent, meaning that a tax-exempt employer may eventually accumulate more than five covered employees).

"Excess parachute payments" refer to compensatory "parachute payments" that are contingent on a covered employee's separation from employment and exceed that employee's five-year average annual compensation (Base Amount). The aggregate parachute payments must exceed three times the Base Amount for these new provisions to apply. This definition is subject to some exceptions, *e.g.*, payments made to individuals who are not "highly compensated employees" under Code Section 414(q) and payments for services performed by a licensed medical professional.

Remuneration is considered paid when the covered employee's right to such remuneration is not subject to a substantial risk of forfeiture. Therefore, deferred compensation may fall within the scope of these rules before it is actually paid to the covered employee.

This excise tax is payable by the tax-exempt employer, not by the covered employee. The Act does not provide for any grandfathering of existing compensation arrangements or any transition period.

Employer Action Items

Tax-exempt employers must:

- Identify their "covered employees" for 2018 and 2017, and
- Review their existing executive compensation and severance arrangements (including any deferred compensation plans) to determine whether payments to covered employees in 2018 or future years could trigger the 21% excise tax.

Tax-exempt employers and their counsel must consider the new rules when structuring new compensation arrangements for executives. An employer may consider including protective language in any new executive compensation arrangements that allows the employer to modify compensation to avoid the excise tax. However, as this new excise tax is imposed on the employer rather than the executive, it may be more difficult to negotiate a cutback where the excise tax applies.

Until the IRS issues guidance on compliance questions, employers and their counsel must put forth their best efforts to interpret the Act.

Change to Employer Deduction Rules

One surprising change made by the Act is the elimination of the employer deduction for certain settlement payments made in the employer-employee context.

General Rule

Payments made in settlement of claims or suits arising out of the employer-employee relationship are tax deductible by an employer, unless the payment is specifically listed as nondeductible in the Code.

Limitations on Deductions

The Act adds two limitations to the tax deductibility of payments that apply in the employer-employee context:

- Any settlement or payment related to sexual harassment or sexual abuse and attorney's fees related to such settlement or payment *if the settlement is subject to a nondisclosure agreement*.
- Any amount paid at the direction of a governmental entity in connection with the violation of any law or the investigation or inquiry by the governmental entity into a potential violation of law, *e.g.*, an amount paid or incurred as reimbursement to the governmental entity for the costs of any investigation or litigation, *other than* amounts paid as restitution for damages or paid to come into compliance with the law.

Both changes are effective for payments made after December 22, 2017.

Further guidance from the IRS is needed to address these issues regarding the nondeductibility of sexual abuse or harassment claims. Open questions include:

- Does nondeductibility apply if the sexual abuse or harassment claim is meritless or frivolous?
- Can the settlement amount for included claims other than sexual harassment or abuse be allocated as deductible?
- If the settlement amount is allocated between the claims, on what basis may the allocation be made?

Previously, both the courts and the IRS have stated that the allocation made by the parties in a settlement agreement can be ignored if the allocation does not reflect the economic substance of the claims.

Employer Takeaways

If a claimant/plaintiff includes claims other than sexual harassment or sexual abuse, one might decide designating in the settlement agreement the portion of the settlement amount allocated to the other claims. This approach provides the basis for the tax deduction of the settlement amount attributable to the other claims. Because of the lack of guidance on the issue at this time, a reasonable allocation may be practical.

If a settlement payment is made at the direction of a governmental entity in connection with the violation of any law or the investigation or inquiry by the governmental entity into a potential violation, the law, as revised by the Act, retains the distinction between nondeductible punitive fines and deductible compensatory penalties. The employer should consult with counsel to determine the deductibility of such payment.

Goodbye to the Individual Mandate

One significant change made by the Act is the elimination of the Affordable Care Act's individual mandate **effective 2019**.

The Act accomplishes the elimination of the individual mandate, not by repeal, but by reducing the penalty amounts of the greater of $695 or 2.5% of household income to $0 and 0%, respectively.

The individual mandate does not affect the majority of Americans, *e.g.*, those who receive their health coverage through their employers or through public programs such as Medicare and Medicaid.

Employer Mandate and Other ACA Features Still in Place

The Act does not affect other aspects of ACA, including:

- The employer mandate and reporting requirements;
- The individual marketplace;
- Premium subsidies for those earning between 100% and 400% of the federal poverty rate;
- The ban on insurers charging more or denying coverage based on health factors; and
- Medicaid expansion.

Applicable large employers must plan around the Code sections 4980H(a) ("A") penalty and (b) ("B") penalty. The A penalty can apply if an employer does not offer minimum essential coverage to at least 95% of its full-time employees and has at least one full-time employee buy subsidized marketplace coverage. The B penalty applies if an employer offers full-time employees coverage that is not affordable or does not meet minimum value requirements.

In 2018, the A penalty is $2,320 (or $193.33 per month) multiplied by the total number of full-time employees (minus 30). The B penalty is $3,480 (or $290 per month) for each full-time employee who buys subsidized marketplace coverage (capped by the A penalty).

If you would like assistance with any review of documents or issues because of the Act, contact a Jackson Lewis attorney.

Recent Developments

Have You Received an Employer Mandate Letter From the IRS Yet?

In late-2017, the IRS sent out employer mandate assessment letters, Letter 226J, to Applicable Large Employers (ALE), as defined in the Affordable Care Act. Employers should address the letters immediately upon receipt because employers have only 30 days to respond to the assessment if they wish to challenge it. If additional time is necessary to prepare the response to the Letter 226J, the employer should contact the IRS agent listed on the letter and request an extension. While not guaranteed, the IRS customarily will grant a short extension of time to allow employers to prepare defensive responses. Contact your Jackson Lewis attorney for assistance if you receive a Letter 226J from the IRS.

IRS Changes Voluntary Correction User Fees

As discussed in the Benefits Law Advisor, effective January 2, 2018, the Internal Revenue Service simplified the user fee charged for most plan correction submissions under the Voluntary Correction Program (VCP). Previously, user fees were computed based on the number of participants in the plan. Under the new method, the user fee is based on the amount of net plan assets, which can be determined by reviewing the most recently filed Form 5500.

The new applicable user fees are:

Total Plan Assets	VCP User Fee
$0 to $500,000	$1,500
Over $500,000 to $10,000,000	$3,000
Over $10,000,000	$3,500

Congress Provides Disaster Relief in Wake of Hurricanes and Wildfires

To assist taxpayers affected by Hurricanes Harvey, Irma, and Maria, Congress has enacted the Disaster Tax Relief and Airport and Airway Extension Act of 2017, making it easier for retirement plan participants to access and use their retirement funds to assist them in recovering from these hurricanes.

The Disaster Relief Act:

- Waives the 10% additional tax under Section 72(t) of the Code for “qualified hurricane distributions” (distributions of up to $100,000 to an individual whose main home is in the disaster area) and permits participants to repay these amounts to the plan, or include them in their income, over a three-year period after receiving the distribution;
- Expands the availability of plan loans to permit loans over the typical $50,000 limit to the lesser of $100,000 or 100% of the account balance; and
- Extends the loan repayment period by one year for disaster victims who took loans or who have loans maturing during a period that began after the disaster occurred (as specified in the legislation) and ends on December 31, 2018.

Plan sponsors have until the last day of the first plan year beginning in or after 2019 to amend their plans to provide either or both distribution options to employees. Any such amendment must apply retroactively. On February 9, 2018, in The Bipartisan Budget Act of 2018, Congress added participants who suffered losses from the California wildfires in 2017 to the participants who can take advantage of the special loan and distribution rules set forth above.

Tenth Circuit Weighs in on Requisite Level of Association with Church Needed to Qualify for ERISA's Church-Plan Exemption

The U.S. Court of Appeals for the Tenth Circuit held that Catholic Health Initiatives (CHI), a church-affiliated organization, qualified for ERISA's church-plan exemption. *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017). The plaintiffs argued CHI's plan was not a church-plan because it was not maintained by a principal-purpose organization for employees of an organization associated with a church.

The Tenth Circuit concluded CHI was associated with a church because it was the civil-law counterpart (and alter-ego) of a canon-law juridic person called Catholic Healthcare Federation (CHCF), whose creation was approved by, and accountable to, the Vatican. CHI's Articles of Incorporation were created "... exclusively for the benefit of, to perform the function of, and/or to carry out the religious, charitable, scientific, and education purposes" of CHCF. The two organizations share trustees and members, and CHI was also listed in The Official Catholic Directory.

The Tenth Circuit also held that the plan's administrator (CHI's Defined Benefit Plan Subcommittee) was a principal-purpose organization that maintained the plan for purposes of the exemption. As an "organization," the subcommittee was a subdivision of CHI whose plan stated it shared "common religious bonds and convictions" with the Catholic Church.

Noteworthy U.S. Supreme Court Writ of Certiorari Denials

The validity of forum selection clauses under ERISA remains an open question after the U.S. Supreme Court denied review of *Mathias v. U.S. District Court for the Central District of Ill.*, No. 17-740, 2018 U.S. LEXIS 689 (Jan 16, 2018). The company in this case, for whom the U.S. Court of Appeals for the Seventh Circuit upheld the forum selection clause, joins other prominent companies whose plans have withstood judicial scrutiny.

The Supreme Court also declined to review whether a New York law whose purpose was to make it harder for insurers to claw back previously paid benefits arising from personal injury was preempted by ERISA. *See Aetna Life. Ins. Co. v. Arnone*, 138 S. Ct. 557 (2017). Under the New York law, personal injury settlements are presumed to not include compensation for amounts that must be paid by the insurer. The Supreme Court's denial of review means the opinion of the U.S. Court of Appeals for the Second Circuit upholding the law as a permissible regulation of New York's insurance markets remains valid and un-preempted by ERISA.

Department of Labor Disability Claims Regulations... Finally Final

In December 2016, our blog discussed the details and requirements of the new disability claims procedures, with the effective date of January 18, 2017, and implementation date of January 1, 2018. Our most recent newsletter discussed the Department of Labor's (DOL's) reluctance to enforce the disability claims procedures implementation date of January 1, 2018. Now, the DOL confirms the comment period allowed by the 90-day delay of the January 1, 2018, date did not yield sufficient data to warrant revisions or further delay to the implementation. Without further ado, the DOL declared that the new requirements apply to claims for disability benefits under plans subject to ERISA filed after April 1, 2018. (See our discussion on the requirements for disability plans.) Remember, contact your Jackson Lewis attorney if any of your plans offer benefits based on determining a disability. This includes not only your disability plans, but it could also include ERISA-covered qualified retirement plans (*e.g.*, pension or 401(k)) and ERISA-covered non-qualified deferred compensation plans (*e.g.*, top hat plans).

Featured Lawyer: René Thorne

By Kellie M. Thomas

This issue's featured employee benefits lawyer is René Thorne, a Principal and the Office Litigation Manager in our New Orleans office. As her second title suggests, René's practice covers the full range of employee benefit litigation matters, including ERISA class actions.

What led you to become a litigator and to ERISA litigation in particular? In my first year of practice, I was assigned to a sex harassment case that led to another and then another. Eventually, this led me to a boutique labor and employment firm. There, I was fortunate to work for a seasoned ERISA litigator. I quickly realized there were very few other women practicing ERISA litigation, particularly those focused on ERISA class actions. I loved the intellectual challenge ERISA litigation provided. As a result, I focused my practice exclusively on ERISA litigation and now have been litigating ERISA cases for more than 20 years.

You have testified in federal court as an expert on ERISA matters. Which is more nerve-wracking, being on or in front of the witness stand? Definitely testifying. The first matter for which I testified was extremely complicated, and I submitted an extensive report. When I was testifying I was worried about having to remember everything in that long report, but I loved every minute of it.

How has the practice of law changed since you first were admitted? It certainly feels like it's become much more competitive. And, in my specialty practice, as more plaintiffs' lawyers realized how interesting benefits litigation can be, there's been a significant uptick in benefits litigation in the last 20 years.

What is the #1 mistake you see clients making that can be easily avoided? Not calling us.

If you could change one thing in ERISA, what would it be? Rewrite Section 413, ERISA's statute of limitations. It is said to be so incoherent that it's "held together by chewing gum and baling wire."

If you had to change careers, what would you like to become? An olive oil producer. I actually have a pilot orchard going now.

If someone is visiting New Orleans for the first time, what are the top three things they must do before they leave? 1. Take the streetcar all the way Uptown, eat at Camellia Grill (at the end of the line), take it back downtown, stopping to walk through Audubon Park.
2. Get a po'boy at Parkway.
3. Visit any music club on Frenchman in the Marigny.

News

Welcome to Megan Holstein!

We are thrilled to welcome Megan Holstein to our Denver office. She has bolstered our ability to advise on disability claims and paid Family and Medical Leave Act benefits, joining us with significant leave of absence compliance and disability expertise from both sides of the client-attorney table. Megan has contributed to firm publications warning clients about the pitfalls of the new disability claims procedures. We are delighted to have Megan and her expertise contributing to our firm.

Media...

- **Alec Nealon** and **Melissa Ostrower** author "Responding to the Tax Act's Executive Compensation Changes," published by SHRM.
- **Monique Warren** comments on details of Section 13403 of the Employer Credit for Paid Family and Medical Leave Act offering a federal tax credit for employers that provide paid family and medical leave to their employees in "Taking Advantage of the New Paid-Leave Tax Credit," published by SHRM.
- **Melissa Ostrower** discusses the tax act and upcoming changes for executive compensation in "Inside Track: Will New Tax Law Wipe Out GC Bonuses?" published by Law.com.
- **Melissa Ostrower** and **Alec Nealon** discuss the enactment of the 2017 tax act, which limits the tax deductions that businesses can claim for certain employee benefits in "Tax Act Alters Executive Pay, Affects Bonus Deductions and Withholding," published by SHRM.
- **Melissa Ostrower** and **Alec Nealon** comment on implications of the 2017 tax act, which limits the tax deductions that businesses can claim for certain employee benefits in "Final Tax Bill Dices and Splices Benefit Changes," published by SHRM.
- **Charles Seemann** discusses tools that utilize the collection of fitness tracker data to update user's rating for life insurance plans in "Saving Enough for Retirement? Check Your Fitness Tracker," published by *Bloomberg BNA.*
- **Joy Napier-Joyce** comments on the details of the Senate-passed tax legislation relating to employee benefits in "5 ways Senate tax legislation benefit changes differ from House bill," published by *Employee Benefit Adviser.*
- **Monique Warren** authors "Crossing the Threshold—Small Business to ACA-Bound 'Applicable Large Employer," published by SHRM.
- **Monique Warren** discusses large employers in "Brewing an ALE," published by Bloomberg BNA.

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 benefitslawadvisor.com), and have updates written by experienced attorneys sent to your inbox, or follow us on Twitter (at twitter.com/jacksonlewispc).

Upcoming Seminars

March

- ***The New ERISA Regulations for Disability Claims and Appeals***, René Thorne and Megan Holstein present Jackson Lewis webinar (recording)

May

- ***How to Tell If Your Disability Plan is Governed by ERISA Regulations,*** Megan Holstein presents at the Disability Management and Employers Coalition Compliance Conference

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

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