

The ERISA Industry Committee

Washington Update

January 13, 2014



Participation Procedure

- Procedure for audience participation
- Audience will be in a “listen-only” mode
- If you wish to ask a question or make a comment, press *6 on your telephone to “un-mute” your telephone
- After speaking, please press *6 again to re-enter “listen-only” mode

Washington Update Agenda

- Welcoming Remarks
- Hill Briefing: Dani Kehoe
- Health Update
- Retirement Update
- Legal Update
- Concluding Remarks/Questions

ERIC on Social Media

- ERIC is on Twitter and Facebook and has a blog!
- Please follow us (and tell your friends and colleagues).



<https://twitter.com/ERISAIndCmte>



<https://www.facebook.com/ERISAIndCmte>



<http://erisaindustrycommittee.blogspot.com/>

- More information is available at <http://www.eric.org/about/eric-social-media/>.

Health



FAQ XVIII – guidance on OOPs, etc.

- Plans with multiple service providers may divide OOP limit as long as aggregate meets ACA \$6350/\$12,700 limit
- Out-of-network OOP expenses, non-covered services don't count toward limit
- Plans may restrict mid-year entry into smoking cessation programs

EAPs de-fanged

- Earlier guidance provided relief for EAPs to be considered excepted benefits in 2014
- New proposed regulation provides relief starting in 2015 with no ending date if certain conditions met:
 - EAP does not provide significant medical benefits
 - EAP benefits cannot be coordinated with another plan's benefits
 - No employee contributions or premiums to participate
 - No cost-sharing in EAP
- Some relief for limited-scope dental/vision plans

DOMA guidance

- NOT the BIG one we've been waiting for
- New guidance provides further details on when change in status elections (e.g., for cafeteria plans) may be made and when elections must take effect
 - Notice 2014-1
 - Also applies to HSAs and dependent care FSAs

Medicare Secondary Payer Program

- Request for public comments on when HHS should impose civil monetary penalties for failure to comply with certain MSP-related reporting requirements
- Basically reporting when group health plan coverage is primary to Medicare
 - Reports request lots of data
- Do ERIC members have any issues with this, or are TPAs primarily taking care of this?

ERIC comment letter on ACA transitional risk reinsurance

- Filed 12/20/13
- Main points:
 - We don't like paying this fee
 - Any change to fee should apply fairly and impartially across all self-funded plans
 - We would like to see the details (numbers and dollars) on exclusion of self-administered, self-funded plans from the fee for 2015 and 2016
 - Amounts to be collected should be offset by excess contributions from prior years

SCOTUS action on contraceptives mandate

- 80+ cases challenge ACA rule that health plans cover contraceptives at no cost
 - Split in 4 Circuit Courts that have decided (3rd, 6th, 10th, and D.C.)
 - SCOTUS will hear case; decision possible in 2014
 - Core issue: do companies have same right as people to free exercise of religion?
 - Would alter, but not dismember, ACA
- Justice Sotomayor issues a TRO on New Year's Eve to prevent government from enforcing contraceptives mandate against *Little Sisters of Poor Home for Aged, Denver, Colorado*

Retirement



Retirement – Legislative Update

Congress/Tax Reform

2013 Budget Agreement

- PBGC premiums increases
- MAP-21 Stabilization extension – not included

Upcoming Issues:

- Debt Limit (extended with “extraordinary measures”)

Retirement – Legislative Update

Tax reform:

- Baucus discussion drafts
- Camp

GAO

- GAO Report on Retirement Plan Disclosures

Retirement – Regulatory Update

Regulations in the “queue”

DOL Rules List Fall 2013

Final Rule stage

- Annual Funding Notice
- Target Date Disclosure
- Amendment of Abandoned Plan

Retirement – Regulatory Update, cont.

DOL Rules List Fall 2013

Proposed Rule Stage

- Pension Benefit Statements (lifetime income illustrations)
- Conflict of Interest Rule/Investment Advice
- 408(b)(2) “Guide” project
- Selection of Annuity Providers – Safe Harbor

Retirement – Regulatory Update, cont.

DOL Rules List Fall 2013

Pre-Rule Stage

- Standards for Brokerage Windows

Retirement – Regulatory Update, cont.

Treasury Department/IRS

Agency Rule List – Fall 2013

- More guidance on DOMA – retroactive effect (not on list – but working on it)

Retirement – Regulatory Update, cont.

Treasury Department/IRS

Agency Rule List – Fall 2013

Proposed Rule Stage

- Update to minimum PV Requirements for DB distributions
- Transition rules relating to the market rate of return requirements for statutory hybrid plans

Retirement – Regulatory Update, cont.

Treasury Department/IRS

Agency Rule List – Fall 2013

Final Rule Stage

- Accrual rules for DB plans
- Determination of minimum required pension contributions
- Notice to participants on failure to defer recap of retirement plan distributions
- Additional hybrid plan rules
- Modifications to minimum PV requirements for DB plans

Retirement – Regulatory Update, cont.

- Notice 2014-5- temporary guidance on frozen defined benefit plans and nondiscrimination testing (issued 12/13/13)
 - Summary
 - Coalition
 - Next steps

Retirement – Regulatory Update, cont.

- Guidance on In-Plan Roth Rollovers
(Notice 2013-74)

Retirement – Regulatory Update, cont.

PBGC

Rule List – Fall 2013

Final Rule stage

- Reportable Events and Certain Other Notification Requirements
- Payment of Premiums, Large-Plan Flat Rate Premium
- Cash Balance Plans, Benefit Determinations and Plan Valuations for Statutory Hybrid Plans [PPA 2006]
- Benefits payable in Terminated Single-Employer Plans: Limitations on Guaranteed Benefits, Shutdowns and Similar Benefits

Retirement – Regulatory Update, cont. PBGC

Rule List – Fall 2013

Proposed Rule Stage

- Missing Participants – PPA 2006
- Liability for Termination of Single-Employer Plans, Treatment of Substantial Cessation of Operations
- Title IV: Treatment of Rollovers from DC to DB plans
- Benefit Payments

Retirement – Regulatory Update, cont.

- PBGC issues final regulations on Oct. 15th date for premium payments- applicable to large plans only – effective 2014 plan year.

Legal



Severance Pay

- **Key issue:** whether SUB payments (e.g. severance) subject to FICA
 - **IRS position:** exempt from FICA only if tied directly to state unemployment benefits
 - **Focus:** statutory construction (IRC)
- **Sixth Circuit decision:** SUB payments not subject to FICA
 - **Contra:** *CSX Corp. v United States*, 518 F.3d 1328 (Fed. Cir. 2008)
- U.S. sought Supreme Court cert. which was granted
- ERIC filed amicus brief
- **Possible impact:** tax refunds and future FICA tax exemption

U.S. v. Quality Stores, 693 F.3d 605 (6th Cir. 2012), cert. granted

Stock Drop

- Most courts have held that plan fiduciaries are presumed to have acted prudently in situations involving a decline in the value of the company's stock.
- Sixth Circuit Court of Appeals held that the presumption of prudence does not apply at the pleading stage of a lawsuit.
- The U.S. Supreme Court agreed to hear the case.
- This case will likely have a significant impact on whether the presumption of prudence still applies and on the cost of litigation.
- Other circuits have held presumption generally applies.
- ERIC plans to file an amicus brief in the case.

*Fifth Third Bancorp v. Dudenhoeffer, 692 F.3d 410
(6th Cir. 2012), cert. granted*

Statute of Limitations

- A plan can specify a statute of limitations period as long as:
 - the period is reasonably long (i.e., at least one year); and
 - it does not conflict with any controlling statute.
- The Court noted that the limitations period did not unreasonably bar the participant from filing suit.
- As a result of the Court's decision, companies will want to consider whether to include statute of limitations periods in their plan documents.

Heimeshoff v. Hartford Life & Acc. Ins. Co., 571 U.S. __ (Dec. 16, 2013)

Deference

- The case involves a DB plan where former employees who received prior lump-sum distributions from the plan were later re-hired.
- At issue is the method for taking into account their past distributions when calculating their current benefits.
- U.S. Supreme Court previously ruled that deference must be provided to the plan administrator's interpretation of the plan.
- Case went back to the Second Circuit Court of Appeals, which ruled that the plan administrator's interpretation of the plan document was not reasonable, even when providing deference.
- This case indicates that there can be limits to the deference a court gives a plan administrator.

Frommert v. Conkright, No. 12-67-cv (2d Cir. Dec. 23, 2013)

Upcoming ERIC calls

- Benefits Litigation Update with Epstein Becker Green
 - January 29, 2014, 2:00 p.m. – 3:30 p.m. ET
- FocusOn call on Shared Responsibility
 - Alden Bianchi, Mintz Levin
 - January 30, 2014, 2:00 p.m. – 3:30 p.m. ET
 - *Tentative*, assuming the regs come out soon
- Washington Update call
 - Monday, February 3, 11:00 a.m. – noon EDT

To receive ERIC updates

- If you are an employee of an ERIC member company and would like to receive your own copy of our emails and notifications of future events, please let us know by writing to Adreanne Cooper at ERIC (acooper@eric.org.)
- In this email, please include your contact information or signature block, and please indicate whether you wish to receive information on retirement issues, health issues, legal issues, or all of the above.

For further information

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