Significant Issue Update
Western Pension & Benefits Council, Portland Chapter
Legal and Compliance Updates – March 11, 2015

Fifth Circuit Holds Wealth Accumulation Plan is an ERISA Plan. In *Tolbert et al. v. RBC Capital Markets Corporation*, Docket No. 13-20213 (5th Cir. July 2014), the Fifth Circuit Court of Appeals held a bank's wealth accumulation plan ("WAP") was an "employee pension benefit plan" subject to ERISA because it expressly provided participants with the opportunity to defer income.

The WAP provided three categories of participant accounts: (1) voluntary deferred compensation; (2) mandatory deferred compensation; and (3) company contributions. Voluntary deferrals were immediately vested. Employees could elect vested amounts to be distributed upon termination of employment, or they could receive in-service distributions. Amounts distributed after termination of employment could be received over a 10-year period.

Several former employees sued alleging the bank violated ERISA's forfeiture rules when it declined to pay them benefits after termination of employment. Specific claims included breach of fiduciary duty under ERISA Section 502(a)(2) and for equitable relief under ERISA Section 502(a)(3).

The plaintiffs appealed a federal district court ruling that the WAP did fall within the definition of "pension plan" set forth at ERISA Section 3(2)(A). Under that provision, a pension plan includes any plan that provides "retirement income" to employees, or results in a "deferral of income" to the termination of covered employment or beyond.

On appeal, the Fifth Circuit reversed the trial court, ruling that the WAP did fall within the definition of "pension plan" set forth at ERISA Section 3(2)(A). Although the court noted that the WAP did not provide "retirement income," the court explained that the plan clearly provided participants with the opportunity to defer income, which made it an ERISA plan.

The Fifth Circuit noted that the plan might be a "top hat" plan exempt from ERISA's fiduciary rules and remanded it back to the district court for that determination.

To obtain a copy of the ruling, visit: http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-20213-CV0.pdf.

Cafeteria Plan Key Employee Concentration Test Modified. IRC Section 125(b)(2) provides that if a cafeteria plan fails the "key employee concentration test," benefits received by key employees under a cafeteria plan are not excludable from gross income.

Under prior law, the key employee concentration test looked to whether "statutory nontaxable benefits" provided to key employees exceeded 25% of statutory nontaxable benefits provided to all employees. Statutory nontaxable benefits are a specific subset of cafeteria plan "qualified benefits" that are already excluded from gross income under certain non-cafeteria plan rules. Statutory nontaxable benefits include accident and health plans under IRC Section 106 and dependent care assistance benefits excludible under IRC Section 129.

The Tax Increase Prevention Act of 2014 ("TIPA") amended the key employee concentration test to change the reference in IRC Section 125(b)(2) from "statutory nontaxable benefits" to "qualified benefits." Thus, to satisfy the key employee concentration test, "qualified benefits" provided to key employees cannot exceed 25% of the qualified benefits provided to all employees. This change was effective December 19, 2014.

Multiemployer Pension Reform Provisions. On December 16, 2014, President Obama signed the Consolidated and Further Appropriations Act of 2015 which included a significant number of multiemployer pension reform provisions intended to provide flexibility to save troubled plans and protect taxpayers. Many multiemployer pension plans are in a precarious financial state. In 2014, the PBGC's multiemployer insurance program's deficit rose to $42.4 billion.

Among other changes, the 160 page amendment:

- Allows the plan sponsor of a multiemployer plan that isn't currently in critical status, but that is projected to be in critical status in any of the succeeding five plan years, to elect to be in critical status effective for the current plan year.
- Modifies the rules surrounding multiemployer plans in critical status, modifies circumstances under which a plan is deemed to have emerged from critical status, and limits the circumstances under which a plan that has emerged from critical status re-enters critical status.
- Modifies the corrective contribution schedules for underfunded multiemployer plans used to implement and enforce funding improvement and rehabilitation plans where the parties to a collective bargaining agreement fail to agree on a plan.
- Provides new rules giving the PBGC authority to facilitate mergers between multiemployer plans.
- Allows trustees of underfunded plans in "critical and declining" status to reduce or suspend vested benefits without violating the "anti-cutback" rule of IRC Section 411(d)(6). This change is a new exception to the anti-cutback rule and is intended to assist severely underfunded plans to survive without a PBGC bailout. Specifically, the IRC Section 432(a)(2) rehabilitation plan rules must be applied to plans in "critical and declining" status and the plan sponsor may suspend benefits under the rules discussed below.
- Increases PBGC premium rates for multiemployer defined benefit plans from $13 per participant to $26 in 2015, indexed for inflation for post-2015 plan years.

Benefit Suspension Rules. Under the new rules, a "suspension of benefits" means the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary.

- *Benefit Suspensions.* The plan sponsor of a plan in critical and declining status may suspend benefits only if:
  - (i) Taking into account the proposed suspensions of benefits, the plan actuary certifies that the plan is projected to avoid insolvency under ERISA Section 418E; and
  - (ii) The plan sponsor determines that the plan is still projected to become insolvent unless benefits are suspended, taking into account various factors, like current and past contribution levels, and any prior reductions of adjustable benefits.
- *Limitations.* Suspensions of benefits are subject to numerous limits, including: (a) the monthly benefit of any participant or beneficiary may not be reduced below 110% of the monthly benefit which is guaranteed by PBGC; (b) benefits based on disability may not be suspended; and (c) for a participant or beneficiary who has attained age 75 as of the effective date of the suspension, not more than the "applicable percentage" of the "maximum suspendable benefits" of the participant or beneficiary may be suspended.
- *Agency Approval and Participant Rejection.* A plan sponsor must submit an application to IRS for approval of any proposed suspensions of benefits. IRS, in consultation with PBGC and DOL, *must* approve the application upon finding that the plan is eligible for the suspensions and has satisfied the specified criteria. Thereafter, participants and beneficiaries may vote to reject the suspension, except for "systemically important plans," in which case the suspension will take effect notwithstanding participant rejection.
- *Notice Requirements; Judicial Review.* There are also specific rules addressing notice of the proposed suspension to participants and beneficiaries and to provide judicial review for any the denial of an application for suspension of benefits.
- *Agency Guidance.* The IRS, in consultation with PBGC and DOL, is directed to publish appropriate guidance to implement the benefit suspension rules.

IRS Issues Notice 2015-7: Guidance Forthcoming on Whether "Governmental Plan" Includes Plans in Which Public Charter School Employees Participate. The IRS recently issued Notice 2015-7, stating that it anticipates issuing proposed regulations under IRC 414(d) to define "governmental plan" to include state and local retirement plans that cover employees of public charter schools.

To obtain a copy of the notice, visit: http://www.irs.gov/irb/2015-6_IRB/ar10.html.

IRS Notice 2015-16 to Initiate "Cadillac Tax" Guidance. The IRS recently issued Notice 2015-16, to "initiate and inform" the process of developing regulations under the IRC Section 4980I (the "Cadillac tax"). The notice describes several potential approaches with regard to various issues which could be incorporated in future proposed regulations, including: (1) the definition of "applicable coverage" subject to the tax; (2) the determination of the cost of applicable coverage; and (3) the application of the annual statutory dollar limit to the cost of applicable coverage.

Treasury and the IRS are inviting comments on the issues and approaches addressed in the notice and on any other issues under IRC Section 4980I.

To obtain a copy of the notice, visit: http://www.irs.gov/pub/irs-drop/n-15-16.pdf.

DOL Fiduciary Rule Proposal Back on Track. On February 23, 2015, President Obama announced that the DOL's long-awaited fiduciary rules project was being sent to the Office of Management and Budget for review before being released for public comment. The proposed rules were first issued in 2010 and then withdrawn after significant criticism. The rules have been the subject of a major lobbying campaign by the financial services industry. Things look to be heating up again soon.

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