

July 2014 Employee Benefits Update

United States Supreme Court Rules Federal Government Cannot Require Hobby Lobby to Cover Some Contraceptives

On June 30, 2014, the United States Supreme Court held that the Religious Freedom Restoration Act of 1993 ("RFRA") prevents the federal government from requiring Hobby Lobby Stores, Inc. (and two other closely held corporations) to provide coverage for certain types of contraceptives to participants in Hobby Lobby's health and welfare plan. See *Burwell v. Hobby Lobby Stores, Inc.* Although the Court's written opinion attempted to limit the decision to the facts and circumstances of the case, some speculate that the case could be used by others going forward to challenge other provisions of the Affordable Care Act ("ACA").

RFRA provides that, if an otherwise religion-neutral law is found to burden the religious exercise of any person, the law may be applied to that person only if the law serves a compelling interest and is the least restrictive means by which the government may meet its compelling interest. The ACA, as administered by the Department of Health and Human Services ("HHS"), requires non-grandfathered health and welfare plans to provide coverage of all FDA-approved prescription contraceptives to female participants without cost sharing ("Contraceptive Mandate"). However, the law contains an exception for churches and houses of worship ("religious entities"). In response to objections to the Contraceptive Mandate by entities that did not qualify for the religious entity exception, HHS crafted an administrative exception to allow entities controlled by religious institutions to avoid the Contraceptive Mandate by filing a form with HHS. Importantly, this administrative exception would not be extended to private corporations.

Hobby Lobby Stores, Inc. ("Hobby Lobby") is a private, closely held corporation that is owned and operated by members of the Green family. The Greens profess to be devout Christians whose faith prevents them from offering two types of emergency contraception and intrauterine devices because, Hobby Lobby argued, the contraceptives could cause the "death" of an already fertilized egg. As such, Hobby Lobby argued that RFRA prevented the application of the Contraceptive Mandate to Hobby Lobby's health and welfare plan. The Court held that the Contraceptive Mandate as applied to Hobby Lobby violates RFRA. The Court found that RFRA could extend to protect the religious beliefs of a closely held corporation, through the Greens, as the owners of Hobby Lobby.

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The Court accepted that the Contraceptive Mandate was a compelling government interest. However, the Court held that the government failed to meet its duty to show that the Contraceptive Mandate was the least restrictive means to meet that interest, in part, because HHS had already granted an administrative exception to entities that had not been expressly excepted under the ACA.

The extent to which this decision will affect the Contraceptive Mandate as applied to other private employers, or other provisions of the ACA, remains unclear.

Select Compliance Deadlines and Reminders

PCORI Fee Due July 31

Sponsors of self-insured health plans required to pay the Patient Centered Outcomes Research Institute ("PCORI") fee must report enrollment numbers on the Form 720 and pay the yearly PCORI Fee by July 31. For self-insured plans paying the PCORI fee for plan years ending on or after October 1, 2013, the per-person amount of the fee is \$2 for 2014.

IRS Form 5500 Due for Calendar Year Plans

Administrators or sponsors of employee benefit plans subject to ERISA must generally submit the Form 5500 by the last day of the seventh month following the end of the plan year. For calendar year plans, the Form 5500 is generally due July 31. Extensions are available if certain steps are satisfied; employers should consult their advisors for specific compliance requirements.

IRS Form 8955-SSA Due for Calendar Year Plans

Administrators or sponsors of calendar year tax-qualified retirement plans must also submit Form 8955-SSA at the same time that the Form 5500 is submitted (generally, July 31, 2014 unless an extension applies).

Retirement Plan Developments

Supreme Court Holds ESOP Fiduciaries Not Entitled to Presumption of Prudence

On June 25, 2014, the United States Supreme Court held that fiduciaries of employee stock ownership plans ("ESOP") are not entitled to a presumption that their decision to invest in employer stock is prudent. Rather, the Court held, ESOP



fiduciaries are subject to the same duty of prudence as all other ERISA fiduciaries, except that ESOP fiduciaries need not diversify plan assets. See *Fifth Third Bancorp v. Dudenhoeffer*.

In *Dudenhoeffer*, the defined contribution plan sponsored by Fifth Third Bancorp ("Fifth Third") offered participants the ability to direct their retirement accounts into any of 20 separate funds, including both mutual funds and an ESOP. Participants in Fifth Third's plan are able to direct their own contributions into any of the offered funds. However, employer matching contributions are automatically invested in the ESOP. Plan participants could then move the employer matching contributions to any of the other offered funds.

Participants in the Fifth Third plan alleged that the plan's fiduciaries violated ERISA's duties of loyalty and prudence by investing in the ESOP even though the fiduciaries should have known that Fifth Third's stock was "overvalued" and "excessively risky." The participants argued that, upon learning of the precarious position of the Fifth Third stock, a prudent fiduciary would have (in some combination) (1) sold the holdings in the ESOP, (2) refrained from investing in the ESOP, (3) cancelled the plan's ESOP option, or (4) disclosed insider information that would have allowed the market to correct the price of Fifth Third's stock.

In confirming that ESOP fiduciaries are subject to ERISA's general prudence standard, the Court held that the only fiduciary duty that does not apply to ESOP fiduciaries is ERISA's requirement to diversify plan investments. Additionally, the Court held that this exception is not broad enough to completely remove the duty of prudence. The Court recognized that applying the general fiduciary standard to ESOP fiduciaries might lead to complications with otherwise applicable laws related to insider trading. However, the court determined that insider trading concerns apply similarly to all ERISA fiduciaries. 3

Finally, the Court held that publically available information is not sufficient to show that ESOP fiduciaries should have known that continued investment in employer stock is not prudent, absent some other special circumstance. Rather, plaintiffs attempting to show a breach of fiduciary duty based on publically available information would also have to show some "special circumstance" showing a breach. Additionally, the Court held that the insider information that the ESOP fiduciaries likely had would not necessarily be sufficient to support a claim for breach of fiduciary duty.

IRS Releases Updated 401(k) Fix-It Guide



On June 17, 2014 the IRS released an updated version of its [401\(k\) Plan Fix-It Guide](#). The Guide provides information regarding 12 of the most common 401(k) plan mistakes and the methods through which sponsoring employers may find and fix the mistakes, as well as methods to avoid the mistakes in the future.

IRS Begins Audit Initiative for Plans Subject to 409A

The IRS has begun a formal compliance initiative project related to deferred compensation plans' compliance with the requirements of Code section 409A. The IRS has indicated that the initial phase of the project will be limited to focus on the 10 most highly compensated employees at 50 companies that were previously identified for an audit based on the companies' previous issues with other employment tax issues. The IRS has informally indicated that audits will focus on compliance issues related to initial deferral elections, subsequent deferral elections and distributions. The IRS will likely expand this project in the future beyond this initial group of taxpayers.

Private Letter Rulings Support Lump-Sum Offers to Participants Already in Pay Status

The IRS recently issued five more Private Letter Rulings ("PLR") confirming that defined benefit plans that offer a limited-time lump-sum distribution option to participants already in pay status will not violate the provisions of Code section 401(a)(9) requiring qualified plans to make yearly minimum distributions to plan participants. The PLRs specifically provide that by issuing the PLRs, the IRS is not opining on whether the specific limited-time offers meet other Code requirements, including the requirements of Code section 417(e), related to minimum present value.

A PLR is only binding precedent with respect to the taxpayer that requested the opinion.

Second Circuit Holds That ESOP Funding Decision Is Not Fiduciary Act

On May 31, 2014, the Court of Appeals for the Second Circuit ruled that an employer's decision to make employer contributions to both an ESOP and a 401(k) in the form of employer stock, rather than cash, was not a fiduciary decision because plan funding decisions are settlor decisions. *See Coulter v. Morgan Stanley & Co. Inc.* Thus, the court held, ERISA's fiduciary standards could not apply.

It should be noted that the Coulter decision preceded the Supreme Court's *Dudenhoeffer* decision, discussed above. It is unclear how this decision should be interpreted in light of the Supreme Court's apparently contrary decision. These two decisions, *Coulter* and *Dudenhoeffer*, illustrate the ongoing issues surrounding stock investments in defined contribution plans. Fiduciaries of plans that hold stock investments may want to consult with their benefits counsel to determine what impact, if any, these cases may have on their obligations.

Health and Welfare Plan Developments

Departments Issue Final Rules Regarding Orientation Periods Used to Apply the ACA's Waiting Period Rules

On June 20, 2014, the Departments of Labor, HHS and Treasury (the "Departments") released final rules regarding employers' use of orientation periods for new employees when determining the date by which an employer must offer the new employee health insurance.

Generally, the ACA requires applicable employers to offer health insurance to all full-time employees within 90 days of an employee's start date, without requiring the employee to meet any other qualification standard. However, employers are permitted to make an offer of insurance to full-time employees contingent on completion of a "bona fide orientation period."

The final rules define a "bona fide orientation period." To be a "bona fide orientation period," the waiting period may not last for more than one calendar month from the employee's start date in a position that would otherwise be eligible for coverage, minus one day. The final regulations take effect with plan years beginning in 2015.

Note, however, that compliance with this orientation period rule will not necessarily mean that an employer has complied with the ACA's employer "pay-or-play" rules. Employers that are subject to the ACA's employer "pay-or-play" rule must offer coverage prior to the first day of the fourth month of employment, regardless of whether the employee must complete an orientation period prior to coverage.

HHS Approves Coverage for Gender Reassignment Surgery Under Medicare

On May 30, 2014, HHS agreed that Medicare would cover the gender reassignment surgery of a 74-year-old veteran. Since 1981, HHS has imposed a



blanket ban on Medicare coverage for gender reassignment surgeries, viewing all such surgeries as experimental, regardless of a specific participant's circumstances.

HHS's decision applies only to the participant seeking coverage in this specific situation.

General Developments

Departments Make Post-Windsor Changes

The Social Security Administration and the Centers for Medicaid and Medicare Services ("CMS") announced policies altering the definition of "spouse" to reflect the Supreme Court's Windsor decision, declaring unconstitutional the federal government's definition of marriage as between only one man and one woman. For purposes of the Medicare Secondary Payer Rules, CMS announced that it will now consider "spouse" to include same-sex spouses.

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