DON’T OVERLOOK LIFE-INSURANCE CONVERSION NOTICE OBLIGATIONS

Employer, Not Insurer, Found Liable for Payment of Life Insurance Benefit

A court ruling earlier this month highlights the importance for employers of reviewing internal policies and procedures regarding the communication of post-employment life insurance rights. In *Erwood v. WellStar Health Systems*, a federal judge in Pennsylvania ruled that an employer owes more than $750,000 to the widow of a deceased former employee.

In this case, an employee terminated employment at the end of his FMLA period and died of a terminal illness just over nine months later. Although the former employee and his spouse believed he would continue to be covered under a life insurance policy following the end of his employment, the group policy coverage lapsed and was not continued because the company’s benefits representative did not properly explain the post-employment individual policy conversion right.

Although the availability of a conversion right was mentioned in a summary plan description, the court found that the employer did not satisfy its disclosure obligations to the employee because no specific form, deadline, or other essential information about the conversion right was ever mentioned or provided, even when the employee and his spouse had reached out with questions and attended an in-person meeting. Instead, the representative simply provided multiple assurances during the employee’s FMLA leave period that all benefit coverages would “remain the same.”

The court held that the failure to provide the employee with specific conversion right election information amounted to a breach of the fiduciary obligation imposed by ERISA to convey complete and accurate information material to the beneficiary’s circumstances. The court also found that an ERISA fiduciary may not, in the performance of its duties, materially mislead those to whom the duties of loyalty and prudence are owed. That duty not only includes the affirmative duty to inform, but also the duty to inform when the fiduciary knows that silence might be harmful to the beneficiary. The court found that the employer had breached these fiduciary obligations in its failure to provide the required conversion notice, and, as a result, found that such breaches amounted to a material misrepresentation by the employer resulting in harm to the spouse as beneficiary.

Unfortunately, the company’s benefit representative was unaware of the company’s communication and fiduciary obligations to provide notice to the employee of the conversion right and wrongly assumed that such notice would be provided by the life insurance carrier itself. Because the deceased employee and his spouse had relied on the company’s communications to their detriment, the judge used the equitable remedy provisions of ERISA to award the widow the full amount of the life insurance benefit, $750,000 (plus interest), she would have received under the policy, had the life insurance benefit continued from the date on which employment ended.

Compare and Contrast with COBRA

Most employers are quite familiar with the obligation to provide a notice of COBRA or state continuation coverage to group health plan participants who cease to be eligible for the workplace group health insurance plan. The process of providing continuation coverage notices has become routine, and indeed, is often handled by the plan's group health insurance carrier.

However, the opposite is true of group life insurance policies. Not only are some employers less aware that group life insurance coverage applies only to active employees, the contractual language of group policies typically requires the employer (rather than the insurer) to provide the conversion right notices when employment ends.

The court's decision in *Erwood* highlights the importance of periodically reviewing internal post-employment benefits right notice obligations and of understanding who exactly has those obligations. This is particularly important in light of the fact that employers may change carriers over time, and that the details of conversion notice requirements may vary from carrier to carrier.

When the same insurer provides both long-term disability and life insurance, it may be that the insurer will be aware of an employee terminating employment on account of disability. In such case, it is possible that an insurer will be willing to assist in making sure that an employee receives a life-insurance conversion notice. It is more common, however, that the onus for providing notice of conversion rights rests solely on the employer, and not the carrier. The *Erwood* decision makes that reality clear for employers.

Because beneficiaries often become aware that eligibility or conversion information was inaccurate or incomplete (or that premiums have lapsed) only after the plan participant has passed away, life insurance errors of this kind are prime candidates for the application of an (often expensive) equitable remedy under ERISA that makes the beneficiary whole.

QSEHRAS ALLOW SMALL EMPLOYERS TO REIMBURSE EMPLOYEES' PERSONAL HEALTH

COSTS

Although the Affordable Care Act's (ACA's) market reforms eliminated the ability of employers to permissibly reimburse employees for individually-incurred health insurance or medical costs, recent legislation now affords certain small employers with an alternate reimbursement option. The 21st Century Cures Act amended the Internal Revenue Code to authorize the creation of a new stand-alone HRA vehicle known as a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA).

An employer may elect to implement a QSEHRA if the business offers *no* group health plan *and* is exempt from the ACA's Employer Shared Responsibility provisions by virtue of having had fewer than 50 full-time (including full-time equivalent) employees in the prior year. The 50-employee limit applies to the aggregate number of employees across all commonly-controlled or affiliated businesses.

A QSEHRA is not a "health plan" within the meaning of the ACA, but may be used to pay for or reimburse the costs of medical care and health insurance premiums incurred on behalf of an eligible employee or the employee's family members. The employee must provide proof of the expenses or coverage costs and the IRS may later request written substantiation. Reimbursements in a calendar year may range up to $4,950 (for payments relating to only the employee) or up to $10,000 (for family coverage costs). These amounts will be adjusted for inflation, and must be prorated for partial years.

Only an employer may fund a QSEHRA. Funds paid into the QSEHRA must be in addition to salary and not paid as a salary substitute. Accordingly, salary reduction contributions by employees are not permitted. With some exceptions, the reimbursement must be made available "on the same terms to all eligible employees" of the employer. Employees who have been employed by the QSEHRA sponsor for less than 90 days, or who work part time, are part of a collective bargaining unit, or are under age 25 may be excluded from participation.

The rules require an employer to furnish a written notice to its QSEHRA-eligible employees at least 90 days before the beginning of a year for which the QSEHRA is provided. In the case of an employee who is hired mid-year, the notice must be provided no later than the date on which the employee begins participation in the QSEHRA.

The notice must include the amount of the eligible employee's permitted benefit under the QSEHRA and advise the employee to inform any health care Exchange of such benefit amount if the employee is applying for advance payment of the premium assistance tax credit.

Under an initial transition rule, the first-applicable QSEHRA notice deadline was March 13, 2017. In Notice 2017-20, however, the Treasury Department and IRS suspended the notice deadline and waived any penalties that could have been imposed on employers for failure to provide the first written notice. Future guidance will specify a revised notice deadline, and will provide at least 90-days' additional time for employers to prepare and provide the notice.

While QSEHRA benefits must be reported (but not treated as taxable) on the employee's W-2 and Form 1095-B, its benefits are exempt from COBRA, or similar, continuation coverage requirements.

Ultimately, whether or not implementation of a QSEHRA makes sense for a small employer will depend on the business's specific personnel-related objectives and goals. For some employers, the cost and administrative requirements may outweigh the potential advantages, while for others a QSEHRA will present the best possible avenue to provide employees with assistance toward paying for health care.

EMPLOYMENT LAWSCENE ALERT: EXECUTIVE ORDER HALTS IMPLEMENTATION OF DOL FIDUCIARY RULE

Early this afternoon (Friday, February 03, 2017), President Trump signed an Executive Order directing the Department of Labor (DOL) to halt implementation of final regulations relating to "investment advice fiduciaries," as defined under ERISA and the Internal Revenue Code.

The Order directs the DOL to reevaluate the regulations and to report back to the President. The regulations, collectively known as the "Fiduciary Rule," had been set to take initial effect on April 10, 2017. The Fiduciary Rule's effective date is now expected to be at least delayed, if not also altered or withdrawn.

The purpose of the Fiduciary Rule, which has been over six years in the making, is to impose a fiduciary standard on individuals and companies receiving compensation for retirement investment advice, including brokers and insurance agents who are currently held to a lesser standard dating to 1975.

The rule would also have required brokers to clearly and prominently disclose any conflicts of interest, like hidden fees or other undisclosed commission payments often buried in the fine print.

A 2015 government study concluded that retirement plan savers lose $17 billion, in the aggregate, each year due to receiving conflicted investment advice that reduces the value of their retirement accounts.

The Trump Administration, on the other hand, takes the view that the DOL rule is unnecessary. The White House Press Secretary called the DOL Fiduciary Rule “a solution in search of a problem,” and as protecting consumers “from something they don’t need protection from.” This view reflects the perspective of those who regard the Fiduciary Rule as an unneeded limit upon investor options and its implementation as a burden upon asset management firms.

Industry spokespersons, as well as politicians with competing views are certain to continue to engage in lively debate regarding the future of the Fiduciary Rule.

While such a discussion has been ongoing over recent years, financial advisors and brokers have steadily worked to update their compensation methods to provide greater transparency to retirement plan savers. For this reason, it is not clear that even the elimination of the Fiduciary Rule would reverse the market trend of providing greater clarity regarding the fees and costs of investing.

We will continue to monitor relevant developments.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- IRS Announces Employee Benefit Plan Limits
- What You Need to Know About Letters of Intent in Commercial Leases
- Understanding Medication as an Alternative to Litigation
- Executive Order Affirms Commitment to Repeal the ACA
- Creditors, Predators, and Divorcing Spouses Are Why Having a Trust May Be Better Than a Will
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms

Pleased to Announce:

- “Best Law Firm” Ranking
- 2016 Super Lawyers Announced

EXECUTIVE ORDER AFFIRMS COMMITMENT TO REPEAL THE ACA; MAKES NO IMMEDIATE CHANGES FOR EMPLOYERS

Within hours of being sworn in on Friday, January 20, 2017, President Trump signed an executive order (the Order), that affirmed the administration's policy of seeking "the prompt repeal" of the Affordable Care Act (ACA). The Order, however, neither specifically mentions employers nor has any immediate impact on employers' obligations under the ACA.

It is important to note that the one-page Order does not repeal any specific provision of the ACA, much of which is governed by existing law and regulations that cannot be eliminated with the stroke of even the Presidential pen.

Instead, the Order directs the Secretary of the Department of Health and Human Services the heads of other federal agencies "with authorities and responsibilities under" the ACA to "exercise all authority and discretion available to them", "to the maximum extent permitted by law," to:

- "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement" of the ACA that "would impose a fiscal burden on any State or a cost, fee, tax , penalty, or regulation burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchaser of health insurance, or makers of medical devices, products, or medications"; and to

- "provide greater flexibility to States and cooperate with them in implementing healthcare programs."

Each "department or agency with responsibilities relating to healthcare or health insurance" is directed, "to the maximum extent permitted by law," to:

- "encourage the development of a free and open market in interstate commerce for the offering o healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers."

While some pundits have quipped that the Order is a license for employers to cease complying with the ACA or to cease offering health insurance, no such authority is contained in the Order. What the Order may permit is greater discretion in granting "hardship exemptions" from the individual mandate. Federal officials in the new administration might also be more receptive to state requests for waivers under Medicaid.

We advise employers to continue to observe the ACA status quo, which includes continuing to focus on complying with ACA Employer Reporting obligations (using IRS Form 1095-C) for the 2016 calendar year.

This is because, as the Order specifically states, any revision of existing regulations can only be changed under the rules of the Administrative Procedures Act, which requires the public issuance of proposed rules, followed by a period of public input. Despite the new administration's Order (and the House of Representative's January 13 vote to begin repealing the ACA), there is no specific change currently available for employers in 2017.

Instead, employers should continue to heed ACA requirements. Only agency rulemaking or congressional action could relieve employers of ACA reporting and other obligations, but either type of action would likely take significant time.

We will continue to monitor developments regarding the possible repeal of the ACA and how any subsequent actions may affect employers' obligations.

TWO OF ATTORNEY STEVE SLAWINSKI'S CASES RANKED AMONG "TOP 9" BY WISCONSIN LAWYER

Two of Steve Slawinski's recent victories before the United States Court of Appeals for the 7th Circuit were featured in an article published in the December, 2016 issue of the *Wisconsin Lawyer* titled "Top 9 Recent Wisconsin Federal Court Decisions." The article discussed the importance of these court decisions in the areas of Wisconsin contract law and Wisconsin insurance law; encompassing Steve's overall focus of construction law.

For 30 years Steve has represented his clients in complex construction, business, and real estate litigation. His practice emphasizes construction litigation and construction law—representing general contractors, subcontractors, owners, design professionals, lenders and title insurers in construction disputes, both in court and in arbitration.

Wonderful job Steve, on your hard work and dedication!

OCHDL HOLIDAY DONATION TO THE RONALD MCDONALD HOUSE

In the spirit of the holiday season the attorneys and staff at O'Neil, Cannon, Hollman, DeJong and Laing decided to do something special this year. We brought gifts to our firm Christmas Party to be donated to the local Ronald McDonald House, and quite a pile of gifts was indeed donated.

We had the opportunity, earlier this week, to tour the house and witness how the donations and support from the community are directly contributing to helping and touching so many lives. We are honored to have been a part of such an amazing organization.

From all of us at the firm:

"Best wishes everyone for a wonderful holiday and a very Happy New Year!"

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. RANKED IN 2017 "BEST LAW FIRMS"

U.S. News and World Report and Best Lawyers, for the seventh consecutive year, announced the "Best Law Firms" rankings. O'Neil, Cannon, Hollman, DeJong and Laing S.C. has been ranked in the 2017 *U.S. News – Best Lawyers®* "Best Law Firms" list in 13 practice areas:

- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Construction Law
- Corporate Law
- Family Law
- Litigation – Bankruptcy
- Mergers and Acquisitions Law
- Personal Injury Litigation – Plaintiffs
- Product Liability Litigation – Defendants
- Real Estate Law
- Securities / Capital Markets Law
- Tax Law

- Trusts and Estates Law

Firms included in the 2017 “Best Law Firms” list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

IMPORTANT HIPAA AND ACA BENEFIT UPDATES FROM THE HHS AND IRS

Be Aware: Current Phishing Email is Disguised as Official OCR Audit Communication

As many HIPAA covered entities and their business associates are aware, the Office for Civil Rights (“OCR”) division of the United States Department Health and Human Services (“HHS”) has begun a second-round of audits to examine compliance with the HIPAA Privacy, Security and Breach Notification Rules. Specifically, the audits are intended to review the policies and procedures adopted and employed by covered entities and business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules.

In an alert issued today, the HHS announced that it has come to their attention that a phishing email is being circulated on mock HHS Departmental letterhead under the signature of the OCR’s Director, Jocelyn Samuels. The email appears to be an official government communication and targets employees of HIPAA covered entities and their business associates. The email prompts recipients to click a link regarding possible inclusion in the HIPAA audit program. The link then directs individuals to a website marketing cybersecurity services. The HHS is taking the unauthorized use of its material very seriously and stresses that the site is in no way associated with the HHS or OCR. Anyone wondering if they have, in fact, received an official HHS or OCR communication may send an email to OSOCRAudit@hhs.gov to seek verification.

IRS Deadline for Providing 2016 ACA Statements to Employees Extended to March 2, 2017

Under the Affordable Care Act’s information reporting rules, an “applicable large employer” (meaning an employer with at least 50 full-time, including full-time equivalent employees) must file a Form 1095-C with the IRS for each employee who was a full-time employee for any month of the calendar year. The employer also must provide each full-time employee a completed Form 1095-C (or a satisfactory substitute for such form).

Larger employers must also provide a Form 1095-C (or substitute form) to each of its full-time employees, regardless of whether the employer offered health coverage to all, some, or none of its full-time employees.

In Notice 2016-70, the IRS recently offered a 30-day extension of the (otherwise applicable) January 31, 2017 deadline to furnish the Form 1095-C statements to employees. The new due date for providing the ACA statements to employees is March 2, 2017. This is a hard deadline; no 30-day extension may be obtained.

Note that there is no extension of the deadline to provide the Forms 1095-C to the IRS under cover of transmittal Form 1094-C. The deadline for paper filing is February 28, 2017 and the electronic filing deadline is March 31, 2017. (Electronic filing is required for applicable large employers filing 250 or more employee statements.)

NINETEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2016 were just published and, once again, a large number of our attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the second time. He was also named one of the Top 50 attorneys in Wisconsin for the eleventh straight year. In doing so, he is one of only seven attorneys out of over 15,000 attorneys in Wisconsin — and the only commercial litigator in Wisconsin — to make the list all eleven years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named one of the Top 50 attorneys in Wisconsin. This is the fourth time that Seth has made the list. Seth and Patrick were also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer and Greg Lyons have made the list for the past 10 or more years.

Megan Harried and Erica Reib were also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

In total, we had 19 of our attorneys named to the lists by *Super Lawyers*, representing more than 50% of our practicing attorneys, which is more than 10 times in excess of the 5% statewide standard.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.