EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

EMPLOYMENT LAWSCENE ALERT: RECENT LEGISLATION IMPACTS QUALIFIED RETIREMENT PLAN HARDSHIP WITHDRAWAL AND PLAN ROLLOVER RULES

The two-year budget agreement passed by Congress on Friday, February 9th, and signed by President Trump later that day, includes tax policy changes that affect qualified retirement plans. Specifically, qualified retirement plan hardship withdrawal operations will be impacted by the Bipartisan Budget Act of 2018 (the Budget Act) as follows:

- **Removal of the six-month prohibition on deferrals following a hardship withdrawal.** Section 41113 of the Budget Act directs the IRS to issue updated guidance to permit 401(k) and 403(b) plan participants who have taken a hardship distribution from a retirement plan to continue contributing to the plan, even immediately following the hardship distribution. Under current rules, once a participant elects to take a hardship distribution, no elective deferrals are permitted to be made until six months have passed from the date of the distribution. The revised rule will take effect on January 1, 2019 for plans that have a calendar-year plan year.
- **Inclusion of QNECs, QMACs, and profit-sharing contributions in hardship withdrawals.** Under current regulations, a plan sponsor may specify the sources of a participant's plan assets eligible for a hardship withdrawal, but such assets may in no event include certain employer contributions. Beginning on January 1, 2019 (for calendar-year plans), the Budget Act rules will permit a participant's 401(k) or 403(b) plan assets deriving from employer profit-sharing contributions, as well as from employer corrective contributions known as Qualified Nonelective Employer Contributions (QNECs) and Qualified Matching Contributions (QMACs), to be included in sources from which a hardship withdrawal may be taken. The earnings on such contributions will also be included among the assets available for withdrawal. Section 41114 of the Budget Act not only expands the potential sources of a hardship withdrawal, but also eliminates the requirement (previously elected by some employers) that a participant must have taken a plan loan before qualifying to take a

hardship withdrawal.

The Tax Cuts and Jobs Act of 2017 (the Tax Act), signed into law by President Trump on December 22, 2017, affects certain plan loan distributions. Specifically, for all tax-qualified retirement plans that offer loans, including 401(k), 401(a), 403(b), and governmental 457(b) plans, the Tax Act provides for an:

- **Extended Deadline for Rolling Over Certain Plan Loan Offsets.**
  - Background and prior law: A plan loan "offset" occurs when an individual owes an outstanding loan to a qualified retirement plan, but then experiences a distribution event that is either (1) a termination of employment; or (2) the termination of the plan. If the plan, in such situation, permits a participant's account balance to be paid out in full, minus the loan amount, then a plan loan offset occurs. A Form 1099-R is issued, indicating that the offset amount is an actual distribution. If a participant receiving a loan offset takes no action, the offset loan amount is considered or "deemed" to be a distribution, and is subject to taxation. Under these facts, taxation of the offset amount can be avoided if: (1) the distribution is otherwise eligible to be rolled over; and (2) the participant rolls the full amount of the distribution, including the amount of the offset, into an IRA. To include the offset amount in the rollover, the participant will need to contribute personal (or borrowed) funds to the rollover amount. Previously, offset loans could only avoid taxation if such a rollover occurred within the 60-day period beginning on the date offset distribution.
  - New law, effective for plan years beginning on and after January 1, 2018: The Tax Act expressly extends the time period for avoid taxation by rolling over an offset loan until the participant's deadline for filing a federal income tax return (taking any extensions into account). This change means that in many cases, a participant will have more time in which to effect a tax-free rollover of a loan offset occurring following termination of employment.

Caution: No Change to Basic Tax Rules

Although recent legislation is trending toward easing the rules relating to hardship withdrawals and plan loans, it is important to remember that nothing about the fundamental tax treatment of these distributions have changed.

A common misconception (especially among participants) is that if a participant qualifies for a hardship distribution, then the distribution from the plan is tax-free.
A hardship distribution is subject to the same taxation rules as other plan distributions. Satisfying the standards for a hardship distribution simply entitles the participant to receive an in-service distribution of elective deferrals (and other contributions) from the plan, but the hardship distribution is subject to income taxes applicable to plan distributions. A hardship distribution is also generally subject to a 10% early distribution penalty, unless the participant has reached age 59-1/2. A hardship distribution is never eligible to be rolled over into an IRA.

Similarly, once a plan loan has been deemed distributed (either due to a plan loan repayment default, because a plan does not provide for an offset option upon distribution, or because an offset is not timely rolled into an IRA), the deemed distribution of a plan loan is taxed in the same manner as a regular plan distribution for purposes of determining the tax, including any early distribution penalty. A deemed distribution may never be rolled over into an IRA.

Plan Sponsor Action Items

With respect to plan hardship distributions, employer sponsors of 401(k) and 403(b) plans should prepare for the 2019 plan year by:

- Considering whether it is desirable to add a hardship distribution option to the plan (if not already permitted). If hardship distributions will be added, amend the plan and communicate the availability of the option to participants by preparation and distribution of a Summary of Material Modification (SMM) (or other appropriate form of communication in the event of a non-ERISA plan).
- Plan documents that already provide for hardship distributions should be amended, effective for the first day of the 2019 plan year, to eliminate the 6-month restriction on elective deferrals following a hardship distribution and to expand the permitted accounts from which hardship distributions may be taken. These details should be communicated to participants in the form of an SMM.

With respect to plan loans, plan sponsors of plans that permit loans should:

- Review the plan loan policy and plan loan provisions to determine if either should be updated to reflect this rule, or consider whether to modify the loan policy to take advantage of this rule. For example, if the plan currently permits continued loan repayments following termination of employment consider whether this option should be continued or eliminated. Consider also whether a loan note should be allowed to be rolled over to a successor plan upon plan termination or if the new extended rollover period provides sufficient flexibility to participants absent a rolled over loan note.
- Consider whether plan participant communications should be revised to alert participants to the greater flexibility now allowable for rollover of loan offset amounts.
- As applicable, confer with any third-party administrator for the plan to avoid inadvertently deeming a participant’s loan a deemed (taxable) distribution.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD REVIEW THEIR EMPLOYEE NON-SOLICITATION AGREEMENTS

On January 19, 2018, the Wisconsin Supreme Court issued a decision in *The Manitowoc Company, Inc. v. Lanning* affirming a 2016 Wisconsin Court of Appeals ruling that expanded the scope of Wis. Stat. § 103.465, which governs the enforceability of restrictive covenants, to include employee non-solicitation, or anti-raiding, provisions. We previously posted a blog about the Court of Appeals decision here.

John Lanning, a long-term employee of the Manitowoc Company, signed an agreement whereby he agreed, for a period of two years after the termination of his employment, not to solicit, induce, or encourage any employee of the Manitowoc Company to terminate his or her employment with the company or to accept employment with a competitor, supplier, or customer of the company. After he terminated his employment, he encouraged multiple employees of the Manitowoc Company to terminate their employment and join him at his new employer, which was a competitor of the Manitowoc Company.

The Wisconsin Supreme Court addressed two questions: 1) Whether employee non-solicitation agreements are “covenants not to compete” governed by Wis. Stat. § 103.465; and 2) if they are, was the provision contained in Lanning’s agreement enforceable.

In answering whether non-solicitation agreements are covenants not to compete, the Court acknowledged that the statute has been applied to agreements viewed as restraints on trade, which may take many forms, and opined that the focus of the inquiry about whether a provision is a covenant not to compete should focus on the effect of the restraint, rather than its label. Therefore, the Court found that, because the non-solicitation provision restricted Lanning’s ability to compete fully with the Manitowoc Company by prohibiting him from soliciting employees and competing in the labor market, it was a restriction on his ability to engage in ordinary competition and was governed by the statute.

The Court stated that the purpose of Wis. Stat. § 103.465 is to invalidate covenants that impose unreasonable restraints on employees. The Court found the employee non-solicitation unenforceable under Wis. Stat. § 103.465 because the non-solicitation provision was unnecessarily broad because it restricted Lanning’s ability to compete fully in the marketplace with the Manitowoc Company by prohibiting him from soliciting all employees wherever they might work in the world. Such a restriction does not allow for the ordinary sort of competition attendant in the free market and, as a result, was an unlawful restraint of trade.

In order to be enforceable under the statute, a covenant not to compete must 1) be necessary for the protection of the employer, 2) provide a reasonable time limit; 3) provide a reasonable territorial limit; 4) not be harsh or oppressive to the employee; and 5) not be contradictory to public policy. Because the Court found that the employee non-solicitation provision that Lanning had signed was not necessary for the protection of the employer, they only addressed that portion of the test. Because words are interpreted to have their plain meaning, the Court found that the words “any employee” contained in Lanning’s agreement prohibited him from soliciting every one of the Manitowoc Company’s 13,000 world-wide employees with no limits as to the nature of the employee’s position, Lanning’s personal familiarity with or influence over the particular employee, or the geographical location in which the employee worked. The company’s contention that it had a protectable interest in maintaining its entire workforce was rejected by the Court, which said that, ordinarily, the protectable interest would be limited to top-level employees, employees with special skills or knowledge important to the employer’s business, or employees with a set of skills that are difficult to replace. Because the employee non-solicitation provision was not limited in any way, the Court found that it was overbroad on its face and unenforceable.

Based on this decision, employers must carefully review their restrictive covenants, particularly employee non-solicitation provisions, to ensure that they are carefully drafted to be necessary to protect their interests and no broader than needed. The focus must be on protectable, identifiable interest of the company. An experienced management-side employment attorney can assist employers with drafting such provisions in order to meet the enforceability standards required by the Wisconsin restrictive covenant statute.

EMPLOYMENT LAWSCENE ALERT: INTERNAL REVENUE CODE SECTION 409A SURVIVES REPEAL-AND-REPLACE ATTEMPT

Employer sponsors of nonqualified deferred compensation (NQDC) plans, as well as the executives and other service providers, who benefit from them, can breathe a sigh of relief. The ability to reward and retain key employees with incentive and compensation plans that provide a current opportunity to earn a payment to be provided (and taxed) in the future, will continue to be available, as it has been under American tax law for more than 80 years. Since late 2004, NQDC agreements have been regulated primarily by Internal Revenue Code (Code) Section 409A.

<u>The House Tax Bill</u>

The ongoing viability of NQDC came under direct threat in the initial draft of the Tax Cuts and Jobs Creation Act (TCJA) as proposed by the U.S. House of Representatives Ways and Means Committee on November 2, 2017 (the House Tax Bill). Section 3801 of the House Tax Bill, which was proposed in substantially similar form to the Section 409A repeal-and-replace proposal introduced in a proposed Tax Reform Act of 2014, would have drastically reduced the ability of employers to reward key employees with deferred compensation arrangements.

As drafted, the House Tax Bill would have eliminated Section 409A and supplanted it with a new Section 409B. These changes, intended to be effective for services performed on and after January 1, 2018, would have meant, as of the New Year, that all NQDC arrangements would become fully taxable upon vesting, with only very limited opportunity to defer taxation until a future year. The proposed law would have applied not only to the common elective, nonelective, incentive payment, and phantom stock forms of NQDC, but would have also expressly *included* the (currently) sometimes-exempt equity-based compensation forms such as stock options, restricted stock units, and stock and stock appreciation rights.

The Joint Tax Committee had estimated that the proposed change would increase revenues by $16.2 billion between 2018 and 2027.

2017 Senate Tax Bill

The language that would repeal section 409A and replace it with a new Section 409B was removed from the final version of the House Ways and Means Committee's Tax House Bill, as issued on November 9, 2017. The Chairman's Mark of the Senate tax reform proposal issued on the same day, however, resurrected the proposals. As unveiled on November 9, 2017 by Senator Orrin Hatch, Chairman of the Senate Finance Committee, the initial Senate version of the TCJA (the Senate Tax Bill) contained the identical Section 409A repeal-and-replace provisions.

Senate Finance Committee Mark Up

Finally, upon the successful amendment offered by Senator Rob Portman, the Section 409A repeal-and-replace proposal was stricken in its entirety from the legislation. This action preserves the current, well-established system, which would have been rendered virtually extinct by the repeal-and-replace proposal. The proposal's demise became known concurrent with the Joint Committee on Taxation's issuance of the Chairman's Modification to the Chairman's Mark of the TCJA late in the day on November 14, 2017.

Impact

The retention of the existing system of taxation for NQDC arrangements is great news for employers and key employees, who can now continue to offer (and benefit from) compensation packages as appropriate to reward and retain top talent. It is also good policy, in that it does not impose limitations on the ability to earn and save for retirement at a time when the general retirement savings rates of Americans across nearly all income levels are widely reported to be insufficient.

EMPLOYMENT LAWSCENE ALERT: ACA EMPLOYER PAYMENT NOTICES ARRIVING SOON

Buried in IRS guidance issued on November 2 is news that the IRS will soon be issuing notices to employers of potential ACA taxes. While the ACA employer payments are widely referred to as "penalties," they are actually "assessable payments" in the form an excise tax.

Specifically, the IRS has announced that applicable large employers (ALEs) will begin receiving notices of potential liability "in late 2017" if the information reported for 2015 on Forms 1094-C and 1095-C indicates that the employer may owe an employer shared responsibility payment. ALEs are employers with 50 or more full-time (including full-time equivalent) employees for a calendar year. Internal Revenue Code Section 4980H, generally, provides for two circumstances under which an employer may owe an employer shared responsibility payment.

First, under Section 4980H(a), an ALE in 2015 may be penalized if it did not offer health coverage to at least 70% of full-time (30 hour-per-week) employees (and their dependents). The Section 4980H(a) penalty, for 2015, was $177.33 per month (or $2,080 per year, if applicable in all months), multiplied by all full-time employees, and reduced by the first 80 full-time employees. This assessed payment would be triggered if at least one employee (of an ALE not offering coverage) enrolled in subsidized coverage through the Exchange.

Second, under Section 4980H(b), an ALE in 2015 may be penalized if although it offered coverage to at least 70 percent of its full-time employees (and their dependents), at least one full-time employee received a premium tax credit to help pay for coverage through the Exchange, which may occur because the ALE did not offer coverage to that particular employee or because the coverage the employer offered that employee was either unaffordable or did not provide minimum value. The Section 4980H(b) penalty, for 2015, was $260 per month (or $3,120 per year, if applicable in all months) per full-time employee who was not offered coverage (or was offered coverage that was either unaffordable, or did not provide minimum value), and who enrolled in subsidized coverage through the Exchange.

Any potential employer shared responsibility payment that might be assessed would relate to coverage offered (or not offered) to the employer's full-time employees during the 2015 calendar year.

<u>What Information Will the IRS Letter Contain?</u>

The proposed payment notice will be in the form of IRS Letter 226J, which will include:

- a brief explanation of Code Section 4980H;
- an employer shared responsibility payment summary table itemizing the proposed payment by month and indicating for each month if the liability is under Code Section 4980H(a), Code Section 4980H(b), or neither;
- an employer shared responsibility response form, Form 14764, “ESRP Response”; and
- an employee PTC list, Form 14765, “Employee Premium Tax Credit (PTC) List” which lists, by month, the ALE’s assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief (see instructions for Forms 1094-C and 1095-C, Line 16), and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee’s Form 1095-C.

The response to Letter 226J will be due by a specified date, which will generally be 30 days from the date of Letter 226J.

Letter 226J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter.

What Do I Need to Do?

If your business receives a Letter 226J from the IRS, you should carefully review all information and determine whether you believe the proposed payment amount is correct. You may want to consider whether your company was eligible for any transition relief in 2015.

If the Letter is Correct

If you agree with the payment amount determination, you should complete, and return to the IRS the enclosed Form 14764. You should also provide full payment for the amount, either by check, or electronically, using the Electronic Federal Tax Payment System EFTPS system.

If the Letter is Incorrect

If you disagree with the payment amount determination, you will be required to complete and return the “ESRP Response” section of the enclosed Form 14764 to substantiate the basis for your disagreement. Your response may include supporting documentation, such as proof that health insurance was offered, or relevant coverage records. Your response must also specify, on the “Employee PTC List,” which changes are requested in order to correct the Forms 1094-C and 1095-C filed for 2015. The Letter 226J will include instructions on how to complete the required forms.

The IRS will respond to an ALE’s formal disagreement by sending Letter 227, acknowledging the ALE’s response and describing any further actions required. If the ALE disagrees with the IRS conclusions in the Letter 227, the ALE may request, within 30 days, a “pre-conference assessment” with the IRS Office of Appeals.

If, after any additional correspondence or discussions, the IRS ultimately determines that the payment is owed, the ALE will be provide the ALE with Notice CP 220J, which is a notice and demand for payment.

In light of the imminent arrival of the ACA potential payment notices, employers should be prepared to review and respond to Letter 226J quickly. Now is a good time to revisit the coverage offered in 2015, and to ensure easy access to applicable records.

It is important to note that, while scammers might see an opportunity to contact employers to demand payments, the IRS will initially contact ALEs about ACA payments only by letter (and not by email or phone).

EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2018 FSA, TRANSPORTATION, AND EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service has released the cost-of-living adjustments to the dollar limits under various employer-sponsored benefit plans for 2018. Several key limits (indicated in bold, below) have been increased for 2018.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2018 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

Health FSA Employee Contribution and Transportation Plan Limits

- For 2018, the maximum dollar limit on employee contribution to health flexible spending arrangements (FSAs) will increase to **$2,650** from the prior limit of $2,600. An Employer is not required to adopt the new Health Care FSA increase, but may do so as long as the Health FSA Plan document is expressly amended for this purpose.
- The maximum pre-tax value of a qualified transportation plan for employee parking or transit passes will increase by $5 to **$260** per employee, per month in 2018.

2018 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2018, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will increase from $18,000 to $**18,500** for employees who participate in:
    - Code Section 401(k) plans;
    - Code Section 403(b) plans; and
    - Most Code Section 457 plans.
- The catch-up contribution limit for those age 50 and over under will remain unchanged at $6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at $3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from $215,000 to **$220,000**.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $54,000 to **$55,000**.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $270,000 to **$275,000**.
- The limitation used in the definition of a highly compensated employee (HCE) under Code Section 414(q) will remain unchanged at $120,000.
- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will remain unchanged at $175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from $1,080,000 to **$1,105,000**.
- The dollar amount used to determine the lengthening of the five-year distribution period will increase from $215,000 to **$220,000**.

Prior Guidance on Additional 2018 Limits

Social Security Taxable Wage Base

As announced in mid-October (and adjusted in November), the Social Security Administration announced that the Social Security wage base for 2018 will increase slightly (from $127,000) to **$128,400**. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for retirement plans using "permitted disparity." (The 2018 increase is about 1% higher than the 2017 wage base. In contrast, the 2017 wage base increase was more than 7% higher than the 2016 amount).

2018 Health Savings Account Limits

In May of this year, the IRS announced that combined annual contributions to a Health Savings Account (HSA) in 2018 must not exceed the maximum annual deductible HSA contribution, which will be **$3,450** for single coverage and **$6,900** for family coverage. These limits reflect a $50 and $150 increase over the 2017 maximums, respectively. The catch-up contribution for eligible individuals who will attain age 55 or older by year end remains at $1,000.

EMPLOYMENT LAWSCENE ALERT: MULTI-MONTH NEED FOR LEAVE DISQUALIFIES EMPLOYEE FROM ADA PROTECTIONS

Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v. Heartland Woodcraft Inc.*, the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are "qualified individuals," meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court's grant of summary judgment to the employer, finding that the employee was not a "qualified individual" with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff's other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating employees’ requests for extended leave.

EMPLOYMENT LAWSCENE ALERT: IT’S TIME TO AMEND 403(B) RETIREMENT PLAN DOCUMENTS!

If your organization is a public school or university, a tax-exempt charter school or hospital, a church, church-affiliated entity, or other tax-exempt organization, it is eligible to sponsor a 403(b) retirement plan.

For any eligible sponsor of a 403(b) plan, it is critical, to ensure the ongoing tax-compliance of the plan, to conform your document to the form of an IRS pre-approved 403(b) document (available for use since March 2017) no later than March 31, 2020. This date is the IRS-announced end of the “special remedial amendment period” that permits correction of plan language defects retroactive to January 1, 2010, provided that plans are operated in the meantime according to the regulatory requirements.

This means that if your last 403(b) plan amendment and restatement pre-dates March 2017, or is not otherwise in the form of a 2017 IRS-approved document, an amendment and restatement must occur by the deadline to ensure proper compliance. The IRS will not honor, or issue, any letters as to the qualified status of an individual 403(b) plan. This is why all 403(b) plan sponsors must adopt a 2017 pre-approved document. Pre-approved documents are available through a number of plan service providers, third-party administrators, and employee benefits attorneys.

Any employer who, for whatever reason, *never* complied with the final 403(b) regulations (and ERISA, if applicable), and operated 403(b) program subsequent to December 31, 2009 *without* adopting a written 403(b) plan document, may make use of an IRS correction program. Under the IRS’s Employee Plan Compliance Resolution System, a properly documented correction and application, together with a fee, can be submitted to obtain administrative relief for the failure to previously document the plan. It is likely that the ability to correct a failure to have a plan document will become significantly more restricted (and expensive) if not addressed prior to March 31, 2020.

In our experience, the IRS has been active, in recent years, in auditing the operations of 403(b) plans of Wisconsin entities and organizations. It should be anticipated that 403(b) plan audits on and after April 1, 2020 will review not only operational, but also documentational, compliance with the 403(b) plan rules.

While the March 31, 2020 deadline is still two and a half years away, it can take some time for 403(b) plan changes to be fully considered and approved by the required bodies (retirement plan committees, and or boards of education or boards of directors) that are common within the organizations of eligible employers.

The existence of the deadline also presents an opportunity for 403(b) plan sponsors to revisit the extent to which current plan design features are functioning to support human resources objectives (on both a recruitment, retention, and costs basis), and whether any design amendments should be considered in conjunction with the required amendment and restatement.

EMPLOYMENT LAWSCENE ALERT: COURT INVALIDATES EXPANDED OVERTIME RULE

On Thursday, a federal court in Texas issued summary judgment invalidating the Obama administration's updated overtime regulations, which raised the minimum salary level for exempt employees from $455 to $913 per week. The Court determined that the "significant increase" was outside of the scope of Department of Labor's (DOL) authority, as was the provision that the minimum salary threshold would automatically update every three years.

The Court looked to Congress's intent under the Fair Labor Standards Act and found that the determining factor for whether an employee should be considered exempt is the duties the employee performs and whether those duties are executive, administrative, or professional in nature. By more than doubling the minimum salary level and excluding an estimated 4.2 million employees who were previously classified as exempt from exempt status, the Court found that the DOL had gone too far and essentially rendered the duties test meaningless. Because the emphasis should be on duties, not salary, the Court invalidated the updated overtime rules.

However, the Court did not go as far as to rule that the DOL has no authority to establish a minimum salary level. The Court found that the current minimum salary level is a permissible "floor" to screen out "obviously nonexempt" employees. Although the Fifth Circuit Court of Appeals is currently considering an appeal of the preliminary injunction the Texas federal court issued last November, the DOL under the Trump administration only continued the appeal for the purpose of establishing that it had the authority to establish a minimum salary level, which has now been done by the Texas court. The DOL is currently seeking public feedback on revisions to the overtime rule and may issue its own revised rule in the future. We will keep you updated on any further changes.

SEVENTH CIRCUIT UPHOLDS WISCONSIN RIGHT-TO-WORK

In March 2015, Wisconsin Governor Scott Walker signed Right-to-Work legislation into law, which allowed workers covered by union representation to not pay union dues if they do not wish to. Since its passage, the law has been under legal fire, including a failed bid for preliminary injunction to halt the law and a state circuit court ruling that found the law unconstitutional. However, in 2015, the federal district court sitting in the Eastern District of Wisconsin upheld the Right-to-Work law as constitutional, relying heavily on the Seventh Circuit's 2014 decision, *Sweeney v. Pence*, which upheld Indiana's right-to-work statute.

On Wednesday, the Seventh Circuit doubled down on its holding in *Sweeny* and upheld Wisconsin's Right-to-Work law as constitutional. The Court found that the plaintiff unions had failed to provide "any compelling reason" to overturn the *Sweeny* decision. The ruling stated that there have been no intervening developments in statutory, Supreme Court, or even intermediate appellate court law that would cause them to reevaluate their decision in *Sweeney* and that the strong dissent in *Sweeney* and a close vote to rehear the case en banc were not compelling reasons that would justify overturning a three-year old decision. The Court also rejected the unions' takings clause argument, whereby they claimed that members of the union who did not pay dues but benefitted from the unions' bargaining and political activities would be taking the unions' property without compensation. The Court found that, in the event that a taking occurred, state courts could "provide an adequate route for seeking just compensation." Although the union has stated that it is considering its next steps, it appears that Wisconsin's Right-to-Work law will continue to pass judicial scrutiny and be enforceable and constitutional.