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.

The House Tax Bill

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.

What Information Will the IRS Letter Contain?

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: 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.

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.

DON’T FORGET ABOUT DOL’S NEW OVERTIME RULES JUST YET

In November, a federal court in Texas issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. Because of the injunction, the new overtime regulations did not go into effect on December 1, 2016, as planned. However, they have also not completely gone away, and their fate is still uncertain.

The Obama administration immediately appealed the injunction to the Fifth Circuit Court of Appeals and asked for an expedited proceeding, which was granted. The DOL filed its initial brief on December 15, 2016, and the twenty-one states, which had opposed the implementation of the new overtime regulations and were granted the injunction, filed their brief on January 17, 2017. DOL’s final reply brief was originally due January 31, 2017. However, since President Trump was inaugurated on January 20, 2017, the Trump administration has asked for three extensions to file its reply brief, all of which have been granted. The first two extension were requested so that the new administration could consider its position on the new regulations and whether it would continue to defend them. Most recently, on Wednesday, April 19, 2017, the Fifth Circuit granted the DOL another two months, until June 30, 2017, to file its brief due to the fact that Alexander Acosta, the nominee for Labor Secretary, has not yet been confirmed.

It is not yet clear what stance the Trump administration will take on the overtime regulations, as there has been no official position taken by the President and nominee Acosta did not take a definitive position during his confirmation hearings. However, even if the administration decides not to pursue the appeal, others may. For example, the AFL-CIO’s Texas branch has petitioned to join the litigation as a defendant due to its concerns that the current administration will not adequately defend the prior administration’s regulations, and the national AFL-CIO has threatened to sue the DOL if it tries to scale back the regulations in any way. Additionally, the lower court, which issued the initial temporary injunction, could still issue a permanent injunction or rule on a pending motion for summary judgment, as it declined to halt proceedings while the Fifth Circuit reviewed the injunction. Therefore, these overtime regulations should still be on employers’ radar, and we will keep you updated on further developments.

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: WHAT PRESIDENT TRUMP'S SUPREME COURT NOMINEE COULD MEAN FOR EMPLOYERS

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill the vacant seat on the U.S. Supreme Court left open by the death of Justice Antonin Scalia in early 2015. Many employers are wondering what impact a potential Justice Gorsuch would have on employment law decisions, and the news is generally positive. Judge Gorsuch, during his time on the Tenth Circuit, has issued decisions that have gone in favor of both employers and employees. However, he favors a straight forward application of facts to the law to reach conclusions and has been critical of administrative agencies overstepping their authority.

Judge Gorsuch, in line with holdings from the Seventh Circuit, has been critical of the *McDonnell Douglas* burden shifting framework that is frequently used in employment discrimination cases. Judge Gorsuch favors focusing on the real question – whether discrimination actually took place – instead of focusing on whether a *prima facie* case can be established. This straight-forward approach to the facts will likely be welcomed by employers who want to avoid getting bogged down in technicalities.

As we have covered multiple times, in recent years, administrative agencies such as the EEOC, OSHA, and particularly the NLRB have expanded the scope and reach of the employment laws they oversee by broadly interpreting existing laws, often to the confusion and detriment of employers. This expansion could be significantly curbed by a U.S. Supreme Court conservative majority anchored by Judge Gorsuch. In particular, Judge Gorsuch has issued opinions limiting the judicial deference that should be given to administrative agencies and stating that lawmaking should be left to Congress. For example, in his dissent in *Trans Am Trucking Inc. v. Administrative Review Board, U.S. Department of Labor,* Judge Gorsuch penned a dissent that stated that nothing in the Surface Transportation Assistance Act stated that an employee could operate a vehicle in a way the employer forbid and that the DOL did not have the authority to expand the law to say so. He also opined in a case involving the NLRB that the agency did not provide a persuasive explanation to reverse its long-standing precedent that interim earnings should be deducted from back pay awards and, therefore, should not be allowed to change its policy.

Finally, Judge Gorsuch has issued opinions favorable to arbitration agreements, which is of particular interest to employers as the Supreme Court has agreed to hear cases regarding whether the NLRB is correct in its interpretation that arbitration agreements that bar workers from pursuing class actions are illegal restraints of employees' Section 7 rights. If confirmed, Judge Gorsuch may be able to weigh-in on this important issue as the U.S. Supreme Court, yesterday, indicated that it will not address this issue during the Court's current term, but will address it next term. Hopefully, by that time Judge Gorsuch will be confirmed by the U.S. Senate. As a result, then Justice Gorsuch could be the deciding vote on this important issue.

Although Judge Gorsuch's confirmation process is likely to be long and contentious, a Justice Gorsuch anchored U.S. Supreme Court can be something that employers can look forward to in providing common sense to employment laws.

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.