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EMPLOYEE BENEFITS DEVELOPMENTS

RULINGS, OPINIONS, ETC.

VALIDATING ROLLOVER CONTRIBUTIONS: NEW GUIDANCE. When accepting a rollover contribution, a plan administrator must reasonably conclude the contribution is a valid rollover contribution. While evidence that the distributing plan received a favorable IRS determination letter is useful to the plan administrator of the receiving plan in concluding a rollover contribution is valid, evidence of a favorable determination letter is not absolutely required to reach that conclusion. Relevant regulations do not mandate any particular documentation or procedure the plan administrator of a receiving plan must use to reach a reasonable conclusion of validity. However, if the receiving plan obtains a letter from the plan administrator of the distributing plan representing that the distributing plan is or is intended to be a qualified plan, and that the administrator is unaware of any plan provision or operation that would result in disqualification of the distributing plan, the administrator of the receiving plan, absent facts to the contrary, is permitted under existing guidance to reasonably conclude the distributing plan is qualified and that the rollover contribution is valid.

The manual step of requesting and reviewing a letter from the distributing plan is perceived to be burdensome. There is a fear that the current rollover process has been discouraging too many plan participants from making a rollover contribution, resulting in "leakage" of funds from retirement plans. To simplify the process of validating rollover contributions and to encourage more rollover contributions, the IRS recently prescribed two alternative safe-harbor due-diligence procedures that will allow the administrator of a receiving plan to more easily concluded that a rollover contribution is valid:

1. When accepting a rollover contribution *from another qualified plan*, the plan administrator of the receiving plan may review the latest Form 5500 filed by the distributing plan and available on the EFAST2 database. If the Form 5500 does not show code 3C on line 8a, then the distributing plan effectively has made a representation that it is intended to be a qualified plan. And, absent any evidence to the contrary, it is reasonable for the receiving plan to conclude that the distributing plan is intended to be a qualified plan.

2. When accepting a rollover contribution *from an IRA*, if the IRA issues a check payable to the trustee of the receiving plan for the benefit of an IRA holder and the check stub indicates that the distributing account is titled "IRA of IRA Holder," the plan administrator for the receiving plan, absent any evidence to the contrary, can reasonably conclude that the source of the funds is a traditional, non-inherited IRA. And if the IRA holder has certified that the distribution included no after-tax amounts and that the IRA holder will not attain age 70 1/2 by the end of the year of the transfer, it is also reasonable for the plan administrator to conclude that the distribution from the IRA may be rolled over.

Under both of these safe-harbor due-diligence procedures, if it is later determined that the amount rolled over is an invalid rollover contribution, the amount rolled over plus any attributable earnings must be distributed to the plan participant within a reasonable time after that determination. (*Rev. Rul. 2014-9*)

CASE

STOCK DROP CASE DEVELOPMENT: THE SUPREME COURT REJECTS THE PRESUMPTION OF PRUDENCE. The Supreme Court unanimously rejected the presumption of prudence for plans invested in employer stock. The court ruled that plan fiduciaries are not entitled to any special presumption when investing plan assets in employer stock, even if the plan documents call for the plan to invest in employer stock. The court's decision overturns a presumption of prudence that existed in one form or another in every circuit court that previously considered the issue. While the elimination of the presumption is a win for plaintiffs in stock drop cases, the Supreme Court's decision does not leave plan fiduciaries defenseless in such cases. The court decided the presumption of prudence is the wrong mechanism for weeding out meritless lawsuits at the pleading stage but also suggests other factors courts should consider when deciding whether to dismiss stock drop cases that still may impose significant burdens on plaintiffs. Whether the Supreme Court's decision ultimately will have a chilling effect on retirement plan investments in employer stock remains to be seen. Watch for further analysis of this Supreme Court decision in a future newsletter. (*Fifth Third Bancorp v. Dudenhoeffer,* US Sup. Ct. 2014)

DIVIDEND EQUIVALENTS SUBJECT TO FICA TAX AT TIME OF PAYMENT. Many grants of restricted stock units (RSUs) provide for "dividend equivalents" - payment of an amount equal to the dividend that would have been payable had these been real shares of stock. If dividend equivalents are granted on RSUs, it is often the case that the dividend equivalent is paid at the time a real dividend is paid, not at the time of settlement of the RSU. A question arises as to when is the proper time to include the dividend equivalent into wages for FICA tax purposes. Under Internal Revenue Code (IRC) § 3121(v), deferred compensation amounts are generally included in FICA wages at the time of vesting of the deferred compensation. If the right to future dividend equivalents is considered part of the deferred compensation arrangement of an RSU, the right to the dividend equivalents would also be part of the amount included in FICA wages at the time the fair market value of the RSU is included in FICA wages. Effectively, the future dividend equivalents would not be subject to FICA tax. In informal legal advice from the IRS Office of Chief Counsel, the advice given was that the right to dividend equivalents is separate from the RSU, and the dividend equivalent is not a deferred compensation arrangement for IRC § 3121(v). As a result, each payment of a dividend equivalent should be included in the employee's FICA wages at time of payment. (*CCA 2101414018*)

IRS PUBLISHES 2015 AMOUNTS FOR HEALTH SAVINGS ACCOUNTS. Revenue Procedure 2014-30, issued by the IRS in April, 2014, provides the 2015 inflation-adjusted amounts for Health Savings Accounts (HSAs).

HSA Contribution Limits. For self-only coverage, the HSA contribution limit for 2015 is $3,350, an increase of $50 over the limit for 2014. For family coverage, the HSA contribution limit for 2015 is $6,650, an increase of $100 over the limit for 2014. The catch-up contribution for individuals who are age 55 or older is not indexed and, accordingly, remains at $1,000 for self-only and family coverage.

High Deductible Health Plan (HDHP) Minimum Deductible. To qualify as an HSA-eligible HDHP, a plan cannot impose a deductible that is lower than a specified dollar amount. For 2015, the minimum HDHP deductible for self-only coverage is $1,300. For family coverage, the minimum deductible is $2,600. These amounts are increased from 2014 by $50 and $100, respectively.

Out-of-Pocket Maximums. To qualify as an HSA-eligible HDHP, a plan cannot expose a participant to out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) that exceed a specified dollar amount. For 2015, the maximum out-of-pocket exposure for self-only coverage cannot exceed $6,450. For family coverage, the maximum out-of-pocket exposure is $12,900. These amounts are increased from 2014 by $100 and $200, respectively.

Note. The 2015 out-of-pocket limits under the Affordable Care Act are expected to be slightly higher than the HSA-eligible HDHP limits described above. The higher ACA limits, however, cannot apply to HDHPs that are intended to be HSA-eligible. The ACA limits for 2015 will be $6,600 and $13,200 for self-only and family coverage, respectively.

SSA ENDS LETTER-FORWARDING PROGRAM. Following the lead of the IRS, which abandoned a similar program in 2012, the Social Security Administration (SSA) recently announced that it was ending its letter-forwarding service. Since 1945, the SSA has processed two types of letter-forwarding requests to help individuals, private organizations, and government agencies locate individuals – free humanitarian requests and fee-based monetary requests. Humanitarian requests are those where the requestor provides a compelling reason that a person would want to know that the health or welfare of someone is at risk or where an immediate family member is trying to locate another. Monetary requests, which incurred a $35 fee, applied to those situations where the "missing" person is owed something of value. Following the abandonment of the IRS's forwarding service, some retirement plan administrators turned to the SSA program to try to locate missing participants. They will now have to rely on the Internet and commercial locater services. The SSA cited the proliferation of these alternative resources as a prime factor in the decision to eliminate its program as a cost-saving measure. (*79 Fed. Reg. 21,831*, April 17, 2014)

CASES

ERISA PENSION BENEFIT MAY BE ASSIGNED TO CO-HABITANT. Raymond Boulds and Elena Nielsen lived together between 1993 and 2009 but were never married. The couple had three children together, and Boulds raised Nielsen's son from a prior relationship as his own child. For at least some of the years the couple lived together, Boulds claimed Nielsen as a dependent for tax purposes.

Boulds was a participant in an ERISA-covered pension plan. Boulds initially listed Nielsen as his beneficiary under the plan. However, when Boulds's employer informed him that a cohabitant could not be named as a beneficiary, Boulds designated his children as the beneficiaries.

Following the end of the couple's relationship, a trial court held that the pension benefit was the property of their domestic partnership, but did not issue an order dividing the pension benefit. Boulds appealed the decision to the Alaska Supreme Court, arguing that (1) Nielsen could not be an alternate payee under ERISA and (2) the pension benefit was not partnership property.

ERISA generally prohibits a participant's benefits under a plan from being assigned or alienated. One exception to this general prohibition is a qualified domestic relations order

(QDRO). A QDRO is a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefit payable with respect to a participant under a plan." In turn, a "domestic relations order" includes an order that relates to the provision of marital property rights to a spouse, former spouse, child, or other dependent of a participant. Finally, an "alternate payee" is a spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under a plan with a respect to a participant.

Applying the definition of "dependent" under the IRC, the court held that, while Nielsen was not Boulds's spouse, she was an "other dependent" under ERISA because Boulds and Nielsen had shared the same principal abode and Nielsen had been a member of Boulds's household. The fact that Boulds claimed Nielsen as a dependent for tax purposes provided further support for treating Nielsen as his dependent.

With respect to the issue of whether the pension benefit constituted marital property under ERISA, the court noted that the term "marital property" is not defined by ERISA and, therefore, courts have looked to applicable state law to define the term. On this point, Alaska law provides for marital-like property distribution following a cohabitative relationship. For this purpose, Alaska courts look to the parties' intent to determine whether property accumulated during cohabitation is to be viewed as quasi-marital property. Because Boulds had designated Nielsen as beneficiary under the plan before being told a cohabitant could not be named as a beneficiary, the parties wore wedding rings at various times, Boulds claimed Nielsen as a dependent for tax purposes, and Boulds worked while Nielsen was primarily responsible for raising the couple's children, the court concluded that the parties intended for the pension benefit to be considered property of the domestic partnership.

As a result, the court held that the pension benefit was marital property and that Nielsen was eligible to be an alternate payee. Accordingly, a portion of Boulds's pension benefit under the plan could be assigned to Nielsen. (*Boulds v. Nielsen*, Alaska, April 25, 2014)

COURT RULES "CLICKWRAP" POST-EMPLOYMENT RESTRICTIVE COVENANTS ENFORCEABLE. The Delaware Chancery Court ruled that an employer could enjoin a former employee from violating the non-disclosure and confidentiality provisions in an RSU agreement. When receiving the RSU, the former employee agreed to the terms of the agreement by clicking the "accept" button on the website granting the RSU. The court found the former employee was given reasonable notice of the newly added provisions because the online disclaimer, located next to the "accept" button, included a link to the agreement and stated that she had read and agreed to the terms of the RSU. Her assent was not invalidated by the fact that she did not completely review the terms of the agreement, as she was an experienced, high-level employee capable of understanding the contract. The court noted that, under Delaware law, parties may assent to and be bound by contracts that they did not read that were formed on the Internet just as they would be with a paper agreement. (*Newell Rubbermaid Inc. v. Storm*, Del. March 2014)

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