Proskauer

newsletter

A report to clients and friends of the firm

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in this issue

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Editor's Overview

In this issue of Proskauer's ERISA Litigation Newsletter, we review a recent ruling by the Tenth Circuit Court of Appeals concerning the application of controlled group principles to the building and construction industry exemption to withdrawal liability. As discussed below, pension plans and employers in the building and construction industry should consider carefully the implications of the Tenth Circuit's ruling. This month's Rulings, Filings, and Settlements of Interest reviews court rulings on incorrectly addressed COBRA notices, the HHS, DOL and Treasury Department's Joint Release of New Summary of Benefits and Coverage Templates and Accompanying Documents, and an IRS information letter on California waiting time penalties.

View from Proskauer: Building and Construction Industry Employers and Pension Plans Take Note—Potential Unforeseen Assessment of Withdrawal Liability*

By Anthony S. Cacace

Employers in the building and construction industry enjoy the benefit of unique rules that considerably limit the circumstances under which they are required to pay withdrawal liability following the cessation of their obligation to make contributions to a multiemployer pension plan. Whereas most employers automatically face withdrawal liability assessments when they cease to have the obligation to make pension plan contributions, construction industry employers need not pay withdrawal liability if they discontinue "covered work" in the jurisdiction of the collective bargaining agreement under which they are required to make contributions to the pension plan for at least five years.

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A recent ruling by the *U.S. Court of Appeals for the Tenth Circuit, Ceco Concrete Construction, LLC v. Centennial State Carpenters Pension Trust, et al.* (10th Cir. May 3, 2016) (86 PBD, 5/4/16), illustrates, however, that construction industry employers must be mindful of the activities of companies within their "controlled group," which could potentially expose them to withdrawal liability that they would otherwise escape.

The Building and Construction Industry Exception to Withdrawal Liability

Withdrawal liability under Section 4203(a) of the Employee Retirement Income Security Act is triggered upon a "complete withdrawal" from a multiemployer pension plan. A complete withdrawal under Section 4203(a) of ERISA occurs when the employer permanently ceases to have an obligation to contribute to the plan, or permanently ceases all covered operations under the plan.

For employers in the building and construction industry, however, Section 4203(b)(2) of ERISA provides an exception, pursuant to which a complete withdrawal occurs only when an employer: (1) "ceases to have an obligation to contribute under the plan," *and* (2) either (a) "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required" or (b) "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption."

Irrespective of the industry in which an employer is engaged, ERISA defines the term "employer," which extends not only to the entity that executes the agreement requiring contributions to be made to the plan, but also all "trades or businesses" under "common control" with that entity. *See* Section 4001(b) of ERISA. This is known as the employer's "controlled group." By virtue of this definition, companies can become liable for withdrawal liability even if they never directly entered into a collective bargaining obligation to contribute to the plan.

And, as the recent Tenth Circuit ruling demonstrates, a construction industry employer's ability to withdraw from a plan without incurring withdrawal liability obligations can similarly be impacted by the activities of other entities within its controlled group.

Ceco Concrete Construction's Withdrawal Liability Assessment

Ceco Concrete Construction LLC ("Ceco") was signatory to a collective bargaining agreement ("CBA") with the local carpenters union in Colorado that was effective until April 30, 2010. The agreement required Ceco to make contributions to the Centennial State Carpenters Pension Trust (the "Pension Plan"). Once the CBA expired, Ceco chose not to renew the CBA, and shortly thereafter, it ceased all operations in Colorado. At the time the agreement expired, Ceco was a subsidiary of Heico Holdings, Inc. ("Heico"), a national construction firm.

Several months later, Heico acquired CFA, another construction company working in Colorado. CFA was a non-union company and did not independently have an obligation to contribute to the Pension Plan. The Pension Plan thereafter assessed Ceco with withdrawal liability, taking the position that, by virtue of their common ownership by Heico, Ceco and CFA were trades or businesses under common control, and thus CFA's non-union work within the jurisdiction of the CBA precluded Ceco from taking advantage of the building and construction industry exception.

Arbitrator's Ruling

Following Ceco's challenge to the assessment of withdrawal liability, an Arbitrator ruled that Ceco was not liable to the Pension Plan because, even though CFA was performing covered work in the jurisdiction of the CBA within five years of the cessation of Ceco's obligation to contribute to the Pension Plan, the two entities were not under common control on the date Ceco's obligation to contribute to the Pension Plan ceased.

Federal Court Litigation

Ceco filed a lawsuit in federal court in Colorado to confirm the Arbitrator's award. Among other things, the district court upheld the Arbitrator's decision that Section 4203(b)(2) of ERISA mandated that withdrawal liability applies only to entities under common control at the time the obligation to contribute to the pension plan ceases, and thus, Heico's subsequent acquisition of CFA, and CFA's performance of covered work, therefore did not trigger a withdrawal by Ceco. *See Ceco Concrete Construction, LLC v. Centennial State Carpenters Pension Trust, et al.,* 75 F. Supp. 3d 1328, 1336-39 (D. Colo. Dec. 18, 2014) (245 PBD, 12/23/14).

On appeal, the Tenth Circuit reversed, holding that the district court's reasoning did not comport with a plain reading of Sections 4001(b)(1) and 4203(b)(2) of ERISA. The Court ruled that ERISA "allows a pension plan to assert withdrawal liability against any entity under common control on the day the common-control group triggers a §1383(b)(2) [4203(b)(2)] withdrawal by continuing or resuming covered work." As applied here, the Court stated that the Pension Plan was authorized to assess withdrawal liability against Ceco once CFA became a controlled group member and engaged in work within the jurisdiction covering Ceco's prior work, since CFS's work occurred within the five years after Ceco no longer had an obligation to contribute to the Pension Plan.

In so holding, the Court made several significant observations. The Court observed that the constitution of controlled groups under ERISA is "not static," and thus can change over time as trades or businesses come in and out of common control. The Court further noted that a complete withdrawal under Section 4203(b)(2) can occur at any time within the five-year period after the employer's obligation to contribute ceases, and therefore, a plan must continue to evaluate a controlled group's operations within the five-year period to determine whether a withdrawal occurs. Lastly, the Court opined that its interpretation advances ERISA's statutory intent. According to the Court, limiting the determination of controlled group status to the time the employer's obligation to contribute ceases would allow withdrawing employers to escape withdrawal liability even when businesses related to them have resumed covered work within the five-year statutory period (without renewing an agreement to make contributions to the plan).

Proskauer's Perspective

Pension plans and employers in the building and construction industry should consider carefully the implications of the Tenth Circuit's ruling. From the plan's perspective, the ruling demonstrates the need to remain diligent in monitoring the activities of employers who have ceased their obligation to contribute to the plan because, even if these employers engage in no additional covered work, because they may become connected to employers who do perform covered work, thereby triggering a withdrawal.

Conversely, building and construction industry employers need to be mindful that they cannot necessarily escape withdrawal liability simply by disengaging from a collective bargaining agreement and resolving that they will discontinue covered work within the jurisdiction of the collective bargaining agreement. Withdrawal liability may yet be assessed if they become related, directly or indirectly, through a controlled group to companies that are engaged in work within the jurisdiction of the collective bargaining agreement.

Rulings, Filings, and Settlements of Interest

Second Circuit Affirms Dismissal of Claim Arising from Incorrectly Addressed COBRA Notice

By Neil Shah

> In *Vangas v. Montefiore Medical Center*, 2016 WL 2909354 (2d Cir. May 19, 2016), the Second Circuit affirmed the district court's holding that an employer is not liable for failing to provide a COBRA notice to a terminated employee under ERISA § 502(c) where the employer followed reasonable procedures to ensure that notices were properly mailed. The Court rejected the terminated employee's argument that the notice was deficient because it was incorrectly addressed to "Cornwallonhuds, New York," rather than to her actual address, "Cornwall-on-Hudson, New York." In so ruling, it noted that the mailing contained the proper zip code and the terminated employee's admission to "receiving eighteen other pieces of incorrectly addressed mail, including mail without the zip code" at that address.

Health and Human Services, Labor and Treasury Departments Release New Summary of Benefits and Coverage Templates and Accompanying Documents

By Sara C. Richland

> The Departments of Health and Human Services ("HHS"), Labor ("DOL"), and Treasury (the "Departments") have jointly released final changes to the Summary of Benefits and Coverage ("SBC") template, the Uniform Glossary, and accompanying documents.

Background

The ACA requires group health plans and health insurance issuers to compile and provide to consumers an SBC that describes the benefits and coverage under the applicable plan and coverage options. This requirement is intended to help consumers better understand and make more informed choices about their coverage options, and it applies to insured and self-funded ERISA group health plans (including grandfathered plans), and to non-ERISA group health plans and individual health insurance coverage.

The SBCs provided to consumers must follow a uniform format and contain certain information. This information includes uniform standard definitions of medical and health coverage terms, a description of the coverage, cost-sharing requirements, and information regarding any exceptions, reductions or limitations under the coverage. The Departments have provided a template for health plans and issuers to use that will allow them to comply with the requirements.

The template currently in use was released in April of 2013. After issuing a proposed rule amending the SBC regulations in December of 2014, a Final Rule in June of 2015 (which finalized most of the 2014 proposed revisions), and revised SBC templates and accompanying documents in February of 2016, the Departments released final SBC templates and accompanying documents on April 6, 2016. The changes to the requirements and templates and all relevant effective dates are described below.

Changes to Requirements

The requirement that health plans and health insurance issuers use 12-point font and replicate all symbols, formatting, bolding and shading where applicable on the SBC have not changed. However, to maintain the four double-sided page limit, the Departments have now allowed more flexibility in form language and formatting. For example, plans and issuers may use different fonts and adjust margins as necessary. The Departments also added required definitions to the Uniform Glossary, and have provided that plans and issuers may hyperlink the terms to a micro-site that HHS will maintain, at https://www.healthcare.gov/sbc-glossary/.

Changes to SBC Template

The Departments also added, deleted and changed certain language and terms in the new SBC template. Some key examples of their changes include:

- The addition at the beginning of the SBC of a simple explanation of what an SBC is and where consumers can find more information.
- The addition to the description of deductibles of how family members must meet their own individual deductibles before the overall family deductible is met and what services are covered before the deductibles are met.
- The changing of the term “person” to “individual.”
- The addition of a statement that copayments for certain services may not be included in out-of-pocket limits.
- The removal of definitions of copayments and coinsurance from page 2 of the template.
- The changing of the “Limitations & Exceptions” column to a “Limitations, Exceptions, & Other Important Information” column, which must now include:
  - When the plan or issuer does not cover a particular service category, or a substantial portion of a service category;
  - When cost sharing for covered in-network services does not factor into the out-of-pocket limit;
  - Visit or dollar limits; and
  - When services require prior authorization.

Cross-referencing is allowed if including all limitations and exceptions would cause a violation of the page limit requirement.

- The addition of the following under Common Medical Events:

- "You may have to pay for services that aren't preventive. Ask your provider if the services needed are preventive. Then check what your plan will pay for."
- A direct link or URL to the formulary drug list where the consumer can find more information about prescription drug coverage, and drug tier information.
- Mental/behavior health and substance abuse are combined into one row, and there is one row each for inpatient services and outpatient services.
- New rows for the "If you are pregnant" category: (1) Office visits; (2) Childbirth/delivery professional services; and (3) Childbirth/delivery facility services.

- The addition of disclosure language about minimum essential coverage, minimum value, and language access services.
- The addition of a third coverage example.
- Changed formatting and other language on the Coverage Examples page.
  - Includes an updated note about wellness programs.
  - Includes a new note that the plan has other deductibles for specific services included in the applicable coverage example.
  - Includes a footnote stating, "The **plan** would be responsible for the other costs of these EXAMPLE covered services."
- Qualified Health Plan issuers ("QHPs") must reflect in the SBC whether it covers abortion services.

Effective Dates

Plans and issuers operating on a calendar year plan year must use the new SBC templates in time for the first open enrollment period beginning on or after April 1, 2017. This means most individual market issuers and any group health plans operating on a calendar year will need to use the new SBC documents by November 1, 2017 for the plan year beginning January 1, 2018.

Non-calendar year plans must use the new SBC documents beginning with the first plan year beginning on or after April 1, 2017. For example, if a group health plan has a plan year beginning October 1, the plan would need to provide the new SBC documents to its participants no later than October 1, 2017.

What Employers Should Do

Carefully review the modifications to the SBC template, the instructions, the Uniform Glossary and the accompanying documents to determine how the employers and the documents are affected. Begin using the updated templates by the effective dates provided above. The revised template, instructions, and other documents can be found at: https://www.dol.gov/ebsa/healthreform/regulations/summaryofbenefits.html. The sample completed SBC can be found at: https://www.dol.gov/ebsa/pdf/Sample-Completed-SBC2-final.pdf.

IRS Confirms California "Waiting Time Penalties" Are Not Wages For Federal Income Tax Purposes

By Sara C. Richland

> A recent IRS information letter confirms that "waiting time penalties" paid under California law are not wages for federal income tax withholding purposes. Section 203 of the California State Labor Code imposes penalties on employers that fail to pay final wages to terminated employees within a specified period of time. These penalties are paid to the terminated employees in amounts based on their wages. In Chief Counsel Advice Memorandum 201522004, and recently in IRS Information Letter 2016-0026, the IRS has clarified these penalties are not considered "wages" for federal income tax purposes, because they are intended to punish employers for failing to timely pay final wages; not to compensate employees for work performed. The IRS has now further clarified that these penalties should not be reported on Form W-2. Instead, they should be reported on Form 1099-MISC in the same manner as other non-compensatory liquidated damages. This is significant for California-based employers for two reasons. First, the guidance affects tax reporting. Second, and on a related matter, the guidance clarifies that these penalty payments are not includable as wages for benefit plan purposes under a plan (like a 401(k) or pension plan) that calculates benefits based on "W-2 income." For additional information, see Chief Counsel Advice Memorandum 201522004 and IRS Information Letter 2016-0026.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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