Proskauer

newsletter

ERISA Litigation

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in this issue

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A report to clients and friends of the firm

Edited by Stacey C.S. Cerrone and Russell L. Hirschhorn

Editor's Overview

In this month's newsletter, our colleagues focus on two sets of legislative updates. First is a discussion of the IRS's proposed Treasury Regulations prescribing rules under Section 457 of the Internal Revenue Code for the income taxation of deferred compensation arrangements for employees of state and local governments and other tax-exempt organizations, and the proposed Treasury Regulations under Code Section 409A. Second, is a review of the EEOC's final rules on the Regulations Under the Americans With Disabilities Act and Genetic Information Nondiscrimination Act, as well as Q&As on Employer Wellness Programs.

In the rulings, filings, and settlements of interest, we review the lawsuits filed challenging the USDOL's final fiduciary rules, as well as a decision addressing Section 510 of ERISA.

IRS Issues Proposed Regulations Under Code Section 457

By Seth Safra, Michael Sirkin and Steven Einhorn

On June 21, 2016, the Internal Revenue Service (IRS) issued long-awaited proposed Treasury Regulations prescribing rules under Section 457 of the Internal Revenue Code (the "Code") for the income taxation of deferred compensation arrangements for employees of state and local governments and other tax-exempt organizations (the "Proposed Regulations"). The IRS simultaneously released new proposed Treasury Regulations under Code Section 409A.

Generally, the Proposed Regulations are pleasantly more flexible and practical than the rules previously suggested by the IRS in Notice 2007-62 and also than what was expected by many practitioners. While the Proposed Regulations require clarification on a number of points, these new rules will provide useful guidance in designing compensation for executives of tax-exempt organizations. Among other things, these rules:

> follow Code Section 409A in recognizing a termination by an employee for "good reason" as an involuntary severance from employment;

- unlike under Code Section 409A, recognize required compliance with a noncompetition agreement as a substantial risk of forfeiture;
- contrary to prior IRS policy statements, permit, in certain situations, elective deferral of current compensation and a rollover of existing substantial risk of forfeiture;
- define bona fide severance pay plans that are exempt from Code Section 457, including by imposing a limit on the amount of severance that can be paid under such a plan of two times a participant's prior year's rate of compensation (similar to the Code Section 409A coverage exception), but without the alternative lower limit based on two times the limit for recognizing compensation under qualified plans;
- define bona fide sick pay and vacation plans that are exempt from Code Section 457;
- specify with flexibility how to determine present value when calculating the amount to be taxed under Code Section 457(f); and
- emphasize that both Code Section 457(f) and Code Section 409A apply to most deferral arrangements.

The key provisions in the Proposed Regulations that relate to tax-exempt organizations are discussed in more detail below:

Background

Generally, Code Section 457 contemplates (1) "eligible" plans under which deferrals of up to $18,000 per year are permitted and (2) "ineligible" plans, which cover all other deferred compensation arrangements of state and local governments and tax exempt entities. Amounts that are deferred under an eligible plan are generally not taxable until paid or made available to the employee. In contrast, amounts deferred under an ineligible plan are generally includible in gross income when the deferred amounts cease to be subject to a substantial risk of forfeiture.

Plans that Do Not Provide for a Deferral of Compensation and Are Exempt from Tax Code Section 457 Taxation

The Proposed Regulations provide that the following plans and arrangements are treated as not providing for a deferral of compensation for purposes of Code Section 457 and, therefore, accrued amounts under them are not taxed until paid:

- *Bona Fide Severance Pay Arrangements.* The Proposed Regulations provide that, to be considered a bona fide severance pay arrangement, the benefits provided under the plan must be payable only upon a participant's involuntary severance from employment or pursuant to a window program that is offered for a limited amount of time or a voluntary early retirement incentive arrangement. Generally, the Proposed Regulations provide that, while the determination as to whether a severance from employment is involuntary is based on the relevant facts and circumstances, an involuntary severance from employment occurs when an employer independently exercises its authority to terminate a participant's services if the participant is willing and able to continue to perform services.

  The Proposed Regulations provide that a participant's resignation for "good reason" will be considered an involuntary severance from employment if it is a result of a unilateral action taken by the employer resulting in an adverse change in the working relationship (such as a material reduction in the employee's duties, working

conditions or pay). The Proposed Regulations generally follow the good reason definition rules under Code Section 409A, including use of a "safe harbor" definition.

The amount payable under the plan must not exceed two times the participant's annual compensation based on the annual rate of pay for services provided to the eligible employer for the calendar year prior to the year in which the participant has a severance from employment needs, subject to certain adjustments. In addition, the severance must be paid no later than the end of the second calendar year following the calendar year in which the severance from employment occurs. One point that will require clarification is whether the IRS will permit bifurcation of the payment of severance amounts as it does under the Code Section 409A rules, or whether severance plans will have to be formally separated into a bona fide severance plan with respect to amounts up to two times a participant's annual compensation and a deferred compensation arrangement providing for the payment of additional severance amounts.

- *Disability Plans*. The Proposed Regulations provide that a bona fide disability pay plan is a plan that pays benefits only in the event of a participant's disability. For this purpose, the Proposed Regulations provide that a participant is disabled if the participant meets any of the following three conditions: (1) the participant is unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or last for a continuous period of not less than 12 months; (2) the participant is receiving income replacement benefits for a continuous period of not less than three consecutive months under an accident or health plan covering employees of the eligible employer that satisfies the criteria in (1); or (3) the participant is determined to be totally disabled by the Social Security Administration or the Railroad Retirement Board. The definition of disability is different than that commonly used in many plans and employment agreements, but largely consistent with that used under Code Section 409A.
- *Sick or Vacation Leave Plans.* The Proposed Regulations provide that a bona fide sick or vacation leave plan is a plan that primarily exists to provide employees with paid time off from work because of sickness, vacation, or other personal reasons. Factors used in determining whether a plan is a bona fide sick or vacation leave plan include: (i) whether the amount of leave provided could reasonably be expected to be used by the employee in the normal course (and before the cessation of services); (ii) limits, if any, on the ability to exchange unused accumulated leave for cash or other benefits and any applicable accrual restrictions); (iii) the amount and frequency of any in-service distributions of cash or other benefits offered in exchange for accumulated and unused leave; (iv) whether the payment of unused sick or vacation leave is made promptly upon severance from employment (or, instead, is paid over a period of time after severance from employment); and (v) whether the sick leave, vacation leave, or combined sick and vacation leave offered under the plan is broadly applicable or is available only to certain employees.
- *Death Benefit Plans.* The Proposed Regulations provide that a bona fide death benefit plan is one that provides death benefits, whether directly or through insurance. The Proposed Regulations further provide that any lifetime benefits payable under a plan that may be includible in gross income will not be treated as including the value of any term life insurance coverage provided under the plan.

Tax Treatment of Deferred Compensation under Code Section 457(f)
Consistent with Code Section 457(f), the Proposed Regulations provide that, if an ineligible plan provides for a deferral of compensation, the compensation deferred under the plan is includible in gross income when it is no longer subject to a substantial risk of forfeiture. Generally, the amount of the compensation deferred under the plan that is includible in gross income is the present value of the deferred compensation on that date. The rules for determining present value under the Proposed Regulations are similar to the rules for determining present value in the proposed income inclusion regulations under Code 409A, except that under the Proposed Regulations, the present value calculation is determined on the date that there ceases to be substantial risk of forfeiture rather than as of the end of the employee's taxable year. The Proposed Regulations, helpfully, permit use of reasonable actuarial assumptions including, where the payout is based on severance from employment, a projected payment commencement date of up to 5 years from the calculation date.

Definition of Deferred Compensation
Generally, a plan provides for a deferral of compensation if a participant has a legally binding right during a taxable year to compensation that, pursuant to the terms of the plan, is or may be payable in a later taxable year. Whether a plan provides for a deferral of compensation is generally based on the terms of the plan and the relevant facts and circumstances at the time that the participant obtains a legally binding right to the compensation.

Short-Term Deferrals
Similar to the rules under Code Section 409A, the Proposed Regulations provide that certain short-term deferrals of compensation will not be considered to be a "deferral of compensation" for purposes of Code Section 457(f). These are payments that the participant actually or constructively receives on or before the last day of the period ending on the later of the 15th day of the third month following the end of the calendar year in which the right to the payment is no longer subject to a substantial risk of forfeiture or the 15th day of the third month following the end of the employer's taxable year in which the right to the payment is no longer subject to a substantial risk of forfeiture. The Treasury Regulations under Code Section 409A contain a similar concept.

Substantial Risk of Forfeiture
The Proposed Regulations provide that an amount is generally subject to a substantial risk of forfeiture only if entitlement to that amount is conditioned on the future performance of substantial services, or upon the occurrence of a condition that is related to a purpose of the compensation if the possibility of forfeiture is substantial. Whether an amount is conditioned on the future performance of substantial services is based on all of the relevant facts and circumstances, such as whether the hours required to be performed during the relevant period are substantial in relation to the amount of compensation. Conditioning an amount upon an involuntary severance from employment (including good reason) will generally qualify as a substantial risk of forfeiture. A condition is related to a purpose of the compensation only if the condition relates to the employee's performance of services for the employer or to the employer's tax exempt or

governmental activities, as applicable, or organizational goals. A substantial risk of forfeiture exists based on a condition related to the purpose of the compensation only if the likelihood that the forfeiture event will occur is substantial. Also, an amount is not subject to a substantial risk of forfeiture if the facts and circumstances indicate that the forfeiture condition is unlikely to be enforced. Factors considered for purposes of determining the likelihood that the forfeiture will be enforced include, the past practices of the employer, the level of control or influence of the employee with respect to the organization and the individual who would be responsible for enforcing the forfeiture, and the enforceability of the provisions under applicable law.

The Proposed Regulations provide that a forfeiture condition tied to a noncompetition agreement may constitute a substantial risk of forfeiture. However, for compliance with a noncompetition agreement that contains a forfeiture condition to be a substantial risk of forfeiture, each of the following conditions must be met: (i) the right to the compensation is expressly conditioned on the employee refraining from the performance of future services pursuant to a written agreement that is enforceable under applicable law; (ii) the employer must consistently make reasonable efforts to verify compliance with all of the noncompetition agreements to which it is a party (including the noncompetition agreement at issue); and (iii) at the time the noncompetition agreement becomes binding, the facts and circumstances must show that the employer has a substantial and bona fide interest in preventing the employee from performing the prohibited services and that the employee has a bona fide interest in engaging, and an ability to engage, in the prohibited services. This is different than the treatment of a substantial risk of forfeiture under Code Section 409A, which specifically provides that a restrictive covenant will not be a substantial risk of forfeiture. The ability and flexibility in utilizing this provision will be very sensitive to the length and scope of the noncompetition agreement and whether the applicable state law governing the noncompetition agreement will permit it to be enforced.

Initial Deferrals of Current Compensation and Extensions of a Substantial Risk of Forfeiture

The Proposed Regulations include special rules to determine whether initial deferrals of current compensation may be treated as subject to a substantial risk of forfeiture and whether a substantial risk of forfeiture can be extended (i.e., "rolled"). The preamble to the Proposed Regulations states that, for this purpose, current compensation refers to compensation that is payable on a current basis such as salary, commissions, and certain bonuses, and does not include compensation that is deferred compensation. This is a welcome change from the IRS's prior stated position, although it will probably be usable only in limited circumstances because of the conditions discussed below.

The Proposed Regulations permit initial deferrals of current compensation to be subject to a substantial risk of forfeiture and also permit an existing risk of forfeiture to be extended only if certain requirements are met. The present value of the amount to be paid upon the lapse of the substantial risk of forfeiture (as extended, if applicable) must be materially greater than the amount the employee otherwise would be paid in the absence of the substantial risk of forfeiture (or absence of the extension). An amount is considered materially greater for this purpose only if the present value of the amount to be paid upon the lapse of the substantial risk of forfeiture, measured as of the date the amount would have otherwise been paid (or in the case of an extension of the risk of

forfeiture, the date that the substantial risk of forfeiture would have lapsed without regard to the extension), is more than 125% of the amount the employee otherwise would have received on that date in the absence of the new or extended substantial risk of forfeiture. In addition, the initial or extended substantial risk of forfeiture must be based upon the future performance of substantial services or adherence to a noncompetition agreement. The period for which substantial future services must be performed may not be less than two years (but the plan may provide that the substantial risk of forfeiture will lapse earlier upon the participant's death, disability, or involuntary severance from employment). Finally, the agreement subjecting the amount to a substantial risk of forfeiture must be made in writing before the beginning of the calendar year in which any services giving rise to the compensation are performed in the case of initial deferrals of current compensation or at least 90 days before the date on which an existing substantial risk of forfeiture would have lapsed in the absence of an extension. Special timing rules apply to new employees. It should be noted that if a substantial risk of forfeiture is extended under Code Section 457(f), such extension will still be subject to Code Section 409A requirements with respect to the time of payment and delay of payment.

Reoccurring Part-Year Compensation

Like the newly proposed Treasury Regulations under Code Section 409A, the Proposed Regulations provide that certain reoccurring part-year compensation is not considered a "deferral of compensation." This provision is primarily intended to accommodate teachers who work 10 months of the year, but whose compensation is spread over a full year.

The Proposed Regulations provide that a plan or arrangement under which an employee receives recurring part-year compensation that is earned over a period of service does not provide for the deferral of compensation if the plan or arrangement does not defer payment of any of the recurring part-year compensation to a date beyond the last day of the 13th month following the first day of the service period for which the recurring part-year compensation is paid, and the amount of the recurring part-year compensation (not merely the amount deferred) does not exceed the annual compensation limit under Code Section 401(a)(17) ($265,000 for 2016) for the calendar year in which the service period commences.

Interaction of Code Sections 457 and Section 409A

The Proposed Regulations address the interaction of Code Sections 457(f) and 409A on deferred compensation arrangements. The Proposed Regulations provide that the rules under Code Section 457(f) apply to plans separately and in addition to the requirements under Section 409A. As a result, a deferred compensation plan that is subject to Code Section 457(f) may also be a nonqualified deferred compensation plan that is subject to Section 409A. This is a particular concern where a noncompetition provision is involved. It will also require attention in a situation where deferred compensation is paid out over time after the deferred compensation has been included in taxable income under Code Section 457(f) (particularly, as to timing of payment of the taxable earnings on the previously taxed amounts).

Proposed Applicability Dates

Generally, the Proposed Regulations apply to compensation deferred under a plan for calendar years beginning after the date of publication of the rules as final regulations,

including deferred amounts to which the legally binding right arose during the prior calendar years that were not previously included in income during one or more prior calendar years. The Proposed Regulations, however, may be relied on immediately.

In the case of a plan that is maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on the date of publication of the Treasury decision adopting these rules as final regulations, these regulations would not apply to compensation deferred under the plan before the earlier of (1) the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension thereof after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register) or (2) the date that is three years after the date of publication of the Treasury decision adopting these rules.

New EEOC Regulations Provide Roadmap for Wellness Programs

By Seth Safra and Tzvia Feiertag

For large employers, the quest to reduce the cost of medical benefits relies in part on helping employees get healthier. Enter the "wellness program," where employers offer incentives to employees and their families to be more proactive about their health in various ways, such as more exercise, quitting smoking, diagnosing high cholesterol and high blood pressure, and evaluating the risk of future health problems.

Although wellness programs are well-intentioned, they raise issues under various federal laws, including:

- The Health Insurance Portability and Accountability Act (HIPAA), which prohibits discrimination in group health plans on the basis of adverse health factors, such as high cholesterol, high blood pressure, medical history, and genetic information;
- The Americans with Disabilities Act (ADA), which requires reasonable accommodations for disabled individuals to have equal access to benefits and prohibits employers from making disability-related inquiries to employees or requiring employees to take medical examinations—but allows ***voluntary*** medical examinations and collection of medical histories as part of an employee health program; and
- The Genetic Information Nondiscrimination Act (GINA), which prohibits requesting genetic information from employees and their spouses, except as part of a ***voluntary*** program that is designed to promote health or prevent disease.

The requirements to comply with HIPAA's prohibition against discrimination rules have been pretty clear since 2006; and the Affordable Care Act further liberalized the requirements, to encourage innovative programs that inspire healthy habits and proactive disease prevention. But as the Departments of Treasury, Labor, and Health and Human Services (HHS) published prescriptive regulations and other guidance, the Equal Employment Opportunity Commission (EEOC) continued to warn employers that programs designed to comply with HIPAA and the ACA might still violate the ADA and/or GINA. The EEOC's principal concern has been that if incentives to participate in a medical examination or provide medical history are too substantial, the program effectively will not be voluntary—which would violate the ADA and/or GINA.

Initially, the EEOC expressed its views through informal statements and guidance in its enforcement manual. In 2014, however, the EEOC brought lawsuits challenging three employers' wellness programs. The suits signaled to employers that merely complying with the Treasury, Labor, and HHS guidance under HIPAA and the ACA might not be enough: there was a risk that any incentive to participate in a medical examination or provide medical history might make the program involuntary, in violation of the ADA and/or GINA.

On May 16, 2016, the EEOC issued final rules on the Regulations Under the Americans With Disabilities Act and Genetic Information Nondiscrimination Act as well as Q&As on Employer Wellness Programs and Title I of the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act that appear to put the "voluntariness" uncertainty to rest. With a few exceptions, the final rules generally mirror proposed rules issued by the EEOC last year. Together with the regulations and other guidance issued by Treasury, Labor, and HHS, the final regulations appear to provide a clear roadmap for designing wellness programs that comply with federal law. Here are five highlights from the EEOC's final regulations:

1. **Wellness programs must be reasonably designed to promote health or prevent disease.** This means that a wellness program may not impose an "overly burdensome" time commitment; involve unreasonably intrusive procedures; be a subterfuge for unlawful discrimination under the ADA, GINA, or other anti-bias laws; or require employees to incur significant costs for medical exams. And the information collected must be used to address at least a subset of conditions identified. Unlike the HIPAA rules, the ADA's "reasonably designed" standard applies not only to health-contingent and outcome-based programs, but also to participatory programs.

2. **Participation in wellness programs must be "voluntary."** This means that incentives may not exceed a specified threshold (the 30% rule described in #3, below); health benefits may not be conditioned on participating in the wellness program; and an employer may not retaliate against anyone who does not participate in the wellness program.

Also, the sponsoring employer must provide a written notice to employees explaining what medical information will be obtained, how it will be used, who will receive it, and restrictions on disclosure. This notice may be included in other materials describing the wellness program. The EEOC says it will issue sample language in June.

3. **Incentives for participation may not exceed 30% of the cost of self-only coverage.** Under the final regulations, the total incentives—discounts on health care premiums, cash rewards, in-kind prizes like Fitbits, gift cards, and gym memberships, and anything else combined—for an employee to participate in a wellness program—may not exceed ***30% of the cost of self-only coverage*** (the employer's share plus the employee's share). This limit is lower than the maximum amount permitted under the HIPAA rules.

A wellness program may also offer an ***additional*** incentive of up to 30% of the total cost of self-only coverage for a spouse to provide information about his or her current or past health status (subject to not exceeding a limit under the HIPAA rules). But a

wellness program may not provide an incentive to provide health information about an employee's child.

Special Rule for Tobacco Use. The 30% limit described above may be increased to ***50% of the cost of self-only coverage*** to answer questions about tobacco use. However, a wellness program may not provide any additional incentive (above the 30% limit described above) to submit to medical tests—e.g., a procedure that tests for the presence of nicotine or tobacco.

Which plan is relevant? In general, the coverage used to determine the maximum incentive should be the lowest cost coverage that the employer offers; but if the wellness program is offered only to employees enrolled in a particular plan, the employer should use the coverage in which the employee is actually enrolled. If the employer does not offer a health plan, the maximum incentive should be based on the cost to a 40-year old non-smoker for self-only coverage under the second lowest-cost Silver Plan available on public exchange for the employer's home state.

4. **Confidentiality is paramount.** Employers and wellness program providers must protect the confidentiality of employee medical information and must not use employee medical information for any purpose that would violate the ADA. The new regulations expand on these principles with two new requirements:

    (i) Information collected through a wellness program may be presented to an employer only in aggregate form—in a way that is not reasonably likely to identify specific individuals, unless necessary to administer the program; and

    (ii) An employer generally may not require an employee to agree to any transfer or disclosure of medical information or to waive confidentiality protections under the ADA.

The EEOC has also issued some optional "best practices" for ensuring confidentiality. These practices include training, use of encryption, and the creation of "firewalls" to prevent transmission of medical information to anyone responsible for making decisions related to employment.

5. **Inside the plan, outside the plan . . . it doesn't matter.** Until now, there was some debate over whether the rules are different for wellness programs offered under a plan than for programs outside of the plan. For purposes of ADA and GINA, that distinction no longer matters. The rules described above apply either way.

Effective Date

The new notice requirement and incentive rules apply for plan years starting on and after January 1, 2017. The EEOC states that all other provisions, such as the confidentiality requirements, are clarifications of existing obligations; so those provisions are effective immediately.

Proskauer's Perspective

After years of uncertainty, the final regulations provide welcome clarity on the requirements for wellness programs—at least under federal law. Employers should review their programs and make adjustments as necessary to comply with the new

regulations. In particular, employers will need to assess the value of prizes that they offer for participating in wellness programs, to make sure they stay below the 30% cap. Also, now that the rules are more clear, employers might wish to revisit incentives in the form of premium subsidies.

Rulings, Filings, and Settlements of Interest

Lawsuits Filed Challenging the USDOL's Final Fiduciary Rules

By Russell Hirschhorn and Benjamin Saper

On April 6, 2016, the U.S. Department of Labor released its Final Rule addressing when a person providing services to an employee benefit plan or individual retirement account (IRA) is considered to be providing investment advice that is subject to ERISA's fiduciary standard. As discussed in our client alert, available here, the rule expanded the types of communications that are subject to the fiduciary standard, extended fiduciary obligations to IRAs, and added new and revised prohibited transaction exemptions, one of which is the Best Interest Contract Exemption.

The Final Rule and the Best Interest Contract Exemption have generated a firestorm of criticism by small and big businesses alike. To date, there have been five lawsuits filed against the U.S. Department of Labor and the Secretary of Labor challenging the validity and constitutionality of the New Rule and exemptions:

- The National Association for Fixed Annuities filed suit in the U.S. District Court for the District of Columbia asserting claims under the Administrative Procedures Act, the Regulatory Flexibility Act and the Due Process Clause of the Fifth Amendment. The case is *The National Association for Fixed Annuities v. Thomas E. Perez et al.*, Case No. 16-cv-1035. The case appears to be on a fast track as the court already scheduled briefing on NAFA's motion for a preliminary injunction and for summary judgment. Briefing is currently scheduled to conclude on those motions by August 5, 2016, and a hearing has been scheduled for August 25, 2016.
- The U.S. Chamber of Commerce, along with a group of financial and business trade groups, filed suit in the U.S. District Court for the Northern District of Texas and asserts claims under the Administrative Procedures Act and First Amendment. The case is *Chamber of Commerce of the U.S.A., et al. v. Thomas E. Perez et al.*, Case No. 16-cv-1476.
- The American Council of Life Insurers and the National Association of Insurance and Financial Advisors filed suit in the U.S. District Court for the Northern District of Texas asserting claims under the Administrative Procedures Act and First Amendment. The case is *American Council of Life Insurers, et al. v. U.S. Department of Labor, et al.*, Case No. 16-cv-1530.
- The Indexed Annuity Leadership Council filed suit in the U.S. District Court for the Northern District of Texas asserting claims that the DOL exceeded its statutory authority, violations of the Administrative Procedures Act and the First Amendment. The case is *Indexed Annuity Leadership Council v. Thomas E. Perez et al.*, Case No. 16-cv-1537.

- Market Synergy Group Inc., a Kansas-based insurance firm, filed suit in the U.S. District Court for District of Kansas asserting claims under the Administrative Procedure Act and the Regulatory Flexibility Act. The case is *Market Synergy Group Inc. v. U.S. Department of Labor, et al.*, Case No. 16-cv-40830.

Should a conflict develop among the lower courts (as in the case of challenges to the Affordable Care Act), Supreme Court review would become likely.

Stay tuned for further developments.

Court Declines to Decide Whether ERISA Protects Employee From Reprisal For Informal Complaint

By J. Robert Sheppard III

A federal court in Missouri was asked to determine whether a former employee proved a viable claim for retaliation under ERISA Section 510 by virtue of being terminated after she sent emails disparaging the company's owner and protesting certain actions. As applicable here, Section 510 prohibits employers from terminating an employee "because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter." The district court first recognized that the Eighth Circuit (in which the court sits) has not answered the question of whether Section 510 protects informal complaints by employees – i.e., the former employee's emails — as an "inquiry or proceeding." Rather than decide the issue, the court assumed that she had made a prima facie showing, and granted the employer's motion for summary judgment on the ground that she had been terminated for legitimate nondiscriminatory reasons. The case is *Graham v. Hubbs Mach. and Mfg., Inc.*, No. 4:14-CV-419 (CEJ), 2016 WL 2910209 (E.D. Mo. May 19, 2016).

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.

For more information about this practice area, contact:

Stacey C.S. Cerrone
+1.504.310.4086 –scerrone@proskauer.com

Russell L. Hirschhorn
+1.212.969.3286 – rhirschhorn@proskauer.com

Robert W. Rachal
+1.504.310.4081 – rrachal@proskauer.com

Myron D. Rumeld
+1.212.969.3021 – mrumeld@proskauer.com

Howard Shapiro
+1.504.310.4085 – howshapiro@proskauer.com