Proskauer

The ERISA Litigation Newsletter

February 2016

Editor's Overview

This month's article reviews a few non-ERISA cases before the U.S. Supreme Court, which may, depending on the breadth of the decisions, impact ERISA litigation. First, in *Spokeo, Inc. v. Robins*, the Court heard arguments on whether a plaintiff must have suffered individualized injury to assert a claim for statutory and regulatory violations. Second, in *Tyson Foods, Inc. v. Bouaphakeo*, the Court is considering two class certification issues under Federal Rule of Civil Procedure 23(b)(3): (i) whether a class may be certified where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample, and (ii) whether a class may be certified when the putative class includes members who were not injured and have no legal right to any damages. Third, in *Campbell-Ewald Co. v. Gomez*, the Court resolved a split among the circuits in deciding that a claim is not mooted as to a named plaintiff and a putative class after a defendant makes an unaccepted offer of complete relief.

In the Rulings, Filings, and Settlement of Interest, we review the Supreme Court's recent decision holding that an ERISA plan cannot enforce an equitable lien against general assets, wellness programs, retiree health benefit claims and IRS rules on safe harbor plans.

View From Proskauer: A Review of Current Supreme Court Cases That May Impact ERISA Litigation*

By Lindsey Chopin

This term, the Supreme Court heard argument in three cases which, although not arising under ERISA, could have the potential to significantly impact ERISA litigation.

First, in *Spokeo, Inc. v. Robins*, the Court heard arguments on whether a plaintiff must have suffered individualized injury to assert a claim for statutory and regulatory violations (213 PBD 213, 11/4/15).

Second, in *Tyson Foods, Inc. v. Bouaphakeo*, the Court is considering two class certification issues under Federal Rule of Civil Procedure 23(b)(3): (i) whether a class maybe certified where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample, and (ii) whether a class may be certified when the putative class includes members who were not injured and have no legal right to any damages.

Third, in *Campbell-Ewald Co. v. Gomez*, the Court resolved a split among the circuits in deciding that a claim is not mooted as to a named plaintiff and a putative class after a defendant makes an unaccepted offer of complete relief.

We briefly review each of these non-ERISA cases below and provide some perspective on their potential impact in ERISA litigation.

Article III Standing

A Supreme Court decision in a Fair Credit Reporting Act (FCRA) case may impact whether ERISA plan participants have Article III constitutional standing to bring claims based on a statutory violation of ERISA. In *Spokeo, Inc. v. Robins*, Dkt. No. 13-339, the Court is considering whether a statutory violation – without more – is sufficient to confer Article III standing on a person who the underlying statute expressly authorizes to file suit for such violations. Thomas Robins sued Spokeo, a website that aggregates publicly available information about individuals. He alleged that the website violated various provisions of the FCRA by publishing false information about the status of his employment, wealth, and education, all of which impeded his job search.

The Ninth Circuit held that Congress created a private right of action to redress statutory violations, and that Mr. Robins had sufficiently alleged injury to himself as a result of these violations (*Robins v. Spokeo, Inc*., 742F.3d 409 (9th Cir. 2014)). In so holding, the court determined that this was not a case in which Article III standing had been manufactured to elevate undifferentiated, collective injuries into statutory rights. Instead, Mr. Robins alleged that Spokeo had violated his statutory rights by publishing false information about him, and that these statutory rights protected interests that were" sufficiently concrete and particularized" for Article III purposes.

Spokeo sought review from the Supreme Court and, over objections from the Solicitor General among others, the Supreme Court granted certiorari. During oral argument, it was not clear how the Court will decide the issue, although the questioning indicated three possible outcomes. First, Justices Sotomayor and Ginsburg seemed willing to support the proposition that standing exists because Congress provided a legal right by statute and the statute was violated, without any further showing of harm (i.e. standing exists if there is proof that the defendant published inaccurate information in violation of the statute, without any need to show, for example, that a third party relied on such information and that such reliance harmed the plaintiff). Second, other Justices, including Chief Justice Roberts and Justice Scalia, seemed to believe that a mere violation of a statutorily created legal right is not enough to confer standing. Rather, Plaintiff must also prove actual harm, such as proof that the plaintiff was not selected for a job based on the false information in his credit report. Third, others, including Justices Kagan and Breyer, seemed inclined to avoid answering whether a plaintiff must prove actual harm to enjoy standing because they believed that the dissemination of false information about the plaintiff is in and of itself a concrete, actual harm – even if it is merely "psychic harm." Thus, in their view, Robinssuffered harm and has standing.

Proskauer's Perspective

Spokeo may have a significant impact on theability of planparticipants to seek relief from plan fiduciaries for statutory and regulatory violations on both an individualized and class-wide basis. ERISA authorizes plan participants to commence actions forviolations of the statute, such as notice violations. In many instances, the participant may have suffered no tangible harm as a result of the violation and, even if he or she did, there is an issue of whether such harm can be established on a class-wide basis. Depending on the outcome of Spokeo, the viability of these types of lawsuits may be called into question.

Class Certification

Federal Rule of Civil Procedure 23(b)(3) allows courts to certify a class where plaintiffs' claims involve "questions of law or fact common to class members predominate over any questions affecting only individual members," and class adjudication is superior to other methods. In two recent decisions, the Supreme Court increased the rigor needed to maintain class actions. First, in *Wal-Mart v. Dukes*, 131S. Ct. 2541(2011), it rejected a "trial by formula" approach, i.e. the use of statistics to extrapolate data from a sample of workers to the class as a whole. Second, in *Comcast v. Behrend*, 133S. Ct. 1426(2013), it held that the damages model must be consistent with the liability model – i.e., a model purporting to serve as evidence of damages in a class action must measure damages attributable to the class-wide theory of harm.

The Supreme Court is confronting another potential hurdle to class certification in *Tyson Foods, Inc. v. Bouaphakeo*, Dkt. No. 14-1146. There, employees of Tyson Foods sued the company for violations of the Fair Labor Standards Act (FLSA) and Iowa state law, arguing that they were undercompensated for time spent walking to their work sites and "donning and doffing" protective equipment necessary to perform their jobs. To prove liability and damages, plaintiffs first determined the average donning, doffing and walking time for a sample of workers, even though it was established that the actual amount of time varied by job type and that Tyson also afforded different types of employees different amounts of paid "don and doff" time, and compensated the same type of employees differently if their shift required set-up or tear down. Plaintiffs then compared this average to each individual's time sheet to determine whether the individual was under-compensated and the amount of his or her damages.

The Eighth Circuit affirmed a jury verdict in favor of plaintiffs and the class in *Bouaphakeo v. Tyson Foods, Inc.*, 765F.3d 791(8th Cir. 2014). In so ruling, thecourt explained that, unlike in *Dukes*, Plaintiffs did notonlyprovide evidence for a sample set of the class,butrather used estimated average donning, doffing and walking times from a sample of workers and then applied that average to theeach individual class member to infer liability and damages. The Eighth Circuit also ruledthat the inclusion of class members whowound up with no damages is permissible under *Comcast* as long as individual damages calculations do not overwhelm questions common to the class.

The Supreme Court granted certiorari and agreed to hear arguments on: (i) whether a class may be certified under Rule 23(b)(3), or as a collective action under the FLSA, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample – even if in reality differences among class members exist; and (ii) whether a class action may be maintained under Rule 23 (b)(3), or certified as an FLSA collective action, when the class includes members who were not injured and have no legal right to any damages. At oral argument, the Justices did not focus on class certification under Rule 23. Instead, they narrowly focused on a seventy year old FLSA decision that permits the use of representative testimony in FLSA collective actions when the employer does not keep time records, noting that FLSA law influences whether certification is proper and this precedent allows the use of representative testimony even if estimations and inferences are relied upon. Interestingly, the Justices appear to have recognized that this precedent is specific to FLSA collective actions, and that *Tyson* would be a closer case, and likely unable to be certified, if the court were considering certification under Rule 23 only. With respect to class members who are ultimately shown to have no damages, the Court expressed skepticism that their inclusion in the class creates any issues and noted that such persons can simply be excluded from recovery when distributing the judgment.

Proskauer's Perspective

When the Court granted certiorari in *Tyson*, many believed that the Court had seized yet another opportunity to further restrict plaintiffs' ability to maintain class actions. The Justices' narrow focus on the use of representative testimony in FLSA collective actions, however, may mean that *Tyson* will not have the impact on class action litigation, including ERISA class actions, that some initially thought it would. Nonetheless, even if the opinion is narrowly focused, it will not be without import. First, after increasing the rigor of class action certification in *Dukes* and *Comcast*, the Court may be hinting at creating context-specific exceptions to those global standards. Additionally, in so far as they rely on the unique features of FLSA law as a basis forallowing the class claims to proceed, the Justices may signal that the outcome could be different under other legal frameworks.

Offers of Complete Relief

Federal courts cannot hear a case that is moot – that is, a case in which the court can no longer grant any relief because the plaintiff lost his personal stake in the claim. In *Campbell-Ewald Co. v. Gomez*, Dkt. No. 14-857, the Supreme Court considered whether a case has become moot whena defendant makes an offer of complete relief that is not accepted by the plaintiff. In a five Justice majority issued on January 20, 2016, the Court held that a plaintiff's claim is not moot under such circumstances.

Jose Gomez, the Named Plaintiff, alleged that he and approximately 100,000 others received from Campbell-Ewald unsolicited messages in violation of the Telephone Consumer Protection Act (TCPA). Prior to class certification, as an offer of judgment under Federal Rule of Civil Procedure 68[1]and again as a standard settlement offer, Campbell-Ewald offered to pay Gomez treble damages for each unsolicited text message received – an offer that the parties agreed fully satisfied his claims– and to enter a stipulated injunction barring future violations of the TCPA. The offer did not admit to liability or include attorney's fees. Campbell-Ewald argued that this constituted complete relief and mooted Gomez's claim. The district court and Ninth Circuit disagreed. The Ninth Circuit held that offers of complete relief made to individual plaintiffs do not moot individual claims and, when made prior to class certification, also do not moot class claims.

With respect to whether a named plaintiff's individual claims are mooted by an unaccepted offer of complete relief, the Ninth Circuit's ruling deepened an already existing circuit split. Regarding the mootness of class claims, several circuits previously determined that an unaccepted offer of complete relief prior to class certification does not moot class claims because such a ruling would allow defendants to pickoff named plaintiffs to avoid class certification. Supporters of the opposite view contended that defendants should not be forced to litigate a claim in which they essentially raised a white flag because such offers make plaintiffs whole and the continued litigation of the claims would serve mainly to benefit plaintiff's lawyers who seek large settlements (and resulting fees).

The Supreme Court granted certiorari, and in an opinion authored by Justice Ginsburg and joined by Justices Sotomayor, Kagan, Breyer, and Kennedy, the Court affirmed the Ninth Circuit's decision and held that an unaccepted offer of judgment does not moot a plaintiff's claim. Relying on basic contract principles and the text of Rule 68, the majority concluded that an unaccepted offer leaves the plaintiff empty-handed and has no binding effect; the parties are still adverse and a live controversy still exists. The dissenting justices, comprised of Chief Justice Roberts and Justices Scalia and Alito, would have found the case moot because, having received the offer of complete relief, Gomez no longer *needed* the Court to redress his alleged injuries.

The ruling did not resolve whether a claim would become moot if full payment of the claim was deposited in an account for the benefit of the plaintiff. The majority opinion reserved judgment on this issue, and several of the Justices appeared to be favorably disposed to this result. For example, Justice Alito authored a dissent noting his belief that defendants should be required to guarantee their ability to make good on the offer. And, in a concurring opinion, Justice Thomas observed that under the common law of tenders a defendant could historically admit liability and deposit the sum owed with the Court to escape further liability.

Proskauer's Perspective

The Court's ruling foreclosed the possibility for avoiding costly class action ERISA lawsuits by simply offering full payment of the named plaintiffs' claims – a tool that could have been especially useful in cases alleging ERISA violations with set statutory penalties, such as claims for failure to timely provide requested plan documents. But it did not rule out the possibility of achieving the same objective by depositing the offered sum in an account payable to the plaintiff. It appears from the Court's opinions that this strategic avenue could one day be available for defendants.

* * *

As is often the case, the Supreme Court has decided one case and may decide others that may have an impact well beyond their specific facts. All of the cases discussed have the potential to significantly limit the claims that plaintiffs may bring and the damages they may seek. Stay tuned for further discussion and perspective as the opinions are applied and released in 2016.

Rulings, Filings, and Settlements of Interest

U.S. Supreme Court Holds ERISA Plan Cannot Enforce Equitable Lien Against Participant's General Assets

By Joseph Clark

- Earlier today, the U.S. Supreme Court reversed a decision by the Eleventh Circuit and held that when a ERISA plan participant obtains a third-party settlement subject to a plan's subrogation provision, and then dissipates the settlement on "nontraceable" items, the plan cannot enforce a lien against the participant's general assets under Section 502(a)(3) of ERISA.In so holding, the Court made clear that: (i) a plaintiff could enforce an equitable lien only against specifically identified funds in the defendant's possession, or traceable items purchased with the funds (*e.g.*, a car); and (ii) expenditure of the entire identifiable fund on nontraceable items (*e.g.*, food) destroys an equitable lien, and any personal claim against the defendant's general assets would be a *legal*, not equitable, remedy, and thus not available under Section 502(a)(3). Because the lower courts did not determine whether the plan participant kept his settlement monies separate from his general assets, or dissipated the entirety of the funds on nontraceable assets, the Court remanded the case to the district court to make that determination.The case is *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan,* 2016 WL 228344 *(U.S. Jan. 20, 2016).*

Stay tuned for Proskauer's perspective on the implications of the Court's decision.

Big Employer Win in Wellness Program Case EEOC v. Flambeau

By Paul M. Hamburger and Tzvia Feiertag

- For the past couple of years, the U.S. Equal Employment Opportunity Commission (EEOC) has been challenging employer wellness programs for their alleged violations of the Americans with Disabilities Act (ADA).The most recent EEOC challenge was in *EEOC v. Flambeau, Inc.*, (No. 14-cv-638-bbc (December 31, 2015)). In this case, the U.S. District Court for the Western District of Wisconsin handed the EEOC another loss in a wellness case (and handed employers a big win) by holding that the ADA "safe harbor" provision for bona fide benefit plans allowed the Wisconsin plastics manufacturer to condition participation in its self-funded group health plan on a requirement that employees complete a health risk assessment (HRA) and undergo "biometric screening."

Background

Flambeau, Inc. maintained a self-funded group health plan for several years. In 2011, Flambeau established a wellness program that included a HRA and biometric screening for employees that wanted to enroll in its group health plan.The wellness program required each participant to complete a questionnaire about his or her medical history, diet, mental and society health and job satisfaction.The biometric test was similar to a routine physical examination.For 2011, the first year of the program, the company gave a $600 credit to employees if they participated and completed both the HRA and the biometric test.For 2012 and 2013, the company eliminated the $600 credit and instead adopted a policy of offering health insurance only to those employees who completed the wellness program.

Dale Arnold participated in the wellness program for 2011, enrolled in the company's group health plan and received the $600 credit. However, for 2012, Mr. Arnold failed to complete the program's health assessment and tests by the established deadline, and the company discontinued his coverage.Mr. Arnold then filed a union grievance and a complaint with the Department of Labor (DOL) and EEOC.After discussions with the DOL, the company agreed to reinstate Mr. Arnold's coverage, subject to his completion of the plan's required testing and assessment.Despite this compromise, the EEOC sued the company alleging that the company violated the provision of the ADA that prohibits employers from requiring their employees to submit to medical examinations.

The Ruling & Analysis

Federal District Court Judge Barbara B. Crabb rejected the EEOC's challenge and upheld the company's wellness program. She ruled that the assessment and testing fell within the ADA safe harbor, which provides an exemption for activities related to the administration of a bona fide benefit plan.Because this was a matter of first impression in Wisconsin courts, she looked to the district court decision in *Seff v. Broward County*, 778 F. Supp.2d 1370 (S. D. Fla. 2011), and affirmed by the Court of Appeals for the Eleventh Circuit in *Seff v. Broward County*, Florida, 691 F.3d 1221 (11th Cir. 2012), which relied on the ADA safe harbor to uphold a similar employer wellness program that required both a biometric screening and completion of an HRA to avoid a $20 surcharge every two weeks.

The *Flambeau* court rejected the EEOC's arguments that the *Seff* decision was wrongly decided and should not be followed.Specifically, Judge Crabb rejected the EEOC's argument that a different exception under the ADA — the voluntary "employee health program" exception involving voluntary tests and inquiries that are part of employee health programs — would be "rendered irrelevant" by applying the ADA safe harbor to the company's wellness program.Judge Crabb was also not persuaded by the EEOC's position in its proposed rule (published on April 20, 2015), reported here, that the ADA safe harbor was not the proper basis for finding wellness program incentives permissible. It is notable that even though the health plan at issue in *Seff* was fully-insured Judge Crabb relied on it to apply the ADA safe harbor on bona fide benefit plans in this case where the plan was self-insured by the employer.

In upholding Flambeau's wellness program, the *Flambeau* case sheds light on how other courts may view the ADA bona fide benefit plan safe harbor as applied to wellness programs. Specifically, the court held the following:

1. *Wellness Program Requirement has to be a Term of an Employer's Benefit Plan*

   The court found that the company's wellness program was clearly a "term" of the company's benefit plan because employees were ***required*** to complete the wellness program before they could enroll in the plan.Judge Rabb found it difficult to fathom how such a condition could be anything other than a plan term.Interestingly, the court reached this conclusion even though neither the plan document, the plan's summary plan description, nor the collective bargaining agreement explicitly set forth the wellness requirements.

2. *Employees Must Receive Adequate Notice of Any Wellness Program Requirement*

   The court highlighted that the employees had adequate notice of the wellness program's requirements. For example, the court noted that the company distributed handouts to its employees informing them of the requirement and also scheduled the program's HRA and biometric screening so that they would coincide with the plan's enrollment period.

3. *The Wellness Program Requirement Must be Based on Underwriting Risks, Classifying Risks, or Administering Such Risks*

   The court found that the wellness program requirement was intended to assist

Flambeau with "underwriting, classifying or administering risks associated with the insurance plan," because the company's consultants used the data gathered through the wellness program (which was collected in the aggregate) to classify plan participants' health risks and calculate the company's projected insurance costs for the benefit year. The court stated that it was irrelevant that the company could have potentially designed and administered the plan without requiring participants to complete the wellness program.

4. *The Wellness Program Must Not be Mandatory*

   Although completing the HRA and undertaking the biometric exams were required as a condition of health plan participation, the court found that the program was not mandatory in the sense of being a requirement of employment. It was deemed critical by the court that the wellness program was not a condition of employment and that employees could refuse to participate in the wellness program and still remain employed.

5. *The Wellness Program Requirement Cannot be a Subterfuge for Discrimination*

   The ADA safe harbor expressly prohibits using the safe harbor as a "subterfuge" to evade the purposes of the ADA. The court found no subterfuge in this case because, regardless of their disability status, all employees that wanted insurance had to complete the wellness program before enrollment in the company's plan and because there was no evidence that the company used the information gathered from the tests and assessments to make disability-related distinctions with respect to employees' benefits.

Proskauer's Perspective

No doubt, the *Flambeau* decision will be seen as a victory for employers. Nevertheless, employers should proceed with caution before making wellness plan design changes based on a reliance on the applicability of the ADA bona fide benefit plan safe harbor exception.It is very likely that the EEOC will appeal the *Flambeau* decision to the Seventh Circuit given the high-profile nature of this case (and others it filed against employers in connection with their wellness programs) and the fact that it is the only federal appeals court to provide a thorough analysis of the application of the ADA safe harbor in the wellness program context.In addition, the decision may cause the EEOC to double-down on its position in any final regulations it issues.Employers should continue to monitor these developments and, in the meantime, employers that wish to avoid EEOC challenges should continue to administer wellness programs consistent with the EEOC's proposed regulations as the EEOC is unlikely to challenge employers who do.

Retiree Health Benefits Case Remanded to District Court for Additional Fact Finding

By Madeline Chimento Rea

- ???On remand from the Supreme Court, the Sixth Circuit sent the parties in *Tackett v. M&G Polymers USA, LLC* back to the district court for additional factual determinations on whether the retirees who commenced the lawsuit had vested in their health benefits.

Nearly a decade ago, a class of retirees sued their former employer's successor, M&G Polymers, after it announced that it would begin requiring the retirees to contribute toward their health benefits.The district court granted M&G Polymer's motion to dismiss and held that the CBA clearly did not give the retirees a vested right to health benefits.On appeal, the Sixth Circuit reversed; applying the principles it established more than three decades earlier in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), it held that the retirees had stated a plausible claim.The district court subsequently ruled in favor of the retirees on remand, and the Sixth Circuit affirmed.

The U.S. Supreme Court granted M&G Polymer's petition for *certiorari* and concluded that the Sixth Circuit's *Yard-Man* inference violated ordinary contract principles "by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."The Court noted that contractual obligations normally cease when the CBA terminates and that ambiguous writings should not be construed to create lifetime benefits.Although the majority opinion did not state that "clear and express" language is required to demonstrate an intent to vest retiree health benefits, it quoted *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) for the proposition that "the intent to vest must be found in the plan documents and must be stated in clear and express language."The Court further explained that the decision did not preclude a finding that parties intended to vest retiree health benefits, but when a CBA is silent, a court may not infer that the parties intended lifetime health benefits.The Supreme Court thus abrogated the reasoning in *Yard-Man* and vacated and remanded the case to the Sixth Circuit.Justice Ginsburg, writing a concurring opinion, agreed that courts must apply ordinary contract principles, and noted that "clear and express" language is not required to show that parties intended healthcare benefits to vest and that both explicit and implied terms of an agreement can evidence such intent.

On remand, the Sixth Circuit purported to rely on both the Supreme Court's majority and concurring opinions.The Sixth Circuit observed that while the Supreme Court's decision "prevents [it] from presuming that absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits, it also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest."Rather than decide whether "clear and express" language is needed to establish an intent to vest under ordinary principles of contract law, the Sixth Circuit remanded to the district court to make factual determinations as to the parties' agreement outside the "shadow" of the *Yard-Man* decision. The decision is *Tackett v. M&G Polymers USA, LLC*, No. 12-cv-3329, 2016 WL 240414 (6th Cir. Jan. 21, 2016).

IRS Significantly Liberalizes Permitted Mid-Year Changes to Safe Harbor Plans

By Steven Weinstein and Tzvia Feiertag

- ???On January 29, 2016, the IRS issued Notice 2016-16 that provides guidance on mid-year changes to a safe harbor plan under sections 401(k) and 401(m) of theInternal Revenue Code. The guidance provides that a mid-year change either to a safe harbor plan or to a plan's safe harbor notice does not violate the safe harbor rules, provided that applicable notice and election opportunity conditions are satisfied and the mid-year change is not a prohibited mid-year change, as described in the IRS Notice.

The IRS Notice doesn't require any additional notice or election conditions for changes to information that is not required safe harbor notice content, even if that information is provided in a plan's safe harbor notice. For purposes of the guidance, a mid-year change is a change that is first effective during the plan year, but not effective as of the beginning of the plan year, or a change that is effective as of the beginning of the plan year, but adopted after the beginning of the plan year.

Notice Conditions

The notice conditions require that an updated safe harbor notice describing the mid-year change and its effective date be delivered to each employee otherwise required to be provided the safe harbor notice, within a reasonable period before the effective date of the change.Whether the timing requirement is met is based on all of the relevant facts and circumstances, but is deemed to be satisfied if the updated safe harbor notice is provided at least 30 days (and not more than 90 days) before the effective date of the change.

If it is not practicable for the updated safe harbor notice to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively to the beginning of the plan year), the guidance provides that the notice is treated as timely if it is provided as soon as practicable, but not more than 30 days after the date the change is adopted.

If the required information about the mid-year change and its effective date was provided with the pre-plan year annual safe harbor notice, an updated safe harbor notice is not required.

Election Opportunity Conditions

Each employee required to be provided an updated safe harbor notice must be given a reasonable opportunity (including a reasonable period after receipt of the updated notice) before the effective date of the mid-year change to change the employee's cash or deferred election (and/or any after-tax employee contribution election). The guidance provides that a 30-day election period is deemed to be a reasonable period for this purpose.

If it is not practicable for the election opportunity to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively for the entire plan year), the guidance provides that an employee is treated as having a reasonable opportunity to make or change an election if the election opportunity begins as soon as practicable after the date the updated notice is provided to the employee, but not later than 30 days after the date the change is adopted.

The following mid-year changes are not subject to the relief provided by the IRS Notice and would violate the safe harbor plan requirements under sections 401(k) and 401(m), unless the applicable regulatory conditions corresponding to each specified change are satisfied:

1. adoption of a short plan year or any change to the plan year;

2. adoption of a safe harbor plan status on or after the beginning of the plan year; and

3. reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status.

Prohibited Mid-Year Changes

In the guidance, the IRS listed the following four mid-year changes that safe harbor plans are prohibited from making unless they are specifically required by applicable law to be made mid-year (e.g., a change required by a change in statute or a court decision):

1. increases in the number of completed years of service that are required for an employee to have a nonforfeitable right to the employee's account balance attributable to safe harbor contributions under a qualified automatic contribution

arrangement (QACA);

2. reductions in or other narrowing of the number of a group of employees who are eligible to get safe harbor contributions (excluding certain changes for employees not already eligible to receive safe harbor contributions);

3. in type of safe harbor plan (for example, from a traditional safe harbor plan to a QACA safe harbor plan); and

4. a modification to the formula used to determine matching contributions if it increases the amount of matching contributions, or one that permits discretionary matching contributions (with a limited exception where the change is adopted at least 3 months prior to the end of the plan year, the updated safe harbor notice and election opportunity are provided, and if the change is made retroactively effective for the entire plan year).

Application to 403(b) Plans

The IRS Notice also provides that the guidance on mid-year changes to safe harbor plans and notices also applies on similar terms to Section 403(b) plans that apply the Section 401(m) safe harbor rules pursuant to Section 403(b)(12).

Effective Date

The IRS Notice is effective for mid-year changes made on or after January 29, 2016.

It revokes prior IRS guidance in Announcement 2007-59, which limited permissible mid-year changes to a safe harbor plan to certain hardship withdrawal changes and designated Roth contribution changes.

Comments Requested

The IRS Notice requests comments no later than April 28, 2016 on additional guidance that may be needed, in particular with respect to mid-year changes to safe harbor plans in cases in which a plan sponsor is involved in a merger or acquisition.

Proskauer's perspective

IRS Notice 2016-16 provides the concrete guidance that plan sponsors have long sought with respect to mid-year changes to safe harbor plans. For years there has been much uncertainty about whether the amendments listed in Announcement 2007-59 were the only amendments that may be adopted mid-year by a safe harbor plan without endangering the plan's safe harbor status.By removing the significant uncertainty that plan sponsors have faced with mid-year plan changes, plan sponsors no longer have to delay most changes to the following plan year.In addition, this guidance may encourage employers who have not adopted safe harbor plans or who eliminated safe harbor features during the financial downturn to reconsider that decision.

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[1] Rule 68 provides that a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding todetermine costs. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

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