Hodgson Russ LLP
ATTORNEYS

EMPLOYEE BENEFITS
DEVELOPMENTS

November 2009

RULINGS, OPINIONS, ETC.

2010 Benefit Limits Announced. The Internal Revenue Service and Social Security Administration have announced the cost-of-living adjusted dollar limits applicable to benefit plans for 2010. Because of the reduced rise of the cost of living, most limits remain unadjusted from 2009. A listing of key limits is set out below:

	2010 Limit
401(k)/403(b)/457 plan maximum elective deferral	$16,500
401(k)/403(b)/457 catch-up	$5,500
Defined contribution maximum annual addition	$49,000
Defined benefit maximum annual pension	$195,000
Qualified plans maximum compensation limit	$245,000
Highly compensated employee	$110,000
IRA limit	$5,000
IRA catch-up	$1,000
SIMPLE limit	$11,500
SIMPLE catch-up	$2,500
Social Security taxable wage base	$106,800

Regulations Issued on Good Faith Required Minimum Distributions for Governmental Plans. Under the Pension Protection Act of 2006, the Secretary of the Treasury was directed to issue regulations providing that governmental plans, *including governmental 403(b) plans*, comply with the minimum required distribution requirements by applying a responsible and good faith standard. The Secretary of Treasury has issued Final Regulations conforming the regulations to provide for this reasonable and good faith standard. (TD 9459)

Enforcement Rules Issued on Multiemployer Plan Funding. The Department of Labor, through the Employee Benefits Security Administration (EBSA), issued a proposed regulation dealing with the procedures for assessing civil penalties on the boards of trustees of multiemployer plans that have not complied with mandatory funding improvement rules and requirements for rehabilitation plans for underfunded trust funds. The rules are directed toward plans that are considered in either endangered or critical status under rules adopted in the Pension Protection Act of 2006. While these rules have become more controversial following the downturn in financial markets that occurred in 2008, all trustees of multiemployer plans should take notice of the potential civil penalties. A multiemployer plan is required to provide an actuarial certification if the plan is or will be in endangered or critical status because of underfunding and must also provide progress reports where the plan is undergoing funding improvement or rehabilitation. Notifications are required to be made to participants, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Department of Labor. If a plan is in endangered or critical status under its actuarial certification, it has 240 days to adopt a funding improvement plan or a rehabilitation plan. DOL Proposed Regulation on Civil Penalties Under ERISA Section 502(c)(8). Published in Federal Register of September 4, 2009.

Delivery of a Summary Prospectus Sufficient Under an ERISA § 404(c) Plan. In Field Assistance Bulletin 2009-3, the EBSA concluded that a plan fiduciary of a participant-directed individual account plan (e.g., a 401(k) plan) may use a mutual fund's summary prospectus to satisfy the plan administrator's prospectus delivery obligations under the ERISA § 404(c) regulations. In the case of an individual account plan that permits participants or beneficiaries to exercise control over the investment of assets in their accounts, ERISA § 404(c) provides that no person who is otherwise a fiduciary will be liable under ERISA for any loss, or by reason of any breach, that results from the participant's or beneficiary's exercise of control. The ERISA § 404(c) regulations require, among other things, that a participant or beneficiary be provided, or have the opportunity to obtain, sufficient information to make informed decisions with regard to investment alternatives available under the plan. In the case of an investment alternative subject to the registration requirements of the Securities Act of 1933 (e.g., a mutual fund), the ERISA § 404(c) regulations provide that a participant or beneficiary must be furnished by the identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), a copy of the most recent prospectus that was provided to the plan, either immediately before the participant's or beneficiary's initial investment in

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the investment alternative, or immediately following that investment. Although the Department of Labor (DOL) has not defined the term "prospectus" in the ERISA § 404(c) regulations, in DOL's view, the term "prospectus," wherever used in the regulation, includes a summary prospectus published under Rule 498 of the Securities Act of 1933. The summary prospectus is a short-form document, written in plain English in a clear and concise format, and its required contents provide a summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. Moreover, if a participant or beneficiary wishes additional information, the summary prospectus provides an Internet address that leads directly to the statutory prospectus as well as a toll-free (or collect) telephone number and e-mail address for obtaining, free of charge, by traditional mail or e-mail, the statutory prospectus and other information.

CASES

Court Finds School District 403(b) Plan Exempt from ERISA. Two teachers from the Long Beach School District alleged that the fiduciary provisions of the Employee Retirement Income Security Act of 1974 (ERISA) were violated in connection with a 403(b) plan sponsored by the school district. The plaintiffs alleged that there was a breach of fiduciary duty under ERISA because the New York State United Teachers, an organization representing the employees, reportedly paid "kick backs" to ING Life Insurance and Annuity Co. in connection with the program. The District Court for the Southern District of New York dismissed the action, finding that the 403(b) plan was exempt from ERISA. The court found that the plan was sponsored by the school district and was therefore a governmental plan not covered by ERISA. The court also rejected the plaintiffs' claim that NYSUT sponsored the plan finding that a 403(b) plan, in order to meet the requirements of Internal Revenue Code Section 403(b), must be sponsored by the employer, not the employee organization. (*Montoya v. ING Life Insurance and Annuity Co*., S.D.N.Y. 2009)

Court Orders Reinstatement of LTD Benefits Based on "Structural Conflict of Interest." The Ninth Circuit recently reversed a district court's decision to uphold the termination of a plan participant's long-term disability benefits. In reversing the lower court's decision, the circuit court held that the insurance company had a "structural conflict of interest" by serving as both the claims administrator and payer of benefits, and that conflict of interest "infiltrated" its decision to terminate the plan participant's benefits. Generally, courts give great deference to benefit determinations made by administrators. Recently, however, the Supreme Court in *Metropolitan Life Insurance Co. v. Glenn* ruled that where a claims administrator has a conflict of interest, that conflict of interest should be a factor that is considered when determining the amount of deference given to the administrator's benefit determination. In this Ninth Circuit decision, the court ruled that, given the case-specific facts and circumstances, the district court did not place enough importance to the administrator's conflict of interest. The circuit court noted the administrative record contained several signs of bias. For example, the court found that the administrator selectively relied on extrinsic evidence and doctor evaluations that favored a denial of benefits. The administrator did not subject the claimant to an in-person medical evaluation, but instead relied on a paper review of the medical records. The administrator also failed to address the Social Security Administration's contrary determination the plan participant was disabled. Considering all of the factors, the court concluded that the administrator's conflict of interest improperly motivated its decision to terminate benefits. This case serves as a reminder to claims administrators who also serve as payers' of benefits that, in addition to conducting a thorough review of a benefit claim, steps should be taken to ensure a neutral review process. (*Montour v. Hartford Life & Accident Insurance Company*, 9th Cir. 2009)

Former Spouse's COBRA Coverage Denied Despite Claim of "Pending Divorce" Notice to Plan. In a recent case, the former spouse of a group health plan participant was denied COBRA coverage because she failed to give the COBRA administrator notice of her divorce from the participant within 60 days of the divorce, instead providing notice some eight months following the divorce. This is an easy case for a court to decide if a plan's summary plan description and COBRA election notices clearly communicate the need to provide notice of the divorce, the procedures for doing so, and the consequences of failing to do so. What makes this case somewhat unusual is that the former spouse argued that even though she did not give formal notice to the plan within the 60-day window, the plan had actual notice of her "pending" divorce from the participant. In dismissing the former spouse's case, the court ruled that notice of a "pending divorce" is not notice of the qualifying event and, therefore, could not be sufficient notice as contemplated by COBRA. What is interesting about this case is that the published opinion does not address whether the summary plan description or COBRA election notices included an explanation of the plan's notice procedures. Under these circumstances, we wonder whether the case would have come out differently had there been actual verbal notice of the divorce within the 60-day period. Employers should review their group health plan summary plan descriptions and COBRA notices to be

sure qualified beneficiary notice procedures are accurately and conspicuously disclosed. (*Ludwig v. Carpenters Health & Welfare Fund of Philadelphia & Vicinity*, E.D. Pa., 2009)

Indemnification for Withdrawal Liability Upheld. The Federal Court of Appeals for the Third Circuit upheld a provision in a collective bargaining agreement whereby a union agreed to indemnify a contributing employer for potential withdrawal liability. A withdrawal or discontinuation of contributions to a defined benefit multiemployer plan carries with it the possibility that the contributing employer may be assessed its share of the plan's underfunded benefits. In this case, an employer negotiated a provision in its collective bargaining agreement with the union that the union would indemnify the employer if it withdrew from the plan and was assessed for withdrawal liability. After a sale of assets, the employer ceased its contributions to the plan and was assessed over $400,000 in withdrawal liability. When the employer demanded that the union make good on its indemnification, the union refused, and a lawsuit was commenced to enforce the indemnification. While the employer did not deny its primary obligation for the assessed liability, the union claimed that to enforce the indemnification would be against the public policy of ERISA. The district court agreed. The appellate decision reversed the district court and upheld the indemnification agreement. The court of appeals concluded that so long as the contributing employer retained the primary liability for withdrawal liability, there is no policy concern that precluded an agreement from the union to hold the employer harmless through indemnification. (*Pittsburgh Mack Sales & Service, Inc. v. International Union of Operating Engineers, Local Union No. 66*, 3rd Cir. 2009)

Practice of Paying for Releases of Claims Is Not an ERISA Plan. The U.S. Court of Appeals for the Second Circuit recently addressed the issue of when an employer's practice of offering payments to terminated employees in exchange for a release of claims may be considered a welfare benefit plan under ERISA. Affirming a lower court dismissal of a terminated employee's claim, the Second Circuit considered three factors in its determination that the employer's program was not an ERISA plan: (1) whether a reasonable employee would perceive an ongoing commitment to provide employee benefits; (2) whether the employer's undertaking or obligation requires managerial discretion in its administration; and (3) whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria. Although the employer in this case had an ongoing practice of offering payments to certain employees in return for release agreements, the court found no evidence suggesting that a reasonable employee would perceive an ongoing commitment to provide such payments. An employee manual included a template release agreement, for example, but stated clearly that separation agreements would "not normally be necessary." As for the other factors, the court upheld the employer's contention that the determination of eligibility for the payments was based on a simple, non-discretionary policy whereby employees who were involuntarily terminated and eligible for benefits under an ERISA severance plan maintained by the employer were offered release agreements. Moreover, in most cases, the amount of the payment was based on "simple arithmetic calculations" determined to be insufficient to constitute the type of managerial discretion required for an ERISA plan. Overall, the practice was found to lack the type of complex administrative scheme that ERISA was designed to regulate. (*Kawski v. Johnson & Johnson*, 2d Cir. 2009)

Lilly Ledbetter Law May Apply to Claims of Discrimination in Benefit Accruals. Applying the recently enacted Lilly Ledbetter Fair Pay Act of 2009 (the Ledbetter Act), the U.S. District Court for the District of Colorado reinstated a previously dismissed age discrimination claim against a pension plan. The case arose out of a company's conversion of its defined benefit pension plan, which had employed a benefit formula based on final average pay, to a cash balance plan, which employs a cash balance formula to determine benefits. Plaintiffs had contended that the "wear-away" transition design used to determine benefit accruals for older employees under the conversion process violates the Age Discrimination in Employment Act (ADEA). The district court originally dismissed the claim, based on the U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) and its conclusion that none of the plaintiffs in the original case had filed a timely charge of discrimination within the required 300 days of the alleged discriminatory act. Under *Ledbetter*, the time period for filing a discrimination charge was held to commence running from the date the employer adopts a discriminatory compensation decision or practice. Overturning the *Ledbetter* decision, the Ledbetter Act modifies the time limit for filing a discrimination charge, providing that the time period is triggered each time compensation is paid under a discriminatory compensation decision or practice. Addressing the defendants' contention that the Ledbetter Act is not intended to apply to pensions, the court drew a distinction between a claim regarding payment of retirement benefits under a pension plan and a claim regarding the rate of benefit accruals. The court noted that the plaintiff's charge of discrimination was filed when he was an active employee and did not concern payment of retirement benefits. Concluding that the Ledbetter Act may apply in these circumstances, the

court reversed its previous order dismissing the ADEA claim. (*Tomlinson v. El Paso Corp.*, D. Colo. 2009)

Reduction in Monthly Benefits Is a Permissible Method of Recovering Excess Pension Plan Payments. An employer miscalculated, and overpaid by more than $1,000 per month, a former executive's monthly benefit under a combination of the employer's qualified pension plan and top-hat retirement plan. This error went on for a period of several months. To rectify the problem, the employer reduced the former executive's pension benefit for the months of December 2007 and January 2008 by the amount of the overpayment. The former executive objected and later sued, claiming that the measures taken to recover the overpayment violated ERISA's antialienation rules. The federal trial court disagreed and ruled that the former executive's claims should be dismissed. In making the ruling, the court noted that many courts have found recoupment of overpayments by a pension plan is not covered by ERISA's antialientation provision where the plaintiff does not demonstrate the recoupment would be inequitable due to economic hardship. Here, the former executive did not offer any facts suggesting that the recoupment created a hardship. (*Palmer v. Johnson & Johnson*, D.N.J. 2009)

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