COBRA NEWS

COBRA Subsidy Extended. On December 21st, the President signed a law that extends the COBRA subsidy provisions of the American Recovery and Reinvestment Act of 2009. The legislation provides that eligibility for the subsidy, currently set to expire on December 31, 2009, will be extended to February 28, 2010. The legislation also extends the maximum subsidy period from 9 to 15 months. Assistance eligible individuals whose maximum subsidized period already expired will be permitted to reinstate their coverage by paying the retroactive subsidized premiums or receive refunds (or credits) for overpaid premiums. Plan administrators will be required to provide notices regarding these changes to individuals who were assistance eligible individuals, or were terminated from employment on or after October 31, 2009. The Employee Benefits team at Hodgson Russ will issue further guidance to keep you up to date on this ever-changing issue.

RULINGS, OPINIONS, ETC.

IRS Releases Enhanced Retirement Plans Navigator. The IRS announced the release of its enhanced Retirement Plans Navigator a "Web guide for choosing a retirement plan, maintaining it, and correcting plan errors." The tool is intended to provide businesses and advisors with comparative information about several different types of plans, including employer-arranged IRAs, simplified employee pensions, 401(k) plans (including designs that use "safe harbor" contribution provisions), profit sharing, tax sheltered annuities (403(b) plans), Section 457 plans, and defined benefit pension plans. The tool is interactive and allows a user to compare two or more plan designs. In addition to the plan comparison tool, the navigator includes useful checklists for plan maintenance covering administrative rules, ADP testing for 401(k) plans, guidance on loans, and hardship withdrawals and other operational issues. There is a comprehensive *IRS 401(k) Fix-It Guide* (49 pages) that contains a number of self-audit tips, guidance on how to both find and avoid problems, and details on corrective actions that can be taken. Similar checklists and fix-it guides are included for each of the various type-s of plans covered. Another part of the navigator provides links to additional government Web sites that include compilations of retirement plan information, publications, videos, and other presentations. There are links to a set of IRS publications and the Web sites for the Department of Labor Employee Benefits Security Administration (EBSA), the Pension Benefit Guaranty Corporation, and the Social Security Administration. The navigator represents a considerable effort by the IRS to compile a great deal of retirement plan information and guidance in a comprehensive and understandable guide. It is worth reviewing and keeping in mind as a resource for retirement plan issues. (*IRS News Release IR-2009-91*; online at www.retirementplans.irs.gov)

IRA Payments to Trust Established for Grandson Do Not Result in Prohibited Transactions. A grandfather (and owner of an IRA) established a trust for the sole benefit of his grandson. The grandfather named himself the initial trustee of the trust; his son was named the successor trustee. The trust was designated as the beneficiary of the grandfather's IRA upon his death. The trust was established simply to receive assets distributed to it from the IRA, including minimum required distributions during the grandfather's lifetime. The son, as successor trustee, was granted a number of powers under the trust, including the power to determine the required minimum distributions from the IRA each year. The son's powers also included the power to request distributions in excess of the minimum required distributions. From the IRA assets distributed to the trust, the trust could pay a commission to the son for serving as successor trustee. Because the amount of the commission was based on the value of the trust assets, the son could manipulate his commission income with IRA distributions.

Based on these facts, the DOL was asked whether IRA distributions to the trust and the related commission payment to the son would constitute prohibited transactions under ERISA. In reaching its conclusions, the DOL determined that the grandfather and son would each be a fiduciary and disqualified person with respect to the IRA, and that the trust would be a disqualified person with respect to the IRA.

The DOL concluded that neither the trustee's decision to take a distribution from the IRA in accordance with the terms of the IRA nor the trust's receipt of the distribution as the IRA beneficiary is a prohibited transaction. It is the DOL's view that ordinary benefit distributions from the IRA are not prohibited

Attorney Advertising © 2009 Hodgson Russ LLP

transactions to the extent the distributions are computed and paid on a basis consistent with the terms of the IRA.

The DOL further concluded that the payment of a commission from the trust is not a prohibited transaction. The son, as successor trustee, would not be acting as a fiduciary of the IRA in deciding whether and how much to distribute in benefits from the IRA into the trust, provided the IRA distributions are computed and paid on a basis that is permissible under the Internal Revenue Code (IRC) and consistent with the terms of the IRA. Thus, those decisions, even though they influence the amount the trustee received as a commission, would not be prohibited transactions. (*DOL Advisory Opinion 2009-02A*)

Brokerage Security Arrangement Creates IRA-Prohibited Transaction. The DOL has issued an advisory opinion that a proposed security agreement in non-IRA assets would be a prohibited transaction in a related IRA. The proposed language is an agreement to be executed by an IRA holder in connection with setting up the IRA with a broker. In this circumstance, the individual IRA holder has other non-IRA assets with the same brokerage firm. The agreement purports to grant to the brokerage firm a security interest in the non-IRA assets to secure any indebtedness the holder might incur through the IRA. The DOL concluded that the security agreement would amount to an extension of credit from the IRA holder to the IRA as well as a use of IRA assets by a fiduciary (the IRA holder) in his own interest or for his own account outside the IRA. By agreeing to the security arrangement in connection with establishing the IRA, these characteristics would constitute a prohibited transaction under the IRC provisions covering IRAs. The DOL pointed out that a prohibited transaction would also occur if the IRA holder granted the broker a security agreement in the IRA assets directly. (*DOL Advisory Opinion 2009-03A*)

CASES

NFL's Vick Ordered to Restore $400,000 to Pension Plan. Among the lessons learned from the various transgressions of NFL football player Michael Vick is that celebrity athletes are not exempt from the plan rules and fiduciary standards of ERISA. Vick was sued by the DOL. In the lawsuit, the DOL alleged that Vick and others violated ERISA by making a series of prohibited transfers from a pension plan sponsored by Vick's company, MV7 LLC. Vick allegedly violated his duties as a plan trustee by making a series of prohibited transfers from the plan for his own benefit. The complaint alleged that the plan assets were partially used to help pay the criminal restitution imposed on Vick after his conviction for unlawful dog fighting and his attorney fees in his pending bankruptcy cases.

In September, the DOL obtained a consent judgment requiring Vick and MV7 LLC to repay at least $416,461.10 in restitution to a pension plan sponsored by the company and ordering Vick to forfeit any rights to benefits from the plan. The defendants also agreed to pay a civil monetary penalty imposed by the DOL. Additionally, the judgment permanently bars Vick and his company from serving in a fiduciary capacity for any plan governed by ERISA and requires them to pay all expenses associated with termination of the plan. (Solis v. Vick, *E.D. Va. 2009*)

IRA Not Eligible S Corporation Shareholder. Taproot Administrative Services, Inc. (Taproot) elected S corporation status in 2003. In 2003, the sole shareholder of Taproot was a custodial Roth IRA account for the benefit of Paul DiMundo. The IRS took the position that Taproot did not qualify as an S corporation because the Roth IRA account was an ineligible shareholder. In 2003, there was no regulation specifically governing whether IRAs and Roth IRAs were or were not eligible S corporation shareholders. (On August 14, 2008, final regulations were issued that clearly indicate that IRAs and Roth IRAs are not eligible S corporation shareholders except for certain grandfathered bank S corporations.) A divided tax court issued partial summary judgment in favor of the IRS determination. The court cited Rev. Rul. 92-73, in which the IRS held that traditional IRAs are not eligible S corporation shareholders because the beneficiary is not taxed currently on the IRA's share of the S corporation income. The court also found that there was no indication of congressional intent to allow either traditional or Roth IRAs as eligible S corporation shareholders and that an IRA formed as a custodial account, as opposed to a trust, did not fall within the permitted custodial arrangements for permitted S corporation shareholders. (*Taproot Administrative Services, Inc.*, U.S. Tax Ct. 2009)

Employee Benefits Practice Group

Peter K. Bradley pbradley@hodgsonruss.com

Anita Costello Greer anita_greer@hodgsonruss.com

Michael J. Flanagan mflanagan@hodgsonruss.com

Richard W. Kaiser rkaiser@hodgsonruss.com

Arthur A. Marrapese, III Art_Marrapese@hodgsonruss.com

Daniel R. Sharpe dsharpe@hodgsonruss.com

The Guaranty Building, 140 Pearl Street, Suite 100
Buffalo, NY 14202 Tel: 716.856.4000 Fax: 716.849.0349

Employee Benefits Developments is a monthly publication of Hodgson Russ LLP. Its contents are intended for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Information contained in *Employee Benefits Developments* may be inappropriate to your particular facts or situation. Please consult an attorney for specific advice applicable to your situation. Hodgson Russ is not responsible for inadvertent errors in this publication.

The Briefing is a periodic publication of Hodgson Russ LLP. Its contents are intended for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Information contained in The Briefing may be inappropriate to your particular facts or situation. Please consult an attorney for specific advice applicable to your situation. Hodgson Russ is not responsible for inadvertent errors in this publication.