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The Cicotte Law Firm, LLC

ERISA and Employee Benefits + Corporate

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Inside

IRS Final Rules on Suspending Contributions to 401(k) and other CODA Plans	1
Supreme Court Agrees to Hear Obamacare Contraceptive Case	2
Tenth Circuit Denies Attorneys Fees in ERISA Claim, Points to Lack of Bad Faith	2
If the Supreme Court Listens to the Department of Labor, Will "ESOP" Become a Four-Letter Word?	3
Mental Health Parity: Final Rule	4
According to the Ninth Circuit, Withdrawal Liability Dischargeable in Bankruptcy	5
New Year, New Rules	6
Firm Information	7

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In This Issue

IRS Final Rules on Suspending Contributions to 401(k) and other CODA Plans: The Internal Revenue Service recently issued final regulations to implement means whereby employers can suspend safe harbor contributions.

Supreme Court Agrees to Hear Obamacare Contraceptive Case: A split interpretation between two federal appeals courts regarding whether a corporation may claim religious protection in the same manner as a person will be decided later this year by the Supreme Court.

Tenth Circuit Denies Attorneys Fees in ERISA Claim, Points to Lack of Bad Faith: The Tenth Circuit recently found that an ERISA claimant failed to satisfy a well established five-point test to determine whether a court can award attorney's fees. The court focused heavily on the requirement that the opposing party must have acted in bad faith.

If the Supreme Court Listens to the Department of Labor, Will "ESOP" Become a Four-Letter Word?: ESOP fiduciaries should be aware that recent case law and an upcoming decision by the Supreme Court later this year may potentially require fiduciaries to conduct a review of ESOP investments in the same manner as investments in a non-ESOP plan.

Mental Health Parity - Final Rule: The U.S. Department of Labor recently released a final rule regarding the Mental Health Parity and Addiction Equity Act which makes several modifications to prior guidance, including new examples to aid employers in complying with the Act.

According to the Ninth Circuit, Withdrawal Liability Dischargeable in Bankruptcy: The Ninth Circuit held that barring a unique agreement to the contrary, liability to a plan does not generate a fiduciary duty to a plan. Thus, a party without a fiduciary duty may discharge its liability in bankruptcy.

New Year, New Rules: Several changes go into effect this year, including updates to contribution and benefit limits.

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IRS Final Rules on Suspending Contributions to 401(k) and other CODA Plans

On November 15, the Internal Revenue Service issued final rules relating to employer contributions to 401(k) and other plans, detailing the requirements for suspending such contributions in certain situations.

As a brief overview of the requirements on Cash or Deferred Arrangements (CODAs), the IRS allows employees to contribute a certain percent of their income, before tax, to deferred plans, often referred to as 401(k) plans. Employers can contribute a certain percentage to the same plan for the employee, but the IRS regulates the amount contributed to ensure no discrimination occurs between highly-paid and non-highly paid employees. In order to maintain preferential tax treatment of both the employees' and the employer's contributions, the employer must ensure it provides contributions in a non-discriminatory manner, known as the actual deferral percentage (ADP). As an alternative, employers can use one of several safe harbor plans for providing matching or nonelective contributions throughout a plan year.

In some instances, employers find it difficult to maintain safe harbor contributions in difficult economic times. The final rule issued addresses and imple-

-continued on page 5

Supreme Court Agrees to Hear Obamacare Contraceptive Case

Some opponents of the Affordable Care Act point to provisions of the Act that require employers to offer contraceptive care to employees as an unconstitutional restraint on the business owners' free exercise of religion. The Christian owners of retail craft store Hobby Lobby, along with the Mennonite owners of Conestoga Wood, brought this issue to federal court, claiming that providing certain contraceptives to employees violates their religious beliefs.

Hobby Lobby's argument against providing contraceptives only extends to forms of birth control that it claims terminate a pregnancy, such as the "Plan B" and "Ella" pills, alleging that these pills constitute abortion, and not ordinary birth control. On appeal, the Tenth Circuit Court of Appeals decided that a business entity could claim religious protection under the Religious Freedom Restoration Act. The Tenth Circuit overruled the district court's original ruling that the Act could not protect business entities, and noted that corporate entities have the right to free exercise of religion as legal "persons," even if operating as a for-profit company. The 10th Circuit relied upon Congress' generic definition of "person," which includes corporations. This decision prompted the Department of Health and Human Services to request review of Hobby Lobby's case by the Supreme Court.

The appeal brought by Conestoga Wood also presents a unique issue, as Conestoga brought a suit against the Department of Health and Human Services, claiming protection under both the Religious Freedom Restoration Act and the First Amendment's free exercise of religion clause. In Conestoga's case, the Third Circuit Court of Appeals ruled in favor of the Department, stating that a business entity could not claim religious protection in the same manner as a "person" under the First Amendment and the Religious Freedom Restoration Act.

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This split interpretation between the 3rd and 10th Circuits likely contributed to the Supreme Court's decision to review both cases. The Supreme Court Blog notes that it has never ruled on the religious beliefs of corporations, but that it will consider the issue in the Hobby Lobby and Conestoga cases. The Court has not set a date for the case, but will likely hear oral arguments in March. Business owners should note the Court's decision might affect their implementation of the Affordable Care Act and the employer mandate.

"On appeal, the Tenth Circuit Court of Appeals decided that a business entity could claim religious protection under the Religious Freedom Restoration Act."

Tenth Circuit Denies Attorneys Fees in ERISA Claim, Points to Lack of Bad Faith

Following Luke Lightfoot's successful claim against Principal Insurance Company regarding a wrongful denial of benefits under Lightfoot's health care plan, Lightfoot moved to recoup all costs and attorney's fees associated with his claim. To his surprise, the Federal District Court for the Western District of Oklahoma denied his claim.

Lightfoot took his case to the Tenth Circuit Court of Appeals, claiming that the District Court "abused its discretion" by denying his claim for costs and fees. The Tenth Circuit first pointed to the well-established, five-point test on whether a court can award attorney's fees. Under the test, an ERISA claimant must show: 1) some degree of bad faith by the opposing party; 2) the opposing party's ability to pay an award of attorney's fees; 3) whether an award of costs and fees would deter others from acting in a similar manner; 4) whether the party requesting fees sought them in an attempt to benefit all participants under a plan, or to resolve a question of law; and 5) the merits of each party's position.

While the court noted that under the second and fifth factor, Principal Insurance no doubt had the ability to pay an award and that Lightfoot had succeeded in his original claim, the other factors did not weigh in Lightfoot's favor.

-continued on page 3

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If the Supreme Court Listens to the Department of Labor, Will "ESOP" Become a Four-Letter Word?

An Employee Stock Ownership Plan (ESOP) provides the opportunity for employees to own the company they work for, and for employers to promote workplace pride and efficiency. Additionally, an ESOP can effectively reduce a business' tax liability if the plan owns a majority of the company-related stock and securities. ESOPs generally operate by placing employer and employee contributions into a fund that purchases company-issued securities, and tracks the growth of those funds as the securities grow in value. ERISA governs most ESOP plans, requiring the company to appoint a fiduciary responsible for managing the plan in participants' best interests.

Recently, the Sixth Circuit Court of Appeals decided Dudenhoefer v. Fifth Third Bancorp, wherein Dudenhoefer and other employees of the Fifth Third Bancorp alleged that a drop in the company's stock price by 74% during the sub-prime mortgage crisis led to a breach by the fiduciary of a failure to invest "prudently," and a failure to protect beneficiary assets when the company stock began to fall. In the past, Sixth Circuit courts (federal courts in Michigan, Ohio, Kentucky, and Tennessee) have relied on a presumption that favors ESOP fiduciaries called the Kuper presumption. Under the Kuper presumption, fiduciaries of ESOPs are presumed to have acted reasonably, even if the fiduciary did not diversify investments, and focused contributions on company-related securities. This presumption exists because companies implement ESOPs with the clear intent to invest employee contributions into company securities, and investments in other securities are secondary. This does not grant plan fiduciaries absolute immunity, rather, it requires plaintiffs to overcome this presumption at the pleading stage.

Rather than rule that the Kuper presumption applied at the start of a the lawsuit, the Sixth Circuit ruled that the presumption only takes effect after a court has had the chance to create a "fully developed evidentiary record," at which point the plaintiff must show a fiduciary did not act prudently. This break from precedent places the same requirement on the plaintiff as if the presumption never applied, and puts ESOP fiduciaries in a difficult situation. The Department of Labor has encouraged the Supreme Court to grant review of the case, and to rule that investments in an ESOP are subject to prudential review in the same manner as investments in a non-ESOP plan.

Should the Supreme Court side with the Department of Labor and the Sixth Circuit, ESOP employers must review plans to ensure the proper safety net exists should a price drop occur.

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"[A]n ESOP can effectively reduce a business' tax liability if the plan owns a majority of the company-related stock and securities."

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Tenth Circuit Denies Attorneys Fees in ERISA Claim

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No evidence showed that Principal Insurance acted in bad faith, or that other plan administrators would view the fees as a deterrent to denying claims in a similar fashion. Additionally, Lightfoot had not sought to bring the claim to benefit all participants of the plan, or settle an issue of ERISA law, but merely to rectify the denial of his own claim.

Even though Lightfoot had three factors weighing against him in his claim, the Tenth Circuit appears to have placed the greatest weight on the first factor, attributing the denial of the claim to a "wrong…decision," rather than an "intentional or reprehensible" act of bad faith.

Plan administrators should understand that the Tenth Circuit's decision illustrates an important principle in claims administration. Even though an appeal could overturn the decision to provide benefits to a participant, as long as insurers and administrators acted in good faith in handling the claim, the plan is less likely to face a penalty for costs or legal fees associated with the denial after this case, particularly in the Tenth Circuit.

If the Supreme Court Listens to the Department of Labor, Will "ESOP" Become a Four-Letter Word?

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For example, an ESOP that owns 100% of company stock will have to consider the effect on the plan any time a business decision or change to the business structure affects its stock price. Fewer employers would view an ESOP as a viable investment option as a result of the higher risks and fewer statutory and precedential protections for fiduciaries. Most of all, the requirement to sell off company securities at the first sign of financial difficulties could cause additional stock price drops and additional financial difficulties, exponentially decreasing the stock price and eliminating an otherwise viable corporation's chance of recovery.

ESOP fiduciaries should maintain awareness of the Supreme Court's treatment of the case, and how to respond if the Court rules in line with the Department of Labor's guidelines.

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Mental Health Parity: Final Rule

The Department of Labor released an interim final rule on the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act in 2010, and issued a final rule on November 13, 2013. The final rule makes several modifications to the interim rule, which clarifies the rule for the public and implements constructive comments received by the Department.

The Department initially passed the Act in 2008, which required group health plans to provide participants with similar mental health benefits as were available for medical and surgical benefits. This applied to co-payments, deductibles, and visit limits, for employers with more than 50 employees. Additionally, the Act prevented any restrictions on mental health services not in place on ordinary health and surgery services, including annual limits or other financial requirements.

The changes implemented in the final rule include changes to the provision of care from "preferred" providers, noting that a plan can differentiate benefits based upon reasonable factors, as long as the limitations on non-preferred mental health providers are no more restrictive than limitations on non-preferred healthcare providers.

Most notably, the final rule implements an increased cost exemption, allowing plans to claim an exemption from the application of the Act in the case that its application caused a plan's costs to increase by more than one or two percent, depending on the plan year. The final regulations provide a precise formula for plans to determine the percent increase in mental health spending, and clarify that plans can include costs incurred from both claims and reasonable administrative costs related to those claims.

The final rules also added new examples to aid employers implementing mental health services, and provided details regarding the specific elements required in notices to plan participants. The final regulations also remove the mention of allowable yearly limitations, now essentially eliminated under the Affordable Care Act. Employers should also keep in mind the need to implement the notice requirements of the Mental Health Parity and Addiction Equity Act in conjunction with the notice and security requirements of the Health Insurance Portability and Accountability Act (HIPAA), and other healthcare related laws.

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IRS Final Rules on Suspending Contributions to 401(k) Plans

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ments the means whereby employers can suspend safe harbor, nonelective contributions. Originally, the IRS required employers to show they suffered a "substantial hardship," first by determining the health of their respective industry, then showing the effect of suspension on a plan and its participants. In the final rule, the IRS simplifies this process and requires an employer to show only that it is "operating at an economic loss."

The final rule also changes the original proposed rule to allow employers to suspend matching contributions during a plan year, as long as the employer provides notice before the plan year begins of the possibility of a suspension. Plans must then notify participants at least 30 days before the actual suspension occurs during the year. In order to implement this form of contribution suspension, employers must also amend the plan documents to allow for such suspensions. Plans are not required to show they are operating at an economic loss before suspending contributions under this method.

In the interest of equity between the suspension of matching and nonelective contributions, the rule also modified mid-year amendments on matching contributions, allowing such contributions to be suspended when an employer operates at an economic loss, or by notifying participants at the start of the plan year and 30 days before the actual suspension. Since this change to qualified matching contributions comes anew in the final rule, it only applies to plans beginning after January 1, 2015. Otherwise, the rule for nonelective contributions applies to amendments adopted by plans after May 18, 2009.

According to the Ninth Circuit, Withdrawal Liability Dischargeable in Bankruptcy

Following several years of providing contributions to a multi-employer pension fund, employer Michael Gordon Moxley ceased providing contributions, but continued to withdraw benefits. When the Pension Plan's liabilities exceeded its assets, the Fund sought to recoup its losses and claimed Moxley owed $172,000 in unfunded vested liability benefits. Moxley filed for bankruptcy protection when the Fund sought to recover the money, leading the bankruptcy court, the district court, and the Ninth Circuit to agree that Moxley could discharge the withdrawal liability in bankruptcy.

The Carpenters' Pension Trust Fund claim against Moxley relied upon finding Moxley acted as a fiduciary under ERISA. In order to do so, the Fund claimed that the money owed to the Fund by Moxley constituted "fund assets," and that Moxley's control of those assets made him a fiduciary. Once a fiduciary, the Fund could claim that Moxley's failure to relinquish those assets violated the fiduciary duty.

The Fund first sought to enforce the withdrawal liability against Moxley in district court, which led to a dispute in bankruptcy court where the Fund argued its position that Moxley was an ERISA fiduciary and not entitled to bankruptcy protection. The court refuted the Fund's case, citing to Ninth Circuit precedent that supported Moxley's position, noting contribution liability did not automatically turn a contributing employer into an ERISA fiduciary. Unperturbed, the Fund appealed to the federal district court, now claiming that the bargaining agreement between the parties defined contributions as plan assets. The district court again cited to established precedent in the Ninth Circuit and the Bankruptcy Code that only if an employer became a fiduciary through an act separate from the alleged wrongdoing could the employer be liable. Under the facts of the case, the district court held that because the Fund claimed that the $172,000 withdrawal liability both created Moxley's fiduciary duty and caused Moxley to violate that duty, the single event could not apply to Moxley's discredit and the liability could be discharged via bankruptcy.

In one last attempt, the Fund appealed to the Ninth Circuit, which sided with the bankruptcy court, the district court, and the precedential decisions those courts relied upon.

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According to the Ninth Circuit, Withdrawal Liability Dischargeable in Bankruptcy

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The court cited to the Bankruptcy Code's requirement that a fiduciary duty must exist before "the bad act of nonpayment, rather than a result of it." While crediting the Fund for asserting a "creative argument" that had some support from fringe cases, the agreement between Moxley and the Fund did not rise to the level of those cases. Overall, the court cited to precedent and held that "the obligations of the fiduciary…must preexist the alleged wrongdoing," and that barring such fiduciary duty, Moxley could discharge his withdrawal liability in bankruptcy.

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While the Ninth Circuit's decision did not overrule prior cases or overturn any longstanding or unpopular notions, it did reaffirm an important principle and provide a reminder to employers and pension funds alike that barring a unique agreement to the contrary, liability to a plan does not generate fiduciary duty to a plan, and that a party without a fiduciary duty can discharge its liability in bankruptcy.

New Year, New Rules

With a new year come new rules, requirements, and regulations on employers and business owners. Apart from the highly publicized "individual mandate" that went into effect on January 1, employers should note several other changes in the early part of 2014.

Expiration

Several laws and extensions to laws expire with the New Year, most notably the Health Coverage Tax Credit, originally created in 2002 as the Health Insurance Tax Credit to provide health coverage and COBRA eligibility expansions. It expired January 1.

The Affordable Care Act

2014 marks a big year for the ACA, as indicated by the following selection of the biggest legal changes which all began on January 1.

Coverage from policies purchased through Health Insurance Marketplaces begins.

Pre-existing conditions no longer prevent the acquisition of immediately applicable health insurance.

Health benefits no longer capped by a yearly limit or maximum.

Premium credits apply to reduce the cost of health insurance purchased through the Health Insurance Marketplace.

The Small Business Health Care Tax Credit begins, for small employers providing at least 50% of full-time employees' premium costs.

Minimum Wage

Several states saw an increase in the minimum wage on January 1. On the West Coast, Washington's minimum wage was increased from $9.19 to $9.32, and Oregon's increased from $8.95 to $9.10. California has also passed a minimum wage increase from $8 to $9, but this increase will not take effect until July 1, 2014.

Most notably, the minimum wage in the city of SeaTac, Washington, increased to $15. The Federal minimum wage remains at $7.25 per hour.

Determination Letters

Employers with individually designed plans in Cycle C should note the submission period for determination letters ends on January 31, 2014. Employers with an EIN that has a last digit of 3 or 8 fall into Cycle C. This does not apply to employers who use a prototype or volume submitter plan document. -continued on page 7

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New Year, New Rules, -continued from page 6

Contribution Limits

Employers should keep in mind the following contribution limits, as they relate to retirement funds, high compensation definitions, and health benefits, which went into effect on January 1.

2014 Retirement, Compensation & Health Benefit Limits

Retirement Limits	Under Age 50	50 +
Maximum salary deferral to a 401(k), 403(b) or 457 plan	17,500	23,000
Maximum annual additions to a defined contribution plan	52,000	57,500
Maximum annual benefit in a defined benefit plan	210,000	210,000
SIMPLE account maximum deferral	12,000	14,500
Maximum IRA Contribution (Deductible or Roth)	5,500	6,500
ESOP distribution periods account balances up to:	5 years 1,050,000	6-10 years +210,000/year
Compensation Limits	**2014**	
Social Security Wage Base	117,000	
Highly compensated employee	115,000	
Maximum eligible compensation	260,000	
SEP minimum compensation	550	
Key employee	Officer 170,000	1% Owner 150,000
Health Benefit Limits	**2014**	
HSA - Individual	3,300 (4,300 for age 55 +)	
HSA - Family	6,550 (7,550 for age 55 +)	
High Deductible Health Plan	Individual	Family
• minimum deductible	1,250	2,500
• maximum out-of-pocket	6,350	12,700
PPACA minimum annual limit on essential health benefits for 2014	No Limit	

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About the Cicotte Law Firm

The Cicotte Law Firm is located in Kennewick, WA, and represents employers in several states in all aspects of benefits law, handling diverse employment, labor, tax and corporate matters.

The Firm's practice covers all areas relating to employee benefits including consumer-directed health plans (HRAs, HSAs, & FSAs), assistance with health reform (ACA) and all other health plan issues, advising on fiduciary responsibilities, maintaining legal compliance with non-discrimination requirements, analyzing unusual benefit claims, representing employers in labor relations matters where pension or welfare benefits are involved, advising on the federal tax implications of complex benefits-related issues, and examining the ERISA status of compensatory arrangements.

Our corporate practice involves formation, corporate compliance, negotiations, mergers and acquisitions, SEC compliance, and HR liaison activities.

The Firm also assists clients with licensing agreements, non-compete agreements, and nondisclosure agreements.

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