Employment Law Update November 2013

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To Mediate or Litigate Employment Disputes?

"*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."* - Abraham Lincoln

"I was never ruined but twice; once when I lost a lawsuit and once when I won one."
- Voltaire

What is mediation? "Mediation" is a dispute resolution process involving a neutral third party who tries to help disputing parties reach a mutually agreeable solution without judging a case's merits. A mediator's job is to analyze the issues and attempt to broker a settlement between the parties. The process is non-binding, meaning parties are not forced to come to a resolution simply because they agree to mediate a dispute. Mediation is not "arbitration." Arbitration is another form of dispute resolution that involves an individual or group that hears the parties' evidence and then renders judgment. Arbitration is essentially "litigation-lite." Most people believe that mediation is only available once litigation begins. Parties, however, are free to mediate at any time and, in many cases, it may be beneficial to engage in mediation prior to the escalation of rhetoric and the filing of a lawsuit.

Why Mediate? In 2011, approximately one percent of civil cases in the federal court system went to trial. Some cases were dismissed or disposed of at the motion to dismiss or summary judgment stage, but a significant number were settled before trial. Many courts now require that parties to employment litigation mediate their cases. Since 99 out of 100 times your case will settle at some point, it makes sense to consider pro-actively moving toward settlement early in a dispute's life, prior to spending significant money in litigation costs.

Mediation's Benefits. Mediation features many benefits that make it an attractive alternative to litigation:

1. In litigation, the decision-maker is a third party; however, in mediation, the parties retain decision-making authority. As a result, mediation empowers an employer to determine when it wishes to resolve a matter and on what terms;

2. In litigation, a resolution is imposed; however, in mediation, a resolution is negotiated. This enables the parties to be

creative in their approach, using resolution strategies that might not be available through litigation;

3. Mediation is private and confidential, unless the employer is a public entity. Nothing used during mediation may be used during subsequent litigation. Litigation, however, is all part of the public record;

4. Mediation involves minimal discovery and procedures are relaxed; litigation involves extensive, invasive, and time consuming discovery procedures; and

5. The cost factor. Mediating a case prior to the commencement of litigation allows the parties to present their case before any money is spent on litigation. The cost of mediating a case is minimal compared to the costs incurred through the life of a lawsuit, and, even if mediation fails, the parties usually split the mediator's fee.

Ultimately, mediation is an option that employers should consider early on when a dispute with an employee arises.

Rick Hackman is an experienced labor and employment litigator and American Arbitration Association-trained mediator. If you have any questions about alternative dispute resolution processes or are looking for a mediator, please contact Rick at (717) 399-1501 or rhackman@barley.com

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Valid Same-Sex Marriages Recognized for Federal Tax and Employee Benefits Purposes Regardless of Domiciliary S

In Revenue Ruling 2013-17, issued on August 29, 2013, the IRS ruled that same-sex couples who are legally married in a jurisdiction that authorizes such marriages will be treated as married for all federal tax purposes, without regard to the law concerning the legality of same-sex marriage in the couple's state of domicile. Soon thereafter, in Technical Release 2013-04, the U.S. Department of Labor ruled similarly that for purposes of ERISA, the federal law that broadly regulates employee benefit plans, the terms "spouse" and "married" mean individuals who are lawfully married under the laws of the jurisdiction where they entered into the marriage, without regard to the laws of the state where the individuals are domiciled. Pennsylvania law prohibits same-sex marriage and also treats as void a same-sex marriage validly entered into elsewhere. Nevertheless, as a consequence of this Revenue Ruling and DOL Technical Release, a same-sex couple domiciled in Pennsylvania who were validly married elsewhere, whether in another state or a foreign country, are married for federal tax and ERISA employee benefit plan purposes.

The Revenue Ruling applies to all federal income and estate and gift tax provisions if marital status is a factor, including filing status, claiming exemptions, taking the standard deduction, claiming earned income and child tax credits, contributing to IRAs, and the tax treatment of employee benefits. The IRS began applying this Revenue Ruling on September 16, 2013. Individuals' tax liability for past, but still "open," tax years, however, may be reduced because the tax payer can now claim married status and file a refund claim for income, FICA, or estate and gift taxes overpaid in a prior open year. Employers with open tax years may also have an opportunity to recoup employer FICA taxes paid on employee compensation imputed to the employee for same-sex partner benefits, if that imputed compensation is now excludable because of the partner's spousal status. Generally, a past tax year remains "open" for three years after the return for the year is filed or for two years after the tax for the year is paid, whichever date is later.

The Revenue Ruling and the Technical Release have obvious significance to individuals who are parties to same-sex marriages, but will also have a major and relatively immediate impact on employers and their employee benefit plans.

For example, beginning no later than September 16, 2013, an employer's tax qualified retirement plan must begin to treat an employee's same-sex spouse as the employee's "spouse" for spousal joint and survivor annuity purposes if the plan is a pension plan, and as a surviving spouse for death benefit purposes if the plan is a defined contribution plan. Also, any health care benefits provided to an employee's same-sex spouse are now excludable from the employee's income, just like opposite-sex spouses. Further, employee contributions toward benefit costs for a same-sex spouse will be treated as pre-tax contributions under cafeteria plans, just like opposite-sex spouses.

These examples are not exhaustive. In the Revenue Ruling and in a series of accompanying Q&As, the IRS recognized this ruling's significance to tax-qualified retirement plans and other tax-favored benefits. The IRS has committed to issuing further guidance specific to benefit plan matters, including the ruling's retroactive application and plan amendment requirements. The Revenue Ruling will also require employers to adjust their payroll procedures to account for their employees' marital status under federal tax law, such as spousal health benefits, while treating the same employees as unmarried for state law purposes in jurisdictions like Pennsylvania.

Employers with questions about this article or any aspect of Revenue Ruling 2013-17 or DOL Technical Release 2013-04 are encouraged to contact any member of Barley Snyder's Employee Benefits Group.

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Affordable Care Act: Reducing Employee Hours May Increase Litigation Risk

By: David J. Ledermann

Under the Affordable Care Act's employer mandate, beginning in 2015, applicable large employers (those having at least 50 full-time equivalent employees) must offer minimum essential health coverage to substantially all full-time employees and their dependents. If employers don't, they risk a penalty of $2,000, on an annualized basis, multiplied by the total number of the employer's full-time employees reduced by 30. If an employer that offers minimum essential coverage to substantially all of its full-time employees and their dependents fails to offer coverage that is affordable (i.e., employee premium contributions for self-only coverage do not exceed 9.5% of household income) and provides minimum value (*i.e.*, the plan pays on average at least 60% of the cost of plan benefits), the employer may be liable for an annualized penalty of $3,000 multiplied by the number of its full-time employees that obtain federally subsidized insurance on an exchange. Fundamental to these penalty provisions is the concept of "full-time" employment because even covered employers will not be liable for penalties for employees who are not full-time.

The Affordable Care Act defines a full-time employee as an employee who averages at least 30 hours per week. Because the employer mandate results in penalties only for full-time employees, some employers have considered, or have even begun, restructuring their workforces to reduce their full-time employee count. Employers should be aware, however, this strategy carries the risk that the employer may be deemed in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"). That law makes it unlawful for an employer to take any adverse action against a participant for exercising a right to which the participant is entitled or for the purpose of interfering with the attainment of any right to which the participant may become entitled under an employee benefit plan.

Reducing employee hours to avoid, or to at least minimize, the employer mandate's impact arguably runs afoul of

ERISA Section 510. Courts that have faced the issue, however, have required that a Section 510 claimant show that the employer specifically intended to interfere with the claimant's benefit plan rights. It remains to be seen whether reducing employee hours to avoid penalties under the Affordable Care Act constitutes an adverse employment decision intended to deprive a participant of a right under the employer's health plan. Another threshold question concerns whether the affected employee is a plan participant, because Section 510 protects only participants, not necessarily employees who do not participate in the benefit plan. It may also be that reducing existing full-time employees' hours to less than 30 per week may be more problematic in terms of Section 510 liability than limiting the hours of newly hired employees.

That being said, an employer who guesses wrong faces significant exposure. Potential remedies for ERISA Section 510 violations include back pay to the extent an employee's compensation suffered because of the reduction in hours, reinstatement to the level of hours the employee previously worked, and the provision of health plan benefits for the period the employee was without coverage under the employer's plan. Plus, a prevailing party in an ERISA suit is eligible to recover the attorney's fees expended prosecuting the claim.

Unfortunately, government regulators have not provided clarifying guidance on this issue. Informal comments from the U.S. Department of Labor suggest that agency will issue no guidance regarding whether employer efforts to minimize the mandate's impact violate Section 510. Moreover, regardless of whether any regulatory guidance on the subject is issued, it is a virtual certainty that the courts will ultimately decide the extent to which employer decisions in response to the employer mandate implicate Section 510 of ERISA.

For questions concerning the employer mandate or for assistance with other issues under the Affordable Care Act, please contact a member of our Employee Benefits Group.

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