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Welcome!

Welcome to the first edition of *ERISA & Employee Benefits Alert*. Our ERISA and Managed Care Group will be providing curated insights and news concerning notable ERISA and managed care issues that highlight current or emerging trends.

If you have any suggested topics for this e-newsletter, feel free to let us know. And, please contact the chair of the ERISA and Managed Group, Grant P.H. Shuma n by e-mail or by phone (304.340.3895) if you have any questions concerning our services.

Thanks for reading.

ERISA and Managed Care Practice Group

Careful, Careful: Arbitration of Benefit Claims Under Collective Bargaining Agreements

In *Cup v. Ampco Pittsburgh Co., 2018 WL 4101049 (3rd Cir. Aug. 29, 2018)*, the Third Circuit addressed a case concerning the arbitrability of benefit claims by retirees in the context of collective bargaining agreements ("CBA"). In *Cup*, the retirees of a company subject to a CBA brought suit against a successor in interest that decided to terminate the retirees' health care benefits. Although the case advanced three causes of action, the only issue the court addressed substantively was the district court's decision that the retirees' claims were required to be arbitrated under the terms of the CBA and/or a memorandum of agreement concerning retiree benefits pursuant to the Labor Management Relations Act ("LMRA"). On appeal by the successor corporation, the Third Circuit disagreed.

In essence, the court concluded the retirees were not covered by the definition of

"employee" under the CBA, inasmuch as the plaintiff and the similarly situated individuals were not employed at the time of the CBA's execution, and the CBA did not expressly cover retirees. Thus, the provision of the CBA requiring arbitration was inapplicable to the dispute. Furthermore, the court rejected the argument that the memorandum of agreement, which established the contribution rate of retirees, was incorporated into the CBA because there was no language to indicate such an incorporation. And, in fact, the court reasoned the mere reference of "Medical Insurance" in the CBA was insufficient to incorporate the memorandum of agreement on the subject of retiree healthcare. The court remanded the case to the district court to allow the retirees to assert claims under section 301 of the LMRA and ERISA.

The key insight of *Cup* is the language of ERISA contracts matters, and that careful drafting can prevent costly litigation over the terms of CBAs, related agreements, and ERISA plan documents. --- Grant P.H. Shuman

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The Way of the Future: Student Loan Benefit Plans

According to a recent study, Americans currently owe approximately $1.4 trillion in student loan debt. With increasing pressure to pay off student loans, some employees choose not to contribute to retirement programs offered by their employers. Instead, employees use discretionary income to pay down student loan debt. Some employers have contemplated how to offer a student loan employee benefit plan to help ease their employees' debt load. One company recently asked the Internal Revenue Service whether its proposed student loan benefit plan complied with certain portions of ERISA and the Internal Revenue Code (the "IRC"). Thanks to the creativity of that company, employers may now have the blueprint to establish a student loan benefit plan that satisfies federal requirements.

On August 17, 2018, the IRS issued Private Letter Ruling Number 201833012, which addressed whether an employer's proposed student loan benefit plan complied with the IRC, specifically prohibitions on contingent benefits applicable to IRC Section 401(k) retirement plans.

The employer sought to modify its existing plan to offer a student loan benefit option. The employer's existing plan was a common 401(k) plan under which employees received an employer contribution equal to five percent of their eligible compensation, provided that any such employee contributed at least two percent of their eligible income to the plan during a pay period.

The employer's proposal allowed its employees to elect to participate in a student loan benefit option of its existing 401(k) plan on a voluntary basis. If an employee elects to participate in the student loan benefit option:

- The employer agrees to make a non-elective contribution of five percent of an employee's eligible compensation to the company's 401(k) plan if such employee paid at least two percent of his or her eligible income toward student loans during a pay period;
- The employee is still eligible to make contributions to his or her 401(k) retirement account, in addition to student loan payments; and
- The employer is required to make a non-elective contribution of five percent of an employee's eligible compensation to the company's 401(k) plan if such employee did not make sufficient student loan payments during a pay period, but contributed at least two percent of his or her eligible compensation to the individual 401(k) retirement account. In such circumstances, the employer must make the non-elective contribution as soon as practicable after the end of the plan year.

While Private Letter Rulings are only binding on the taxpayer requesting the ruling, the IRS provided a general blueprint for companies who may wish to implement a student loan benefit program. Offering a student loan benefit plan, such as the one outlined in PLR 201833012, could be a very attractive option for many qualified candidates. Further, such a

plan could provide a tool to attract top tier candidates and to retain existing talent.

For any questions regarding this article, or if your company may be interested in offering a student loan benefit plan, please contact us. --- J. Spencer Cook

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The Need for Clarity: Standard of Review

In *Griffin v. Hartford Life & Acc. Ins. Co., 898 F.3d 371 (4th Cir. 2018)*, the Fourth Circuit addressed the issue of whether a related company of an entity that enjoyed the abuse of discretion standard also was entitled to the same deference.

The plaintiff's claim, which is somewhat novel, is that while Hartford Life & Accident Insurance Company retained discretionary authority, and, therefore, a discretionary standard of review of the plaintiff's benefit determination, the adjusters who decided the claim were paid by a subsidiary of the Hartford group of companies--namely, Hartford Fire Insurance Company. The plaintiff reasoned that because Hartford Fire was a separate entity from Hartford Life, the abuse of discretion standard did not apply. The district court and the Fourth Circuit ruled against the plaintiff on this point, and upheld the claim denial. The Fourth Circuit relied on undisputed evidence that the correspondence with plaintiff concerning his claim denial was on Hartford Life letterhead, and, more importantly, Hartford Fire paid all employees of the Hartford's subsidiaries and affiliate companies. Accordingly, the fact the employees of Hartford Life were paid by another related company in the form of Hartford Fire did not affect Hartford Life's contractual discretion over claims decisions.

In addition, the Fourth Circuit concluded Hartford Life did not bear the burden of proving the plaintiff's condition changed before it denied continuing long-term disability benefits, or to seek a medical examination to prove the same.

This case highlights the need for clarity concerning which entity is subject to discretionary review in the context of an insured plan, and to remove any latent ambiguity concerning the relationship between affiliated companies. --- Grant P.H. Shuman

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