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Legal Developments Impacting Retirement Plans
2015 Year-End Update

1. At the request of President Obama, the DOL issued proposed regulations on **the definition of an ERISA fiduciary** and corresponding changes to the DOL's prohibited transaction exemptions. The proposals, if adopted, would make it more likely that a person providing investment advice would qualify as an ERISA fiduciary. The proposal has sparked considerable debate, with the DOL receiving more than 3,000 written comments. The DOL intends to finalize the regulations and exemptions in the first half of 2016.

2. Under the "successor liability" doctrine, a company that buys the assets of another company will be responsible for the seller's liabilities if (a) the buyer has notice of the liabilities at the time of the sale, and (b) there is substantial continuity in the operation of the business before and after the sale. In prior cases, the Seventh Circuit Court of Appeals and various district courts have applied this doctrine to determine if a buyer is responsible for the seller's **withdrawal liability**. In 2015, the Ninth Circuit agreed that the successor liability doctrine may apply in withdrawal liability cases, both generally and under the special building and construction industry rules.[1] The Seventh Circuit also found that the notice requirement was satisfied where the buyer had knowledge of the seller's contingent liability, even though withdrawal liability had not been assessed at the time of the sale.[2]

3. In July 2015, the IRS announced major changes to the **determination letter program** for retirement plans, including the elimination of the staggered five-year remedial amendment cycles for individually designed plans. Beginning in 2017, individually designed plans will only be able to obtain a determination letter for initial qualification, termination, and in other limited circumstances that have yet to be announced.

4. To increase retirement savings, **several states have implemented retirement savings programs for private-sector employees** despite uncertainty about whether these programs are permitted by ERISA. In November 2015, the DOL clarified that states may sponsor ERISA retirement plans as long as employer participation is voluntary. For example, a state could offer a prototype ERISA plan that individual employers could adopt. The DOL also published proposed regulations that would allow states to administer IRA savings programs via payroll deduction without creating an ERISA plan, so long as certain requirements are met. For example, employees must be allowed to opt out and employer involvement must be minimal (such as collecting and remitting the payroll deductions).

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[1] *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc.*, No. 12-17675, 2015 WL 5295091 (9th Cir. Sept. 11, 2015).

[2] *Tsareff v. ManWeb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015).

Also, last fall the IRS launched the *my*RA program, which allows individuals without access to an employer-provided retirement plan to contribute to a Roth IRA through payroll deduction. The *my*RA program invests in a U.S. Treasury bond and so carries no risk of loss.

5. The DOL updated its guidance on **economically targeted investments** (ETIs), which are investments chosen not only for their investment return but also for their social, environmental or other public policy benefits. The DOL was concerned that its prior statements unduly discouraged fiduciaries from investing plan assets in ETIs. In its updated guidance, the DOL clarified that fiduciaries may invest in an ETI so long as the ETI is appropriate for the plan and financially equivalent to other available investment options.

6. Defined contribution plans that allow participants to direct investment of their accounts must provide a fee disclosure notice annually and before first investment. Under prior guidance, each annual notice generally had to be provided within 12 months of the prior annual notice. This timing created difficulties: if a plan distributed its annual notice early one year, its deadline for providing the notice in subsequent years would be accelerated. Therefore, effective June 17, 2015, the DOL provided a **two-month grace period for annual fee disclosure notices**. In other words, plans may now provide the annual notice within 14 months of the prior annual notice.[3]

7. In its 2013 *Windsor* decision, the U.S. Supreme Court invalidated section 3 of the Defense of Marriage Act (DOMA). As a result, same-sex marriages were recognized for purposes of federal law and retirement plans had to provide same-sex spouses with the spousal protections required by ERISA and the Code (such as death benefit rights). Any plan amendments needed for consistency with *Windsor* had to be adopted by the end of 2014. In June 2015, the Supreme Court held in *Obergefell v. Hodges* that **states must permit same-sex marriage** and recognize same-sex marriages performed in other states. The IRS has confirmed that retirement plans are not required to make additional changes as a result of *Obergefell*.[4]

8. Health Care Reform expanded the required benefit claim and appeal procedures for health plans. In November 2015, the DOL issued proposed regulations that (if finalized) would make similar changes to the claim and appeal procedures for **disability benefits**. For example, if a participant appealed a disability benefit claim denial, the plan would have to automatically provide the participant with any new evidence the plan develops while the appeal is pending.

9. In its 2014 *Dudenhoeffer* decision, the U.S. Supreme Court eliminated the **"*Moench* presumption"** that employer stock is a prudent investment under ERISA. As a result, ESOP fiduciaries must review employer stock in the same manner as other plan investments, and must invest plan assets in employer stock with care, skill, prudence, and

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[3] The DOL also allowed plan administrators to use the two-month grace period for notices issued from March 19 – June 17, 2015, if doing so would benefit participants.
[4] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

diligence. In 2015 the Sixth Circuit applied *Dudenhoeffer*, holding that fiduciaries may rely on market pricing of company stock absent "special circumstances." In the Sixth Circuit case, participants sued a fiduciary to the General Motors 401(k) plan for not realizing that the market price of the company stock was overvalued, and for failing to sell the stock until two months before General Motors declared bankruptcy. The Sixth Circuit sided with the fiduciary, concluding that the fiduciary followed a prudent process for monitoring the company stock and that plaintiffs had not shown any special circumstances that would have prevented the fiduciary from relying on market pricing.[5]

10. The U.S. Supreme Court ruled that ERISA's six-year statute of limitations may not apply when plan participants sue fiduciaries for improper investment selection, as fiduciaries have an **ongoing duty to monitor investments**.[6]

11. The IRS released two **updates to EPCRS**, its program for correcting plan qualification errors. These updates provide new permissible correction methods for certain common errors, including benefit overpayments and 401(k) elective deferral failures. Additionally, the IRS reduced the user fees that apply under EPCRS's voluntary correction program (VCP), effective February 1, 2016.

12. **Form 5500** for the 2015 plan year includes new IRS compliance questions. These questions, which address issues such as nondiscrimination testing and the timing of required plan amendments, are currently optional but may become mandatory in future years.

13. In July 2015, the Second Circuit held that a cash balance plan's definition of **"normal retirement age"** as five years of service violated ERISA because it bore no reasonable relationship to the age when the plan's participants typically retire. The court noted that IRS regulations take a similar approach when determining if a plan's definition of normal retirement age complies with the Tax Code.[7]

14. If a participant sues to challenge a claims administrator's final denial of a benefit claim, the court will not give deference to the administrator's decision unless plan terms gave the claims administrator **discretionary authority to decide claims**. In 2015, two federal appellate courts emphasized that grants of discretionary authority need to be in formal plan documents—not just SPDs—in order to be enforceable.[8]

15. In July 2015, the DOL clarified a fiduciary's obligations when selecting and monitoring **annuity providers for distributions from defined contribution plans**, as well as the statute of limitations for participant lawsuits alleging breach of those obligations.

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[5] *Pfeil v. State Street Bank & Trust Co.,* 2015 WL 6874769 (6th Cir. 2015).
[6] *Tibble v. Edison Int'l*, 2015 WL 2340845 (U.S. 2015).
[7] *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272 (2d Cir. 2015). Specifically, the plan defined its NRA as the earlier of age 65 or 5 years of service.
[8] *Prichard v. Met. Life Ins. Co.*, 783 F.3d 1166 (9th Cir. 2015) and *Bilheimer v. Fed. Ex. Corp. Long Term Disability Plan*, 605 Fed. Appx. 172 (4th Cir. 2015). These cases involved welfare plans with separate SPDs and plan documents, but the same principles would apply to retirement plans.

16. Several retirement plan **compensation and benefits limits** are staying the same in 2016:

- Maximum elective deferral to a 401(k) or 457(b) plan: $18,000 (plus $6,000 catch-up)
- Maximum compensation taken into account under a qualified retirement plan: $265,000
- Highly compensated employee threshold used for nondiscrimination testing: $120,000

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