

Legal Developments Impacting Retirement Plans 2014 Year End Update

1. In June 2014, the U.S. Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer* eliminated the “**Moench**” presumption that employer stock is a prudent investment under ERISA.¹ And so ESOP fiduciaries must now review employer stock in the same manner as other plan investments, and must invest plan assets in employer stock with care, skill, prudence, and diligence. As a result of the decision, several cases have been remanded to the lower courts for reconsideration in light of the Supreme Court’s holding, and additional case law interpreting the Supreme Court’s holding is expected.² Read more at: <http://www.songmondress.com/Articles/Recent-Case-Law-Regarding-Retirement-Plan-Investments-in-Employer-Stock-The-Presumption-of-Prudence.shtml>.
2. In June 2013 the U.S. Supreme Court invalidated a section of **DOMA**, the law which generally limited federal recognition of marriages to opposite-sex couples.³ The IRS and DOL issued guidance in 2013 stating that a same-sex couple married in a state that recognizes same-sex marriage but residing in a state that does not recognize their marriage will nonetheless be treated as married under ERISA and the Code.⁴ In April 2014, the IRS issued further guidance concerning timeframes for operational compliance and plan amendments.⁵ Read more at: <http://www.songmondress.com/Articles/Guidance-for-Retirement-Plans-on-Retroactivity-of-Windsor.shtml>.
3. In December 2014, the President signed into law the **Multiemployer Pension Reform Act** of 2014 (“MPRA”)⁶ as part of the Consolidated and Further Continuing Appropriations Act of 2015. MPRA addresses a number of issues which are intended to protect the solvency of financially troubled multiemployer plans and the PBGC itself. Some of MPRA’s key provisions include the permanent extension of certain provisions of the Pension Protection Act of 2006, creation of a new zone status for seriously troubled multiemployer plans known as “critical and declining” status (and provisions allowing such plans to reduce or eliminate certain previously-protected benefits), increases to the PBGC premiums owed by multiemployer plans, and expansion of the documents that multiemployer plans are required to furnish to participants, beneficiaries, and contributing employers upon request. Most of MPRA’s provisions are first effective for plan years beginning on or after December 31, 2014.
4. On September 19, 2014 the IRS issued final regulations governing **cash balance and other hybrid plans**, updating proposed regulations from 2010.⁷ The final regulations are effective for the first plan year beginning on or after January 1, 2016, and focus primarily on the permissible interest crediting rates for these hybrid plans. At the same time, the IRS

issued new proposed regulations, which would provide transitional, anti-cutback relief to existing hybrid plans whose interest crediting rates are inconsistent with the final regulations.⁸

5. In recent years, the IRS and DOL have engaged in a joint effort to **promote deferred annuities for participants in defined contribution plans**. In 2014, the IRS issued two pieces of guidance in furtherance of this effort, including:
 - On July 2, 2014, the IRS issued final regulations creating an exemption from the Code's required minimum distribution ("RMD") rules for **qualifying longevity annuity contracts** ("QLACs"), in order to facilitate the purchase of deferred annuities that begin payments at an advanced age under a defined contribution plan.⁹
 - On October 24, 2014, the IRS issued Notice 2014-66, which allows 401(k) and certain other defined contribution plans to provide lifetime income by offering as an investment option a series of **target date funds (TDFs) that include deferred annuities**, even if some of the TDFs in the series are available only to older participants.
6. The IRS and DOL published several pieces of guidance in 2014 concerning **rollover distributions**. These include:
 - Examples of **procedures** that qualified retirement plan administrators may follow to reasonably conclude that a potential rollover contribution is a valid rollover contribution under Treas. Reg. § 1.401(a)(31)-1, Q&A-14¹⁰;
 - Guidance permitting participants electing direct rollovers of pre- and after-tax amounts to two or more plans to choose how the pre-tax amounts will be allocated to those plans, and treating all disbursements that are scheduled to be made simultaneously as a single distribution¹¹;
 - A revised safe harbor model notice to be used to satisfy the **Code § 402(f)** requirement that certain information be provided to the recipients of eligible rollover distributions.¹² These revisions relate primarily to the allocation of pre-tax and after-tax amounts; and
 - Final PBGC regulations clarifying that benefits resulting from **rollover distributions from defined contribution to defined benefit plans**, where the defined benefit plan is terminated and trusted by the PBGC, are not subject to the PBGC's maximum guaranteeable benefit or five-year phase-in limitations.¹³
7. In August 2014 the DOL updated its guidance concerning fiduciary duties related to **missing participants** in terminated defined contribution plans, following the recent elimination of the Social Security Administration and IRS letter forwarding programs for missing participants. Notably, the DOL added free internet search tools in place of these programs as one of the steps fiduciaries must take to locate missing participants in order to take advantage of the safe harbor.¹⁴

8. On March 12, 2014, the DOL proposed an amendment to its **ERISA § 408(b)(2) service provider fee disclosure regulation**, which would require covered service providers that furnish 408(b)(2) disclosures in multiple or lengthy documents to include a guide to assist retirement plan fiduciaries in reviewing the disclosures.¹⁵
9. Plan administrators who fail to timely file Form 5500 series annual reports can be subject to both DOL and IRS penalties. IRS Notice 2002-23 provided for a waiver of IRS penalties if a **delinquent Form 5500** is corrected through the DOL's Delinquent Filer Voluntary Correction Program, and certain other requirements are met. In May, the IRS issued Notice 2014-35, which states that in order to qualify for this waiver, the plan administrator must also timely file the paper Form 8955-SSA (relating to separated participants with deferred vested benefits under a plan).
10. The IRS has expanded its rules regarding the group trusts described in Rev. Rul. 81-100 ("**81-100 group trusts**").¹⁶ These changes allow certain plans qualified only under the Puerto Rico Code to invest in 81-100 group trusts, clarify that insurance company separate accounts may in some cases invest in 81-100 group trusts, and provide limited transitional relief to "dual-qualified plans."¹⁷
11. Notice 2014-5 provides temporary **nondiscrimination relief for certain "closed" defined benefit plans** (that is, plans that provide ongoing accruals, but only with respect to some or all employees who participated in the plan on a certain date). This notice permits certain employers that sponsor a closed DB plan and a separate DC plan to demonstrate that the plans, together, comply with the certain benefits nondiscrimination requirements of § 401(a)(4).
12. The Sixth Circuit Court of Appeals recently held that an ERISA plan administrator's benefit denial letters must identify any **contractual statute of limitations to file a lawsuit** in order for that limitation to be enforceable.¹⁸
13. By February 2, 2015, all multiemployer plans, and plans of certain plan sponsors whose EIN ends in 4 or 9, should apply to the IRS for a **favorable determination letter**. By January 31, 2016, governmental plans, and plans of certain plan sponsors whose EINs end in 5 or 0, should apply to the IRS for a favorable determination letter.
14. Several retirement plan **compensation and benefits limits** change each year because they are tied to a COLA increase. For 2015, the maximum elective deferral to a 401(k) or 457(b) plan is increased to \$18,000 (up from \$17,500 in 2014), and the maximum catch-up contribution is increased to \$6,000 (up from \$5,500 in 2014). For 2015 the maximum compensation to be taken into account under a qualified retirement plan moves from \$260,000 in 2014 to \$265,000, and the highly compensated employee threshold used for nondiscrimination testing moves from \$115,000 in 2014 to \$120,000.¹⁹
15. On January 5, 2015, Illinois enacted legislation providing an **automatic Roth IRA** (via payroll deductions) for employees of certain large employers which do not sponsor a qualified retirement plan.²⁰ The law will not take effect until after the state has issued rules

implementing the Roth IRA program. Illinois is the first state to enact such a law, although a number of other states are currently considered similar legislation.

From all of us here at Song Mondress, your employee benefits law firm.

Not intended as legal advice.

¹ *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).

² For example, the Supreme Court vacated and remanded the 9th Circuit Court of Appeal's decision in *Harris v. Amgen*, 738 F.3d 1026 (2013), which has since been revisited by the 9th Circuit in *Harris v. Amgen, Inc.*, 770 F.3d 865 (9th Cir. 2014).

³ *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

⁴ Rev. Rul. 2013-17; DOL Technical Release 2013-04.

⁵ IRS Notice 2014-19. In June 2014, the IRS also issued Notice 2014-37, which provides additional guidance on mid-year *Windsor* amendments for safe harbor 401(k) and 401(m) plans.

⁶ Text of the bill as passed is available at <https://www.congress.gov/bill/113th-congress/house-bill/83/text>.

⁷ 79 Fed. Reg. 56442 (Sept. 19, 2014).

⁸ 79 Fed. Reg. 56305 (Sept. 19, 2014).

⁹ 79 Fed. Reg. 37633 (July 2, 2014).

¹⁰ Rev. Rul. 2014-9.

¹¹ IRS Notice 2014-54; *see also* 79 Fed. Reg. 56310 (Sept. 19, 2014) (proposed regulations addressing the treatment of distributions from designated Roth accounts under tax-favored retirement plans).

¹² IRS Notice 2014-74. These safe harbor notices were originally issued in Notice 2009-68.

¹³ 79 Fed. Reg. 70090 (Nov. 25, 2014). These rules finalize proposed regulations issued earlier in 2014 (79 Fed. Reg. 18483 (April 2, 2014)).

¹⁴ DOL FAB 2014-01.

¹⁵ Fed. Reg. 13949 (Mar. 12, 2014).

¹⁶ Rev. Rul. 2014-24.

¹⁷ "Dual-qualified" refers to plans with U.S. trusts qualified under both the U.S. and Puerto Rico Codes.

¹⁸ *Moyer v. Metropolitan Life Ins. Co.*, 762 F.3d 503 (6th Cir. 2014).

¹⁹ IRS News Release IR 2014-99.

²⁰ *See* <http://www.ilga.gov/legislation/98/SB/PDF/09800SB27581v.pdf>.