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B&K BENEFITS UPDATE

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Second Circuit Court of Appeals Holds DOMA Unconstitutional

On October 18, 2012, the U.S. Court of Appeals for the Second Circuit, which covers New York, Connecticut, and Vermont, joined the U.S. Court of Appeals for the First Circuit in declaring Section 3 of the Defense of Marriage Act of 1996 ("DOMA") unconstitutional. *Windsor v. U.S.*, Docket No. 12-2335-cv (2nd Cir. Oct. 18, 2012).

Section 3 of DOMA defines "marriage" as a legal union between one man and one woman for purposes of federal law, thereby precluding same-sex spouses from certain benefits and coverages under the Social Security Act, ERISA, and the Internal Revenue Code.

The *Windsor* case involved a same-sex couple who were legally married in Canada, and who resided in New York, a state that recognizes same-sex marriage, for the duration of their 40-year union. Upon the death of one of the spouses, the IRS imposed over $350,000 in federal estate taxes on the survivor. These taxes would not have been imposed if the couple's marriage were recognized for purposes of federal law.

In reviewing the lower court's finding that DOMA is unconstitutional, the Second Circuit agreed that Section 3 of DOMA violates the Equal Protection Clause of the 14th amendment to the Constitution, which guarantees equal protection of the laws to all individuals within a state's (and the federal government's) jurisdiction.

It is widely expected that this case, along with several other cases addressing the constitutionality of DOMA, will be heard by the United States Supreme Court in the coming months. If the Supreme Court finds Section 3 of DOMA unconstitutional, ERISA-covered plans will no longer be permitted to rely on DOMA to exclude benefits

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for same-sex spouses.

IRS Issues FAQs Relating to Federal Tax Treatment of Same-Sex Couples

On August 4, 2012, the IRS released a set of Frequently Asked Questions and answers ("FAQs") relating to the federal tax treatment of same-sex couples. The FAQs reiterate the IRS's position that legally married same-sex couples may not file their tax returns using the married filing jointly or married filing separately status. The FAQs also clarify that if the same-sex partner is the stepparent of his or her partner's child under the laws of the state in which the couple resides, then the same-sex parent is the stepparent of the child for federal income tax purposes. The IRS has not stated how this position affects group health plan coverage in states where same-sex marriage is legal.

PBGC Issues Guidance Increasing Premiums Beginning in 2013

On August 28, 2012, the Pension Benefit Guaranty Corporation ("PBGC") issued Technical Update 12-1, which provides technical guidance on the effect of the Moving Ahead for Progress in the 21st Century Act (MAP-21) on PBCG premiums. Under this guidance, the flat rate per participant premium applicable to multiemployer plans is increased from $9 to $12 beginning in 2013. Pursuant to this guidance, beginning in 2013, the flat rate per participant premium for single employer plans is also increased from $35 to $42, and the variable rate premium (also applicable to single employer plans) is capped at $400. After 2013, the premiums will be indexed for inflation.

DOL Fines Defined Benefit Plan Advisor $1.27 Million for Failing to Disclose Fees

On August 23, 2012, the Department of Labor ("DOL") issued a news release announcing that USI Advisors, a Glastonbury, Connecticut based fiduciary investment advisor, had agreed to pay $1.27 million to 13 pension plans to resolve alleged violations of ERISA stemming from the company's failure to fully disclose its receipt of 12b-1 fees from the mutual funds in which the pension plans' assets were invested. In addition to failing to disclose the receipt of such fees, USI also failed to use those fees for the benefit of the plans by either directly crediting the amounts to the plans or offsetting other fees that the plans paid to the company. Under ERISA, a fiduciary with respect to a plan cannot use its fiduciary authority to receive an additional fee or to receive compensation from third parties for its own personal account in transactions involving plan assets. This settlement underscores the importance of the DOL's recently finalized fee disclosure regulations, which require fiduciaries like USI to be more transparent about the fees they receive while providing services to ERISA retirement plan clients.

IRS Announces Termination of Letter Forwarding Program for Locating Plan Participants

On August 31, 2012, the Internal Revenue Service ("IRS") issued Revenue Procedure 2012-35, which discontinues the IRS letter forwarding program for qualified retirement plans. Before September 1, 2012, the IRS letter forwarding program was available to assist plan administrators, plan sponsors, and qualified termination administrators of abandoned plans under the DOL's abandoned plan program to locate missing participants. The letter forwarding program will continue for situations in which an individual is seeking to find a taxpayer for a "humane purpose" or in the event of an emergency. Beginning September 1, 2012, plan administrators should use alternative procedures to locate missing participants, such as hiring companies that specialize in such activities, conducting internet searches, and using the missing participant services offered by the Pension Benefit Guaranty Corporation or the Social Security Administration.

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Second Circuit Finds ERISA Withdrawal Liability Exception Does Not Apply Where Asset Purchaser Can Subsequently Reduce Employee Hours

On May 3, 2012, the United States Court of Appeals for the Second Circuit (the federal appellate court with jurisdiction over New York), in a 2-1 decision, confirmed an arbitration award concerning a multiemployer pension plan's assessment of withdrawal liability. *See HOP Energy, L.L.C. v. Local 553 Pension Plan*, Docket No. 10-3889-cv (2d Cir. May 3, 2001). The case began when a contributing employer entered into an asset purchase agreement that gave the purchaser the right to amend, revise, or terminate any collective bargaining agreement to layoff employees or otherwise reduce the total number of hours for which it was required to make contributions to the pension fund.

The Fund's Trustees assessed $1,204,007 in withdrawal liability against the seller maintaining that this provision took the transaction outside the protection of ERISA Section 4204, which provides an exception to withdrawal liability where the purchaser retains an obligation to contribute to the plan for "substantially the same number of contribution base units" for which the seller was obligated to contribute. Despite the employer's appeals, the arbitrator, the District Court, and the Second Circuit agreed with the Trustees' assessment of withdrawal liability. The court reasoned that although the purchaser was subject to the same contribution rate, it was not obligated to contribute for the same "hours of pay" and consequently did not qualify for ERISA Section 4204 exemption from withdrawal liability.

IRS Issues Guidance Regarding Determining Full-Time Employees for Purposes of Health Reform Employer Shared Responsibility Requirements

On August 31, 2012, the IRS issued Notice 2012-58 (the "Notice"), which provides guidance for employers on determining which employees are treated as full-time employees for purposes of the employer shared responsibility provisions of the Patient Protection and Affordable Care Act ("PPACA"). The employer shared responsibility provisions of the Patient Protection and Affordable Care Act ("PPACA"). The employer shared responsibility provisions, which are contained in new Section 4980H of the Internal Revenue Code, provide that an employer with 50 or more full-time equivalent employees could be subject to a financial penalty if any low-income, full-time employee is certified to receive a premium tax credit or cost-sharing reduction payment in connection with health insurance coverage purchased through an American Health Benefit Exchange beginning January 1, 2014. Generally, this may occur when either: (1) the employer does not offer minimum essential coverage under an employer-sponsored plan to its full-time employees (and their dependents); or (2) the employer offers minimum essential coverage to its eligible employees and their dependents, but that coverage is unaffordable relative to an employee's household income (meaning the employee's contribution toward the cost of the coverage exceeds 9.5% of his or her gross income) or does not provide minimum value (meaning that at least 60% of the allowable costs under the plan are paid by the plan).

Under the Notice, which expands and modifies guidance previously issued by the IRS, employers may use a "look-back" period of up to 12-months to determine whether new variable-hour employees or seasonal employees are full-time. An employee is a variable-hour employee if at the outset of his or her employment it cannot reasonably be determined whether he or she will work an average of 30 hours per week. The Notice also provides employers with the option to use an administrative period of up to 90-days in which to determine which employees are eligible for coverage and to notify them of such eligibility, and provides guidance on transitioning new employees from the new employee determination method to the determination method chosen by the employer for ongoing employees. The Notice does not address questions previously raised to the IRS regarding the application of these requirements to multiemployer plans.

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Employers may rely on the guidance contained in this Notice at least through the end of 2014.

Agencies Release Guidance on Health Reform's 90-Day Waiting Period Limit

On August 31, 2012, the DOL, IRS, and Department of Health and Human Services released temporary guidance relating to the Patient Protection and Affordable Care Act ("PPACA") mandate prohibiting group health plans from imposing waiting periods for coverage of more than 90 days in plan years beginning on or after January 1, 2014. The guidance, contained in IRS Notice 2012-59 and DOL Technical Release 2012-02, confirms that other conditions for plan eligibility, such as limiting coverage to full-time employees or to employees working at a particular location, are generally permissible so long as such conditions are not designed to avoid compliance with the 90-day waiting period limitation. The guidance also provides that the use of an initial eligibility measurement period will not be considered an attempt to avoid compliance with the 90-day waiting period limitation, as long as the coverage is effective no more than 13-months after the employee's start date. Further, cumulative hours of service eligibility requirements are permissible so long as the cumulative number of hours required does not exceed 1,200 hours, and coverage is available no later than the 91st day after the hours requirement is met. This guidance will remain in effect at least through the end of 2014.

IRS Releases Final Regulations on Health Insurance Premium Tax Credit for Coverage Purchased Through an Exchange

On May 18, 2012, the IRS issued final regulations under the PPACA on the federal premium tax credit that will be available to qualifying individuals who purchase health coverage through an American Health Benefit Exchange ("Exchange"), beginning in 2014. The premium tax credit will be available to directly reduce a qualifying individual's premium for coverage purchased through an exchange. In order to be eligible for a tax credit towards the cost of coverage purchased through an Exchange, an individual's household modified adjusted gross income must be between 100% and 400% of the federal poverty level ("FPL"). A qualifying individual must also not be eligible to enroll in "affordable" group health coverage that offers "minimum value." For this purpose, coverage is deemed to be "affordable" if the employee's required contribution for self-only coverage does not exceed 9.5% of his or her household income for the year. A plan provides "minimum value" if the plan's share of the total allowed costs of benefits provided under the plan is at least 60%. The determination of "minimum value" will be addressed in future guidance. As noted earlier, an employee of an employer with 50 or more full-time employees receives a premium assistance tax credit, the employer may be subject to a financial penalty under the employer shared responsibility provisions of the PPACA.

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