THOMPSON COBURN LLP

Thompson Coburn LLP |One US Bank Plaza | St. Louis, MO 63101

Recent Employee Benefit Developments

IRS Expands Cafeteria Plan Status Change Events
On September 18, 2014, the Internal Revenue Service issued Notice 2014-55, which establishes two new change in status events for cafeteria plans. The new change in status events apply only to coverage under a group health plan that provides minimum essential coverage (within the meaning of the Affordable Care Act). Changes under health flexible spending accounts are specifically excluded.

Cafeteria plans (also known as flexible benefit plans or section 125 plans) allow employees to pay for certain employer welfare benefits (such as health insurance premiums) on a pre-tax basis. In general, cafeteria plan elections must be irrevocable during a period of coverage – frequently a twelve month period of coverage that coordinates with the welfare benefit plan year.

The change in status rules provide specific exceptions to the irrevocable election rule. The existing change in status rules include events such as change in legal marital status, change in number of dependents, or change in employment status that affects eligibility under the underlying benefit plan. The two new change in status events are described below:

Reduction in Hours of Service

The first new change in status event applies to an employee who was expected to average at least 30 hours of service per week, but as a result of a mid-year employment change, is expected to average less than 30 hours of service per

week. Such an employee may prospectively revoke his election for group health plan coverage during the year. The election change is allowed even if the reduction in hours does not cause the employee to lose eligibility under the underlying health plan.

There are two conditions that an employee must satisfy before the change is allowed:

- The drop in coverage must correspond to the intended enrollment of the employee (including any dependents whose coverage would also be dropped) in other minimum essential coverage (such as a coverage through the exchange or another group health plan); and
- The new coverage must be effective no later than the first day of the second month following the month that includes the date as of which coverage is dropped.

In applying the above rules, the plan administrator may rely on an employee's reasonable representation of the intended enrollment and the effective date of the new coverage.

Enrollment in Exchange Coverage

The second new status change event applies to an employee who is eligible to enroll in coverage through the exchange (during an exchange open enrollment or special enrollment period). Such an employee may prospectively revoke his election for group health plan coverage during the year.

There are two conditions to that an employee must satisfy before the change is allowed:

- The drop in coverage must correspond to the intended enrollment of the employee (including any dependents whose coverage would also be dropped) in exchange coverage; and
- The new coverage must be effective no later than the day after the employer's coverage is dropped.

The plan administrator may rely on an employee's reasonable representation about the intended enrollment.

Employer Action Items

The new status change events are optional. Plan administrators may allow such elections beginning September 18, 2014. However, the cafeteria plan must be amended to provide for such election changes. The amendment must be adopted on or before the last day of the plan year in which the elections are allowed. A

special rule allows amendments effective in 2014 to be adopted no later than the end of the plan year beginning in 2015.

Sixth Circuit Enforces Forum Selection Clause

The enforceability of forum selection clauses in ERISA plans has been a hot topic in ERISA litigation circles in recent years. The substantial majority of district courts have enforced forum selection clauses that have designated a federal court sitting in the district where the plan is administered. We have been successful in enforcing such clauses for our clients all 10 instances where they have been challenged, winning the argument before courts in Louisiana, Michigan, New York and Ohio and multiple courts sitting in California.

But the Department of Labor has filed *amicus* briefs opposing the enforceability of forum selection clauses and a handful of courts have adopted the Department's position.

The first federal appellate court has now weighed in on the issue and in a 2-1 decision held that such clauses are enforceable. *Roger L. Smith v. Aegon Companies Pension Plan*, No. 13-5492 (6th Cir. Oct. 14, 2014). The Sixth Circuit majority held that the DOL's opinions expressed in its *amicus* brief were not entitled to any deference under either *Chevron or Skidmore*. Moreover, even if deference was given to the DOL's opinions, the majority held that it would enforce the forum selection clause before it. That clause required the Kentucky participant to litigate his claim in Cedar Rapids, IA.

The Sixth Circuit noted that plan sponsors are given great leeway by ERISA to draft their plans and that nothing in ERISA suggests that sponsors cannot include a forum selection clause. The appellate court explained it would apply the same rules it applied whenever any party challenged the enforceability of a forum selection clause. First, was the forum selection clause obtained by fraud, duress or unconscionable means? Second, would the designated forum ineffectively or unfairly handle the suit? Third, would the designated forum be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust?

Usually, it is the third question that is the focus of the court's analysis. We, however, have persuaded five different California judges to transfer cases to New York over the strenuous objections of the plaintiffs. Because courts most always resolve ERISA benefit claims on summary judgment decided on the briefs, it is not inconvenient to have the case decided in a distant forum. Rarely would the participant be required to travel to the distant court.

The Sixth Circuit adopted several of the reasons we have argued forum selection clauses in ERISA plans are enforceable. First, nothing in ERISA expressly prohibits

forum selection clauses. Had Congress intended to forbid them, it could have included such a prohibition in ERISA, either initially or at any time since 1974. Second, limiting venue to one designated jurisdiction encourages uniformity of decisions interpreting the plan, thereby allowing administrators to establish a uniform administrative scheme. This uniformity allows for more consistent and less expensive administration. Third, other courts have enforced arbitration clauses in ERISA plans, and arbitration clauses are merely another form of forum selection clauses. Moreover, a plan participant forced to arbitrate loses the protection of having her case heard by an Article 3 judge and the benefits of the Federal Rules of Civil Procedure. Neither of these protections is lost when a court enforces a forum selection clause.

We have advised our clients that when they designate a forum, it should be where the plan is administered, one of the three venues permitted by § 502(e). But the *Smith* majority, *in dicta*, allowed that the plan could select any forum, that its choices were not limited to one of the three specified in § 502(e). This portion of the ruling surprises us. It seems to us that to allow a plan sponsor to mandate one of the three venues expressly allowed in ERISA is one thing. But to allow that sponsor to mandate a venue not permitted by ERISA is a further reach.

The dissenting judge argued that § 502(e) was intended to grant an affirmative right to ERISA participants and beneficiaries to choose the forum where they wanted their cases heard and that a forum selection clause thwarts that right. He asserted that allowing a plan sponsor to designate the forum was contrary to ERISA's strong public policy considerations. He was specifically concerned that the clause would require the Kentucky plaintiff to litigate his claim in Iowa, more than 500 miles from his home.

The majority's opinion in *Smith* is not the last word on the issue. We expect the plaintiff will seek a rehearing *en banc,* and the Sixth Circuit has not been the most friendly of circuits for ERISA plan sponsors, administrators and fiduciaries.

But forum selection clauses offer many benefits to plan sponsors and we think it makes sense to seriously consider inserting them in every ERISA plan. Some facts may weigh against including such a clause. For instance, if your plan is administered in a district or circuit that is unfriendly to ERISA sponsors/administrators/fiduciaries (e.g. the Ninth Circuit), you may prefer not to have a forum selection clause.

Year End Reminders

Group The end of 2014 is rapidly approaching and Plan Sponsors of calendar-year employee benefit plans would be well served by making certain any required or discretionary amendments are adopted in a timely manner. For example, Plan

Sponsors should consider if a change needs to be made before year end to recognize same-sex marriages.

Plan Sponsors should also make certain that required year-end notices are provided. Items to consider include qualified default investment alternative notices, automatic enrollment notices, safe harbor plan notices, Summary Annual Reports, Summaries of Benefits and Coverage and wellness program disclosures.

For assistance with your end-of-the-year employee benefits plan checklist, please contact a Thompson Coburn benefits attorney.

Cathryn A. Conrad	314-522-6021	cconrad@thompsoncoburn.com
Paul G. Griesemer	314-552-6400	pgriesemer@thompsoncoburn.com
Linda Lemel Hoseman	312-580-2238	lhoseman@thompsoncoburn.com
Lori W. Jones	314-552-6568	ljones@thompsoncoburn.com
Michael D. Lane	314-552-6522	mlane@thompsoncoburn.com
Richard J. Pautler	314-552-6470	rpautler@thompsoncoburn.com
Ruth A. Streit	314-552-6381	rstreit@thompsoncoburn.com
Mark S. Weisberg	312-580-2340	mweisberg@thompsoncoburn.com
Patricia A. Winchell	314-552-6217	pwinchell@thompsoncoburn.com

Thompson Coburn LLP
Chicago | Los Angeles | St. Louis | Southern Illinois | Washington, D.C.
www.thompsoncoburn.com