VOLUME 72 ◆ NUMBER 12

Employee Benefit Plan Review

Ask the Experts

Submit questions to Employee Benefit Plan Review via e-mail to smeyerowitz@meyerowitzcommunications.com Answers by the columnists may appear in an upcoming issue.

Disclosure of Health Plan Documents to Former Employee

Q A former employee has reached out to my company asking for documents related to our company-sponsored health plan. This person has neither worked for our company, nor participated in our health plan, for over a year. We are not sure why he is asking, and we have concerns about providing some of the requested documents. Are we required to respond to his request and give him the requested documents?

A It depends. Under ERISA, your company has an obligation to provide a health plan participant with certain documents upon written request.[1] Under ERISA §104(b)(4), a plan administrator:

> shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Failure to provide such information subjects the plan administrator to a penalty of up to $100 per day for each day it is late, and such other relief as a court deems proper.[2]

Under ERISA § 3(7), the term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan that covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. The U.S. Supreme Court addressed the question of when a claimant is a "participant" for purposes of ERISA's document disclosure requirements in the case *Firestone Tire & Rubber v. Bruck*.

In the *Firestone Tire* case, the U.S. Supreme Court found that the term "participant" for purposes of determining the persons entitled to information and documents under ERISA's disclosure requirements includes a former employee who has a reasonable expectation of returning to covered employment or a "colorable claim" to benefits. The U.S. Supreme Court stated in the *Firestone Tire* case that the claimant "must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future...."[3]

The documents required to be disclosed to participants upon written request under ERISA §104(b)(4) generally would be limited to the "latest" of the covered documents, and a plan administrator generally does not violate ERISA when it provides only current documents and not historical ones. However, there is an exception for prior versions of plan documents that might have current bearing on the requesting participant or beneficiary that might be material in evaluating a participant's or beneficiary's rights.

Which documents are considered "other instruments under which the plan is established or operated" is

generally a facts-and-circumstances determination, and case law in your jurisdiction may provide relevant guidance. Your company should use care in determining what this former employee's rights are under the plan, and what documents must be provided. We recommend consulting with an experienced employee benefits attorney to assess the former employee's rights under your company's plan, whether the former employee is eligible for benefits under the plan, the extent of the former employee's interest in the plan, and your company's disclosure obligations with respect to each specific document requested by the former employee.

Your company will want to do a fact-intensive inquiry to determine what documents referenced in ERISA § 104(b)(4) must be disclosed to this former employee upon written request, and should make a document-by-document determination based on input from legal counsel.

Status of Foreign Employees for Purposes of Employer Mandate

Q I work for a large global company that sponsors a group health plan for our United States workforce. I understand that, to avoid penalties under the health care reform law, one of the requirements is that we are required to offer coverage under the health insurance plan to 95 percent of our full-time employees each month. Does this requirement to offer coverage to 95 percent of our full-time employees apply only to our employees within the United States, or to our company's foreign employees as well?

A For purposes of meeting the Affordable Care Act's requirement to offer health plan coverage to 95 percent of your full-time employees to avoid penalties, compensation that is not United States source income is generally excluded from the determination of whether a service provider is a "full-time employee," so your company's foreign employees are unlikely to be counted for this purpose.

Under the Affordable Care Act, for purposes of the "employer mandate" pursuant to which an applicable large employer must offer qualifying health insurance coverage to its full-time employees or else be subject to a penalty, an applicable large employer is treated as offering health insurance coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers coverage to all but five percent (or, if greater, five) of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offers coverage to that employee's dependents).

For this purpose, "full-time employee" is defined as, with respect to a calendar month, "an employee who is employed an average of at least 30 hours of service per week with an employer." The term "hour of service" means "each hour for which an employee is paid, or entitled to payment for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence...."

However, the definition of "hour of service" specifically excludes certain hours, including an exception for services outside of the United States. The definition specifies that the "term hour of service does not include any hour for services to the extent the compensation for those services constitutes income from sources without the United States" (within the meaning of Internal Revenue Code Sections 861 through 863 and the regulations thereunder). This means that "hours of service" do not include hours for which an employee receives compensation that is taxed as income from sources outside the United States (generally meaning certain work overseas).[4]

Qualified Moving Expense Reimbursements

Q We have an employee who was transferred to our Illinois office on December 31, 2017. He recently submitted requests for reimbursement of final moving expenses under our company's relocation policy. Are the amounts he is reimbursed under our relocation policy included or excluded from his income?

A This is a very timely question. The Internal Revenue Service (IRS) issued guidance in late September 2018, which clarifies that amounts received by an employee for moving expenses incurred before January 1, 2018 may be excluded from income if certain requirements are met.[5]

As noted in IRS Notice 2018-75, Section 132(a)(6) of the Internal Revenue Code (IRC) generally excludes from income "qualified moving expense reimbursements." Section 132(g)(1) defines a "qualified moving expense reimbursement" as any amount directly or indirectly received by an individual from an employer as payment for (or a reimbursement of) expenses which would be deductible as moving expenses under Section 217 if such expenses were paid or incurred by the individual.

"Qualified moving expense reimbursements" do not include any payment for (or reimbursement of) expenses that were actually deducted by the individual in the prior taxable year. In addition, qualified moving expense reimbursements are excludable from wages and compensation for employment tax purposes.[6]

The Tax Cuts and Jobs Act of 2017 (TCJA) suspended the exclusion from income of qualifying moving expenses reimbursed by an employer for taxable years beginning

after 2017 and ending before 2026. This suspension does not apply to members of the U.S. Armed Forces on active duty who move pursuant to a military order and incident to a permanent change of station.

IRS Notice 2018-75 clarifies that the suspension of the moving expenses exclusion under Section 132(a)(6) applies only to payments or reimbursements for expenses incurred in connection with moves that occurred after December 31, 2017.

This means that, if (1) an employee moved in 2017, (2) the employee's expenses would have been deductible by the employee under IRC Section 217 before the TCJA was enacted, and (3) the expenses were not deducted by the employee, then the amount the employee receives (either directly or indirectly) in 2018 from the employer will be qualified moving expense reimbursements. As a result, these expenses would be excludible from the employee's gross income and from wage withholding and compensation under the IRC Sections cited above.

The IRS also notes that employers that have included these amounts in the employee's wages or compensation may use the adjustment process under IRC Section 6413 or file a claim for a refund under IRC Section 6402 to correct the overpayment of federal employment taxes. Additional information on these corrections and adjustments is cited in IRS Notice 2018-75. ✪

Notes

1. *See* ERISA § 104(b)(4).
2. *See* ERISA § 502(c)(1).
3. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).
4. *See* 26 CFR §§ 54.5980H-4(a), 54.4980H-1.
5. *See* IRS Notice 2018-75.
6. *See* IRC Sections 3121(a)(20), 3231(e)(5), 3306(b)(16), and 3401(a)(19).

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