

Benefits Alert

July 2009

Retroactive Pension Calculations Not Necessary, Supreme Court Rules

The U.S. Supreme Court has ruled that employers don't necessarily violate the 1978 Pregnancy Discrimination Act (PDA) when a portion of female employees' pension benefits is calculated under accrual rules that applied before the PDA became law. This is good news for employers with longtime employees who are now nearing retirement, and for defined benefit plans that have been amended to account for the PDA but that didn't make retroactive pension calculations after the PDA became law. (*AT&T Corp. v. Hulteen*, U.S. Sup. Ct., No. 07-543, 2009)

NOT ALL MEDICAL LEAVES WERE EQUAL

AT&T based pension calcu-

lations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy leaves than for other medical leave. This was perfectly legal until the PDA, which required that all medical leaves be treated similarly, was enacted. AT&T changed its pension plan to conform to the law, but didn't recalculate female employees' years of service to account for the change. Female employees who went out on maternity leave prior to the PDA, therefore, received less service credit and lower pensions.

Four female employees sued, claiming that the lower pension calculations discriminated against them, in violation of the PDA. The lower courts agreed.

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The Supreme Court didn't, and reversed the lower courts' decisions. *Supreme Court*: AT&T's seniority system is *bona fide*, that is, it has no discriminatory terms. Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate the PDA today, a seniority system doesn't necessarily violate the law when it gives current effect to rules that



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IRS Grants Funding Relief To Some 401(k) Safe-Harbor Plans

As an alternative to plan termination, proposed regulations allow sponsors of qualified non-elective contribution 401(k) safe-harbor plans to amend their plans so that employer contributions may be reduced or suspended if the employer is suffering a substantial business hardship. *Key:* Safe-harbor plans that choose this alternative must satisfy non-discrimination tests for the entire plan year. You may rely on these regs until final regs are issued.

TWO SAFE-HARBOR PLANS, ONE RELIEF PROCEDURE

Generally, there are two types of 401(k) safe-harbor plans —

plans that provide qualified employer matching contributions (QMACs) and plans under which employers make qualified non-elective contributions (QNECs) into employees' accounts. QMACs already have the ability to reduce or suspend matching contributions if employers are suffering substantial business hardships, which are defined as:

- operating at a loss;
- substantial unemployment or underemployment in the employer's industry;
- depressed or declining sales and profits; or
- a reasonable expectation that the plan will terminate without relief.

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Retroactive Pension Calculations Not... (cont.)

operated before the PDA.

IMPACT OF LEDBETTER

In 2007, the Supreme Court ruled in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, that under the Equal Pay Act, the 180-day period to file a claim with the Equal Employment Opportunity Commission (EEOC) begins with the first act of discrimination, thus foreclosing pay discrimination lawsuits by employees who learn of the discrimination many years after the original discriminatory decision.

Earlier this year, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. The law clarifies that employees experi-

ence pay discrimination with every paycheck. Employees now have 180 days after receiving a discriminatory paycheck to file a charge with the EEOC prior to suing for pay discrimination.

The female employees in *AT&T* made a similar argument — that the prior discriminatory act (i.e., lower service credit calculations) was carried through to the present via pension checks. The Supreme Court didn't buy it. *Court:* *AT&T's* pre-PDA decision not to award its female employees service credit for pregnancy leave wasn't discriminatory when adopted. Therefore, the Court reasoned, the Fair Pay Act doesn't apply. ❖

The proposed regs extend the option to reduce or suspend employer contributions to QNECs under the same circumstances and using the same procedures. Under the proposed regs, plans must be amended to provide for the reduction or suspension of qualified non-elective contributions before the end of the plan year, and satisfy all applicable non-discrimination tests using the current year testing method for the entire plan year. In addition, these rules apply.

- All eligible employees must be given a supplemental notice that explains the reduction or suspension of future safe harbor non-elective contributions and its consequences, the procedure for changing their pre-tax elections, and the effective date of the amendment.

- The reduction or suspension of safe harbor non-elective contributions is effective no later than 30 days after employees receive their supplemental notice or the date the amendment is adopted. *Timing is everything:* Because of this 30-day rule, you can't implement this change by adopting the amendment at the end of the plan year.

- Eligible employees must have a reasonable opportunity prior to the reduction or suspension to change their pre-tax elections.

- The plan satisfies the safe harbor non-elective contribution requirements through the effective date of the amendment.

- The overall pre-tax contribution, after-tax contribution, and employer matching contribution limit (usually called the 401(a)(17) compensation limits) must be prorated. This last requirement now applies to QMACs, as well. ❖

DOL Releases Form For Expedited Review Of COBRA Cases

Under the 2009 American Recovery and Reinvestment Act, individuals eligible for the 65% COBRA subsidy who believe that they were wrongfully denied subsidized coverage have access to an expedited process under which a review of their status must be completed within 15 business days. The Department of Labor (DOL) has finalized the form these individuals must use.

OVERVIEW OF THE FORM

Applicants may either print the multiple-page form, *Application to the U.S. Department of Labor for Expedited Review of Denial of COBRA Premium Reduction*, from the DOL's website and mail or fax it back to the DOL, or complete the form online by cycling through 10 screens of information. The form itself hews closely to the IRS's guidance. Several questions ask applicants to provide details about their former em-

ployer, including the employer's name, address, and the name of a contact person. In all likelihood, this will be the person named in the COBRA notice. Applicants are also asked to provide details regarding the plan sponsor. *Important:* The DOL doesn't have to defer to the employer's decision to deny subsidized COBRA coverage. On the other hand, courts are likely to defer to the DOL's decision.

Questions one through four establish an employee's eligibility for subsidized COBRA coverage. Question five delves into the circumstances of the termination, and asks employees the following questions.

- Was it a permanent lay-off?
- Was it a layoff with possible recall or a temporary furlough?
- Was it a buyout or severance package in anticipation of a layoff?
- Did the employee resign

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Investment Advice Regs Delayed Again

Final regulations allow, but don't require, 401(k) plans to arrange for outside financial advisors to provide in-person or computer-modeled advice to plan participants. Plan sponsors who exercise prudence in selecting outside advisors won't be liable to participants if the advice falls short, or if the outside advisor

doesn't comply with the standards these regs set.

These regs were first slated to become effective on March 23, 2009. That date was pushed back 60 days, to May 22, 2009. The Department of Labor (DOL) has again announced a delay in the effective date, to November 18, 2009. The additional 180 days will give

as a result of a change in the geographic location of employment?

- Did the employee's employment end while the employee was absent due to illness or disability?

Questions eight and nine discuss COBRA coverage and subsidized COBRA coverage, respectively. Question 10 seeks information regarding whether the employee and his/her dependents were eligible for coverage under another group health plan.

PROCEED CAUTIOUSLY

It's possible to find yourself in a bind between the DOL and the IRS, if you turn down an employee's request for subsidized coverage. *How:* While the DOL is inclined to rule in favor of an employee's application, the IRS may not be so predisposed. However, to harmonize decision-making between the two agencies, the IRS has said that it won't challenge your determination that an employee was involuntarily terminated, provided your explanation is reasonable. ❖

the DOL time to consider legal and policy issues raised in comments to the final regs. These comments are available on the DOL's website at <http://www.dol.gov/ebsa/regs/cmt-investmentadvicefinalrule.html>.

Upon completion of its review, the DOL may decide to allow the regs to take effect, issue a further extension, withdraw the regs, or propose amendments.

Benefit\$ Alert discussed these regs in our June 2009 issue. ❖

Tame Those 401(k) Expenses

4 01(k) plan sponsors have to pony up for lots of expenses. But not all of them have to come out of the company's pocket. The plan itself can pick up a host of expenses, and that can save the company some money. But you have to know which ones. Here's the rundown.

WHAT'S OK FOR THE PLAN TO PAY

It's best to inform your

third-party administrators, record-keepers, etc., that some fees will be shifting to the plan. That way, they can adjust their billing practices. Then, consult the plan to see if fee shifting is allowable. The 401(k) plan can pay its own administration costs, including:

- audit fees;
- fees to prepare summary plan descriptions and other similar communications docu-

ments; and

- attorneys' fees paid with regard to the plan's operations.

WHAT'S NOT OK FOR THE PLAN TO PAY

Fees related to plan design, a change in plan design, or changes necessitated by a change in the law, must be borne by the company.

So, for example, the company must pay if it's contemplating incorporating an auto-enrollment feature or switching to or from a safe-harbor plan. ❖

Ask The Experts

Q. *On June 1, 2008, a plan participant took out a \$10,000 loan from her 401(k) plan, with an 8% interest rate. The loan was for five years and required monthly payments of \$203. The loan was to be paid back through paycheck withholding. Paychecks are issued monthly, on the first of each month. The employee's loan information wasn't forwarded to the Payroll department, and, as a result, no payments were withheld during 2008. The problem was discovered on December 15, 2008, during an annual review of the plan's records. What options do the employee and the plan have?*

A. July 1, 2008 (i.e., 30 days after the loan was made and the first repayment date), is considered to be the first missed payment, and the employee's outstanding loan balance of \$10,067 (loan plus accrued interest) is treated as a deemed distribution. The employee should have reported \$10,067 as income on her 2008 Form 1040. To fully remedy this situation, the plan may request and obtain relief from the IRS under its Voluntary Correction Program. In order to obtain relief, the mistake must be corrected. If the failure was corrected on January 1, 2009, the plan administrator could have asked the employee to:

- make a lump-sum payment of \$1,245 for the six missed installments (adjusted for interest at 8%) and continue making the \$203 installment payment for the remaining period of the loan;
- reamortize the outstanding balance of the loan, resulting in increased installment payments of \$230 a month for the remainder of the loan period; or
- make a partial lump-sum payment (an amount less than \$1,245) and reamortize the outstanding balance of the loan, resulting in a monthly payment that is higher than \$203 a month but less than \$230 a month.