TRUCKER ✦ HUSS

BENEFITS REPORT

IN THIS ISSUE...

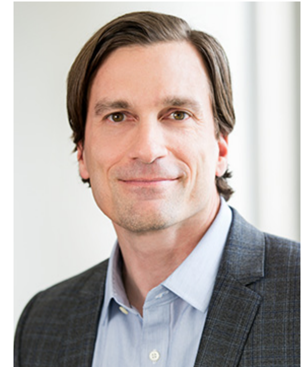
1 IRS Provides Update on Pending Guidance on the Determination Letter Program

3 The Retro-Effect: Outstanding Issues in Qualified Plan Recognition of Same-Sex Marriage as Highlighted by *Schuett v. FedEx*

5 What Plans and Plan Fiduciaries Need to Know about *Montanile*: Supreme Court Narrows ERISA Plan Reimbursement Rights

8 New Filing Guidance Regarding the Retroactive Commuter Benefit Increase

IRS Provides Update on Pending Guidance on the Determination Letter Program



KEVIN E. NOLT

On January 4, 2016, the Internal Revenue Service ("IRS") issued Notice 2016-03, which provides that the Department of Treasury ("Treasury") and the IRS will issue guidance in anticipation of the elimination, effective January 1, 2017, of the five-year remedial amendment cycle system for individually designed retirement plans under the IRS determination letter program. As described below, the future guidance will address the following: (1) Cycle A elections by controlled groups, (2) determination letter expiration dates and (3) the extension of deadlines for certain defined contribution pre-approved plans. Plan sponsors may rely on the guidance in Notice 2016-03 until further guidance is issued.

Background

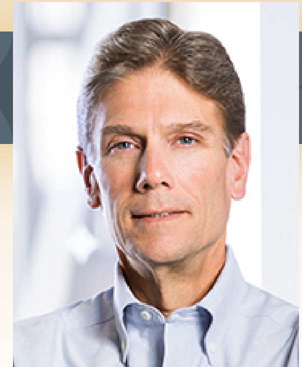
On July 21, 2015, the IRS released Announcement 2015-19, announcing a significant curtailment of the IRS determination letter program for individually designed retirement plans. The changes to the program are the result of the significant budget and time constraints facing the IRS. Announcement 2015-19 explains that the IRS will eliminate the staggered five-year remedial amendment cycle (which permits plan sponsors to apply for determination letters once every five years) for individually designed plans, effective January 1, 2017. The last cycle permitted to file under the current program is the Cycle A submission period beginning February 1, 2016 and ending January 31, 2017. This is significant for plan sponsors, who rely on favorable determination letters to confirm that their plans maintain tax-qualified status under Section 401(a) of the Internal Revenue Code (the "Code") and the related trusts are tax exempt under Section 501(a) of the Code. Announcement 2015-19 also provides that the scope of the determination letter program for individually

TRUCKER ✦ HUSS
A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS
www.truckerhuss.com

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617
Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Trucker ✦ Huss is pleased to announce…



Nicholas J. White became the newest Director of the Firm on January 1, 2016.

Congratulations to Nick!

designed retirement plans will be limited to initial plan qualification, qualification upon plan termination, and certain other limited circumstances. As of July 21, 2015, the IRS ceased accepting off-cycle determination letter applications (as defined in Section 14 of Revenue Procedure 2007–44), except with respect to new and terminating plans.

In light of these changes to the five-year remedial amendment cycle and the determination letter program, the Treasury and the IRS will be issuing additional guidance to plan sponsors and plan administrators to address these significant changes. Notice 2016-03 is the first guidance since Announcement 2015-19 and provides the following clarifications on the IRS determination letter program.

Cycle A Elections by Controlled Groups

Under the current provisions applicable to the five-year remedial amendment cycles, members of a controlled group or affiliated service group could elect to file their plans under Cycle A, provided that they file applications for all plans in their controlled or affiliated service group and that the election is made by the end of the applicable Cycle A period. In Notice 2016-03, however, the IRS stated that only controlled and affiliated service groups that had previously made a Cycle A election would be able to make that election for this Cycle A. This means that any controlled or affiliated service group that had not previously made a Cycle A election is not permitted to utilize the election now in order to submit their plans for a determination letter in Cycle A.

Expiration Dates on Previous Determination Letters

Notice 2016-03 also provides that expiration dates included in determination letters issued prior to January 4, 2016, no longer apply. In response to comments submitted with respect to Announcement 2015–19, the Treasury and the IRS intend to issue guidance with respect to the status of existing expiration dates on determination letters issued prior to January 4, 2016. Revenue Procedure 2016-6, which is the annual Revenue Procedure addressing the rules and procedures of the IRS determination letter program, was updated to reflect Announcement 2015-19 and Notice 2016-03.

Deadline to Adopt Pre-Approved Defined Contribution Plans Extended

Plan sponsors of pre-approved defined contribution plans have until April 30, 2016, to adopt a current defined contribution pre-approved plan and submit it for a determination letter. The Notice extends this deadline to April 30, 2017, for a plan sponsor who first adopts a pre-approved defined contribution plan on or after January 1, 2016. This extension is designed to facilitate a plan sponsor's ability to convert an existing individually designed

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

defined contribution plan into a current pre-approved defined contribution plan. Plan sponsors who had previously adopted a pre-approved plan prior to January 1, 2016, are still subject to the April 30, 2016, adoption and determination letter filing deadline. The IRS has not issued guidance on the due date for adoption of pre-approved defined benefit plans but future guidance from the IRS on these plans should address the deadline.

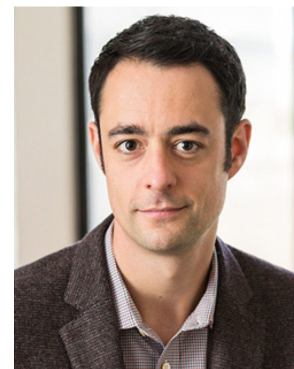
Potential Next Steps

Plan sponsors of individually designed retirement plans should watch for this future guidance so that they can make timely decisions with respect to their plans. One option may include maintaining their individually designed plan documents and conducting periodic reviews of the plan documents to ensure that all required changes were timely made and to examine any other plan amendments. Any document defects uncovered during such periodic reviews may be submitted to the IRS's Voluntary Correction Program for remediation. A second option may include restating their plans on a pre-approved defined contribution plan document by the April 30, 2017 deadline (or such other deadline applicable to pre-approved defined benefit plans) if their plans can fit within the confines of such pre-approved documents (but for some plans this may not be desirable or feasible depending on the type of plan and its complexity).

The effects of these changes have not been fully realized and there remains outstanding questions requiring further guidance and consideration. We will provide updates on such guidance as it is issued by the IRS or the Treasury. If you have questions, please contact the author of this article or the Trucker Huss attorney with whom you normally work.

JANUARY 2016

The Retro-Effect: Outstanding Issues in Qualified Plan Recognition of Same-Sex Marriage as Highlighted by *Schuett v. FedEx*



ROBERT R. GOWER

On January 4, 2016, an order issued by U.S. District Judge Phyllis J. Hamilton in *Schuett v. FedEx Corp.*, (No. 15-CV-0189-PJH, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016)) brought light to a long anticipated question surrounding the retroactive application of the United States Supreme Court opinion in *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

When the Supreme Court handed down its opinion in *Windsor* on June 26, 2013, holding Section 3 of the Defense of Marriage Act ("DOMA") unconstitutional and requiring the federal government to recognize same-sex marriages entered into under state law, questions immediately began stirring in the qualified plan community as to the potential retroactive application of the decision. Federal recognition of same-sex marriage meant qualified plans would need to recognize same-sex marriages for Plan purposes (for example, qualified joint and survivor annuity and spousal consent requirements), but there was a lack of clarity as to whether *Windsor* would be applied retroactively. A determination by the U.S. Supreme Court that a law is unconstitutional generally means that the law is not only void going forward, but also that the law is and always has been void. This raised the concern that if *Windsor* invalidated all plan-related decisions since 2004 (when Massachusetts became the first state to permit same-sex marriages) with respect to participants with same-sex spouses, qualified plans might have to take corrective action.

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

The Internal Revenue Service ("IRS") addressed *Windsor*'s retroactivity in April of 2014, issuing Notice 2014-9, providing that qualified plans would not be required to apply *Windsor* prior to June 26, 2013 (the date of the *Windsor* opinion) for federal tax purposes. This served as welcome guidance for Plan sponsors concerned over the retroactive effect of *Windsor* on their plans. However, the Notice only protects plans for federal tax purposes (*e.g.*, the qualified status of the Plan), not from civil actions brought under Title I of ERISA to enforce a benefits claim by a participant in a same-sex marriage who retired before June 26, 2013 (or the surviving spouse of such a participant who retired or died before that date). Stacey Schuett filed such a claim in January of 2014.

Stacey Schuett and Lesly Taboda-Hall began living together as a couple in the mid-1980s. The couple entered into a registered domestic partnership in California in 2001, and a marriage in California on June 13, 2013. At the time the couple was married in California, the marriage was not recognized due to a state Constitutional amendment barring same-sex marriage that was held invalid shortly thereafter. Nevertheless, the marriage was confirmed by the California Superior Court on September of 2013 as having been validly entered into on June 13, 2013. Taboda-Hall passed away on June 16, 2013, ten days before the *Windsor* decision. At the time of her death, Taboda-Hall had been a FedEx Corporation ("FedEx") employee for 26 years, and was fully vested in the FedEx Corporation's Employees' Pension Plan (the "FedEx Plan").

Under the terms of the FedEx Plan, a Qualified Pre-Retirement Survivor Annuity ("QPSA") is to be paid to the surviving spouse of a fully vested participant who dies before retiring. At the time of Taboda-Hall's death, the Plan defined "Spouse" by applying a DOMA definition of marriage (a union between one man and one woman as husband and wife). Schuett submitted a claim as Taboda-Hall's surviving spouse for a QPSA on November 26, 2013. The claim was denied by FedEx on the grounds that at the time of Taboda-Hall's death, the Plan defined spouse by incorporating the DOMA definition of marriage. Following a denial of her appeal, Schuett filed a lawsuit in January 2015 against FedEx, the Plan, and the FedEx retirement committee, asserting three causes of action — (1) a claim for benefits; (2) a claim for breach of fiduciary duty for failure to administer the Plan in accordance with applicable law (under a theory that *Windsor* must be applied retroactively); and (3) a claim for breach of fiduciary duty for failure to inform and/or providing misleading communications (under a theory that had FedEx clearly communicated its position on marriage, Taboda-Hall could have retired prior to her death and Schuett may have received survivor benefits as a non-spouse beneficiary). On October 7, 2015, FedEx filed a motion for judgment on the pleadings.

Signficantly, the court denied FedEx's motion with respect to the claim for breach of fiduciary duty for failure to administer the Plan in accordance with applicable law, finding that Schuett had adequately alleged that FedEx violated Title I of ERISA by acting contrary to applicable federal law and failing to provide a benefit mandated by ERISA. In reaching this conclusion, the Court made several observations:

- The Supreme Court held in *Windsor* that the Equal Protection Clause of the Fourteenth Amendment prevented the federal government from refusing to recognize same-sex marriages entered into under the law of a state, and the decision in *Windsor* was applied retroactively to provide relief for the plaintiff.
- A Technical Release from the Department of Labor ("DOL") issued on September 18, 2013 (Technical Release 2013-04), provided that the DOL would interpret the term "spouse" to include a same-sex spouse legally married in any state or foreign jurisdiction, thus providing that ERISA's mandatory benefit provisions apply to all spouses.
- The FedEx Plan document provided that if any provision of the Plan were deemed to be at variance with or contrary to any law of the United States, the law of the United States would be deemed to govern.
- FedEx was not able to argue any basis upon which the court could determine that ERISA's statutory scheme and regulations limited FedEx's ability to retroactively apply *Windsor* absent an amendment to the plan to provide for such application.

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

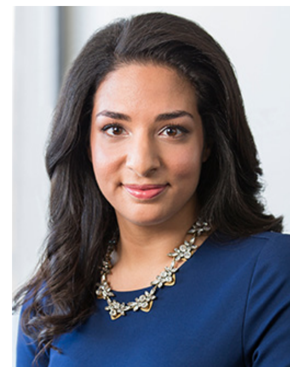
The Court dismissed Schuett's two other causes of action, finding that it was not an abuse of discretion for FedEx to interpret its Plan to bar Schuett from receiving benefits, and that Schuett was not entitled to pursue her claim for breach of fiduciary duty in providing misleading communications because she was not a plan participant and had no claim as a beneficiary of the non-spousal benefits in question.

Importantly, the Court's order is not a final determination — it simply allows Schuett to continue to pursue her claim against FedEx.

The *Schuett* case highlights the reality and potential impacts of a retroactive application of *Windsor*. Plan administrators and fiduciaries should remain aware of the possibility of claims brought under Title I of ERISA to enforce a benefits claim by a participant in a same-sex marriage who retired before the *Windsor* decision (or the surviving spouse of such a participant who retired or died before the *Windsor* decision). Furthermore, Plan administrators should be aware that plan amendments that provide for recognition of same-sex marriages beginning on the date of the *Windsor* decision will not protect the plan and fiduciaries from Title I claims stemming from events prior to the *Windsor* decision. If you have questions regarding such claims, please contact the Trucker Huss attorney with whom you normally work.

JANUARY 2016

What Plans and Plan Fiduciaries Need to Know about *Montanile*: Supreme Court Narrows ERISA Plan Reimbursement Rights



GISUE MEHDI

On January 20, 2016, in a blow to ERISA plans and plan fiduciaries, the Supreme Court held in *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan*, 2016 WL 228344, 577 U.S. __ (2016), that when a participant receives a settlement from a third-party for an injury and spends the settlement on non-tangible items such as food and services, an ERISA plan fiduciary cannot bring an ERISA § 502(a)(3) claim for reimbursement from the participant's general assets. Under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), plan fiduciaries can file civil suits "to obtain…appropriate equitable relief…to enforce…the terms of the plan." ERISA fiduciaries have relied on ERISA §502(a)(3) to litigate claims for reimbursement against plan participants who have received plan benefits and who later receive a third-party settlement that triggers a right of reimbursement under the terms of the plan.

After *Montanile*, an ERISA plan may have a difficult time (and cannot bring a viable claim under ERISA §502(a)(3)) recovering benefits it paid where the participant who received the benefits related to a car accident has received a settlement payment from the other motorist or insurance and has spent the settlement payment on consumables or services (food and travel, for example).

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

This case has serious implications for health and disability plans but may also have far-reaching consequences for other welfare plans and pension plans. This decision by the Supreme Court will likely encourage participants to quickly spend all of their settlement funds or overpayments on non-traceable assets. The good news is that plan fiduciaries can take steps, which will be discussed later in this article, to protect their plans against such situations.

Circuit Split

In deciding *Montanile*, the Court resolved a long-standing circuit split, in favor of what appeared to be the minority position of the Eighth and Ninth Circuits, against the majority view adopted by the First, Second, Third, Sixth, and Eleventh Circuits.

Those latter five Circuit Courts of Appeals have held that plan fiduciaries pursuing an equitable lien under § 502(a)(3) on behalf of the plan may bring a claim for recovery from a participant's general assets, even in situations where specifically identified funds were not delineated from general assets. Two Circuits, including the Ninth Circuit in *Bilyeu v. Morgan Stanley*, 683 F.3d 1083 (9th Cir. 2012), and the Eighth Circuit in *Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012), held that either possession of the funds received from the settlement or strict tracing to specifically identifiable funds is necessary for a plan to assert an equitable lien claim under § 502(a)(3). The Court's decision in *Montanile* is not entirely surprising, because it follows the reasoning and framework already established by the Ninth Circuit in *Bilyeu* and adopted by the Eighth Circuit in *Goding*.

The Supreme Court previously set forth the contours of an ERISA §502(a)(3) claim for "appropriate equitable relief" in *Great-West Life & Annuity v. Knudson* (2002), *Sereboff v. Mid-Atlantic Medical Services* (2006), and *US Airways v. McCutchen* (2013). But, as the Court recognized in *Montanile*, those prior cases did not resolve whether the remedy sought by plan fiduciaries for reimbursement for medical expenses after the plan participant recovered money from a third party, *from the participant's general assets*, is equitable in nature.

Background

Robert Montanile was a participant in a health plan administered by the Board. The plan stated: "Amounts that have been recovered by a [participant] from another party are assets of the Plan . . . and are not distributable to any person or entity without the Plan's written release of its subrogation interest." Further, the plan also provided that "any amounts" that a participant "recover[s] from another party by award, judgment, settlement or otherwise . . . will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan . . . and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person." In addition, the plan contained language requiring participants to notify the plan and obtain consent before settling third-party claims.

In December 2008, Montanile got in a car accident with a drunk driver, and the plan paid $121,044.02 for his medical expenses. Montanile signed an agreement to reimburse the plan from any related settlement recovery, and he later obtained a $500,000 settlement against the drunk driver and Montanile's uninsured motorist insurance coverage. Montanile paid $260,000 of the settlement for legal fees, leaving him with $240,000.

At that point, Montanile's attorney put the settlement funds in the attorney's client trust account. The attorney denied the Board's request for reimbursement and after negotiations failed, informed the Board that he would disburse the remaining settlement funds to Montanile, unless the Board objected within 14 days. The Board did not object; Montanile's attorney released the funds to his client; and Montanile spent the settlement funds.

Six months after negotiations ended with Montanile, the Board sued Montanile under ERISA §502(a)(3) to enforce the plan's lien provisions for the $121,044.02 in benefits that the plan paid. The district court entered, and the Eleventh Circuit affirmed, a $121,044.02 judgment against Montanile out of his general assets. (Notably, the Supreme Court remanded the case to the district court to determine how much Montanile had dissipated the settlement funds and whether Montanile commingled the settlement fund with his general assets.)

The Eleventh Circuit mainly relied on another recent Eleventh Circuit case, *AirTran Airways, Inc. v. Elem*, 767

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

F.3d 1192 (11th Cir. 2014), where it held that settlement funds were specifically identifiable, even after the participant no longer possessed them, because the subsequent dissipation of funds could not destroy the lien that attached prior to dissipation.

Supreme Court's Holding

The Supreme Court's opinion, delivered by Justice Thomas, held that when a participant spends a third-party settlement on nontraceable items, the plan fiduciary may not bring suit under §502(a)(3) to recover from the participant's general assets. The Court emphasized that the Board's claim would have been equitable (and could have been brought under §502(a)(3)) "had the Board immediately sued to enforce the lien against the fund."

The Board argued that if a plan had an equitable lien by agreement, a plan could still recover without specifically identifying a fund in the defendant's possession to which the right to recover attached. The Board based its reasoning on that of the majority of Circuit Courts of Appeals that had decided the issue and on its reading of *Sereboff*. The Board argued that under *Sereboff*, the plan was allowed to recover settlement proceeds from a participant under the terms of the plan, without requiring strict tracing of the settlement proceeds to a particular fund or asset.

Following the Court's framework in Sereboff, the Court's inquiry in *Montanile* began with the question of whether a remedy "is legal or equitable depends on [(1)] the basis for the [the plaintiff's] claim and [(2)] the nature of the underlying remedies sought." *Montanile* citing *Sereboff,* 547 U.S. at 363. Identifying the crux of the legal question before it, the Court opined that (1) the basis for the Board's claim is equitable, but the Court must decide if (2) the *remedy*, "enforcement of an equitable lien by agreement against the defendant's general assets," is equitable. The Court resolved this issue by examining standard equity treatises, where equitable remedies are generally directed against, or give a right to, a specific thing. The Court clarified its ruling in *Sereboff* by opining in *Montanile* that the Board "misread[] *Sereboff,*" which according to the Court, "left untouched the rule that all types of equitable liens must be enforced against a specifically identified fund in the defendant's possession." Even though the basis for the claim in *Montanile* was equitable, the "plaintiff must still identify a specific fund…to enforce the lien" *Montanile* (discussing *Barnes v. Alexander*, 232 U.S. 117, 123 (1914)).

Further, the Court identified a public policy reason for its holding — "allocat[ing] liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." Allocating that liability to the plans, the Court stated that plans have the knowledge and are in the best position to track expensive claims, especially when there are plan provisions requiring participants and beneficiaries to notify the plan of legal claims against third parties and giving the plan rights of subrogation and reimbursement.

Finally, the Court remanded the case to the district court to determine whether Montanile kept his settlement fund separate from his general assets or dissipated the entire fund on nontraceable assets.

Best Practices

Plan fiduciaries could face increased costs and obligations related to the ongoing tracking and monitoring of settlements and filing suit for an equitable lien *immediately*. Plans should dedicate resources to developing proper infrastructure to monitor and investigate any related litigation and must be prepared to race against the clock, before a participant spends all of his settlement funds. The Court trivialized[1] the additional burden and costs to plans, stating that plans have developed safeguards, without admitting that those safeguards are not always adequate in yielding plan recoveries where they are due.

Plan sponsors should review their plans to ensure that they have strong reimbursement language that requires participants to give prompt notice to the plan in the case of a third-party settlement. After *Montanile*, plans should consider adding language requiring participants to give the plan a certain amount of notice before monies are disbursed.

[1] Notably, Justice Ginsburg, the lone dissenter, took issue with the Court's "bizarre conclusion" that a participant can escape his reimbursement obligation by rapidly spending settlement funds on nontraceable items.

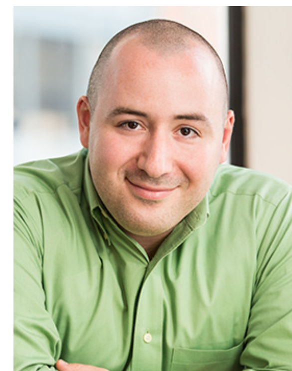
Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Next, plan fiduciaries need to determine the most effective way to enforce the plan's subrogation and reimbursement rights, particularly when the plan provides health or disability benefits. Because the Court has opined that plans are the best equipped to stay abreast of potential third-party tort suits, the plans should maintain communication with all parties in a tort suit, particularly the participant's attorney, in hopes of receiving proper notice and a recovery before funds are disbursed to the client.

Montanile's most important lesson to plan fiduciaries is that they should take immediate action if the settlement funds are going to be distributed to the participant. As the Court remarked, the Board "had sufficient notice of Montanile's settlement to have taken various steps to preserve those funds." While it may not seem like a long time, even waiting six months could be fatal to the plan fiduciary's claim, especially where the participant has spent all, or a substantial portion, of the settlement on consumables.

JANUARY 2016

New Filing Guidance Regarding the Retroactive Commuter Benefit Increase



FREEMAN L. LEVINRAD

To help those employers that allowed employees to exclude more than $130 in nontaxable monthly transit benefits for 2015, the IRS issued Notice 2016-6 to facilitate their adjustment of employees' federal nontaxable wages following the recent retroactive increase in excludable transit benefits. On December 18, 2015, the President signed the Consolidated Appropriations Act, 2016, Public Law No. 114-113 (the "Act") which included an amendment to §132(f)(2) of the Internal Revenue Code. The amendment creates parity between the transit benefit exclusion for qualified parking and the exclusion for transportation in a commuter highway vehicle and any transit pass, effective for periods after December 31, 2014. This means that the monthly exclusion for commuter highway/transit pass benefits increased from $130 per participating employee to $250 per participating employee for 2015. (Note: For 2016, the monthly nontaxable benefit amount for each type of benefit *(i.e.*, qualified parking and transit commuter/transit) is $255.)

Special Process for Adjusting Taxable Wages

As a result of the retroactive increase, employers who provided transit benefits during 2015 to an employee in excess of $130 (the former maximum monthly excludable amount) and up to $250 (the amended maximum amount) withheld excess income and FICA taxes from the employee's gross income and wages. Notice 2016-6

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

provides a special administrative procedure for employers who have not yet filed Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2015, to reflect changes in the excludable amount for transit benefits provided in all quarters of 2015, and in filing Forms W-2, Wage and Tax Statement. By using the special administrative procedures, an employer can avoid following the more onerous "normal" procedure for adjusting federal nontaxable wages described below.

To be eligible to use this special procedure, the employer must repay or reimburse employees for their overcollected FICA tax (including any Additional Medicare Tax) on the excess transit benefits for all four quarters of 2015 before filing the fourth quarter Form 941. The employer can then complete the fourth quarter Form 941 by reducing the following amounts by the excess transit benefits for all quarters of 2015: (1) the fourth quarter wages, tips and compensation reported on line 2, (2) the taxable social security wages reported on line 5a, (3) the taxable Medicare Wages and tips reported on line 5c, and (4) the taxable wages and tips subject to Additional Medicare Tax withholding reported on line 5d, Notice 2016-6 also provides instructions for reconciling the total taxes reported on line 10 of Form 941 with the total liability for the quarter reported on line 14 (for a monthly schedule depositor) or Schedule B (for a semiweekly schedule depositor).

Normal Process for Adjusting Nontaxable Wage

If the special procedure described above is not pursued, an employer must use the "normal" process for adjusting nontaxable wages. This means that the employer must file corrected Form 941-X, and obtain a written statement from each employee confirming that the employee did not or will not make a claim for refund of FICA tax overcollected in a prior year. In addition, the employer may not repay or reimburse, make an adjustment with respect to, or seek a refund of Additional Medicare Tax or income tax deducted or withheld from the employee in 2015.

Form W-2 Guidance

Employers that paid excess transit benefits in 2015 and have not furnished 2015 Forms W-2 to their employees must take into account the increased exclusion for 2015 transit benefits in calculating the amount of wages reported in boxes 1, 3, and 5. Employers that have already repaid or reimbursed their employees for the overcollected FICA taxes prior to furnishing Forms W-2 (under either the normal or special procedures) must reduce the amounts of withheld tax reported in boxes 4 and 6. In all cases, employers must report the amount of income tax actually withheld during 2015 in box 2, Federal income tax withheld. The additional income tax withholding will be applied against the taxes shown on the employee's individual income tax return (Form 1040).

Employers that repaid or reimbursed their employees for overcollected FICA taxes after furnishing W-2s to employees but before filing the W-2s with the Social Security Administration ("SSA") must check "void" at the top of each incorrect W-2, prepare new W-2s with the correct information, and send these new forms to the SSA. The employers must write "CORRECTED" on the employees' new copies and then furnish them to employees. In contrast, employers that have already filed 2015 Forms W-2 with the SSA must file Forms W-2s, Corrected Wage and Tax Statements, and furnish copies of the Forms W-2c to employees.

2016 Transit Benefits

For 2016, the monthly exclusion for each type of benefit (*i.e.*, qualified parking or commuter highway/transit pass) is $255. Although employers generally are not required to offer the maximum amount of pretax benefits, employers in certain locations (including the Bay Area, New York, and the District of Columbia) may be subject to local laws with heightened requirements. For example, if an employer in the Bay Area has 50 or more full time employees and chooses to offer pretax benefits, it must offer up to the maximum amount allowed under federal law.

JANUARY 2016

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.

FIRM NEWS

In December, **Lee Trucker** and **Brad Huss** were included among the top 15 attorneys identified by NAPA-Net readers as "*the best ERISA attorney.*"

Charles Storke's comments are included in the *Institutional Investor* article, "Is the Pension Benefit Guaranty Corp. Worth Propping Up?" (published January 14, 2016).

On January 15, as Chair of the ABA's Tort Trial & Insurance Practice Section's Employee Benefits Committee, **Robert Schwartz** moderated a panel on Recent Developments in ERISA litigation and legislation at the ABA's Symposium on Insurance and Employee Benefits held in Clearwater, Florida.

On January 21, **Benjamin Spater** spoke at a Legislative Update of the Western Pension & Benefits Council, San Francisco Chapter.

On January 22, **Brad Huss** spoke at a workshop entitled "ERISA Litigation Update" during the ASPPA College of Pension Actuaries 2016 Los Angeles Advanced Pension Conference.

On January 29, 2016, **Tiffany N. Santos** spoke on the "Elimination of Bias in the Profession: The LGBT Ally Toolkit" panel at the 2016 Midyear Meeting of the ABA Section of Taxation in Los Angeles, California. On February 3, 2016 she will moderate a webinar, "The Interaction of Employer-Provided Group Health Plans with Marketplace Coverage, COBRA, and Medicare," for the ABA's Joint Committee on Employee Benefits.

On February 10-13, **Clarissa A. Kang**, **Tiffany Santos** and **Robert Schwartz** will speak at the ABA, Labor and Employment Law, Employee Benefits Committee Midwinter Meeting in Las Vegas. **Clarissa Kang** will speak on "External Review Pros and Cons: Perspectives of the Plan and Claimant" and, as a co-chair of the EBC's Diversity Committee, she will also facilitate a lunch presentation on diversity issues. **Robert Schwartz** will participate on a "Retirement Plan Merger Workshop" panel. Tiffany Santos will be speaking on the "Anatomy of a Contract" panel.

Trucker Huss attorneys **Mary Powell**, **Tiffany Santos**, **Elizabeth Loh**, **Callan Carter** and **Eric Schillinger** will host an in-person seminar entitled ***Ready or Not: ACA Reporting Starts March 31st!*** The seminar will be held Wednesday, February 24th in San Francisco at the Westin St. Francis Union Square and again on Thursday, February 25th in Santa Clara at the Biltmore Hotel & Suites. Seating is limited, so plan to register early:
https://trucker-huss-aca-reporting.eventbrite.com

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

Editor: Shannon Oliver, soliver@truckerhuss.com

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date shown above, are general in nature and are not the substitute for legal advice or opinion in a particular case.