LABOR & EMPLOYEE BENEFITS LAW

HOLM & O'HARA LLP

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INSIDE THIS ISSUE:

AGENCY SHOP FEES 1
IRS LETTER REQUESTS 1
WELLNESS PROGRAMS 2
BARGAINING OVER THE CADILLAC TAX 2

IRS CYCLE E FILING DEADLINE JAN. 31, 2016

- Individually designed governmental retirement plans that did not submit IRS determination letter applications in the second Cycle "C" that ended Jan. 31, 2014, may submit applications in the second Cycle "E" through Jan. 31, 2016, in accordance with IRS Rev. Proc. 2012-50. Trustees should ensure that their plans have adopted all required amendments for governmental plans, as provided in the IRS's 2014 Cumulative List.
- Plans that submit IRS determination letter applications in the second Cycle "E" ending Jan. 31, 2016, but did not submit applications in the initial Cycle "E" ending Jan. 31, 2011, will also need to comply with the 2008 and 2009 items from the 2008 and 2009 Cumulative Lists.

SUPREME COURT TO DECIDE ON AGENCY SHOP FEES FOR PUBLIC EMPLOYEES IN 2016

Early next year, the U.S. Supreme Court is set to hear a constitutional challenge to its own decades-old precedent that allows public-sector unions to collect fees from employees who refuse to join the union, in order to cover the costs of collective bargaining and related activities. If the prior law is overturned, the change is likely to dramatically impact public-sector unions throughout the country.

On June 30, 2015, the Supreme Court agreed to hear the case named *Friedrichs v. California Teachers Association*. *Friedrichs* involves a challenge brought by a group of California public-school teachers to a state law that authorizes the California Teachers Association, the National Education Association ("NEA") and their local affiliates to collect an agency fee from all public-school employees, regardless of their union membership.

The teachers challenging the state law authorizing the agency fee have argued that the law violates their First Amendment rights to free speech and association.

Friedrichs is a direct challenge to the Supreme Court's prior decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), which upheld agency shop fees to cover the costs of public-sector collective bargaining and certain related activities. In *Abood,* the Court held that such fees are permitted under the Constitution when the charges "are used to finance expenditures by the Union for collective-bargaining, contract-administration, and grievance-adjustment purposes." Since the Supreme Court's *Abood* decision in 1977, the Court developed a three-part test to determine which expenditures may be charged to public-sector nonmember employees. The activities must "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). The Court noted then that public-sector unions often expend considerable resources in securing ratification of negotiated agreements.

In *Friedrichs*, the Court will decide if *Abood* should be overruled entirely, to prohibit public-sector agency shop arrangements. The Court will also hear arguments over whether state bargaining laws may require public employees to "affirmatively object" to subsidizing those activities of public-sector unions that nonmembers may not be compelled to pay for, such as most political campaigns and legislative lobbying.

IRS ENDING 5-YEAR DETERMINATION LETTER PROGRAM

In Announcement 2015-19 released this past July, the IRS announced that it is ending the voluntary 5-year determination letter program for individually designed plans, effective Jan. 1, 2017. As of that date, the IRS will no longer accept determination letter applications based on the 5-year remedial amendment cycles. The program will be eliminated to allow the IRS "to more efficiently direct its limited resources," according to the Announcement.

Effective Jan. 1, 2017, a sponsor of an individually designed plan will be permitted to submit a determination letter application for a plan seeking initial qualification, and for qualification upon termination. In addition, a sponsor will be permitted to submit a determination letter application in certain other circumstances that will be determined by the U.S. Treasury Department and the IRS.

Additionally, effective July 21, 2015 through Dec. 31, 2016, the IRS will no longer accept off-cycle determination letter applications, except for applications for new plans, and for terminating plans. The IRS also requested comments on changes to its Employee Plans Compliance Resolution System.

BARGAINING OVER THE CADILLAC TAX

While still years from taking effect, the Affordable Care Act's ("ACA") so-called "Cadillac tax" for high cost employer-sponsored health coverage has become a hot topic in collective bargaining for labor agreements that will cover 2018 and subsequent years.

For background, the ACA created Section 4980I of the Internal Revenue Code ("IRC"). Section 4980I applies to taxable years beginning after Dec. 31, 2017 (i.e., 2018 and later). Under this provision, if the aggregate cost of "applicable employer-sponsored coverage" provided to an employee exceeds a certain dollar limit, the excess is subject to a 40% excise tax (commonly known as the "Cadillac tax"). The Cadillac tax specifically includes governmental plans as "applicable employer-sponsored coverage," under IRC Section 4980I(d)(1)(E). The dollar limit is to be revised annually for cost-of-living adjustments. For 2018, the limits are $10,200 per employee for self-only coverage, and $27,500 per employee for "other than self-only" coverage. These dollar limits for 2018 will also be adjusted by a health cost determined for that year. There are different dollar limits for certain employees, including qualified retirees, employees engaged in a high-risk profession and employees who repair or install electrical or telecommunications lines.

Barring a change in (or repeal of) the law, many collectively bargained plans are expected to exceed these dollar limits and therefore become subject to the Cadillac tax in the coming years. Under the law, the responsibility for paying a Cadillac tax lies with a health insurer for fully insured coverage, an employer for Health Savings Accounts ("HSAs") and Medical Savings Accounts ("MSAs"), and a plan administrator of a self-insured plan. However, in anticipation of potentially large tax liability, many Unions and employers presently negotiating agreements to cover 2018 and beyond have begun addressing plan designs relating to both the costs of future health benefits and the party(ies) responsible for payment of the Cadillac tax.

Founded over twenty-five years ago, Holm & O'Hara LLP is a general practice law firm in New York City concentrating in employee benefits, labor law, litigation, real estate, trusts and estates and commercial transactions. The firm is comprised of five partners, eight associates and seven paralegals. Holm & O'Hara LLP represents and counsels unions, employee benefit plans, public and privately held corporations, individuals and associations.

The labor law practice provides representation primarily to unions in the construction, utility and railroad industries, as well as the public sector. The employee benefits practice provides counseling and litigation services to Taft-Hartley multiemployer plans, as well as governmental plans, as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"). The firm's employee benefits counseling is led by founding partner Vincent F. O'Hara and associate Timothy S. Klimpl. The firm also provides unions with benefits advice for negotiations and arbitrations in the areas of pension and health benefits. Holm & O'Hara LLP is proud of the quality of its representation. We provide both legal and strategic advice for the benefit of our clients.

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WELLNESS PROGRAMS MAY BOOST PLANS' FINANCIAL HEALTH

Sponsors of health plans that are looking for ways to add benefits and potentially restrain ever-increasing medical costs may want to consider adding or expanding a wellness program as part of their plan. While they have been around for years, wellness programs have been strengthened by the Affordable Care Act ("ACA") and continue to grow as an employee benefit around the U.S. Self-insured plans in particular, which generally enjoy complete control over their plan designs, can examine if adding or building upon a variety of wellness programs may add value to employees and their covered dependents, while potentially saving their plan money in the long-term. Wellness programs can take a variety of forms, although studies of their effectiveness show mixed results. Some of the more common categories of programs include detecting health risks, lifestyle management to reduce health risks and encourage healthy lifestyles, and disease management to support employees and dependents with chronic conditions, according to a recent RAND Corporation report sponsored by the U.S. Department of Labor (https://www.dol.gov/ebsa/pdf/WellnessStudyFinal.pdf). The report also noted that around half of employers with at least 50 employees, and over 90% of employers with more than 50,000 employees, had some kind of wellness program in 2012. Examples of wellness programs include exercise programs, such as reimbursement of gym memberships; preventive medical exams, such as prostate exams and mammograms; immunizations; nutritional and health risk assessments; stress management; disease management and smoking cessation programs.

Under the ACA, plans are now generally permitted to reward employees up to 30% of the cost of coverage for participating in a nondiscriminatory "health-contingent wellness program," which generally requires individuals to meet a specific standard related to their health to obtain a reward, such as a reduction in tobacco use or cholesterol level. To comply with HIPAA's nondiscrimination standards, individuals with certain medical conditions must be given reasonable alternative means for qualifying for the reward, among other requirements.