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BENEFITS REPORT

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Second Circuit Breathes New Life Into Company Stock Litigation

JOSEPH C. FAUCHER
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FEBRUARY, 2019

In offering their own company stock as a plan investment option, retirement plan fiduciaries are subject to the same duty of prudence that governs the selection, retention and removal of any other investments. Before 2014, litigation against plan fiduciaries that offered their companies' stock as an investment option was relatively commonplace. Some insurers viewed those companies as a particular risk. However, the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), made it very difficult for plaintiffs in cases challenging the inclusion of company stock to survive early motions to dismiss. As a result, the number of cases filed challenging fiduciary decisions to continue offering company stock as an investment option declined significantly. Many plaintiffs' attorneys began to view these cases as not being worth the time and effort to pursue. This, in turn, has caused some companies to perceive that the risk of offering company stock has largely declined.

Under *Dudenhoeffer*, plaintiffs must satisfy a rigorous two-part test if they allege a fiduciary failed to prudently act on non-public information in managing

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Trucker ✦ Huss is pleased to announce...

Angel L. Garrett became a Director of the Firm on January 1, 2019.

Congratulations to Angel!

plans that offer company stock. Plaintiffs commonly allege, for example, that these fiduciaries failed to prudently: (i) sell the plan's holdings in the company stock, (ii) cease additional purchases of the stock, or (iii) disclose negative, non-public information to the market. To satisfy *Dudenhoeffer's* test, a plaintiff must first sufficiently plead an alternative action the fiduciary could have taken that would not have violated securities laws (i.e., insider trading rules). Second, plaintiffs must plead facts that show why a prudent fiduciary in that fiduciary's position would ***not*** have viewed the alternative action as more likely to harm the stock fund than help it. This second requirement has proven to be nearly insurmountable for litigants, as courts have dismissed almost every so-called "stock drop" case filed since *Dudenhoeffer*.

The recent decision by the U.S. Court of Appeals for the Second Circuit in *Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018), however, reverses that trend. In *Jander*, the Second Circuit Court of Appeals found the plaintiffs' allegations sufficient to meet the heightened *Dudenhoeffer* standard.

The plaintiffs in *Jander* were participants in a retirement plan sponsored by IBM. One of the Plan's investment options was an IBM Company Stock Fund (the "Fund"), which was primarily invested in IBM stock. In October 2014, IBM announced the sale of its microelectronic business division, and a related $2.4 billion write-down of its assets. Plaintiffs alleged that IBM knew this division was struggling financially, but failed to take action to prevent the foreseeable drop in IBM's stock price that occurred once IBM announced the sale of the division. After the announcement, the value of IBM shares fell over 7% in three days.

In their amended complaint, the plaintiffs claimed that IBM could have taken three alternative courses of conduct to mitigate the losses to the Fund. First, they alleged IBM could have made an earlier corrective public disclosure about the true financial health of the microelectronics division. This, they claimed, would have brought IBM stock to its actual value because it was traded in an efficient market. Second, they claimed IBM could have halted all trades of IBM stock by the Fund. And, third, they alleged that IBM could have purchased a hedging product to offset the foreseeable losses from the inevitable announcement of the sale and related write-down. The plaintiffs relied on a number of academic articles and studies to support these allegations.

The district court concluded, however, that the plaintiffs failed to plead the context-specific allegations required under the *Dudenhoeffer* standard, and dismissed the case. It held that the plaintiffs did not sufficiently allege that a prudent fiduciary in the defendants' position would not have viewed their proposed alternatives as more likely to harm the Fund than help it.

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By the time the case reached the Court of Appeals, plaintiffs had abandoned all but one of the suggested alternative actions that the fiduciaries could have taken. On appeal, they argued only that the fiduciaries could have made early corrective disclosures of the microelectronics division's financial health in the company's regular SEC reporting, or in disclosures to participants.

The Second Circuit concluded that, when drawing all reasonable inferences in the plaintiffs' favor, "several allegations" in the plaintiffs' complaint stated a viable claim. First, it found the plaintiffs sufficiently pled that the Plan's fiduciaries knew the IBM stock was artificially inflated because they knew about the microelectronics division's struggles. Second, it found the fiduciaries could have disclosed information about the microelectronic division's actual financial health through IBM's quarterly SEC filings and normal participant disclosures. Third, it found that Plan fiduciaries could have foreseen that an inevitable disclosure of the microelectronics division's financial struggles would have negative effects on IBM's reputation and value. Fourth, a reasonable fiduciary would not have feared the market would overreact to an early disclosure, because IBM traded in an efficient market and a truthful disclosure would bring the stock to its true value. And, finally, it concluded that fiduciaries knew that disclosure about the struggling division would be inevitable because they were actively working to sell it. The court found this fifth point "particularly important" because this was not a case where the decision was to release the information or not release it. Rather, it was a decision between an early disclosure and an inevitable later disclosure.

Noting that the "standard is plausibility — not likelihood or certainty…," the court held that the plaintiffs had sufficiently pled that no prudent fiduciary in the fiduciaries' position could have concluded that an early disclosure would do more harm than good to the Fund. It remanded the case to the district court, where it will proceed past the pleadings stage.

Jander arguably breathes new life into an area of ERISA litigation that many plaintiffs' attorneys had largely abandoned. It is somewhat difficult to reconcile *Jander* with the decisions in other post-*Dudenhoeffer* decisions, in which courts have consistently found that a prudent fiduciary may very reasonably fear an early disclosure would lead to a drop in stock price. *Dudenhoeffer* itself cautioned that courts should consider whether "publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Jander* also went against trend in accepting the argument that disclosure was inevitable, and therefore, should have been made sooner. Other courts have rejected this hypothetical argument finding it insufficient to outweigh the reasonable fear of an adverse effect on the company's stock price.

It is too soon to say whether other courts will follow *Jander* (which is only binding upon courts in the Second Circuit), or, if the courts instead will continue to view *Dudenhoeffer* as presenting a very difficult obstacle for plaintiffs to scale. In all likelihood, plaintiffs' attorneys who may have avoided entering the fray in company stock cases since *Dudenhoeffer* may be emboldened to revisit their approach. Companies that choose to offer their stock as an investment option should act accordingly, and engage in a prudent process of weighing the risks and benefits of doing so.

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IRS Issues Proposed Regulations Modifying Hardship Distribution Rules

BRYAN CARD

FEBRUARY, 2019

The new year brings significant changes to hardship distributions under Section 401(k) plans and Section 403(b) plans. Following the passage of the Bipartisan Budget Act (the "Act") in February 2018, the Internal Revenue Service (IRS) released proposed regulations in November 2018 which provide implementing guidance for the new rules and modifications made by the Act.

The hardship distribution changes are effective for distributions made in plan years beginning after December 31, 2018, unless otherwise specified. Final comments on the proposed implementing regulations were due on January 14, 2019, and final regulations should be issued later this year. In the meantime, plan sponsors should look to the proposed regulations for implementing guidance.

Most of the changes made by the Act and the proposed regulations apply to the safe harbor rules for hardship distributions, and many plans have adopted those changes because they provide better assurance of compliance with the hardship distribution standards.

Current Hardship Distribution Rules

Under Internal Revenue Code (the "Code") Section 401(k)(2)(B)(iv), an active participant facing a financial hardship may obtain a distribution of their elective deferrals without a distributable event. In order for a distribution to qualify as a hardship, the distribution must satisfy two requirements:

(i) The distribution must be made on account of an immediate and heavy financial need; and

(ii) The amount must be necessary to satisfy the financial need.

Determinations under both prongs of this test must be made on the basis of all relevant facts and circumstances, and in accordance with nondiscriminatory and objective standards set forth in the plan.

"Immediate and Heavy Financial Need" Prong

Facts and Circumstances Test

Whether a participant has an immediate and heavy financial need is determined based on all relevant facts and circumstances. For example, the need to pay for funeral expenses would qualify as an immediate and heavy financial need, but a distribution for the purchase of a television or a boat would not. Note that the proposed regulations and the Act did not modify the facts and circumstances test for this prong of the hardship distribution test.

Safe Harbor

Under existing regulations, the immediate and heavy financial need prong of the hardship distribution test is satisfied if the expense falls within one of the six categories that the IRS considers to be a "deemed immediate and heavy financial need." These are as follows:

1. Expenses for medical care;
2. Costs directly related to the purchase of a principal residence for the participant;
3. Post-secondary education expenses for the participant, the participant's spouse, child or dependents;
4. Payments necessary to prevent the eviction of the participant from the participant's principal

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residence or foreclosure on the mortgage on that residence;

5. Funeral expenses for the participant's deceased parent, spouse, child or dependents; and
6. Expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction under Section 165.

"Distribution Necessary to Satisfy Financial Need" Prong

Facts and Circumstances Test

Under the existing regulations, a distribution is not treated as necessary to satisfy an immediate and heavy financial need of a participant to the extent the need may be relieved from other resources that are reasonably available to the participant. In making this determination, the employer may rely on the participant's representation (unless the employer has actual knowledge to the contrary) that the need cannot reasonably be relieved from various sources specified in the regulations (e.g., liquidation of participant's assets, cessation of elective deferrals or participant contributions under the plan).

Safe Harbor

In order to meet the safe harbor test for determining whether the distribution is "necessary to satisfy the financial need," the following three requirements must be met:

(i) The distribution does not exceed the amount of a participant's need;

(ii) The participant has obtained all other currently available distributions (including distribution of ESOP dividends under Section 404(k), but not hardship distributions) and nontaxable loans under the plan, and all other plans maintained by the employer; and

(iii) The participant is prohibited from making elective deferrals or contributions to the plan or any other plan maintained by the employer for at least six months after receipt of a hardship distribution.

Modifications to the "Deemed Immediate and Heavy Financial Need" Prong

Safe Harbor Hardship Distribution Event – Federally Declared Disaster

The proposed regulations added an additional category to the list of events deemed to constitute "immediate and heavy financial need." That category is for expenses and losses incurred by a participant for a disaster declared by the Federal Emergency Management Agency (FEMA), provided that the participant's principal place of residence or employment is in the area declared a disaster by FEMA.

Casualty Loss Expense

The Tax Cuts and Jobs Act of 2017 added Code Section 165(h)(5), which provides that for taxable years 2018 through 2025, the deduction for a personal casualty loss generally is available only to the extent the loss is attributable to a nationally declared disaster. The proposed regulations clarified that the safe harbor withdrawal event allows for distributions for expenses for the repair of damage to the participant's principal residence if those expenses would otherwise qualify for the casualty deduction under Code Section 165, thus indicating that the withdrawal event is not dependent on whether the loss is incurred due to a federally declared disaster.

Primary Beneficiary

The proposed regulations modified the safe harbor events for medical expenses, post-secondary education expenses and funeral expenses to include certain medical, educational and funeral expenses paid on behalf of a "primary beneficiary" under the plan (i.e., an individual who is named as a beneficiary under the plan and has an unconditional right, upon the death of the participant, to all or a portion of the participant's account balance under the plan). The Pension Protection Act of 2006 previously provided hardship distributions on behalf of a primary beneficiary for these specified safe harbor events. Therefore, the proposed regulations do not make any substantive changes to hardship distributions, but rather make the regulations consistent with the law.

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Relief for Victims of Hurricanes Michael and Florence

Announcement 2017-15 was a form of relief issued by the IRS in 2017 that allowed participants of tax-qualified employer plans to obtain a hardship distribution for needs arising from Hurricane Maria or the California Wildfires, provided that the participant's principal place of residence was located in those disaster areas. This relief also relaxed certain procedural requirements for obtaining a hardship distribution. For example, plan administrators were permitted to rely upon representations from the participant as to the financial need and the amount of the financial need.

The preamble to the proposed regulations extended the relief provided under Announcement 2017-15 to similarly situated victims of Hurricanes Michael and Florence, except that the "Incident Dates" are as specified by FEMA for these 2018 hurricanes and relief is provided through March 15, 2019. Any necessary amendments must be made no later than the deadline for plan amendments set forth in the preamble to the proposed regulations.

Effective Date for Modifications Under the "Immediate and Heavy Financial Need" Prong

The modifications made to the safe harbor expenses may be applied to distributions occurring as early as January 1, 2018.

Modifications to the "Distribution Necessary to Satisfy the Financial Need" Prong

The proposed regulations revamped this prong by eliminating both the facts and circumstances test and the safe harbor test, and replacing it with just one general standard. Under the new standard, a distribution may be treated as necessary to satisfy an immediate and heavy financial need if the following three requirements are met:

(i) The distribution does not exceed the amount of a participant's need;

(ii) The participant has obtained all other currently available distributions (including distributions of ESOP dividends under section 404(k), but not hardship distributions) under the plan and all other plans of deferred compensation (whether qualified or nonqualified) maintained by the employer; and

(iii) For a distribution that is made on or after January 1, 2020, the participant must represent (in writing, by an electronic medium or in such other form as may be prescribed by the Commissioner) that he or she has insufficient cash or other liquid assets to satisfy the need. The plan administrator may rely on the participant's representation unless the plan administrator has actual knowledge to the contrary.

Under this prong of the test, plans must discontinue the use of the facts and circumstances test and the safe harbor test, and implement the modified general standard by January 1, 2020, but may begin utilizing this standard on January 1, 2019. However, the proposed regulations specify that a plan generally may stipulate additional conditions to obtain a hardship distribution (e.g., the requirement to obtain loans).

Elimination of the Six-Month Deferral Suspension

Effective January 1, 2020, plans must cease suspension of elective deferrals or participant contributions following a hardship distribution. However, the elimination of deferral suspensions may be applied as of the first day of the first plan year beginning after December 31, 2018, even if the distributions were made in the prior plan year.

Elimination of Loan Requirement

Effective January 1, 2019, a plan participant will no longer be required to first take out a loan before receiving a hardship distribution. However, plan sponsors may choose to continue to require participants to obtain all nontaxable loans under the plan.

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Expanded Sources for Hardship Distributions (QNECs, QMACs and Earnings)

Effective January 1, 2019, accounts available for withdrawal for a hardship distribution will include qualified nonelective contributions (QNECs), qualified matching contributions (QMACs) and earnings (including earnings on elective deferrals, QNECs and QMACs). However, plan sponsors are not required to expand the sources available for a hardship distribution.

It should be noted that the Act did not amend Section 403(b) (11); therefore, income attributable to Section 403(b) elective deferrals continues to be ineligible for distribution on account of hardship. In addition, QNECs and QMACs in a Section 403(b) plan that are in a custodial account are not eligible for withdrawal on account of hardship; however, QNECs and QMACs in a Section 403(b) plan not in a custodial account *are* eligible for withdrawal on account of hardship.

Plan Amendments

If the regulations are finalized, the Treasury Department and IRS anticipate that plan sponsors will need to amend a plan's hardship distribution provisions. The preamble to the proposed regulations states that Rev. Proc. 2016-37 provides the applicable deadline for amending a disqualifying provision (i.e., the end of the second calendar year that begins after the issuance of the Required Amendments List described in section 9 of Rev. Proc. 2016-37 that includes the change). The preamble also states that a plan amendment that relates to the final regulations will be treated as an amendment to correct a disqualifying provision, even if it does not; therefore, all amendments that relate to the final regulations will have the same deadline.

Conclusion

In response to these proposed regulations, plan administrators should determine which changes will need to be made to ensure compliance with the mandatory provisions prescribed by the Act and the proposed regulations. Plan administrators should also review the optional modifications and implement those they believe will be most beneficial for administrative efficiency and convenience, as well as the needs of their plan participants. Once the IRS issues the final regulations, plan administrators should then determine if any further changes to the plan are necessary.

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FIRM NEWS

Joe Faucher was featured in the January Law360 article, "ERISA Cases to Watch in 2019." The article discusses six of the biggest benefits cases to watch in 2019.

On January 17–19, **Joe** participated in the panel *ERISA Hot Topics,* as part of the 45th Annual TIPS Midwinter Symposium on Insurance and Employee Benefits in Coral Gables, Florida. The session presented an update on recent developments in ERISA litigation.

On January 24, **Joe** led the workshop, *Who's Winning in Retirement Plan Litigation?* as part of the L.A. Advanced Pension and 401(k) Conference, which was sponsored by Trucker Huss.

Joe Faucher and **Dylan Rudolph** co-wrote an article for the ABA Tort Trial & Insurance Practice Section (TIPS) Winter, 2019 Committee Newsletter entitled, "What Is an ESOP Fiduciary to Do?" Read the article here.

T. Katuri Kaye is currently featured as the National Bar Association's Member Spotlight Attorney for the month of January.

On January 18, **Katuri** presented at the National Bar Association's Young Lawyer's Division (NBA YLD) Retreat during the 2019 NBA Mid-Winter Conference in Panama City, participating in two panels:

- *Understanding ERISA*
- *Millennial Management — How to Shift the Focus from Being the Youngest to Being a Strong, Knowledgeable Leader in the Multi-Generational Workplace.*

On January 24, 2019, **Nick White** facilitated a workshop at the LA Advanced Pension & 401(k) Conference entitled, *Nuts and Bolts of Administration after Mergers*, which addressed the many employee benefit plan issues that arise when one company acquires another.

On January 29, **Robert Gower** participated on a panel, *Essentials for the Benefits Practitioner: Experts' Guide to Employee Benefits Research,* presented by the American Bar Association's Joint Committee on Employee Benefits.

On February 1, **Marc Fosse** spoke in a start-up seminar entitled *A Legal Toolkit for In-House Counsel* at the San Francisco Chapter of the Association of Corporate Counsel. The seminar focused on the practical day-to-day issues critical to keeping your company in compliance and out of court.

On February 7, **Brad Huss** and **Sarah Kanter** will participate in the 2019 Midwinter Meeting of the ABA's Section of Labor and Employment Law — Employee Benefits Committee, to be held in Nashville.

- **Brad** will speak on: *Will the States Step Into the Benefits Void?* The states have been picking up the slack surrounding benefits issues where the feds have pulled back — but does ERISA permit them to do that?
- **Sarah** will participate in *Top Ten Employee Benefits Topics of 2018,* speaking specifically about recent litigation involving the use of the Segal Blend in calculating employer withdrawal liability.

On February 13, **Marc Fosse** will participate in a live CPE Webinar entitled "Nonprofits & Exempt Organizations One Year After Tax Reform." Marc will present on the 2017 tax reform law and offer guidance on strategies to deal with changes to individual and business tax treatment that will have a significant impact on exempt org operations.

1 p.m.– 3 p.m. (EST) / 10 a.m. — 12 p.m. (PST)

On February 13, **Robert Gower** and **T. Katuri Kaye** will present at a live BLR Webinar entitled "Locating Missing 401(k) Plan Participants: Best Practices to Comply with DOL and IRS Guidance."

1:30 p.m. – 3 p.m. (EST) / 10:30 a.m. – 12 p.m. (PST)

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).

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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*.

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