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BENEFITS REPORT

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DOL Proposes Stricter Prohibited Transaction Exemption Application Procedures

MIA BUTZBAUGH

JULY 2022

The Employee Retirement Income Security Act of 1974, as amended (ERISA) includes rules that limit plan fiduciaries' conduct. The limits set forth in ERISA Sections 406 and 407(a) are known as the "prohibited transaction rules" and are so broad that, absent exemptions, employee benefit plans would be unable to function. For example, ERISA's prohibited transaction rules bar fiduciaries from hiring professionals (such as actuaries, auditors, or recordkeepers) for services that are necessary to operate a plan.

To address that problem, ERISA includes certain statutory exemptions to the prohibited transaction rules, and it authorizes the Department of Labor (DOL) to issue administrative exemptions of two types: the DOL may grant "individual" prohibited transaction exemptions (PTEs) for specific transactions, and it may grant "class" PTEs to provide relief for parties who engage in the categories of transactions described in the exemption.[1]

Although the DOL may initiate administrative PTEs, exemptions are typically issued in response to applications, such as those from plans, plan sponsors

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Chambers and Partners USA 2022 Recognizes Trucker ✦ Huss for Employee Benefits & Executive Compensation and ERISA Litigation

We are pleased to announce that we have been recognized in two practice areas: Employee Benefits & Executive Compensation — San Francisco, Silicon Valley & Surrounds and ERISA Litigation, USA — Nationwide.

The following were also individually recognized:

R. Bradford Huss
Employee Benefits & Executive Compensation, San Francisco, Silicon Valley & Surrounds and ERISA Litigation, USA — Nationwide

Mary E. Powell
Employee Benefits & Executive Compensation in San Francisco, Silicon Valley & Surrounds

Kevin E. Nolt
Employee Benefits & Executive Compensation in San Francisco, Silicon Valley & Surrounds

Clarissa A. Kang
ERISA Litigation, USA — Nationwide

Mia Butzbaugh
Employee Benefits & Executive Compensation in Oregon

In its recognition, Chambers USA stated that Trucker Huss is "A highly rated employee benefits and ERISA boutique offering expert advice to Fortune 50 companies, small businesses and plan service providers with wide-ranging knowledge in all aspects of employee benefit work."

Chambers USA further recognized the firm's ERISA Litigation practice group: "Trucker Huss APC is well regarded for its handling of ERISA litigation. The firm expertly defends clients against single-plaintiff claims and class actions involving breach of fiduciary duty and breach of contract claims. The group is also adept at defending excessive fee cases in connection with 403(b) and 401(k) plans."

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and service providers. In 1975, the DOL first adopted procedures for PTE applications. Those procedures were most recently updated in 2011. In March of this year, the DOL issued proposed rules that would significantly revise the current procedures.

Grants of Individual PTEs Have Dramatically Declined

The DOL's website provides information about the individual PTEs it has granted since 1996. These individual PTEs include authorizations under "EXPRO," a DOL program that expedites applications for transactions that are "substantially similar" to those described in recently issued PTEs. In all, the DOL granted 1,255 individual PTEs from 1996 through 2021. Of those, almost 70 percent were granted during the first ten years of that period, from 1996 through 2005; only 30 percent were granted in the 16-year period from 2006 through 2021. While the DOL granted an average of 68 PTEs each year for the five-year period of 1996 through 2000, it granted an average of only seven PTEs each year from 2016 through 2020.

It's likely that various factors have contributed to the drop-off in the DOL's grant of individual PTEs, such as the enactment of new statutory PTEs and the adoption of class PTEs that eliminated the need for certain individual PTEs, as well as constraints on or redirection of the DOL's resources. Still, the decline in individual PTEs since 2005 is dramatic, as is the fact that the DOL issued ***only five*** individual PTEs over the past two years. That suggests the DOL may be reluctant to grant individual PTEs, even when they are needed and appropriate.

Proposed Rules Would Make Significant Changes to PTE Procedures

In light of the decline in individual PTEs, it may be no surprise that, under the DOL's proposed rules, the PTE application process would become more demanding and expensive, with limited opportunity to communicate informally with the DOL. Below is a description of a few of the notable proposed changes.

Pre-submission Contact with the DOL Would Not Be Anonymous and Would Be Part of the Public Record

Currently, it is not uncommon for plans and other parties to ask the DOL's exemption staff for informal, non-binding advice about whether a specific fact pattern would result in a prohibited transaction and require an exemption. This is permitted under the DOL's current PTE procedures, which also provide that any such advice from the DOL is not part of the administrative record.

The proposed rules, however, provide that a party that contacts the DOL to inquire whether a specific fact pattern would require an exemption is a "pre-submission applicant" and the DOL "will not engage a pre-submission applicant" unless the applicant identifies and fully describes the possible transaction, identifies itself and the relevant plan and parties to the potential transaction, and sets forth the prohibited transactions it believes to be applicable. Further, information provided to the DOL before a PTE application is submitted, including notes the DOL may take during a pre-submission conference, would become part of the administrative record and open for public inspection.

Additional Requirements for Appraisers and Fiduciaries to Be Independent

Exemptions to ERISA's prohibited transactions rules sometimes involve fiduciaries or appraisers who are independent of the parties engaging in the transaction. The PTE procedures say the DOL's determination of whether a fiduciary or appraiser is "independent" for this purpose is based on the relevant facts and circumstances, but the current procedures say that when considering revenue, the fiduciary or appraiser is deemed independent if its revenue from the parties in interest[2] or their affiliates makes up no more than two percent of its total revenue; and even if such revenue is above two percent, the fiduciary or appraiser still may be independent if it does not exceed five percent. The proposed rules eliminate the two-percent safe harbor and provide that, unless the DOL in its sole discretion determines otherwise, an appraiser or fiduciary will ***not*** be treated as independent if its revenue from the parties involved in the exemption transaction[3] is more than two percent of its total revenue.

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The proposed rules also provide that a fiduciary will not be independent unless it is independent of and unrelated to any party involved in the exemption transaction ***and*** any other party "involved in the development of the exemption request" (such as consultants or advisors that assist with structuring the exemption transaction and submitting the exemption application). Further, when evaluating a fiduciary's independence, the DOL will consider "whether the fiduciary has an interest in the subject transaction or future transactions of the same nature or type." This is to address the DOL's concern about whether a fiduciary has a conflict of interest if, for example, it may "use the exemption transaction to promote its fiduciary services to potential clients contemplating similar transactions or if its work with respect to the exemption transaction is connected to a valued relationship with a third party, such as an investment advisor or bank."

Applications Must Include Additional Information

The proposed rules specify additional information a PTE application must include, beyond what is already required for applications. For example, an application would be required to include:

- A description of any material benefit (including the avoidance of any materially adverse outcome) that a party involved in the exemption transaction may receive if the exemption is granted;
- The costs and benefits (quantified, if possible) of the exemption transaction to the affected plan(s), participants, and beneficiaries;
- A detailed description of the alternatives to the exemption transaction that would not involve a prohibited transaction and why those alternatives were not pursued;
- A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;
- A statement that the exemption transaction will be in the "best interest" of the plan and its participants and beneficiaries;[4]
- Various statements and information from any qualified independent appraiser, auditor, or accountant whose reports or documents are submitted in support of the exemption application, including a detailed description of any relationship that provider has had or may have with any party involved in the development of the exemption request that may influence the appraiser, auditor, or accountant and a copy of its services agreement with the plan, which agreement may ***not*** (i) provide for any direct or indirect indemnification or reimbursement of the service provider for a failure to adhere to its contract or applicable law; or (ii) waive any rights, claims, or remedies of the plan or participants or beneficiaries with respect to the exemption transaction; and
- A statement that the independent fiduciary maintains fiduciary liability insurance in an amount sufficient to indemnify the plan for losses resulting from the independent fiduciary's breach of applicable law or its contract, and with no exclusion for actions by the DOL or any other federal, state, or other regulatory body, the plan, or plan participants or beneficiaries.

Also, applications for individual PTEs would need to state whether the plan or plan sponsor has had any prior transactions with a party involved in the exemption transaction.

Past PTEs Are Not Determinative of Future PTEs

The proposed rules state the existence of a PTE is not determinative of whether a future exemption application with the same or similar facts will be proposed, or if an exemption is proposed, whether it will include the same conditions as the previously issued PTE. It is unknown what impact this language — which the DOL's preamble says reflects "existing policy that it has the sole discretionary authority to issue exemptions and is not bound by facts or conditions of prior exemptions in making determination with respect to an exemption application" — will have on the EXPRO program.

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Other Noteworthy Changes

The proposed rules provide for many more changes to the current PTE application procedures, beyond those briefly summarized above. For example, the proposed rules would: require certain additional reporting to the DOL while a PTE application is pending and after a PTE is granted; permit the DOL to hold a conference with "any party," including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to the exemption request and without the presence of the applicant or other parties to the transaction or their representatives; increase scrutiny of applications for retroactive PTEs; and permit the DOL, under certain circumstances, to issue a final denial letter without first issuing a tentative denial letter or holding a hearing.

Pending Issuance of Final Regulations

It is unknown which of the proposed changes to the PTE application could be adopted as final rules, but anyone considering filing a PTE application before the final regulations are issued should carefully review the proposed rules and the DOL's explanatory preamble (which, in several cases, says the proposed rules simply formalize the DOL's current practice). Certainly the proposed rules, along with the very few PTEs granted in recent years, indicate it will continue to be an uphill battle to secure a PTE.

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[1] The Internal Revenue Code of 1986, as amended (Code) also includes prohibited transaction rules and allows for individual and class exemptions thereto. The DOL is authorized to issue those exemptions. See 92 Stat. 3790. Therefore, the procedures discussed in this article also apply to the Code's prohibited transaction rules, but for ease of reading, we refer only to ERISA.

[2] As defined by ERISA Section 3(14).

[3] "Party involved in the exemption transaction" is a new term that includes not only an ERISA party in interest but also any party engaged in the exemption transaction or an affiliate thereof and any party providing services to either a party in interest or a party engaged in the exemption transaction. Prop. DOL Reg. § 2570.31(l). As such, relative to the current procedures, the proposed rules broaden the pool of revenue the DOL will consider.

[4] Under Prop. DOL Reg. § 2570.34(b)(2)(iii), an exemption is in the "best interest" of the plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character with like aims, enter into the exemption transaction based on the plan's circumstances and needs.

The Legal 500 Recognizes Trucker Huss for ERISA Litigation in 2022

Trucker Huss, APC is pleased to announce it has been ranked for ERISA Litigation by The Legal 500. The Legal 500 guides review the strength and strategies of law firms in over 150 jurisdictions. Researchers speak to thousands of law firm clients to identify the best law firms around the globe.

Legal 500 considers Trucker Huss to be, "…a highly experienced and sophisticated ERISA litigation practice group, which defends employers and plan fiduciaries in cases involving claims for plan benefits and fiduciary breach allegations."

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FICA Tax Withholding and Reporting for Section 457(b) and 457(f) Nonqualified Deferred Compensation Plans

J. MARC FOSSE

JULY 2022

Administering withholding and reporting of taxes under the Federal Insurance Contributions Act (FICA) for nonqualified deferred compensation plans maintained under Section 457 of the Internal Revenue Code (the "Code") can be complex for many tax-exempt organizations. Employers frequently need assistance in setting up proper procedures and pay codes to implement timely and proper withholding and reporting of FICA taxes, which consist of both Social Security and Medicare taxes. Social Security taxes are withheld up to the applicable wage base ($147,000 for 2022), but Medicare has no wage base limit. This complexity stems from the fact that the timing rules for withholding of income taxes and FICA taxes are different. To explain this difference, this article initially provides a brief summary of the timing rules for income tax withholding applicable to 457(b) and 457(f) plans. Next, it reviews the special timing rule and exceptions for FICA tax withholding for nonqualified deferred compensation plans. Finally, it provides ideas and strategies for properly setting up and administering FICA tax withholding and reporting.

Income Tax Withholding for Code Section 457(b) Plans

There are two types of plans that can be established under Section 457(b) of the Internal Revenue Code (the "Code") — governmental plans and nongovernmental plans. Governmental 457(b) plans are broad-based retirement plans that have many of the features of a 401(k) plan (such as rollovers and age 59 ½ minimum age for distributions), and the income tax withholding and reporting rules are also similar to tax-qualified plans. This article focuses on the rules applicable to 457(b) plans of nongovernmental entities.

Nongovernmental 457(b) plans (a "457(b) Plan") can be maintained by certain tax-exempt organizations to provide deferred compensation to a select group of management or highly compensated employees. While not as flexible as a tax-qualified retirement plan, a 457(b) Plan permits executives to defer compensation until termination of employment, and sometimes beyond.

To qualify as a 457(b) Plan, the amount that may be deferred annually is limited under Code section 457(e)(15) — $20,500 for calendar year 2022 — and the amount is not increased by traditional catchup contributions.[1] In addition, a 457(b) Plan is subject to required minimum distributions when a former executive attains age 72. Distributions from a nongovernmental 457(b) Plan cannot be rolled over to an "eligible retirement plan" or individual retirement account (IRA), but the plan may provide for a direct trustee-to-trustee transfer to the 457(b) Plan of another tax-exempt organization for which the employee is providing services.[2]

A 457(b) Plan can only be set up as an "account balance plan," meaning the amount of the distributions from the plan will be equal to the monetary value of the account at the time of distribution. Contributions to a 457(b) plan may be made by participant deferrals or employer contributions. Generally, amounts contributed to a 457(b) plan are 100% vested,[3] but the account balance is not included in taxable wages until "made available" (which generally means at the time of distribution) to the participant.

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Income Tax Withholding for Code Section 457(f) Plans

Any nonqualified deferred compensation plan of a tax-exempt organization that does not meet the requirements of Code section 457(b) is treated as a plan subject to Code section 457(f) (a "457(f) Plan").[4] If compensation is subject to Code section 457(f), then the full present value of any deferred compensation will be included in income tax in the first year in which the compensation is no longer subject to a substantial risk of forfeiture (i.e., fully vested). Compensation deferred under a 457(f) Plan is subject to a substantial risk of forfeiture because the benefit will be forfeited unless the employee provides substantial services for a set period of time, or the employee or organization meet certain predetermined performance goals.

The general rule under Code section 457(f) is that deferred compensation is subject to income tax when it vests, even if the plan provides installment payments after vesting. The proposed Code section 457 regulations provide some exceptions to this rule, such as payments made within the "short-term deferral" period (defined below) or under a severance pay plan.

FICA Tax Withholding and Reporting

General vs. Special Timing Rule

Under the "general timing rule," an amount earned is included in wages for purposes of FICA tax reporting and withholding when actually or constructively paid. There is a mandatory "special timing rule" for nonqualified deferred compensation plans. The special timing rule provides that the amount deferred must be included in FICA wages by the later of (1) the date the services creating the right to the amount are performed or (2) the date on which the right to the amount is no longer subject to a substantial risk of forfeiture (i.e., the vesting date). Therefore, FICA taxes are frequently due (and subject to tax withholding and reporting) before the income taxes are due on the deferred compensation at distribution.

Employee deferrals and employer contributions to a 457(b) Plan are almost always 100% vested. For that reason, FICA taxes should be withheld at the time services are performed to earn the employee deferrals or when an employer contribution is made. In order to maximize the amount deferred to the 457(b) Plan, FICA taxes are usually withheld from other wages, such as base salary. For example, if the employee elected to defer wages to the 457(b) Plan in the amount of $20,500 (the 2022 annual limitation), and if the employer reduced the amount of the deferrals by the amount of FICA taxes, then the net deferral to the plan would be less than the 457(b) Plan annual contribution level. For these types of vested contributions, the employer's pay codes would generally include the contributions as Social Security wages up to the wage base (reported in box 3 of Form W-2) and as Medicare wages (in box 5 of Form W-2) at the time the deferrals or contributions are made. The Social Security withholding is reported in box 4 and the Medicare withholding in box 6 of Form W-2. Under this arrangement, the FICA taxes withheld must be deposited with the IRS under the employer's regular deposit schedule for taxable wages in the payroll period. The FICA wages and withholding are reported on the employer's quarterly employment tax return (Form 941).

If employer contributions are not vested, then the resolution date for withholding FICA taxes would be delayed to the date when each contribution becomes vested, which is usually still before the distribution date when income tax withholding would be made. For this type of contribution, the employer pay code requires the employer to enter and track each vesting date.

For amounts credited to a 457(f) plan, FICA tax withholding and reporting is required for any portion of the plan benefit that becomes vested. Under most 457(f) Plans, the benefit is also subject to income tax withholding and reporting as the benefit becomes vested. In that case, the timing rules for income tax and FICA tax withholding and reporting will be the same. However, there are exceptions. For example, the proposed Code section 457 regulations provide that if the payment must be made prior to the 15th day of the third month of the taxable year after the taxable year when the 457(f) benefit vests (the "short-term deferral period"), such a payment from a 457(f) Plan is not included in taxable income until actually paid.[5] However, the value of the 457(f) Plan benefit is still treated as FICA wages on the date the benefit vests.

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In that case, similar to vested 457(b) Plan benefits, the employer would need to set up pay codes to have the 457(f) Plan benefits subject to FICA tax withholding at the time of vesting and income tax withholding at the time of distribution.

Non-Duplication Rule

Under the non-duplication rule, once the FICA taxes have been withheld on nonqualified deferred compensation, then the deferred compensation will no longer be subject to FICA taxes again at the time of distribution. Importantly, interest or investment gains credited to the contributions that were previously subject to FICA tax withholding are not subject to FICA taxes at distribution, as long as the gains credited under the plan are based on a market interest rate or an actual investment. If the amounts credited to a 457 plan are based on non-market interest rates or investment options, then the gains credited to the plan are treated as new contributions that will be subject to FICA taxes.

The non-duplication rule is particularly important for contributions to a 457(b) Plan because the 457(b) benefit may be paid many years, even decades, after it is credited to the plan. Assume that an executive had deferred $87,000 of base salary over a five-year period and at the time of distribution twenty years later the contributions have grown to $205,000 based on reasonable investment returns credited to the plan. If the special timing rule has been properly applied, then at the time of distribution the amount of the investment growth ($118,000) will not be subject to FICA taxes. The employee and employer each save taxes in the amount of 7.65% (combined 15.3%) of the distribution amount related to investment option gains.

Because FICA and income tax withholding are generally triggered at the same time under a 457(f) plan, the non-duplication rule is not always applicable. However, as discussed above, if a payment under a 457(f) Plan is paid within the short-term deferral period, then the 457(f) Plan benefit is treated as FICA wages upon vesting, but not included for income tax withholding until paid. For example, if the benefit under a 457(f) Plan vests at the end of the employer's June 30th fiscal year, and the payment will not be made until January 15th of the next calendar year, then distribution of the 457(f) account balance would not be subject to income tax withholding until the distribution date. If the 457(f) account balance increased in value between the vesting date and distribution date (based on reasonable investment options credited to the account), then the increase would not be subject to FICA taxes at distribution.

Rule of Administrative Convenience

The FICA regulations provide a "rule of administrative convenience" which permits an employer to elect to treat the resolution date as any later date during the same calendar year in which the resolution date would otherwise occur. Many employers select the last day of the calendar year, so that most employees will have already met the Social Security wage base and no Social Security tax withholding will be required. Medicare taxes will still apply. If the rule of administrative convenience is used, then the present value of the benefit must be determined at the time of the elected deferred resolution date.

Many employers also take advantage of the rule of administrative convenience to reduce the administrative burden created by the difference in timing rules between FICA and income tax withholding. To do this, the employer elects to treat all contributions to the 457(b) Plan or the vesting dates of a 457(f) Plan as occurring on December 31 of the calendar year. This may not only reduce administrative headaches, but also potentially reduce FICA taxes. Because 457 plans are "top hat plans" maintained solely for management and highly compensated employees, most participants will have already hit the Social Security wage base before the end of the calendar year. Using the rule of administrative convenience to delay the FICA tax resolution date to the end of the year, the employer will only need to treat the 457 plan contributions as Medicare wages. The employer would report the value of all contributions made to a 457 plan as Medicare wages on the employer's fourth quarter Form 941 and in box 5 of the employee's Form W-2. Because the amount of the Medicare tax is only 1.45%, this small withholding amount is usually taken from the participant's base pay in her final paycheck of the calendar year.

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Non-Compliance with Special Timing Rule Results in Application of General Timing Rule

The failure to adhere to the special timing rule (or one of the available alternative timing rules) would require withholding under the general timing rule. This would result in Social Security and Medicare taxes being withheld from each payment under the nonqualified deferred compensation plan. As discussed above, this would result in FICA taxes applying not only to the deferrals or contributions, but also to any investment growth credited to the account under the 457(b) Plan. At least one court has held that the employer committed a breach of contract for failing to use the special timing rule which resulted in significant additional FICA taxes. The court held that the participant did not receive the benefit of the bargain under the 457(b) Plan because of the material reduction in the net distribution of the participant's account due to additional FICA taxes owed under the general timing rule. For that reason, if the tax withholding cannot be corrected (see below "*IRS Correction Procedures for FICA Tax Failures*"), then the employer may be liable for the employer side of the FICA taxes and the employee's side plus a tax gross-up payment on the value of the additional FICA taxes the employer pays on behalf of the employee.

IRS Correction Procedures for FICA Tax Failures

To encourage self-correction of employment tax withholding and reporting errors, the IRS has established certain voluntary correction procedures for inadvertent employment tax withholding and reporting errors. During open tax years, an employer may file a Form 941X for the calendar quarter in which the FICA taxes should have been withheld. The statute of limitations runs until April 15th of the third year after the calendar quarter in which the original Form 941 was due to be filed with the IRS. Before end of the statute of limitations, the Form 941X must be filed no later than the deadline for the calendar quarter following the calendar quarter in which the employer discovers the error. Usually, the employer will also be required to issue a Form W-2c to the participant employee to correct the FICA tax withholding and reporting.

If an employer has failed to properly apply the special timing rule for 457(b) or (f) plans, then the employer should consult with counsel to determine if the failure can be corrected. Even if the failure cannot be corrected, it is advisable to consult with counsel to evaluate the risks associated with the failure and how best to resolve the issue with the affected 457 plan participant.

Recommendation

At the time an employer adopts a 457(b) Plan and/or a 457(f) Plan, we recommend that the employer also set up, in its payroll system or with its third-party payroll provider, the pay codes or other procedures controlling when FICA tax withholding and reporting will be accomplished. This will help the employer properly implement the timing rules for a 457 plan and avoid errors that are potentially very costly. Early set-up will also give the employer time to model and evaluate whether using the rule of administrative convenience would simplify the employer's tax withholding and reporting obligations.

Our experience has shown that setting up these pay codes and procedures can take months to complete. This is because many payroll systems are not set up to handle the special timing rule or rule of administrative convenience, and often the third-party payroll provider is not familiar with these rules. In such cases, the employer must work with the payroll system vendor or third-party payroll provider to create customized procedures. Any delays in properly establishing pay codes and related procedures may result in late deposits and late reporting of applicable tax withholdings, which may trigger IRS penalties.

If an employer has inadvertently failed to comply with the special timing rule, the employer should consult with counsel regarding the IRS correction program or other actions to mitigate potential risks.

Footnotes follow on next page

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[1] A 457(b) Plan may have very limited catch-up contributions. To qualify for catch-up contributions, the employer must look back and determine if the participant has not received full contributions in a prior year. If so, then in the three years prior to the participant's retirement age, contributions can be made up to the lower of (i) two times the 457(b) contribution limit or (ii) the amount of the missed contributions in prior years.

[2] The other 457(b) plan must also permit transfers into its 457(b) Plan

[3] A contribution to a nongovernmental 457(b) plan is not considered by the IRS to be credited until the year in which the contribution is vested. To make the maximum contributions to a 457(b) plan each year, the amounts credited must be fully vested. A tax-exempt organization cannot make the maximum contributions to a 457(b) over a period of 4 years and require 4-year cliff vesting. This is because all the contributions would be treated as contributed in the final year, and would exceed the annual contribution limits for a 457(b) plan.

[4] Certain programs are exempt from Code section 457(f), such as death benefits, vacation benefits and severance pay programs. See Proposed Treasury Regulations § 1.457-11(d) for pay that will meet the definition of an exempt severance pay plan.

[5] The employer may have discretion when to make the payment during that period. However, the employee may not have any discretion to determine in which tax year the benefit will be paid.

Super Lawyers Recognizes Twenty-Two Trucker ✦ Huss Attorneys for 2022

Trucker Huss, APC is pleased to announce that twenty-two of our attorneys have been recognized by Super Lawyers this year. Twenty Trucker Huss attorneys are on the 2022 Super Lawyers magazine list for Northern California. In addition, two attorneys in the firm's Los Angeles office are named to the Southern California Super Lawyers lists.

Northern California

- J. Marc Fosse
- Angel L. Garrett
- Robert R. Gower
- R. Bradford Huss
  Brad was also selected as a 2022 Northern California "Top 100" Attorney; he has been recognized in this category since 2007.
- Clarissa A. Kang
  Along with being selected as a 2022 Northern California "Top 100" Attorney, Clarissa is recognized as a "Top 50 Women" Attorney.
- Elizabeth Loh
- Kevin E. Nolt
- Mary E. Powell
- Robert F. Schwartz
- Charles A. Storke
- Nicholas J. White

Northern California Rising Stars

- Adrine Adjemian
- Jahiz Noel Agard
- Sarah Bowen
- Bryan Card
- Sarah T. Kanter
- Yatindra Pandya
- Catherine Reagan
- Dylan D. Rudolph
- Jennifer D. Truong

Southern California

- Joseph C. Faucher (Super Lawyers)
- Brian D. Murray (Rising Stars)

Every year Super Lawyers identifies the top five percent of attorneys in each state or region, as chosen by their peers and through independent research to receive this honor. In addition, each year no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of Rising Star.

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FIRM NEWS

On July 7, **Sarah Kanter** served as a panelist for an ABA Webinar, *Abortion Services and Employee Benefits: Plan Design Options and Legal Compliance Post* Dobbs V. Jackson. The panel discussed the legal implications of *Dobbs* for both insured and self-funded group health plans, employee benefit plan options and possible design changes, medical travel reimbursements, ERISA preemption issues, and legal compliance.

On July 13, **Marc Fosse** co-presented a Strafford Live Webinar entitled, *Employee Severance Agreements and Section 409A Deferred Compensation: Withstanding Heightened IRS Scrutiny*. The CLE course guided counsel on structuring employee severance or separation agreements to comply with Section 409A's deferred compensation restrictions. The panel discussed best practices for performing compliance self-audits and taking corrective action to remedy substantive or documentary failures.

On August 9, 9:00–10:00 AM PDT, **Mary Powell** and **Sarah Kanter** will present a webinar on: *Providing Benefits for Abortion Services Post-Dobbs — Ways to Protect the Plan Sponsor.* In the aftermath of the decision in *Dobbs v. Jackson Women's Health Organization*, some plan sponsors have adopted changes to their health plans to enhance benefits for abortion services — to various reactions from employees. Additionally, certain lawmakers (and other organizations) have sent plan sponsors letters threatening to sue the plan sponsor for violation of a state law that bans abortion — even when the employee received an abortion (or abortion medication) in a state where it is legal, but that person resides in a state where abortion is illegal. This webinar will discuss the issues that have arisen since plan sponsors began enhancing the abortion service benefits in their health plans.

To register: truckerhuss.com/events

On August 24, **Clarissa Kang**, **Angel Garrett** and **Dylan Rudolph** will present a Strafford Live Webinar on ERISA Class Action litigation, entitled, *Defending ERISA Class Actions Amid an Evolving Litigation Landscape: Best Practices for Counsel and Fiduciaries.* This CLE course will provide class action litigators and fiduciaries with a review of the developments and trends from 2021 to the present in ERISA class action litigation, and the impact of recent Supreme Court rulings on the ERISA landscape. The panel will also outline key litigation strategies for defending ERISA class claims.

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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