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TAFT-HARTLEY REPORT

Proposed Legislation Aims to Prevent Surprise Out-of-Network Claims

It happens all too often. You go to a doctor to have a routine medical procedure performed. You check with your insurer beforehand to make sure that the doctor and the hospital are in-network to minimize your out-of-pocket expenses. Your insurer confirms that the doctor and hospital are in-network, so you move forward with the procedure. After the procedure is done, you get hit with a surprise medical bill from an out-of-network provider such as a radiologist or anesthesiologist that you had no role in choosing. Your insurer only covers a small portion of the bill because the provider is out-of-network and you are stuck being balance billed. Under recent proposed legislation, these surprise out-of-network bills may be a thing of the past.

In September 2018, a bipartisan group of six senators released draft legislation to protect patients from these surprise out-of-network bills. Titled the Protecting Patients from Surprise Medical Bills Act, the legislation is aimed to protect patients in both insured and self-insured plans from receiving surprise out-of-network bills in two main situations: 1) emergency care; and 2) out-of-network providers at in-network facilities such as hospitals or surgical centers. In situations like these, the draft legislation would first limit the patient's cost-sharing to what he or she would owe to an in-network provider. Insurers would then only pay the provider either the median in-network contracted rate for the service or 125% of the average allowed amount for the service. Finally, the legislation would prohibit the provider from balance billing the remainder to the participant.

This would generally mean that patients would only be responsible for the amount they would have owed if the service in question was performed by an in-network physician. In addition, if a patient receives an emergency service from an out-of-network provider, once the patient is stabilized the facility would have to notify the patient that he or she may have higher cost-sharing than if the service was received in-network. The patient would be given the option to transfer to an in-network facility for any additional services and would be required to sign a written acknowledgment of that notification before additional services are provided.

Many states have already passed laws which resemble the proposed federal legislation. However, such state laws do not apply to self-funded health plans because the Employee Retirement Income Security Act of 1974 ("ERISA") preempts these state laws. The proposed federal legislation would apply to both insured and self-funded health plans.

Although this legislation would certainly help consumers avoid surprise out-of-network claims, some are concerned that it would reward doctors and other providers for not joining a network. Many professionals have noted that while the proposed legistlation clearly prohibits an out-of-network provider from balance billing, it also sets up a reimbursement requirement from the insurer that is likely higher than would otherwise be required. While this is certainly a benefit for the consumer, it could provide an unintended incentive for providers to stay out-of-network.

ERISA Whistleblower Provision

The Ninth Circuit recently issued a decision denying the U.S. Department of Labor ("DOL")'s request to reconsider a December 2018 decision involving the Employment Retirement Income Security Act of 1974 ("ERISA"). In *Acosta v. Brain*, the Court held that a trustee and a lawyer for employee benefit trust funds ("Trust Funds") violated ERISA's whistleblower protection provision[1] when they caused the Director of the Trust Funds' internal Audit and Collections Department ("A&C Department") to be removed from her position after she assisted the DOL in an investigation of the trustee.[2] The Director ("Whistleblower") was concerned that the trustee, who also served as the business manager and financial secretary of the Union, was interfering with the A&C Department's collection efforts, as he allegedly told certain contractors who owed smaller contributions to the Trust Funds to "fly under the radar," and often interpreted certain agreements "in a manner that reduced the amount owed by covered contractors."[3] After learning about the Whistleblower's communications and assistance with the DOL's investigation, the trustee/business manager and Funds' attorney (who were involved romantically) "created an environment that was hostile to her," and "caused" the trustees to vote unanimously to put the Whistleblower on leave at a special Board of Trustees meeting.[4]

The Ninth Circuit affirmed the lower court's decision that Section 510 of ERISA (29 U.S.C. § 1140) is clearly meant to protect whistleblowers because "[i]f one is . . . discharged for raising the problem [to the managers of an ERISA plan], the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistleblower before the whistle is blown." *Id.* quoting *Hashimoto v. Bank of Hawaii*, 999 F.2d 408. 411 (9th Cir. 1993). The Court held that the Whistleblower's cooperation with the DOL was quintessential protected activity and held the Defendants liable because they arranged and manipulated the vote to terminate her employment. Section 510 prohibits interference with benefits and retaliation for the exercise of rights under ERISA and employee benefit plans. Most significantly, Section 510 prohibits adverse employment actions taken against individuals who have given information, have testified, or are about to testify in an inquiry or proceeding related to ERISA.

The case also discussed the "two-hat" principle of fiduciary duties under ERISA as outlined by the U.S. Supreme Court. This principle requires that a fiduciary with two hats (in this case, employer and trustee) only wear one at a time and wear the fiduciary hat when making fiduciary decisions.

In general, this ruling demonstrates the necessity of keeping the whistleblower provisions in Section 510 in mind, as this statute not only protects potential whistleblowers, but also provides a remedy to the whistleblower if a fiduciary commits an adverse act such as the acts committed by the business manager/trustee here. As always, please contact J&K if you have any questions on Section 510 and the whistleblower statute.

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[1] Section 510 of ERISA makes it "unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA]." 29 U.S.C. § 1140. To establish a claim of retaliation under Section 510, the Secretary must show that: (1) [the individual] engaged in an activity protected under ERISA; (2) [the individual] suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Teutscher v. Woodson*, 835 F.3d 936 , 945 (9th Cir. 2016).

[2] *Acosta v. Brain*, Nos. 16-56529, 16-56532, 2018 WL 6314617 (9th Cir. Dec. 4, 2018)

[3] *Id*. at 507.

[4] *Id*. at 509.

Prior Withdrawal Liability Credits Can Be Wiped Out in Subsequent Withdrawal Calculations

The Ninth Circuit recently issued a decision that could affect the way pension plans give credit for prior partial withdrawals under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381–1405. Quad/Graphics, Inc. ("Quad") is a commercial printing business that acquired a company called Quebecor World Inc. ("Quebecor") in 2010. Under the terms of a collective bargaining agreement ("CBA") with the Graphic Communications Conference, International Brotherhood of Teamsters, Local 826-C ("Union"), Quad was required to contribute to a multiemployer pension plan, the GCIU-Employer Retirement Fund ("Fund"). In 2009, prior to Quad's acquisition of Quebecor, employees at the Memphis Quebecor facility voted to decertify the Union. Quebecor ceased contributing to the Fund on their behalf, resulting in a partial withdrawal under 29 U.S.C. § 1385. Quad assumed the obligation to contribute to the Fund with respect to the remaining Quebecor facilities when it acquired Quebecor. But by 2011, the last of Quad's employees voted to decertify the Union, resulting in a complete withdrawal under 29 U.S.C. § 1383.

A dispute arose as to what point in the process of calculating the payment schedule for the 2011 total withdrawal the employer would be given credits for the 2009 partial withdrawal. The MPPAA imposes liability on employers withdrawing from pension plans and provides step-by-step instructions for calculating employer withdrawal liability in 29 U.S.C. § 1381(b)(1). As part of that calculation, the MPPAA credits the employer for any payments made for a prior partial withdrawal and reduces the liability arising from the present withdrawal accordingly. 29 U.S.C. § 1386(b). The MPPAA also provides for a twenty-year cap on annual payments made to discharge the employer's complete withdrawal liability. 29 U.S.C. § 1399(c)(1)(B).

In calculating Quad's liability for the 2011 complete withdrawal, the Fund gave Quad a credit for the partial withdrawal liability imposed after the 2009 Memphis facility withdrawal. *See* 29 U.S.C. § 1386(b). The Fund applied the twenty-year payment limitation specified in 29 § 1399(c)(1)(B) *after* first applying the 29 U.S.C. § 1386(b) credit against Quad's liability. Quad contended that the reverse should happen: the 20-year cap on the complete withdrawal should be applied *before* the application of the credit for the prior partial. Critics of the Ninth Circuit's decision have noted that the sequencing is important, as some funds are so underfunded that the credits for payments for the prior withdrawal are almost completely negated by the unfunded vested liability. The near complete negation of the credit on the front end of the calculation could result in a payment schedule that is nearly the same as if the payments were never made. This was the net effect of the way the credit was applied in Quad's case.

The parties originally submitted the dispute to mandatory arbitration. *See* 29 U.S.C. § 1381(a) and 1401(a)(1). The arbitrator found the Fund had correctly applied the credit before the 20-year cap. In reviewing the arbitrator's decision *de novo*, the district court concluded that the Fund's calculation was correct. The Ninth Circuit affirmed, holding that the Fund correctly applied a credit for a prior partial withdrawal under 29 U.S.C. § 1386(b) against the employer's complete withdrawal before calculating the 20-year limitation on annual payments provided for in 29 U.S.C. § 1399(c)(1)(B). The end result is that prior credits for prior partial withdrawals may not offset future complete withdrawals to the extent once thought.

The full text of the court's opinion can be found at http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/07/17-55667.pdf.

Plan Administrator's Decision to Deny QDRO Upheld

Common property that is divided between spouses upon divorce includes retirement benefits earned during the marriage. In order to divide those benefits, the Employee Retirement Income Security Act of 1974 ("ERISA") requires a Qualified Domestic Relations Order (most commonly known as a "QDRO"). Without a QDRO, benefits awarded pursuant to a divorce decree and/or marital settlement agreement cannot be paid out.

A court order will be deemed a QDRO by a plan administrator if it complies with the terms of the plan and ERISA. Even if the parties

have a court order which is intended to act a QDRO, it does not necessarily mean that the plan administrator will accept the order as a QDRO. Under ERISA, the plan administrator has the final say on whether a court order can be deemed a QDRO. If the plan administrator determines that the order cannot be deemed a QDRO, then the parties will need to amend the order pursuant to the plan administrator's reasons for denial. Absent a plan administrator's approval, an order will not be deemed a QDRO, and benefits cannot be paid out. As such, a plan administrator should not hesitate to deny an order that does not comply with the terms of the plan and ERISA as a plan administrator's approval signifies that benefits may be paid under the plan.

The First Circuit Court of Appeals recently dealt with a case that demonstrates the importance of a plan administrator's refusal to accept a QDRO that did not comply with terms of the plan.[5] The plan participant elected to receive an early lump sum pension benefit in 2005. From the lump sum pension distribution received, the participant paid his ex-spouse the pension benefits that were awarded to her pursuant to the parties' 1997 marital settlement agreement. In 2011, after the participant's death, the ex-spouse attempted to obtain a court order designating her as the participant's surviving spouse and awarding her any of the participant's remaining pension benefits under the plan. However, the plan administrator refused to recognize the court order as a QDRO for two reasons: 1) the ex-spouse had already received her benefit pursuant to the marital settlement agreement from the lump sum pension distribution; and 2) the court order attempted to award the ex-spouse a surviving spouse benefit that she did not qualify for under the terms of the plan by rewriting the marital settlement agreement.

The ex-spouse then submitted a second court order which was to be applied retroactively to the parties' 2011 divorce. However, the plan administrator refused to recognize this order as well, which sparked the district court's involvement in this matter. The district court ruled in favor of the plan administrator because the order attempted to rewrite the marital settlement agreement and award the ex-spouse a benefit (i.e., surviving spouse benefit) she was not entitled to pursuant to the terms of the plan. The First Circuit Court of Appeals affirmed that district court's decision to rule in favor of the plan administrator as the court order would require the plan to provide increased benefits as prohibited by ERISA.[6]

This case demonstrates the importance of carefully reviewing domestic relations orders and ensuring that an order accurately complies with the terms of the plan and ERISA before it is deemed a QDRO since an order may attempt to award benefits to an ex-spouse that are not possible. Accordingly, plan administrators should not hesitate to deny an order that does not comply with the terms of the plan and ERISA. If you have any questions regarding any QDRO issues, please do not hesitate to contact our office.

The State of Our Unions: Membership Trends Long-Term and Post-*Janus*

The U.S. Bureau of Labor Statistics ("BLS") began tracking unionization rates in 1983. At that time, the union membership rate was 20.1 percent and there were 17.7 million union workers. Since then, there has been an overall decline in private sector union membership.

In January 2019, the BLS released the figures for 2018. The data, which is collected as part of the Current Population Survey,[7] shows that union workers constituted 10.5 percent of the workforce in 2018, down from 10.7 percent in 2017. The numbers also show that the total number of workers covered by a collective bargaining agreement declined by 64,000. In 2018, 11.7 percent of workers were covered by a CBA, while 11.9 percent of workers were covered by a CBA in 2018.[8] Overall, the numbers indicate that while some unions lost membership, the overall numbers for 2018 are roughly the same as those from 2017.

[5] *Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 16-11131-DPW (D. Mass. filed April 18, 2018).

[6] *Garcia-Tatupu v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 17-2179 (1st Cir. App. Ct. Jan. 14, 2019).

[7] The Current Population Survey is a monthly sample survey of about 60,000 eligible households that obtains information.

[8] These figures include union and non-union members.

In both 2017 and 2018, there were about 7.6 million private sector union members and roughly 7.2 million public sector union members. This total of nearly 15 million union members seems to suggest that the overall decline in rate since the BLS began following the unionization rates, may have more to do with non-union jobs being added to the economy than the decline in union rolls by 2.9 million members over the last 35 years.

Based on the 2017 and 2018 figure, it also appears that the Supreme Court's 2018 decision in *Janus v. AFSCME* has had very little effect on these numbers. In June of 2018, the U.S. Supremse Court ruled that public sector employees cannot be forced to pay union "fair share" fees to cover the costs of collective bargaining, and that rules to the contrary are unconstitutional. While the 2019 numbers may show that the story is still unfolding, it seems that the *Janus* decision did not have a major impact on overall union membership rates, at least in the short term, in spite of what was widely thought to be a major blow to union membership and funding.

For the Taft-Hartley world, the most important figures from the BLS 2018 may be the unionization rate of 6.4 percent for private sector workers, as compared to 33.9 percent for public sector workers. Additionally, the 2018 private sector rate is down slightly from the 6.5 percent rate in 2017.

Overall, the number of union members is little changed over the last 12 months, though the trend of decline since 1983, the first year for which comparable union data is available, continues.

Whether ERISA Fiduciary Breach Cases Are Arbitrable Based on *Epic Systems Corp. v. Lewis*

In May 2018, the U.S. Supreme Court decided that arbitration agreements in employment agreements are enforceable, and therefore, can preclude employees from bringing class action lawsuits. The Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), has wide reaching implications that may eventually extend to the Employee Retirement Income Security Act of 1974 ("ERISA"). The case of *Epic Systems Corp. v. Lewis* was made up of three companion cases in which employees entered into agreements with their employer that they would arbitrate any disputes that might arise between themselves and their employer.

One of the three companion cases was *Ernst & Young, LLP v. Morris*, 836 F.3d 975 (9th Cir. 2016), where an employee filed a class-action lawsuit in Federal Court claiming that his employer violated the Fair Labor Standards Act by paying salaries to employees without overtime pay. The employee argued that the arbitration agreement he entered into with his employer only required arbitration of individualized disputes and could not prevent class actions given the requirement of the National Labor Relations Act ("NLRA") to allow employees to engage in concerted activity.

The Ninth Circuit Court of Appeals agreed and held that requiring an employee to arbitrate a class-action lawsuit would prohibit employees from engaging in concerted activity to right alleged wrongs in the work-place and therefore violate the NLRA. However, in 2018, the U.S. Supreme Court disagreed. Specifically, the U.S. Supreme Court held that an arbitration agreement can preclude an employee from filing a class-action lawsuit, and that such prohibition does not violate the NLRA. This decision has raised an important question that legal scholars are opining on—what does the decision in *Epic Systems* mean for class action waivers set forth in plan documents and employment agreements for breach of fiduciary duty cases brought under ERISA?[9]

There is no clear cut answer on this question yet; however, the Ninth Circuit did address it in *Munro v. Univ. of Southern California*, 896 F.3d 1088 (9th Cir. 2018). The Court held that breach of fiduciary duty class action claim under ERISA was not waived via an arbitration agreement with an individual employee because the benefits of a plan inure to the plan as a whole and not individual participants. Therefore, unlike the question in *Epic Systems*, the class

[9] See e.g. Joseph C. Faucher and Dylan D. Rudolph, Arbitrability of ERISA Fiduciary Breach Cases, Journal of Pension Benefits, Volume 26, Number 1 (Autumn 2018).

action could continue in Federal Court despite the individual arbitration agreement entered into by the individual lead plaintiff.

In Illinois, the House recently approved House Bill 2975, which consists of an amendment to the Employment Contract Act to provide that an employer may not require employees and applicants to waive, arbitrate or otherwise diminish any future claim, right or benefit to which the person would otherwise be entitled to under State or Federal law. It appears that this provision was taken in response to the *Epic Systems* decision, as it would make it unlawful for an employer to condition hiring or continued employment on arbitration-type agreements.

It is important to note that this issue will likely not affect multi-employer plans where the terms of employment are collectively bargained, as an employer entering into a separate arbitration agreement with an employee who is a member of a labor union would be unlawful under the NLRA. Therefore, J&K believes that parties can still agree to a waiver in a collective bargaining agreement. However, it will be important to keep an eye on the decisions of the circuit courts of appeals as this issue unravels throughout the country as it could have some effect on the U.S. Supreme Court's interpretation of breach of fiduciary duty issues under ERISA.

New Bipartisan Legislation to Address Multiemployer Pension Crisis

On January 9, 2019, Massachusetts Democratic Congressman Richard Neal introduced the Rehabilitation for Multiemployer Pensions Act. The purpose of this legislation is to address the nation's worsening multiemployer pension crisis.

According to the Pension Benefit Guaranty Corp. ("PBGC"), the agency dedicated to the protection of pension benefits in private-sector defined-benefit plans, projections for its multiemployer program show a very high likelihood of insolvency by 2025. Moreover, 130 of the approximately 1,400 multiemployer plans that the PBGC insures have declared that they will be unable to raise sufficient contributions to avoid insolvency within the next 20 years. The proposed bill is intended to help these types of multiemployer pension plans.[10]

The legislation would create the Pension Rehabilitation Administration ("PRA"), a new agency which would be funded within the U.S. Department of Treasury. The PRA would be authorized to issue bonds in order to finance loans to "critical and declining status" multiemployer pension plans, plans that have suspended benefits for its participants, and insolvent plans that are receiving financial assistance from the PBGC. The bill also provides the President with the power to appoint a Director of the PRA who will hold the title for a term of five years, and who would have the power to appoint deputy directors, officers and employees.[11]

The PRA would also establish and administer the Pension Rehabilitation Trust Fund ("PRTF"). The PRA would be authorized to make loans at low interest rates, around 3%, from the PRTF to multiemployer pension plans at risk of insolvency; the amount of the loan would equal what is needed to fund the plans' obligations for the benefits of participants and beneficiaries in pay status.[12] The loans would consist of proceeds from specially issued Treasury bills sold to institutional investors in the open market, such as financial firms, and loan and interest repayments made from borrowing pensions.[13] According to the bill, the payments to institutional investors in the Treasury bills would be paid from the PRTF.[14]

In order to qualify for the loans, pension plans would not be required to cut benefits. Moreover, pension plans that have already suspended benefits under the Multiemployer Pension Reform Act

[10] Katz, Michael. *Bill Proposes Creation of Pension Rehabilitation Administration.* Chief Investment Officer. January 15, 2019. https://www.ai-cio.com/news/bill-proposes-creation-pension-rehabilitation-administration/

[11] *Neal Introduces Bipartisan Legislation to Address Multiemployer Pension Crisis. Press Release.* Ways and Means Committee. January 9, 2019. https://waysandmeans.house.gov/media-center/press-releases/neal-introduces-bipartisan-legislation-address-multiemployer-pension.

[12] Katz, Michael at 1.

[13] Thornton, Nick. *Rehabilitation for Multiemployer Pension Act introduced in use.* BenefitsPro. https://www.benefitspro.com/2019/01/14/rehabilitation-for-multiemployer-pensions-act-introduced-iuse/?slreturn=20190119145520. January 14, 2019.

[14] *Id.*

would be required to apply for loans. The terms of the loans would require the borrowing plans to make interest payments for 29 years, with final interest and principal repayment due in the 30th year. According to Congressman Neal, this legislation is not a "bailout," rather, it represents the "federal government…simply backstopping the risk."[15]

The legislation is currently under review by the Committee on Education and the Workforce and the Committees on Ways and Means, and Appropriations.

[15] Katz, Michael at 1.

William P. Callinan Presents on Harrassment and Discrimination in the Workplace

William P. Callinan
Member

Education
Juris Doctor (2007)
Michigan State College of Law, Magna Cum Laude

Bachelor of Arts (Political Science) (2003)
Minnesota State University, Magna Cum Laude

Over the past year, serious issues and allegations have arisen regarding harassment and discrimination in the workplace and improper management of these complaints by employers and supervisors. Such complaints should not be taken lightly. Employers, unions, and funds should ensure that adequate training is available to their employees and apprentices so that they understand the nature of harassment and discrimination in the workplace and how to address it.

William C. Callinan, Member of J&K, continues to present on such an important issue across the Midwest, most recently at the Illinois State Apprenticeship Committee & Conference. Mr. Callinan's presentation focuses on understanding the state and federal regulations against harassment and discrimination, the different types of harassment and discrimination, and preventing and effectively dealing with harassment and discrimination in the workplace. If you have any questions regarding harassment and discrimination in the workplace or wish for Mr. Callinan to present on this topic, please contact our office.

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Johnson & Krol Welcomes
Lucas J. Habeeb, Associate Attorney

Lucas joined Johnson & Krol in December of 2018 as an Associate Attorney. Lucas' practice focuses on ERISA litigation and labor litigation. In these settings, Lucas advocates for J&K's clients through all phases of litigation in single employer, alter-ego, and successor liability claims. In addition, Lucas assists clients with subrogation matters and Qualified Domestic Relations Order (QDRO) issues.

During law school, Lucas served as a judicial extern to the Honorable Judge Theodore J. Jarz of the Circuit Court of Will County, where he gained valuable legal research and writing experience. He also clerked at a prominent trusts and estates litigation firm, where he gained valuable experience in handling complex trust disputes.

Lucas graduated from Indiana University Maurer School of Law in 2018, where he served as the Associate Executive Editor of the Indiana Law Journal. He also served as a Certified Legal Intern at the Community Legal Clinic and competed in the Sherman Minton Moot Court Competition. Lucas is a licensed attorney in the Supreme Court of Illinois and the U.S. Northern District of Illinois.