EDITION Nº THIRTY-THREE

NEWS WITH PURPOSE, DECISIONS THAT COUNT

STATE OF THE UNION

THE JOHNSON + KROL NEWSPAPER

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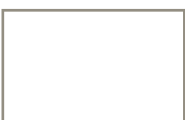

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401(K) PLAN INVESTMENTS IN CRYPTOCURRENCIES

In March of 2022, the Department of Labor issued Compliance Assistance Release 2022-01 ("CAR 2022-01"), which *strongly* discourages defined contribution plans from allowing participants to invest in cryptocurrency.

In the guidance, the Department reminds fiduciaries of their duties under ERISA and the liability associated with the breach of such duties. Specifically, the Department has concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies, specifically noting the significant risks of fraud, theft, and loss.

The Department elaborates on its concerns with cryptocurrency investments. In particular, the Department outlines the following reasons for its strong opinion:

- Investments in cryptocurrencies are highly speculative and subject to extreme price volatility. The Department warns this can have a devastating impact on participants, especially those approaching retirement.
- Cryptocurrencies are often promoted as innovative investments with a unique potential for outsized profits, attracting inexpert plan participants who expect high investment returns, but have little appreciation of the risks related to such highly volatile crypto investments. The Department notes that, when plan fiduciaries choose to include a cryptocurrency option on a 401(k) plan's menu, they effectively tell the participants that knowledgeable investment experts have approved the cryptocurrency option as a prudent option for plan participants.
- There are significant custodial and recordkeeping concerns, as the loss of a password could result in the complete loss of a cryptocurrency asset.
- Cryptocurrencies carry a risk of unreliable and inaccurate valuation.
- Rules and regulations governing cryptocurrency markets are evolving, and some market participants may not be complying with the existing regulatory framework. The Department warns plan fiduciaries of the potential liability of entering into unlawful transactions with inadequate disclosures for participants.

The Department concludes the guidance by indicating it expects to conduct an investigative program requiring fiduciaries of plans that permit cryptocurrency investments to justify those decisions as consistent with ERISA's fiduciary duties of prudence and loyalty.

With the increasing demand to invest in cryptocurrency, the guidance has prompted strong opposition from 401(k) plan sponsors and other industry members. One 401(k) provider, ForUsAll, has already brought suit in the District of Columbia to invalidate CAR 2022-01 on the grounds that it was issued in violation of the Administrative Procedure Act and asks the court to enjoin the Department from any enforcement action based on CAR 2022-01.

Other providers, such as Fidelity Investments, have sent letters to the Department disagreeing with the Department's position. Despite the Department's warning, Fidelity also unveiled an investment option which permits participants to invest up to 20% of their accounts in cryptocurrency.

Other critics of CAR 2022-01 disagree with the Department's decision to issue such guidance without the standard notice and comment rulemaking procedure. Some see the guidance as an extremely vague warning, as it doesn't distinguish at all between direct participant investments in cryptocurrency versus cryptocurrency investments managed by investment professionals.

While the Department has not entirely banned investment in cryptocurrency and digital assets, it has warned that plan sponsors should expect to be questioned about "how they can square their actions with their duties of prudence and loyalty." At this time, it remains unclear what the future holds for crypto investments. Nonetheless, plan sponsors should be diligent and prepared for possible DOL investigations should they choose to offer cryptocurrency investments to their 401(k) participants.

STARBUCKS WORKERS UNION GAINS MOMENTUM IN CHICAGO

In June and August of 2022, Starbucks employees at locations in Chicago's Bucktown and North Park Neighborhoods voted in favor of unionization, making them the fifth and sixth Chicagoland locations to choose union representation. The result gives the primary union spearheading the national campaign, Workers United–part of the Service Employees International Union–six victories against three losses in the Chicago area. This is largely reflective of the success rate that Workers United has enjoyed nationally in the organizing drive of Starbucks employees which began in 2021. In its national campaign, Workers United has won votes at 209 stores and lost at forty-five, according to a count the National Labor Relations Board published in August. Each store will stand alone as its own bargaining unit.

Workers United's success in organizing the food service industry is atypical of normal trends and is of recent origin. Food and beverage employees like Starbucks workers have proven difficult to organize, but that is changing quickly. An independent analysis of NLRB election data showed that almost 28% of new election petitions are from food services and accommodations workers. Even though Starbucks refers to its store-level employees as "partners," workers at different locations echo the concern that they are underpaid, undertrained and poorly treated–deficiencies that were highlighted during the pandemic. While Workers United was able to partially seize upon this worker discontentment from the pandemic, its success in reality was built on extensive organizing efforts that took several years.

Workers United's success also highlights a principle that has been known to union organizers for time immemorial: unions do better in elections conducted in smaller units with low turnover. Starbucks locations are largely characterized by smaller groups of employees who generally stay in their positions longer than average. This has translated to success for Workers United, which can be contrasted by organizing efforts at Amazon which occurs in large plants with abnormally high turnover rates. In a historic victory in April of 2022, workers at an 8,300 employee Amazon warehouse in Staten Island, New York, voted to make theirs the first unionized Amazon facility in the country. Since then, however, no other Amazon warehouse has even petitioned for a union election. However, it must be noted that when the union won at Staten Island, it organized more people in one fell swoop than Workers United has overall during the Starbucks campaign.

Progress has not been easy for Workers United despite their success. Starbucks workers in Buffalo, New York, were the first to unionize in late 2021 making it the only unionized shop among the chain's 9,000 company-owned stores in the United States. Two other Buffalo stores voted concurrently, of which one voted to unionize and the other did not. Despite the wins, the Regional Director of the National Labor Relations Board in Buffalo, N.Y. eventually issued a complaint against Starbucks alleging over 200 violations of the National Labor Relations Act stemming from the Buffalo campaign. Nationally, Workers United has filed more than 250 unfair labor practice charges against Starbucks, while Starbucks has filed only two against the Union. Starbucks has been accused of conduct ranging from cutting hours of long-time employees, surveillance, intimidation, shutting down stores, hiring new employees to impede union elections, to outright termination of union leaders. The resolution of all these matters will take several years to sort out due to their sheer number, which is compounded by staffing issues at the NLRB. This number will surely grow as Workers United continues to organize.

THE CONSUMER COVERAGE DISCLOSURE ACT OF 2021: WHAT YOU NEED TO KNOW

Under the Act, employers who offer group health insurance are required to provide their employees with a "notice of coverage."

On August 27, 2021, Governor Pritzker signed the Consumer Coverage Disclosure Act ("Act") into law, which imposed certain disclosure requirements on Illinois employers regarding group health plan coverage, effective immediately.

Under the Act, employers who offer group health insurance are required to provide their employees with a "notice of coverage." The purpose of the notice of coverage is twofold: it provides eligible employees with information about the benefits provided under their employer's group health plan and compares those benefits with the benchmark "essential health benefits" that plans offered through the Illinois insurance marketplace provide. The Act applies to all Illinois employers.

Employees are defined as "any individual permitted to work by an employer," while eligible employees are defined as employees who are entitled to receive benefits under the employer's group health plan.

COMPLYING WITH THE CONSUMER COVERAGE DISCLOSURE ACT

To comply with the Act, employers who provide group health coverage must provide eligible employees with notice of coverage at the time they are hired, and annually thereafter. Employees are permitted to request a copy of the notice of coverage at any time. Employers may provide the notice of coverage via email or by publishing it on their company website. In addition to providing the notice of coverage, employers are required to maintain records showing that each employee received the notice of coverage information for a period of one year.

The Illinois Department of Labor ("IDOL") is tasked with administration and enforcement of the Act. Therefore, it may request to inspect an employer's records regarding its annual distribution of the notices of coverage among its employees. Employers who fail to provide the disclosure will have 30 days to comply before facing civil penalties.

Anyone may submit a written complaint to report a violation of the Act to the IDOL. In the event that an employer is found to be in violation of the Act, the IDOL may impose a penalty. The Act instructs the IDOL to consider various factors when determining the amount of the penalty, including the employer's good faith effort to comply, the gravity of the violation, and the employer's size.

ALL ILLINOIS EMPLOYERS?

The plain language of the Act would lead one to believe that its provisions apply to all Illinois employers, without exception. Yet, the doctrine of federal preemption, which is based on the Supremacy Clause in the U.S. Constitution, states that a federal law will prevail over a state and/or local law, if it regulates the same specific issue(s). As a result, if a federal law and a state or local law conflict, the federal law supersedes the conflicting state or local law.

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that explicitly preempts state laws that directly or indirectly relate to employee benefit plans. At the time of ERISA's passage, legislators hoped to create a federally cohesive system, in which benefits could be administered uniformly, without the addition of state-by-state regulatory patchwork. Especially for self-funded ERISA plans whose member populations spanned multiple states, legislators hoped to ensure that a plan would be able to administer its benefits in the same manner, regardless of members' states of residence.

Section 514(a) of ERISA provides that state laws are preempted to the extent that they relate to employee benefit plans subject to Title I of ERISA. Therefore, the Illinois Consumer Coverage Disclosure Act poses an interesting conundrum for self-funded ERISA plans. Yet, the Act provides that its notice of coverage provisions is a requirement for all Illinois employers, which would include employers that provide employees with healthcare via self-funded ERISA plans. The question, therefore, for Illinois employers, regardless of what type of benefits they provide, is: to comply or to not comply?

TO COMPLY:

On one hand, it is possible, and even likely, that ERISA does preempt the requirements of the Act. The notice obligation included in the Act is specifically directed towards employer plans, and courts are more likely to determine that ERISA preempts state laws which affect the administration of employer plans. If the Act's notice obligations are preempted under ERISA, then self-funded plans would not be obligated to comply with the Act. While states have the ability to regulate insurers, states do not have the ability to regulate the administration of ERISA plans. This ensures that ERISA plans are administered consistently throughout the United States.

The U.S. Supreme Court underlined this sentiment in a 2016 opinion, in which the Court determined that ERISA preempted a Vermont law, to the extent that the state law applied to ERISA plans, which required plans to disclose information related to health care services. The Court stated that the law "impose[d] duties that are inconsistent with the central design of ERISA, which is to provide a single uniform national scheme for the administration of ERISA plans without interference from laws of the several States." *Gobeille v. Liberty Mutual Insurance Company*, 577 U.S. 312, 326 (2016).

TO NOT COMPLY:

On the other hand, there is always the risk that courts will determine that ERISA does not preempt the Act. The IDOL has stated on its website that ERISA does not preempt the notice requirement, because the notice requirement "does not mandate insurance provisions or otherwise have any direct impact on employer-provided group health insurance coverage. . ." In other words, the notice requirement is directed at employers and employees, rather than at the plans themselves, or the administration thereof. While this may be a small distinction, it appears to still be a valid difference. At this point, it is impossible to know how the Courts will rule on this issue.

PENALTIES FOR VIOLATING THE ACT:

The IDOL may impose civil penalties upon employers it deems noncompliant with the Act. Such penalties vary, based on the number of employees and the number of offenses an employer commits, as depicted below:

NUMBER OF EMPLOYEES	OFFENSE #1	OFFENSE #2	OFFENSE #3
Fewer than 4	Not to exceed $500	Not to exceed $1000	Not to exceed $3000
4 or more	Not to exceed $1000	Not to exceed $3000	Not to exceed $5000

CLOSING THOUGHTS:

Illinois employers that utilize self-funded ERISA plans must weigh the possible costs associated with complying with this Act with the possible costs of paying civil penalties for failure to comply or defending the view that the Act is preempted by ERISA in court. Of the available choices, it remains to be seen which is the most cost-effective in both the long and short term. For more information about the Consumer Coverage Disclosure Act, please contact our office.

ILLINOIS WILL VOTE IN NOVEMBER ON BALLOT QUESTION TO ENSHRINE RIGHT TO COLLECTIVELY BARGAIN IN THE ILLINOIS CONSTITUTION

Voters will vote yes or no on "establishing a state constitutional right for employees to organize and bargain collectively through representatives of their choosing to negotiate wages, hours, and working conditions and to protect their economic welfare and safety at work."

When Illinois voters go to the polls this November, in addition to voting for Governor and other federal, state and local offices, they will also see Illinois Amendment 1, Right to Collective Bargaining Measure, commonly referred to as the Workers' Bill of Rights. Voters will vote yes or no on "establishing a state constitutional right for employees to organize and bargain collectively through representatives of their choosing to negotiate wages, hours, and working conditions and to protect their economic welfare and safety at work."[1] If approved, the Amendment would add the following language to Article I of the Illinois Constitution:

(a) Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.

(b) The provisions of this Section are controlling over those of Section 6 of Article VII.

BACKGROUND OF THE PROPOSED AMENDMENT AND AMENDING THE ILLINOIS CONSTITUTION

Since its original constitution was adopted in 1818, Illinois has had three subsequent constitutional conventions and the current (and fourth) state constitution was adopted in 1970. There are two ways to get a ballot initiative to amend the Illinois Constitution before the voters. The first is by referral from the state legislature. The second is collecting signatures equal to eight percent of voters who voted in the most recent gubernatorial election.[2] Of the seven constitutional amendments that have been referred to Illinois voters in the last 25 years, five were passed and two were rejected. Most recently and perhaps famously,

Illinois voters rejected a graduated income tax amendment in 2020. Since the fourth constitution was adopted in 1970, only one question has successfully made its way onto the ballot by Illinois using citizen signatures. The instant amendment was referred by the state legislature. In May 2021, the measure passed the Illinois Senate by a vote of 49 to 7 and the Illinois House of Representatives by a vote of 80 to 30, with bipartisan support in both chambers.

WHY WAS THE AMENDMENT PROPOSED?

In addition to establishing the right to collectively bargain, the Amendment, if passed, would effectively prohibit the possibility that Illinois could ever become a "right-to-work" unless the Constitution was amended again. Illinois could not become "right-to-work" via state law or local ordinance. Three other states enshrine the right to collective bargaining in their constitutions, Hawaii, Missouri and New York. But Illinois would be the first state to ban "right-to-work" legislation. Twenty-seven of the fifty states currently have "right-to work" laws. Sponsor State Rep. Marcus Evans said, "workers' rights will be prioritized and not just in this General Assembly, but we will bake it (in) and we will make it permanent in the Constitution of the state of Illinois for our children for generations to come."[3] The Amendment is supported by many labor organizations including the Illinois AFL-CIO, Illinois Pipe Trades Association, and the Chicago Teachers Union.[4]

LEGAL CHALLENGE

In April of 2022, two Cook County teachers and two parents of Chicago students filed a lawsuit arguing that the Amendment is preempted by the National Labor Relations Act.[5] They filed a Petition seeking to stop the use the taxpayer funds needed to place the question on the ballot, due to the alleged preemption/supremacy clause issues. The lawsuit was brought in conjunction with the Illinois Policy Institute and the Liberty Justice Center, which is the organization that won the Janus lawsuit. On May 26, 2022, a Circuit Court judge in Sangamon County denied the Petition. The Liberty Justice Center appealed that decision. On August 26, 2022, the 4th District Appellate Court affirmed the Circuit Court decision, denying the Petition to file the taxpayer action.[6] This means that unless anything further happens, the question will appear on the ballot in November.

[1] www.ballotpedia.org
[2] Illinois Constitution, Article XIV Constitutional Revisions, Sections 2 and 3.
[3] chicagotribune.com/politics/ct-illinois-union-amendment, May 26, 2021, Rick Pearson and Dan Petrella.
[4] www.ballotpedia.org
[5] *Sachen, et al. v. the Illinois State Board of Electors, et al.*, (22-CH-34).
[6] *Sachen, et al. v. Illinois State Board of Electors, et al.*, Case No. 4-22-0470.

EMPLOYEES FAKING COVID-19 ILLNESS CAN HAVE SERIOUS CONSEQUENCES

Employers should have policies outlining the consequences of falsifying documents.

It has long been said that in the midst of chaos, there is also opportunity. The opportunities for malfeasance during the COVID-19 pandemic ran every aspect of life during the pandemic including, but not limited to, websites selling fake at-home COVID-19 vaccination cards, stimulus payments stolen through identity theft, vaccination surveys promising a free reward if you provide your payment information for a small shipping and handling fee, offers for phony at-home COVID-19 testing kits, robocalls offering scam services, such as inexpensive health insurance or work-from-home jobs and sales of personal protective equipment with delivery dates the seller knows they can't meet. The run-away winner was the Paycheck Protection Program, where the federal government estimates $80 billion–or about 10 percent of the $800 billion handed out–went to those who couldn't resist purchasing luxury automobiles, homes, swanky vacations, and alpacas.[1]

Most scams have disappeared over time; however, one species has persisted: employee fraud. From the beginning of the pandemic the FBI has warned employers to be on the lookout for potential fraud, citing the case of an employee at a critical manufacturing facility who faked a positive COVID-19 test result, leading to a plant shutdown and productivity loss of $175,000. By the time the company discovered the claim was false, the company incurred more than $175,000 in lost productivity and disinfection costs. The employee was eventually sentenced to three years in prison and ordered to pay $187,550 in restitution to his former employer. Similarly, a McDonald's employee submitted a fraudulent doctor's note claiming she had tested positive for COVID-19, which caused the restaurant to close for several days while professional cleaning services worked to sanitize the store.

While cases of this severity are becoming increasingly rare as our understanding of COVID-19 had evolved, the problem of employees seeking to take advantage of the pandemic still remains. Employers can and should require appropriate documentation confirming the employee's need for paid time off or leave under the Family and Medical Leave Act (FMLA) or the employer's leave policy. A statement or description of appropriate medical facts regarding the patient's health condition for which leave is requested is appropriate. Employers can ask follow-up questions to clarify ambiguities and continue to verify anything that seems out of the ordinary, just as they would with any other ambiguous or problematic leave requests.

But most importantly, employers should have policies outlining the consequences of falsifying documents. An employer can discharge a worker who is caught falsely reporting an illness from COVID-19. Employers need to have clearly communicated rules and expectations and then abide by them. Employees need to know that there could be consequences beyond their own immediate circumstances. A clear policy reinforced with documentation will serve to eliminate most instances of employee fraud in this regard.

[1] www.washingtontimes.com/news/2021/may/4/man-fraudulently-obtained-ppp-loans-purchase-alpac/

BASIC ONLINE SECURITY TIPS

Help prevent cyber attacks and keep your data safe.

Cyber criminals often exploit weaknesses in our day-to-day life to gain access to sensitive information, launch attacks, or take control of a system. The U.S. Department of Labor has issued online security tips to mitigate the risk of fraud and loss. We encourage everyone to implement these useful tips to help prevent cyber attacks and to keep your data safe.

STRONG AND UNIQUE PASSWORDS

Use strong and unique passwords that contains letters, numbers, and special characters. Always change passwords every 120 days. Do not write down, share, or repeat passwords. If you are concerned about forgetting your passwords, obtain a secure passwords manager to help you manage and keep track of all your passwords.

MULTI-FACTOR AUTHENTICATION

Multi-Factor Authentication ("MFA") requires a second credential to verify your identity, such as entering a code sent in real time to your phone or email. MFA is a crucial tool in mitigating malicious cyber activity. Try to implement MFA on all accounts.

AVOID FREE WI-FI

Free Wi-Fi can seem enticing but be wary of it. Public Wi-Fi available at airports, hotels, and coffee shops can be a security risk that may give cyber criminals access to your personal data. Try opting for your cellphone, home network, or a secure virtual private network (VPN).

ONLINE AND UNUSED ACCOUNTS

Monitor online accounts and sign up for activity notifications whenever possible. This can reduce the risk of fraudulent access to your accounts. In addition, for any unused account, close or delete to minimize access. The smaller online presence, the less vulnerable you are.

PHISHING ATTEMPTS

Phishing attempts are common ways to trick users into sharing private and sensitive information such as passwords and account numbers. Phishing attempts may often look misleading. It may look like it's coming from a trusted source, such as a colleague or an executive. Here are some common signs of phishing attempts:

- Unexpected emails and text messages
- Spelling and grammar errors
- Odd or mismatched links
- Emails requesting you to open a link
- Emails that seem of great urgency, aggressive, or too good to be true
- Odd phone calls asking for private information

Cyber criminals can also send emails with downloadable links, PDFs, Microsoft Word documents or Excel files to corrupt computer systems.[1] If an email seems suspicious or makes you feel uneasy, report it.

ANTIVIRUS SOFTWARE AND APPS

Antivirus software are important tools used to protect your computers and mobile devices from viruses and malware. Be sure to utilize trustworthy software. Keep antivirus software and apps up to date with the latest upgrades. In addition, conduct antivirus scans on a routine basis.[2]

[1] CISA, the FBI, NSA, et al., "Weak Security Controls and Practices Routinely Exploited for Initial Access", issued May 17, 2022
[2] *Id.*

> *“While it may have redress against the subcontractors who did not pay their employees, the risk for damages is still large.”*

EXPANDED REMEDIES FOR COLLECTION OF UNPAID WAGES AND FRINGES UNDER THE IWPCA

On June 10, 2022, Governor J.B. Pritzker amended the Illinois Wage Payment & Collections Act (“IWPCA”) by signing legislation (820 ILCS 115/13.5) that gives individuals working in the construction trades additional collection remedies for unpaid wages and fringe benefits. By way of background, the IWPCA generally establishes when, where, and how often wages get paid to employees in the State of Illinois. The Illinois Department of Labor (“IDOL”) enforces the IWPCA by assisting workers in the collection of wages and final compensation including vacation pay, commissions, and other fringe benefits. The new section of the IWPCA provides an additional remedy against a general contractor for its subcontractor’s (of any tier) unpaid wages and fringe benefits under contracts entered into after July 1, 2022.

Before discussing the scope of remedies, it is important to note that this amendment has exclusions. First, the amendment only applies to primary contractors with a direct contractual relationship with the property owner who enters into a contract for the “erection, construction, alteration, or repair of a building, structure, or other private work in the State where the aggregate cost of the Project exceeds $20,000.” On most projects, this entity is known as the “general contractor.” Second, there is an exclusion for any general contractor that is a signatory to a collective bargaining agreement (“CBA”) on the project where the work is being performed (the “collectively-bargained exception”). Third, contracts performed for federal, state or local government entities as well as contracts on any single-family home or residence are excluded.

If the general contractor of the project does not qualify for an exception, the general contractor will be liable for a subcontractor’s non-payment of wages and fringe benefits. The IWPCA also provides for interest, penalties assessed by the IDOL, and attorney’s fees and costs. These items can be assessed even though the general contractor was not the employer and fully paid its subcontractor. To invoke the IWPCA’s protection, an employee must first provide written notice to the primary contractor and to the unpaid employee’s employer detailing the nature and basis of any alleged non-payment claim. If the employee’s employer fails to resolve the claim within ten (10) days after receipt of the written notice, the employee claimant may file a lawsuit to enforce the provisions of the IWPCA or file a complaint with the IDOL. Relief can be pursued against both the general contractor and the subcontractor, or either of them separately. Notably, the amendment is silent on whether an employee’s union has institutional standing to pursue these remedies on behalf of its members.

The collectively-bargained exception, outlined *supra*, presents the potential for the greatest change to a general contractor’s liability profile on construction projects. General contractors on a private, non-union commercial construction project where the aggregate cost of the project exceeds $20,000 are likely to be the most affected. This is because no contractor of any tier is signatory to a CBA with anyone, therefore the general contractor could potentially be liable for paying the wages of every employee on the project twice. In theory, the general contractor could correctly pay all of its subcontractors and still be liable for wages, interest, penalties and attorney’s fees. While it may have redress against the subcontractors who did not pay their employees, as explained below, the potential for damages is still large.

But the new remedy is also of concern for general contractors on private union commercial construction projects in excess of $20,000 that are not signatory with the right union. The general contractor must itself be signatory to a CBA with the same trade covering non-paying subcontractor’s employees to qualify for the collectively-bargained exception. And while the amendment requires a non-paying subcontractor to indemnify the paying upstream contractor, this right presents little comfort given the circumstances. Subcontractors who neglect their employees are generally neglecting other financial obligations as well.

Whatever the amendment’s intent, it does act to protect union workers from non-paying contractors, at the expense of non-signatory general contractors. The biggest risks will be to private, non-union projects, which are not subject to the various exemptions contained in the IWPCA. But as is typical with Illinois law, there are many open aspects of the amendment’s application that are beyond the scope of this summary that will have to be clarified as it is applied.

IRS ANNOUNCES NEW PRE-PILOT PROGRAM

Under this PEP program, the IRS will notify plan sponsors by letter 90 days before an IRS Examination begins, informing the plan that it has been selected for examination.

On June 3, 2022, the Internal Revenue Service (IRS) announced[1] a new Pre-Examination Pilot ("PEP") program that will allow retirement plan sponsors to avoid a full examination by taking certain steps to remedy retirement plan document or operational errors. Under this PEP program, the IRS will notify plan sponsors by letter ("PEP Letter") 90 days before an IRS Examination begins, informing the plan that it has been selected for examination for at least one issue(s). During the 90-day review period, the plan sponsor may review the plan document and operations to confirm compliance with current tax law requirements. No current expiration date for the PEP program has yet been announced.

SOME PLAN ERRORS MAY BE CORRECTED DURING THE 90-DAY PEP REVIEW PERIOD

Any errors identified by the plan sponsor during the 90-day PEP review period may be corrected using principles set forth in the IRS Correction Program procedures (Employee Plans Compliance Resolution System ("EPCRS")) identified in Revenue Procedure 2021-30. Under EPCRS, certain "insignificant" plan document errors are usually eligible for self-correction, and correction of the error and documentation of the remedy is the cure. If the errors can be resolved through self-correction under EPCRS, the plan sponsor can document the remedy and submit a written proposed response and relevant Plan

documentation (i.e. Plan Amendments or other relevant information) to the IRS within the 90-day time window following receipt of the PEP letter.

Where the plan sponsor identifies errors not eligible for self-correction under EPCRS, the plan sponsor can propose the remedy and seek a closing agreement with IRS. The IRS will apply the Voluntary Correction Program ("VCP") fee structure to calculate any sanction payment as opposed to the higher fees included in the Audit Closing Agreement Program (CAP) fee schedule that would normally apply. VCP fees are currently capped at $3,500.

THE IRS WILL REVIEW DOCUMENTATION PROVIDED BY PLAN IN RESPONSE TO THE PEP LETTER

The scope of issues that can be resolved in this PEP program and latitude allowed to IRS examiners are yet to be fully known by the retirement plan community. A potential impact of this PEP program is to encourage internal diligence review and incentivize voluntary compliance for retirement plan sponsors. This program is also a mechanism for the IRS to magnify the impact of retirement plan compliance efforts in the face of a short-staffed IRS compliance team. The potential benefits of this PEP program for plans will become more fully known by the retirement plan community as more plans begin to utilize this program.

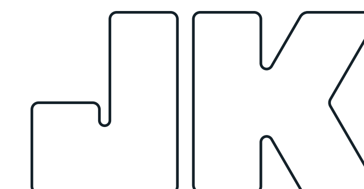
IF THE PLAN DOES NOT RESPOND TO THE PEP LETTER, THE IRS WILL SCHEDULE AN EXAMINATION

Where a plan sponsor fails to respond to the PEP letter within the 90-day window, the IRS has indicated that an Examination will be scheduled.

POTENTIAL BENEFITS FOR RETIREMENT PLANS RESPONDING WITHIN THE PEP LETTER RESPONSE PERIOD

The PEP program allows retirement sponsors an opportunity to self-correct certain known plan errors at a potential reduced cost and/or sanction. Plan correction issues that may not initially qualify for self-correction under EPCRS may be afforded self-correction remedies. Plan sponsors may be given an initial chance to resolve significant plan errors short of a full IRS Examination. JK can offer assistance for plan sponsors reviewing and contemplating a PEP letter response. Contact our office if you have questions or if you would like more information.

[1] irs.gov/retirement-plans/employee-plans-news



CLAIMS ADMINISTRATORS CAN CURE ERRORS MADE DURING THE INITIAL CLAIM DENIAL IN SEVENTH CIRCUIT

An ERISA Fund's plan document is a comprehensive document that, among other things, guides the plan sponsor and plan administrator in making decisions and executing their responsibilities. Often, the plan document will set forth the material a plan administrator may review when determining whether to approve or deny a participant's claim.

In the case, *Canter v. AT&T Umbrella Benefit Plan No. 3*, a telephone service technician applied for short-term disability benefits through his employer's Umbrella Benefit Plan No. 3 (the "Plan") after he began to suffer from migraines, light-headedness, and dizziness. 33 F. 4th 949, 953 (7th Cir. 2022). While the technician did receive benefits under the Plan for almost five months, the Plan Administrator eventually terminated the benefits after an independent occupational medicine doctor concluded that the technician's medical tests were normal and his symptoms had improved. In the denial letter, it was explained that the technician had failed to provide "objective Medical Evidence" to support his claim, as was required by the Plan. *Id.*

The technician attempted to appeal the Plan Administrator's decision using the employer's internal appeal process, but he was unsuccessful. Soon thereafter, the technician sued his employer and the Plan. The district court granted summary judgment in favor of the employer and the Plan, and the technician appealed. *Id.* at 954-55.

One of the technician's arguments was that the Plan Administrator made the denial determination based on a misunderstanding of his job duties. The independent doctor's report "concluded that [the technician] was capable of 'lifting, driving, bending, and stooping,'" but it made no mention of climbing. *Id.* at 957. The Court found this omission from the report troubling since climbing was one of the technician's key job duties. Nevertheless, the Court determined that the initial claim denial's failure to address whether the technician was disabled from climbing was cured during the internal appeal process. During the internal appeal, two additional independent medical reviewers explicitly touched on the technician's ability to climb in their own reports. Because all three independent doctors ultimately reached the same conclusion that the technician could return to work, the Court found it "unlikely that [the first independent doctor's] omission was meant to communicate anything." *Id.*

While it is important for Plan Administrators to review all information required by the plan document during the review of a claim, this case shows that inadequacies made in an initial claim denial can be cured during the appeal process.

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