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Employee Benefits

The newsletter of the Illinois State Bar Association's Section on Employee Benefits

Employers must prepare for penalty assessments under the Affordable Care Act

BY STEVE FLORES

The Internal Revenue Service ("IRS") recently released a set of FAQs and a new form Letter 226J that will be used to alert employers of a penalty under 4980H of the Internal Revenue Code ("IRC").[1]

The IRS has indicated that it intends to issue Letter 226J to applicable large employer members ("ALE") if it determines that, for at least one month in 2015, one or more of the ALE's full-time employees was enrolled in an exchange plan and received a subsidy.[2]

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New IRS audit guidelines address missing participants and unpaid retirement benefits

BY WESLEY COVERT

Internal Revenue Code section 401(a)(9) establishes required minimum distribution (RMD) standards for qualified retirement plans. Generally, these standards require a participant's benefit payments to begin no later than April 1 of the calendar year after the participant attains the age 70 1/2 or retires. On October 19, 2017, the Internal Revenue Service (IRS) released guidance for when a plan's efforts to locate missing participants and beneficiaries should be challenged on audit. The new IRS guidance addresses

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4980H Penalties

As a refresher, ALEs include employers with 50 or more full-time or full-time equivalent employees, determined on a controlled-group basis.[3] The IRC imposes a penalty on ALE's who fail to offer full-time employees and their dependents the opportunity to enroll in a health plan. The penalty is triggered if at least one full-time employee who is not offered an opportunity to enroll in a plan enrolls in exchange coverage and receives a subsidy.[4] A separate, and often less severe, penalty may apply if a large employer offers a plan to its full-time employees and their dependents but that plan is not affordable (in 2015, premiums were more than 9.56% of household income) or does not meet minimum value standards (the plan did not cover the cost of at least 60% of benefits offered under the plan).[5]

Where an ALE has failed to offer coverage, the potential penalty is assessed on a calendar month basis and is calculated by multiplying the applicable payment amount (in 2015, 1/12 of $2,084) by the number of all full-time employees during any month (reduced by thirty allocated amongst controlled group members).[6] Importantly, an ALE is treated as having offered all of its full-time employees and their dependents an opportunity to enroll in a plan if the opportunity is offered to all but five percent of its full-time employees and their dependents.[7] Importantly, as part of transition relief, the regulations expanded this five percent to 30 percent for all of 2015 and any calendar months during the large employer's 2015 plan year that fall in 2016.[8]

Where the ALE has offered coverage, but that coverage is unaffordable or does not provide minimum value, the monthly penalty is 1/12 of $3,120 (in 2015) for each full-time employee that enrolls in exchange coverage and receives a subsidy.[9]

Penalty Assessment Letters

The IRS indicates that for the 2015 calendar year, the IRS plans to issue Letter 226J informing ALEs of their potential liability for an employer 4980H penalty, if any, in late 2017.

For purposes of Letter 226J, the IRS determination of whether an employer may be liable for an employer 4980H penalty and the amount of the potential payment are based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed exchange subsidies.

The IRS indicates that the new notice will include a variety of helpful information, including an itemized penalty assessment indicating for each month if the liability is under section 4980H(a) or section 4980H(b) (or neither) and an "Employee Premium Tax Credit (PTC) List" which will list, by month, the ALE's assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief) and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C.

Disputing Penalty Assessments

Employers will need to quickly analyze and respond to the Letter 226J as any response will be due by the response date shown on Letter 226J, which generally will be thirty days from the date of the Letter 226J. Letter 226J will provide instructions for how the ALE should respond in writing, either agreeing with the proposed employer 4980H penalty or disagreeing with part or all or the proposed amount.

If an ALE responds to Letter 226J, it can expect to receive a response on Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226J and describe further actions the ALE may need to take).

If, after receipt of Letter 227, the ALE disagrees with the 4980H penalty, the ALE may request a pre-assessment conference

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with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on Letter 227, which generally will be thirty days from the date of Letter 227. The Letter 227 will provide instructions on how to request a conference with the IRS Office of Appeals. IRS Publication 5, "Your Appeal Rights and How To Prepare a Protest if You Don't Agree" also should be consulted.

Final Penalty Assessment

If the ALE does not respond to either Letter 226J or Letter 227, or if the ALE appeals the 4980H penalty assessment and the IRS or IRS Office of Appeals determines that the ALE is liable for a 4980H penalty, the IRS will assess the amount of the proposed penalty and issue a notice and demand for payment on Notice CP 220J. Notice CP 220J will include a summary of the employer 4980H penalty and will reflect payments made, credits applied, and the balance due, if any. ALEs will not be required to include the employer 4980H penalty on any tax return that they file or to make payment before notice and demand for payment. An employer may be able to apply for different payment options, such as entering into an installment agreement. For these purposes, Publication 594, The IRS Collection Process should be consulted. ■

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1. *See* Making an Employer Shared Responsibility Payment on: https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act
2. *See* Q&A 55—58.
3. 26 U.S. Code § 4980H.
4. 26 U.S. Code § 4980H(a).
5. 26 U.S. Code § 4980H(b).
6. Treas. Reg. § 54.4980H-4(a).
7. Treas. Reg. § 54.4980H-4(a).
8. Final Rule, 79 Fed. Reg. 8544. 8575 (Feb. 12, 2014).
9. 26 U.S. Code § 4980H(b).

New IRS audit guidelines address missing participants...

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how qualified retirement plans may satisfy RMD standards when the participant or beneficiary to whom the payment is due cannot be located. Specifically, a qualified retirement plan that cannot locate a participant or beneficiary will be treated as satisfying RMD standards if the plan takes the following three steps: (1) it searches plan and publically available records for the participant's contact information; (2) it uses a commercial locator service, credit reporting agency or proprietary internet search tool to locate the participant or beneficiary; and (3) it attempts to contact the participant or beneficiary via United States Postal Service certified mail sent to the last known mailing address and any other appropriate means of contact, such as by email or telephone. Although retirement plans do not have to be formally amended to comply with this new guidance, it would be prudent to at least implement a policy to address this new audit standard. Finally, it should be noted that although this new guidance is helpful to plan sponsors, the Department of Labor (DOL) has its own recommendations related to locating participants and paying benefits. Because each agency may independently audit a retirement plan, plan sponsors should be familiar with both sets of rules. ■

Just in time for the holidays, the IRS issues employer mandate tax assessment guidance

BY CHAD DEGROOT

The IRS recently updated its FAQ guidance on employer shared responsibility payments under the Affordable Care Act to describe in more detail how the IRS plans to assess such payments against "applicable large employers" (50 or more full-time or full-time equivalent employees) who failed to offer health coverage, or failed to offer affordable coverage to full-time employees who received subsidized coverage through a health insurance exchange or marketplace. The updated FAQs summarize the process for responding to or appealing such assessments and the process for making the payments. Key takeaways from this guidance include that Letter 226J, which will be used to notify employers of these assessments, will be issued in "late 2017" for 2015 coverage penalties, and that a response to Letter 226J will be due only 30 days after the date of the letter. It is unclear at this point whether the IRS will permit extensions of the 30-day deadline, which may prove to be a narrow time frame in which to collect and analyze the necessary data and prepare a response to the IRS. Employers receiving Letter 226J need to act quickly if a response or appeal is needed. ■

Pension plan and health plan limitations for 2018

BY WESLEY COVERT

In October 2017, the Internal Revenue Service issued Notice 2017-64 and Revenue Procedure 2017-58, containing the cost-of-living adjustments applicable to retirement plan limitations under the Internal Revenue Code (Code) and health flexible spending accounts (FSAs) under a Code §125 cafeteria plan and the parking and transit account limits under an Code §132 Transportation Plan. These changes will take effect on January 1, 2018. Many of the limitations are being increased, while others remain unchanged. Below is a summary of some of the more common limitations.

Limitations Increased

- The limitation on the annual benefit under a defined benefit plan is increased from $215,000 to $220,000.
- The annual contribution limitation for defined contribution plans is increased from $54,000 to $55,000.
- The annual deferral limit for 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan are increased from $18,000 to $18,500.
- The annual compensation limit is increased from $270,000 to $275,000.
- The dollar limitation for determining the maximum account balance in an employee stock ownership plan subject to a 5-year distribution period is increased from $1,080,000 to $1,105,000, whereas the dollar amount used to determine the lengthening of the 5-year distribution period is increased from $215,000 to $220,00.
- The limitation concerning the qualified gratuitous transfer of qualified employer securities to an employee stock ownership plan is increased from $45,000 to $50,000.
- The annual deferral limit for deferred compensation plans of state and local governments, and tax-exempt organizations is increased from $18,000 to $18,500.
- The pre-tax salary reduction limit for health FSAs will increase to $2,650 for plan years on or after January 1, 2018.
- Parking and Transit limits for 2018 each increase to $260 per month.

Limitations Unchanged

- The annual compensation threshold for purposes of the definition of "key employee" remains at $175,000.
- The annual deferral limitation for SIMPLE retirement accounts remains at $12,500.
- The maximum amount of catch-up contributions that individuals age 50 or over may make to SIMPLE 401(k) plans or SIMPLE retirement accounts remains at $3,000.
- The compensation threshold for simplified employee pensions (SEPs) remains at $600.
- The maximum amount of catch-up contributions that individuals age 50 or over may make to 401(k) plans, 403(b) plans, SEPs and governmental 457(b) plans remains at $6,000.
- The maximum amount the can be contributed to an IRA remains at $5,500. The IRA catch-up contribution limit for IRAs remains unchanged at $1,000.

Regarding plans that offer participants a high deductible health plan with a Health Savings Account (HSA) option, the IRS in Revenue Procedure 2017-37 released the following limits to apply for calendar year 2018:

Contribution Limit to an HSA

- Self-Only Coverage — $3,450
- Family Coverage — $6,900

For a High Deductible Health Plan, the annual deductible may NOT be less than

- Self-Only Coverage — $1,350
- Family Coverage — $2,700

The Out-of-Pocket Maximum may NOT exceed

- Self-Only Coverage — $6,650
- Family Coverage — $13,300 ■

Update: DOL Proposes Delay to Disability Claims Procedure Rule

BY STEVE FLORES

As previously reported in the June 2017 Employee Benefits newsletter, the Department of Labor ("DOL") issued final regulations revising claims procedure rules under the Employee Retirement Income Security Act of 1974 ("ERISA") for employee benefit plans that provide disability benefits. The final rule adopts certain procedural protections and safeguards for disability benefit claims that are currently applicable to claims for health benefits under the Affordable Care Act.

The revised rules would require employers who sponsor employee benefit plans that provide disability benefits to revisit policies and procedures, plan documents, summary plan descriptions, and claim-related notices.

In January 29, 2017 the DOL published a final rule that delays for ninety days—through April 1, 2018—the applicability of the final rule amending the claims procedure requirements for disability-related claims.

The original final rule became effective on January 18, 2017 and would have applied to claims for disability benefits under ERISA-covered employee benefit plans filed on or after January 1, 2018. The DOL indicates that following the publication of the final rule, various stakeholders and members of Congress asserted that the final rule would drive up disability benefit plan costs, cause an increase in litigation, and impair workers' access to disability insurance benefits. In accordance with Executive Order 13777 (which directs agencies to engage in regulatory reform), the DOL determined that extending the applicability date past January 1, 2018, allows the DOL to complete the public solicitation process and examine regulatory alternatives prior to the Final Rule becoming applicable.

Absent further action by the DOL, the final rule will become applicable to claims for disability benefits that are filed after April 1, 2018, rather than January 1, 2018. ■

Taking FMLA leave does not guarantee reinstatement

BY MICHAEL R. LIED

Employees sometimes think taking FMLA leave insulates them from an adverse employment action. Not so, as a couple of recent cases make clear.

Autumn Tibbs worked as the administrative assistant to the Chief Judge of the Circuit Court of the Seventh Judicial Circuit of Illinois. The Chief Judge has responsibility for the administrative functions of the circuit. Judge Leslie Graves, the Presiding Judge of Sangamon County, supervised Tibbs.

Tibbs took leave under the FMLA because of health issues from March to May 2011 and from June to August 2012. The day she returned from leave in August 2012, Judge Graves presented a letter that described several instances of misconduct and said Tibbs was being placed on paid administrative leave pending a disciplinary meeting with Chief Judge Mitchell.

The letter invited Tibbs to answer the allegations at a meeting with Chief Judge Mitchell. The letter also said that Tibbs could respond in writing, but told her that the meeting would proceed with or without her. Tibbs wrote Chief Judge Mitchell saying she would not attend. Chief Judge Mitchell fired her.

Tibbs then brought suit. She claimed the Administrative Office of the Illinois Courts was her employer. She asserted that the Administrative Office had retaliated against her for using FMLA leave.

The district court granted the Administrative Office's motion for summary judgment, finding that the Administrative Office had not actually employed Tibbs and was not otherwise responsible for terminating her employment. The court also found that even if the agency did control and terminate Tibbs' employment, she had not offered sufficient evidence to support an inference that she was fired to retaliate against her for using FMLA leave. Tibbs filed an appeal.

To survive summary judgment on her claim of retaliation under the FMLA, Tibbs had to point to evidence supporting a reasonable inference that she was fired because she took protected leave. The main evidence she offered in support of her claim was timing, because she was suspended immediately upon returning from the FMLA leave.

The appellate court agreed the timing was suspicious. However, suspicious timing alone is rarely enough by itself. A plaintiff must ordinarily present other evidence that the employer's explanation for the adverse action was pretext for retaliation. According to the court, the critical question is simply whether the inference of unlawful intent is reasonable (at summary judgment) or correct (at trial).

The Administrative Office introduced evidence that Tibbs was fired for facially legitimate reasons. Tibbs maintained that the reasons were phony and thus were pretexts to cover retaliatory motives.

Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is a lie, specifically a phony reason for some action.

The court observed that merely disagreeing with an employer's reasons does not meet this standard. A plaintiff must point to evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the termination.

Additionally, where multiple reasons are given the plaintiff has a tougher burden. Showing that just one reason was a lie may not be enough.

Tibbs failed to offer evidence sufficient to support an inference that any of the proffered reasons was false.

Tibbs did not dispute testimony that Chief Judge Mitchell honestly believed that each reason listed in the disciplinary letter supported her discharge. It was not enough for Tibbs to argue that Chief Judge Mitchell was wrong in his assessment of her performance. She had to point to facts showing that his explanation was unworthy of belief. She didn't.

The judgment of the district court in favor of the Administrative Office of the Illinois Courts on Tibbs' claim of FMLA retaliation was affirmed. *Tibbs v. Administrative Office of the Illinois Courts*, 860 f.3d 502 (7th Cir. 2017).

Before his employment with Sotera Defense Solutions, Inc., Gary Waag worked for Potomac Fusion, Inc., reporting to Dan Haug. At Potomac Fusion, Waag was "Senior Director of Operations, National Intelligence Programs." Waag's primary duties at Potomac Fusion included providing budgetary guidance and oversight for national security programs, developing standardized program controls, and supporting business development efforts to grow the footprint of the firm, particularly in the area of modeling and simulation.

In December 2011, Sotera, a defense contractor, acquired Potomac Fusion, which became Sotera's Data Fusion Analytics ("DFA") division. Sotera installed Haug as Vice President for the DFA division, and Waag kept the Director of Operations title he had held at Potomac Fusion. Waag's duties at Sotera included oversight of issues related to recruiting, security, IT, and facilities. and development of new business at Sotera.

In September 2012, the United States Army selected Sotera as one of the non-exclusive prime contractors for the Software and Systems Engineering Services Next Generation program ("SSES NexGen" or "NexGen" program) to provide war fighting software solutions and support to the Army at the Aberdeen Proving Ground in Maryland. NexGen was an IDIQ contract—an "indefinite delivery/indefinite quantity" contract. A prime contractor has the right to bid on "Requests for Proposals" ("RFPs") or "task orders" issued by a federal department or agency under an IDIQ contract like NexGen. Sotera was qualified to bid on RFPs in the area of software and analytics. With a budgetary ceiling of $7 billion, the NexGen program was potentially very lucrative for contractors who were awarded work, but Sotera still had to out-bid other prime contractors. Thus, the NexGen program was worth nothing to Sotera until it outbid other prime contractors for NexGen work.

In early October 2012, Haug and Vice President Kathleen Lossau asked Waag to become the Program Manager ("PM") of Sotera's NexGen work in light of Waag's experience managing IDIQ contracts. The PM position for an IDIQ contract was largely "a marketing business development role," particularly in the early stages. Thus, Waag's salary was not directly billable to the government—it was paid out of Sotera's overhead costs. During Waag's tenure as PM, Sotera did not have any work related to NexGen task orders, and Waag had no staff or employees reporting to him on NexGen projects.

On October 17, 2012, Waag severely injured his hand when he fell off the roof of his house. He was hospitalized for several days and his physician anticipated he would not return to work until December 31, 2012. Waag informed Haug about his injury on the day it happened and explained that he would not be able to work for an extended period of time due to the severity of the injury.

According to Waag, Sotera never notified him of his rights to take leave under FMLA. Sotera, however, gave its employees a handbook containing its leave policies, and this information was also accessible online. Sotera's leave policy provides up to 12 weeks of unpaid family and medical leave and states that, "with limited exceptions, an employee who takes leave under this policy will be able to return to the same job or a job with equivalent status, pay, benefits and other employment terms." When Waag began his employment, he received a Kindle device onto which Sotera's leave and other human resources policies were loaded.

While he was on leave, Waag communicated with Lossau about NexGen. In late October 2012, Waag indicated he was severely limited in his ability to step into the Project Manager role. After speaking with Waag and learning he would be out of work until mid-December or early January 2013, Lossau told Haug, "I need a new PM for SSES nexgen," and asked for Haug's input. Shortly thereafter, Haug and Lossau decided to place Devin Edwards, in charge of NexGen IDIQ work. Haug told Edwards there was "nothing to do" at the time Edwards took over because there were no pending task orders.

In early November, Waag and Lossau corresponded via e-mail regarding the NexGen PM position. Lossau explained that "Devin has agreed to be the SSES NexGen PM and will get things started for us" and asked Waag to pass on any info he had to Devin. Waag asked what his role in NexGen would be after he returned to work, noting that Lossau's e-mail "reads like Devin will be your full-time permanent SSES NEXGEN PM and not just a stop-gap measure until I am able to return." Lossau responded that Waag should not "worry about [his] position" and that "[f]or the purposes of getting the team up and going with SSES NexGen we have to provide some stability [and] Devin is that stability for now." Lossau encouraged Waag that "[a]ll will work out," and that "we will evaluate as we ease you back into full time work when you are ready . [T]ogether we [will] figure out what roles work best for all involved." But, she also told Waag that he had "been in the business long enough to know that no position is permanent."

Shortly after Waag began his medical leave, federal budget sequestration went into effect, resulting in substantial cuts to federal spending. The effect of sequestration on defense contractors was significant since funding was not readily available for government contracts. One of the many programs delayed was NexGen. In 2012 and 2013, there were no NexGen RFPs for which Sotera could submit a bid. During this period, the NexGen PM position was not a full-time job; Edwards estimated that he spent only ten to twenty percent of his time on his NexGen duties.

In late December 2012, Haug told Waag that when he returned to work, Waag would be reporting to a different supervisor, Jim Gerard, to help grow Sotera's new Electronic Warfare Program ("EWP") which involved modeling and simulation work. Unlike the NexGen program, which had no RFPs to bid on, the EWP unit was competing for a specific contract. Gerard was tasked with winning an EWP Management Trainer ("EWPMT") contract—a 70 or 80 million dollar single award contract. Because of Waag's experience in modeling and simulation, he was assigned to work on the EWPMT proposal, which was a very complex pricing job. Waag spent the majority of his time in January 2013 working on the EWPMT proposal, which was submitted in February 2013. The salary for Waag's new position was identical to the salary for the NexGen PM position he held before taking medical leave, and, as before, Waag's salary was overhead as he was not performing billable work in the EWP. According to Lossau, Waag's new job was an equivalent position to the NexGen PM job and provided Waag concrete work to perform.

In late 2012, Sotera and its DFA Business Unit saw a drastic decrease in work due to sequestration, and Sotera missed its 2012 budget revenue goal by $110 million. In February 2013, Haug was informed by senior management that he needed to cut his division's overhead cost by $2.3 million and that the only way to do that was to lay off employees. Haug's DFA business unit was especially under pressure because it had the highest indirect costs and was woefully underperforming on the revenue side. In choosing which employees in his unit to lay off, Haug focused on employees who were not performing work directly billable to the government and who were assigned to the less important strategic priorities. Haug determined that the EWP and modeling and simulation groups were doing lower priority work than several other groups in the DFA division. Thus, Waag, an overhead employee not doing high priority work, was included in the initial group of employees laid off in February 2013. During 2013, fourteen senior managers were either laid off or resigned and were not replaced, and Waag's boss Gerard, a vice president, was laid off after Sotera failed to win the EWPMT contract. But Edwards, Waag's replacement for NexGen PM, was not among those laid off. Even though Sotera had no NexGen IDIQ work, Edwards was retained because he was critical to a number of other significant revenue programs and was vital to the organization for reasons unrelated to NexGen. Layoffs continued throughout 2013 and 2014, and the DFA division ultimately was rolled into the company and no longer existed. Finally, rather than be laid off himself, Haug resigned from Sotera in October 2014.

Waag brought suit against Sotera in federal court, asserting that Sotera violated his FMLA rights (1) by failing to restore Waag to the same position after he returned from medical leave, (2) by failing to restore him to a bona fide equivalent position, and (3) by terminating his employment. Sotera moved for summary judgment, arguing that Waag had no absolute right to reinstatement to the last exact job he was performing before his leave began and that Waag's new job was equivalent to his pre-leave position. Sotera disputed that Waag was terminated because he took leave, asserting that Waag's employment would have been terminated, due to Sotera's poor financial condition even if Waag had not taken leave.

The district court granted Sotera's motion for summary judgment, and Waag appealed.

The appeals court explained that in passing the FMLA, Congress sought "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to promote national interests in preserving family integrity," and "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b)(1)-(2). Congress hoped to achieve these purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3).

Under the FMLA, "an eligible employee" is "entitled to a total of 12 workweeks of leave during any 12–month period" for family and health-related reasons. 29 U.S.C. § 2612(a)(1). An employee who takes leave under § 2612 shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a)(1). Furthermore, an employee who avails himself of FMLA leave "shall not" lose "any employment benefit accrued prior to the date on which the leave commenced." 29 U.S.C. § 2614(a)(2). On the other hand, an employee who has returned from such leave is not entitled to "any right, benefit, or position of employment" that the employee would not have been entitled to "had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B).

The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. § 2615(a)(1). Claims for violations of the prescriptive rights set forth in § 2612 are known as 'interference' or 'entitlement' claims. Additionally, the FMLA contains proscriptive provisions that protect employees from discrimination or retaliation for exercising their substantive rights under the FMLA. The retaliation provision states that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title." 29 U.S.C. § 2615(a)(2).

Waag first argued that Sotera interfered with his FMLA rights by failing to restore him after he returned from leave "to his former position with the company even though the position was still available." However, the FMLA does not require an employer to restore an employee returning from leave to his previous position no matter what. The FMLA provides that an eligible employee "shall be entitled, on return from such leave—(A) to be restored to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

Pursuant to the plain terms of § 2614(a)(1), Sotera had the option of placing Waag in a job equivalent to his original, pre-leave job. Waag did not have an absolute right to return to his original position. Thus, the district court correctly rejected Waag's legal contention that Sotera interfered with his FMLA rights by not restoring him to his pre-leave position.

Waag next argued that Sotera interfered with his FMLA rights by failing to restore him to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. An equivalent position means one that is virtually identical to the employee's former position, not only with respect to pay and benefits, but also working conditions, including privileges, perquisites and status. 29 C.F.R. § 825.215(a). The new position "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." The equivalency requirement, however, "does not extend to *de minimis*, intangible, or unmeasurable aspects of the job." 29 C.F.R. § 825.215(f).

The district court concluded that there was no genuine issue of material fact regarding whether the tangible aspects of the position to which Waag was restored were equivalent to those of Waag's former position, finding that "[i]n all material and significant respects, the two positions were the same." It was undisputed that Waag's salary was identical for both jobs and that Waag was eligible for bonuses in both positions. The employment benefits were exactly the same for both positions. For example, Waag enjoyed full health benefits both before and after his medical leave.

Moreover, the terms and conditions of employment were equivalent for both jobs. Waag's worksite was the same before and after leave. His title—Senior Director—stayed the same in his new position, and he reported to a Sotera Vice President, just as he had before taking leave. And, his duties and responsibilities in the EWP position were substantially similar to those attached to his original position. Waag focused on business development for most of his time at Sotera, both before and after taking medical leave. Prior to the Sotera-Potomac Fusion merger, Waag's primary duties included business development for the modeling and simulation side of the business. Likewise, during Waag's short stint as NexGen PM, business development was a major focus for him. According to Waag himself, the project manager of an IDIQ contract had a few critical responsibilities, "but the big one is marketing business development," in light of the fact that "[w]hen you're managing an IDIQ contract, you don't have any clients yet," and "you don't have any funding yet," The project manager must "win task orders," which requires "cultivating relationships with customers."

The court of appeals determined that no reasonable factfinder could conclude that Sotera failed to place Waag in an equivalent position or that the differences between the two jobs were more than merely *de minimis*.

Finally, Waag challenged the dismissal of two claims based on his termination from Sotera. First, Waag argued that Sotera interfered with his FMLA rights by terminating him a little more than one month after his return from medical leave. Second, Waag contended that Sotera terminated him in retaliation for exercising his rights under the FMLA to take medical leave.

Waag claimed that Sotera did not restore him to a real position. Rather, Waag believed that his post-leave job associated with the EWP was, in fact, a sham position, created to make it appear that Waag had been restored to an equivalent position but that, in actuality, was slated for elimination.

The court concluded, however, that no reasonable juror could believe, based on the record, that Waag was put in a short-term sham job to cover Sotera's decision to fire Waag when he returned from leave. Waag argued that a jury could conclude that the job Sotera gave Waag following medical leave "was a fake or sham position" based largely on "temporal proximity"—that is, he was placed in a new business development job that was eliminated approximately six weeks later. Waag pointed out that obtaining government contract work involves a protracted bidding process, and maintained that his business development position was eliminated well before he had a chance to generate any revenue. Waag, however, pointed to no actual evidence in the record that would permit a jury to conclude—without speculating—that the EWP job was a sham. The undisputed evidence showed that Waag's position was genuine and that it was not slated for lay-offs at the time that Waag returned from leave. Vice President Gerard was assigned to the EWP, which, at the time Waag joined, was working toward winning an EWPMT contract worth 70 or 80 million dollars. In fact, Waag himself worked on the proposal. Although Sotera's bid was ultimately unsuccessful, it was a real bid. And if it was a sham, it was an elaborate one that affected other people—Gerard, a vice president, also lost his job following the failed bid.

Finally, Waag contended that Sotera terminated him in retaliation for exercising his rights under the FMLA to take medical leave. To establish a *prima facie* retaliation claim under the FMLA, the plaintiff must demonstrate that he engaged in protected activity, that the employer took adverse action against him, and that the adverse action was causally connected to the plaintiff's protected activity.

Significantly, unlike FMLA entitlement or interference claims, employer intent is relevant. If the plaintiff can produce no direct evidence of intent, he can demonstrate intent by circumstantial evidence

Waag submitted that he established a *prima facie* case of retaliation by showing close temporal proximity between the protected activity at issue—medical leave—and his employer's adverse action—termination from employment less than six weeks after Waag returned from leave. The appeals court agreed that, for purposes of establishing a *prima facie* case, close temporal proximity between activity protected by the statute and an adverse employment action may suffice to demonstrate causation. But, even assuming that Waag established a *prima facie* case of retaliation under the FMLA, he still "bears the burden of establishing that [Sotera's] proffered explanation is pretext for FMLA retaliation." Sotera offered evidence that government sequestration in October 2012 had a disastrous effect on the defense contracting industry, cutting federal spending on programs such as NexGen. Sotera missed its projected revenue for 2012 by $110 million and determined that drastic cuts in spending were required. In February 2013, Sotera decided that the DFA division, which had high overhead and was underperforming in terms of revenue, needed to cut costs by $2.3 million. To effectuate these drastic cuts, the DFA division began laying off employees in February 2013 and continued throughout 2014. Haug focused initially on employees who were not performing important strategic work that could be billed directly to the government, and thus Waag was among the first employees included in the layoffs.

The court concluded that Waag failed to produce sufficient evidence to create a genuine issue of material fact such that a reasonable factfinder could conclude the adverse employment action was taken for an impermissible reason, *i.e.*, retaliation.

The court affirmed the district court's grant of summary judgment in favor of Sotera as to each of Waag's claims under the FMLA.

Waag v. Sotera Defense Solutions, Inc., 857 F.3d 179 (4th Cir. 2017). ■

This article was originally published in the October 2017 issue of the ISBA's Labor & Employment Law newsletter.

Five action steps now to make your money last

BY SUSAN STEIN

Making your money last through your lifetime may be this generation's greatest financial challenge. Why? Interest rates are at historic lows and lifespans are at record highs. For those of you planning to retire in the next decade, that's an ominous combination.

Your parents weren't too concerned about making their money last. They retired at age 65, bought bonds yielding 8% and died at 70 or so. Easy peasy, no big deal.

Things have changed. Bonds no longer yield 8%; investment grade bonds are in the 2.5% range. The average 50-year-old woman can expect to live to age 83, much longer than the previous generation. But your expected lifespan may even be longer. New research published by the National Academies of Sciences, Engineering and Medicine suggests that upper-income women can be expected to live until age 92. Keep in mind, that's just the average—you might get lucky and live to 100 or more.

The longer you live, the more complicated your financial situation can be. Making your money last is much more difficult than accumulating your assets, especially since you don't know how long your money needs to last—you're trying to set goals against a moving target.

Don't wait until retirement to prepare for this challenge. Here are five steps you can take now to make your future much more manageable:

1. **Make sure you're on the right track**. Make sure your career and other key aspects of your life are on the right track. Nothing is ever perfect, but it's smart to check in with yourself and see if you're on a reasonable track with your career. Is this really what you want to do over the long term? If not, take action. Plan changes in your future, cost them out and create a realistic strategy for making those changes. With those changes in process, it's a good time to begin your financial plan.
2. **Create a financial plan**. Be realistic, don't fool yourself with lofty assumptions. If you're in the midst of making changes to your life, incorporate those costs into your financial plan. This is a reality check to estimate you how much you will need to make your money last. Essentially, a financial plan will help you determine where you are and where you need to be. The challenge is to design and execute an investment plan to fill that gap.
3. **Invest based on your target return**. To make your financial plan work, you will need to earn a certain long-term return on your investments. As long as it fits with your risk tolerance and is realistic given market conditions, that should be your target for long-term investment returns. Your asset allocation, the composition of your portfolio, should be carefully chosen based on historical data to give you confidence that you can achieve your long-term investment return.
4. **Leverage retirement plans to save even more**. Depending on your work situation, you may be able to take advantage of certain retirement plans to reduce your taxes and save for the long term. There are money-saving opportunities available beyond the IRA or 401(k), so check with an actuary or a retirement benefits expert to see if such plans could be a possibility for you. The savings can be substantial and could help you make your money last longer.
5. **Choose the right financial advisor**. This is more challenging than you might think. Make sure the advisor you choose is a fiduciary, which means they operate in their clients' best interests – not everyone does! Learn about their investment philosophy. Choose an advisor who wants to learn about you and help you through today's treacherous investment markets. Don't get sucked into high-cost products – they usually make your advisor rich, not you. Keep investment costs low. Many investors are surprised to learn that the investment business is one in which you don't get what you pay for – higher costs usually mean lower returns.

Making your money last through your lifetime is challenging enough. Don't make it harder by avoiding the subject. Taking steps now can make your retirement years much easier and enjoyable. For more articles on the subject, check out our Women's Group Blog at www.Disciplined-Investment.com. ■

This article was originally published in the December 2017 issue of the ISBA's *The Catalyst* newsletter.

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

January

Tuesday, 01-09-18 Webinar—Fight the Paper. Practice Toolbox Series. 12:00-1:00 PM.

Wednesday, 01-10-18 – LIVE Webcast—On My Own: Starting Your Solo Practice as a Female Attorney. Presented by WATL. 12-2 PM.

Thursday, 01-11-18 – ISBA Chicago Regional Office—Six Months to GDPR – Ready or Not? Presented by Intellectual Property. 8:45 AM – 12:30 PM.

Friday, 01-12-18, Chicago, ISBA Regional Office—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Friday, 01-12-18, Chicago, Live Webcast—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Tuesday, 01-16-18 – LIVE Webcast—Proper Pleadings: Complaints, Answers, Affirmative Defenses, Motions for a More Definite Statement, Motions to Strike, and Motions for Judgement on the Pleadings. Presented by Labor and Employment. 1:30-3 PM.

Wednesday, 01-17-18 – LIVE Webcast—Clearing the Skies: How to Fly with the Mandatory Initial Pilot Program. Presented by Intellectual Property. 12-1 PM.

Thursday, 01-18-18 – ISBA Chicago Regional Office—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Thursday, 01-18-18 – LIVE Webcast—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Tuesday, 01-23-18 Webinar—Technology for Your Practice: Beyond the Buy – Understanding the Why. Practice Toolbox Series. 12:00-1:00 PM.

Thursday, 01-25-18 – ISBA Chicago Regional Office—Starting Your Law Practice. Presented by General Practice. 8:50 AM – 4:45 PM.

Tuesday, 01-30-18 LIVE Webcast—Concerted Activity in the Age of Social Media and Online Systems: Employee Rights, Employer Pitfalls, Remedies and Penalties. Presented by Labor and Employment. 2-4 PM.

Wednesday, 01-31-18 ISBA Chicago Regional Office—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

Wednesday, 01-31-18 LIVE Webcast—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

February:

Thursday, 02-01-18 – LIVE Webcast—Storm Water Regulation Under the National Pollutant Discharge Elimination System (NPDES). Presented by Environmental Law. 11AM – 12PM.

Thursday, 02-01-18 – LIVE Webcast—The Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Permit Program. Presented by Business Advice and Financial Planning. 1:30PM – 2:30PM.

Friday, 02-02-18 – Normal, IL—Hot Topics in Agriculture Law – 2018. Presented by Agriculture Law. All-day.

Friday, 02-02-18 – ISBA Chicago Regional Office—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Friday, 02-02-18 – LIVE Webcast—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Feb 6 - June 26—Fred Lane's ISBA Trial Technique Institute.

Wednesday, 02-07-18 – Webinar—TITLE INSURANCE 101: HOW TO HANDLE COMMON TITLE INSURANCE AND COVERAGE ISSUES IN RESIDENTIAL REAL ESTATE TRANSACTIONS—A Primer for New Attorneys and Those 'New' to Real Estate Law Practice. Presented by Real Estate. Time: 2-3 PM.

Friday, 02-09-18 – SIU Carbondale—Central and Southern Illinois Animal Law Conference. Presented by Animal Law. 8:00AM to 5:30PM.

Monday, 02-12 to Friday, 02-16—ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Tuesday, 02-13-18 Webinar—Cloud Services. Practice Toolbox Series. 12:00-1:00 PM.

Monday, 02-19-18 – Chicago, ISBA Regional Office—Workers' Compensation Update – Spring 2018. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm. ■

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