

**2004 Joint Committee of Employee Benefits Meeting
With Department of Labor Staff
Held on April 26, 2004 at 1:30 P.M.**

The following questions and answers are based on informal discussions between private-sector representatives of the Joint Committee on Employee Benefits (JCEB) and Department of Labor (DoL) staff. The questions were submitted by ABA members and the responses were given at a meeting of JCEB and government representatives. The responses reflect only unofficial, nonbinding staff views as of the time of the discussion, and do not necessarily represent the official position of the Department of Labor. Further, this report on the discussions was prepared by JCEB representatives, based on their notes and recollections of the meeting.

Question 1: A group of employers has formed a trade association (the “Association”) that constitutes an exempt organization under Internal Revenue Code section 501(c)(6). The Association affords its member employers (the “Members”) the opportunity to purchase insured group medical coverage (the “Medical Insurance Program”) for Members' employees. There is no requirement that any Member purchase coverage for its employees under the Medical Insurance Program; Members’ participation in the Medical Insurance Program is entirely voluntary. The Members have no role in the selection, design, or administration of the Medical Insurance Program; a committee of the Association (the “Committee”) is vested with final say regarding all aspects of the selection and design of the Medical Insurance Program. The Committee is elected by the Members, but, once elected, does not require Members’ approval with regard to any aspect of the Medical Insurance Program.

The Committee is charged with selecting and designing the Medical Insurance Program to accommodate the specialized medical insurance requirements of Members. To this end, the Committee may engage consultants, and other experts, to assist in the design and implementation of the Program.

The Association owns all of the capital stock of an insurance company (the “Captive Insurer”) that already insures a variety of property/casualty risks of the Members. The Association, at the recommendation of the Committee, arranges to have the Captive Insurer issue and underwrite a group medical insurance policy (the “Policy”) that conforms to the Committee’s design recommendations. (The issuance of the Policy complies with all applicable state insurance regulatory requirements.)

A Member that elects to purchase coverage for its employees under the Medical Insurance Program makes a number of coverage elections in accordance with a standardized prototype menu of coverage alternatives,

and agrees (with the Captive Insurer) to establish and maintain a standardized individual health plan that will be insured by the Policy. The Captive Insurer engages a third party administrator (the “TPA”) to administer employees’ benefit claims under the Medical Insurance Program. The Captive Insurer provides standardized procedures for enabling each Member subscribing to the Medical Insurance program to comply with all applicable ERISA reporting and disclosure requirements. Members subscribing to the Medical Insurance Program remit premiums to the Captive Insurer.

Would the Members’ payments of premiums to the Captive Insurer constitute prohibited transactions?

Proposed

Answer 1:

Members’ premium payments to the Captive Insurer would not constitute prohibited transactions. ERISA § 406 prohibits certain transactions between a plan and a party in interest with respect to the plan. In this case, each Member should be deemed to be sponsoring its own separate plan, and the Captive Insurer would not be a party in interest under ERISA § 3(14) with respect to any of the Members’ respective plans. (To the extent that the Captive Insurer was regarded as a “person providing services to the plan” under section 3(14)(B), the premium payments to the Captive Insurer should be exempt under section 408(b)(2) for “services necessary for the establishment or operation of the plan.”).

DoL

Response 1:

Staff partially agrees with the proposed answer. Staff assumes that each Member employer has established its own separate plan, and that an employer is acting in a fiduciary capacity in selecting the Captive Insurer as provider for its plan. (When the selection of an insurance provider involves the disposition of plan assets, that selection is an exercise of authority or control with respect to the management and disposition of plan assets within the meaning of ERISA section 3(21), and constitutes a fiduciary act subject to ERISA’s fiduciary responsibility provisions.)

Staff agrees that, to the extent that the Captive Insurer is a party in interest under section 3(14) as a service provider, section 408(b)(2) provides conditional exemptive relief from ERISA section 406(a) with respect to its ongoing provision of services and payment for those services. However, section 408(b)(2) does not provide an exemption from an act described in section 406(b). *See* 29 CFR 2550.408b-2(e). In general, section 406(b)(1) prohibits a fiduciary, such as a sponsoring employer, from using the discretion or authority that makes it a fiduciary to cause a plan to pay an additional fee to a person in which such fiduciary has an interest which may

affect the exercise of such fiduciary's best judgment as a fiduciary. Thus, if the Member employer by virtue of its membership interest in the Association or by its purchase of property/casualty insurance from the Captive Insurer is considered to have an interest in the Captive Insurer, its payment of the premium, i.e., an additional fee payable to a person in which the fiduciary has an interest, would be prohibited.

Whether a fiduciary has an interest in a party that may affect its best judgment as a fiduciary is an inherently factual question. Relevant factors would include, for instance, a sponsoring employer's interest in the Association (which owns the Captive Insurer) in connection with its membership, and a sponsoring employer's interest in the Captive Insurer in connection with its receipt of insurance against property/casualty risks. DoL also notes that the requirements of section 404 also must be satisfied.

Question 2: In light of recent case law and existing business practice with respect to nonqualified deferred compensation plans for executives and management employees and other highly compensated employees, what are the DoL's current views regarding the definition of a "top hat" group and will the DoL issue guidance to clearly and appropriately reflect a more practical approach to defining a top hat group?

Proposed

Answer 2: It is noted that practitioners and employers do not have clear, workable guidance from the DoL regarding the definition of a top hat group. The DoL's most recent pronouncement in this area, Advisory Opinion 90-14A (5/8/90) which is now almost 14 years old, takes an extremely restrictive and truly unwarranted approach to the determination of a top hat group by focusing on whether an eligible participant has the ability to influence the terms of his or her compensation. See also DoL Adv. Op. 92-13A (5/19/92) (reaffirming the standard established in Adv. Op. 90-14A for determining whether a top hat group exists). This DoL guidance is to be contrasted with two more recent court cases (note: it would appear to be impossible to reconcile this DoL guidance with these two cases). In *Demery v. Extebank Deferred Comp. Plan*, 216 F.3d 283 (2d Cir. 2000), a top hat plan was found even though it covered over 15% (i.e., 15.34%) of the employer's employees and where the compensation of some of the eligible employees was relatively low. In *In re: The IT Group, Inc.*, 2004 WL 226041 (Bankr. D. Del.), a top hat plan was also found where the plan covered management employees below the level of executive and employees whose base annual salary was at least \$100,000.

DoL

Response 2: The Department expressed the view in Advisory Opinion 90-14A (May 8,

1990) that, in providing relief for “top hat” plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I. There is no initiative underway at the Department to reexamine the AO in light of the cases cited in the question.

Question 3: Is a Health Savings Account (HSA) with employer contributions a welfare benefit plan or a pension benefit plan?

Proposed

Answer 3: While an employee can defer distributions from an HSA until termination of employment or beyond, the HSA should not be a pension benefit plan because there is no deferral of income, since the distributions will be tax-free unless the individual uses them for non-covered medical expenses which is expected to be incidental to the health expense purpose of the HSAs. Instead, it should be a welfare plan since the primary purpose is for the provision of health benefits.

DoL

Response 3: The Department expressed the view in Field Assistance Bulletin 2004-01 that HSAs generally will not constitute "employee welfare benefit plans" for purposes of the provisions of Title I of ERISA. If employer involvement with the HSA is limited as described in the FAB, employer contributions to the HSA of an eligible individual will not result in Title I coverage. To the extent that employer involvement is sufficient for a particular HSA to be an ERISA plan, or part of a larger plan, the Department would view an HSA that meets the conditions of the Internal Revenue Code as an employee welfare benefit plan.

Question 4: If a group health plan covers both employees and retirees and dependents of both but limits the definition of dependent to an employee's spouse or child (*i.e.*, closing the class of eligible dependents when the employee retires), do the special enrollment rules require the plan to allow the retiree to add a spouse or child acquired after retirement?

Proposed

Answer 4: No. The special enrollment rules don't apply because the spouse or child acquired after retirement would not qualify as an eligible dependent under the plan's terms. The legislative history and, in fact the statutory language

itself, indicate that the special enrollment rules are purely timing rules and are not intended to grant substantive eligibility rights to otherwise ineligible persons.

DoL

Response 4: The DoL did not agree with the proposed answer. The DoL pointed out that it answered this question both two years ago and three years ago, and the answer has not changed.

Because the plan covers both current employees and retirees, the special enrollment provisions of section 701(f)(2) apply. These are the special enrollment rights that apply when certain life events occur, such as marriage or the birth of a child. In such cases, a retiree can enroll his or her new spouse, child, etc. However, the occurrence of a life event does not entitle a retiree to enroll. The DoL noted that the special enrollment rights under section 701(f)(1) do not apply to retirees; they apply only to current employees. The DoL also noted that if the plan only covered retirees, neither the special enrollment rules of sections 701(f)(i) or 701(f)(2) would apply.

Question 5: DoL ERISA Advisory Opinion 2004-02A states that a second QDRO may modify an earlier QDRO to reduce benefits awarded to the alternate payee under the first QDRO. The reduction was in favor of the participant in the original QDRO. Thus, the opinion did not approve of taking benefits away from alternate payee number one to give them to a different alternate payee (number two) with respect to the participant. However, subparagraph (B)(i)(I) of section 203(d)(3) of ERISA provides:

[T]he term ‘qualified domestic relations order’ means a domestic relations order . . . which creates or recognizes the existence of an *alternate payee’s* right to, or assigns to an *alternate payee* the right to, receive all or a portion of the benefits payable with respect to a *participant* under a plan (Emphasis added.)

How does the DoL square its opinion with this language of the statute, since the order it approves provides for just the opposite result from that apparently permitted by the statute because the order assigns to the *participant* the right to receive a portion of the benefits payable to an *alternate payee* under the plan?

Proposed

Answer 5: You are reading the statute too literally. Our analysis interprets the wording of subparagraph (B)(i)(I) of section 203(d)(3) of ERISA based on our understanding of the purposes of the QDRO provisions of the law. Once

the alternate payee is assigned the interest in the plan under QDRO number 1, the alternate payee becomes a plan participant within the meaning of that term (“participant”) as used in subparagraph (B)(i)(I) of section 203(d)(3) of ERISA. Moreover, since the original participant is the spouse or former spouse of the alternate payee-participant, then the original participant may become an alternate payee with respect to the alternate-payee participant. If effect, both individuals are at the same time participants and alternate payees with respect to different portions of the pension benefit. Of course, this logic also means that a portion of the first alternate payee’s interest in the plan could be assigned (under a QDRO) to a spouse or former spouse of the first alternate payee other than the original participant. Moreover, while it does not mean that the first alternate payee's interest could be directly assigned to a different spouse or former spouse of the original participant, it does mean that the first alternate payee’s interest could be indirectly assigned to a different spouse of the first participant. The first step would be to “return” all or a portion of the first alternate payee's interest back to the original participant, as our opinion would countenance, and then the second step would be to reassign that interest in a separate QDRO to a second alternate payee of the original participant.

DoL

Response 5: Staff disagreed with the proposed answer. The question stretches the language in section 206(d)(3) too far forward by describing the order at issue in Advisory Opinion 2004-02A to be one which “assigns to the participant the right to receive a portion of the benefits payable to an alternate payee under the plan.” Advisory Opinion 2004-02A involves an agreement between a participant and an alternate payee to modify the assignment reflected in a previous QDRO involving the same participant and alternate payee. In Advisory Opinion 2004-02A, the Department opined that, provided that a domestic relations order otherwise meets the requirements of section 206(d)(3) of ERISA, a plan administrator may not fail to qualify the domestic relations order merely because the order changes a prior assignment to the same alternate payee. The answer reveals a basic misconception about the status of alternate payees. A person who is an alternate payee under a QDRO is generally considered a beneficiary under the plan for purposes of ERISA, but is not considered a participant under the plan. Thus, since ERISA only provides for the assignment to an alternate payee of benefits payable with respect to a participant and an alternate payee includes only the spouse or former spouse (or child or other dependent) of a **participant**, the alternate payee’s interest in the plan may not be assigned (under a QDRO) to a spouse or former spouse of the alternate payee.

Question 6: In light of the 8th Circuit's decision in *Harley v. Minnesota Mining and*

Manufacturing Co., 284 F.3d 901 (8th Cir. 2002), is the Department reconsidering its position that a prohibited transaction exists if a fiduciary influences its compensation for services performed for a plan, even if the fee is reasonable compensation for the services rendered?

Proposed

Answer 6:

The 8th Circuit found that ERISA § 408(c)'s unambiguous language that, "[n]othing in section 406 shall be construed to prohibit any fiduciary from...receiving any reasonable compensation for services rendered..." means that it is not a prohibited transaction for a fiduciary to influence its compensation, as long as that compensation is reasonable. Regulation § 2550.408b-2(e) provides that the section 408(b)(2) exemption for the provision of services does not provide an exemption from section 406(b), and the Department has used this provision of the regulations in stating in a number of Advisory Opinions that fiduciaries may not be permitted to influence their compensation (other than through performance). Since the regulation in question does not consider the exemption contained in section 408(c), the Department is reconsidering this position.

DoL

Response 6:

The Department continues to hold the view, expressed in our *amicus* brief in *Harley*, that section 408(c)(2) merely clarifies that a fiduciary, like any other party in interest, may be paid reasonable compensation for its services to the plan but does not permit the fiduciary to engage in an act of self-dealing under section 406(b) of ERISA. Section 408(c)(2) does not provide an independent exemption from section 406(b). Further, the Department's long-standing view, as expressed in regulation section 2550.408b-2(e), is that the provision of office space or services that involves an act described in section 406(b) of ERISA constitutes a separate transaction that is not exempt under section 408(b)(2). Accordingly, a fiduciary that causes a plan to pay an additional fee to it, or to a party in which the fiduciary has an interest that may affect the exercise of the fiduciary's best judgment on behalf of the plan, for the provision of a service has engaged in a non-exempt prohibited transaction.

Question 7:

Assume that an employer discovers evidence that a significant number of claims that were submitted under its self-funded medical plan were improperly processed. Employer would like to audit the claims under the plan involving large payouts to determine what corrective actions are necessary. The company that processed those claims argues that those records belong to it not to the plan, so that it is not obligated to allow the employer to review those records. The service contract relating to the claims paying arrangement does **not** mention the issue of the ownership of those records.

Proposed

Answer 7: The fiduciary of the plan must have an absolute right to review the claim paying history to be able to determine whether or not the plan was operated in accordance with its terms. The absence of any express language in the contract conferring that right upon the fiduciary does not defeat the right of the fiduciary to review those records.

Should the claim payer refuse to allow the fiduciary to review those claims on a commercially reasonable basis, as a last resort the Department of Labor could use its investigative powers to obtain access to those records, should it determine that (1) evidence of improper handling of claims by that party is pervasive and (2) the claims payer refuses to allow the fiduciaries of the affected plans to review the claims paying history.

DoL

Response 7: Staff felt that the suggested answer was basically right, subject to some caveats. Staff indicated that in entering into service contracts, plan fiduciaries must ensure that they have access to all plan records necessary to fulfill their obligations in accordance with the plan documents and ERISA, including the ability to monitor the plan's service providers. The Staff noted that, consistent with Department's views on electronic recordkeeping, plan recordkeeping arrangements may not be subject to any agreement or restriction that would, directly or indirectly, compromise a fiduciary's ability to comply with obligations under Title I of ERISA. Accordingly, fiduciaries should not interpret service contracts that are silent as to the plan fiduciaries' rights to review claims records as restricting the plan fiduciaries' right to review such records. Staff also noted that to the extent the recordkeeper is an insurance carrier or other organization which provides some or all of the benefits under the plan, ERISA section 103(a)(2) provides that the carrier or organization must transmit and certify to the plan administrator information the carrier or organization maintains that is necessary for the administrator to comply with the requirements of Title I.

Staff noted that general fiduciary standards in ERISA section 404 would apply to determinations regarding the scope of the records audit and the amount of plan assets that could properly be incurred in getting access to the necessary records.

Staff further noted that questions regarding disputes with particular service provider on the extent of their contractual obligations to provide the fiduciary with the necessary equipment and resources (including software, hardware and personnel) as would be needed for inspection and examination of records, and conversion of electronic records into legible

and readable paper copy or other usable form acceptable to the fiduciary, as well as questions regarding the role of the Department in such disputes, are not suitable for this informal Q&A setting because they generally depend on the individual facts and circumstances involved. Staff suggested as a means of addressing this issue that the fiduciary write into the contract with the record keeper the rights and obligations of each party.

Question 8: The Code and the IRS have not defined the term “successor plan.” Specifically, when an employer terminates all health insurance plans, then subsequently but not contiguously adopts another plan, how is the employer to know if the second plan counts as a “successor plan” thus entitling COBRA participants on the terminated plan to enroll in the new plan? In the dicta of *Risteen v. Youth for Understanding*, 245 F. Supp. 2d 1 (D.D.C. 2002), the court suggested considering the following factors: 1) how long has is the gap between coverage? 2) how close is the benefit to the benefit that was terminated? 3) how close does the eligible class of enrollees of the terminated plan resemble the eligible class of enrollees in the new plan? and 4) was there a prior plan to replace coverage? While these are clear criteria, the court did not indicate where the threshold would be for the answers.

Has the DoL adopted this test? Does it have a different test? If it has adopted the test, does the gap need to be 2 months to qualify or does it need to be a year, etc.?

Proposed

Answer 8: No employer shall terminate a health plan for the primary or substantial reason of disenfranchising COBRA participants. At the time of termination, the employer must document the primary reason for the termination of the health plan, and provide the documentation to COBRA participants, if requested. The employer shall make these records available for inspection by COBRA participants, or their agents, for a duration of 18 months following termination of the plan. A COBRA participant unlawfully disenfranchised under this rule shall be entitled to liquidated damages of \$2,000 per month of lost, eligible COBRA coverage and actual damages equal to the amount of medical expenses the COBRA participant incurred during the period of lost, eligible COBRA coverage. The employer shall take credit against actual damages for medical expenses incurred by the COBRA participant that are otherwise covered under another health insurance policy.

DoL

Response 8: Staff declined to answer this question, stating that this was within the jurisdiction of the IRS.

Question 9: If an employer does not pay its administrative fees, can the record keeper refuse to turn over the plan records?

Proposed

Answer 9: Assuming that the record keeper is not a fiduciary, there is no absolute prohibition on such a provision in a contract. However, the existence of such a provision in a contract is one factor that the fiduciary should consider when deciding whether to enter into such a contract.

DoL

Response 9: See the answer to number 7.

Question 10: Could an investment banking firm issue a fairness opinion to an employee benefit plan in connection with a transaction in which the investment banking firm only gets paid if the deal is actually consummated?

Proposed

Answer 10: No. That is such a conflict of interest as to preclude the fiduciaries of the plan from giving any deference to that opinion.

DoL

Response 10: The Staff agreed with the proposed answer that the investment banking firm has an irreconcilable conflict of interest.

Question 11: We have received a notice of a tax levy from the IRS for one of our 401(k) plan participants. Is there any fiduciary obligation on the part of the plan to investigate the tax levy, or not? Is there an obligation to notify the participant about the levy?

Proposed

Answer 11: The fiduciary need not conduct any investigation into the propriety of the levy, nor does the fiduciary have a duty to notify the participant about the levy. That is a matter to be resolved between the participant and the IRS.

DoL

Response 11: Generally, staff agreed with the proposed answer. The Staff indicated that, in evaluating a tax levy, the plan may apply the same principles set forth in Adv. Op. 99-13A regarding a fiduciary's duty to investigate the validity of qualified domestic relations orders. In Adv. Op. 99-13A regarding QDROs, Staff stated, in general, that the plan administrator may rely on the validity of the QDRO unless the plan administrator has received evidence calling into question the validity of the order and whether the order was

fraudulently obtained. When made aware of such evidence, the administrator must take reasonable steps to determine its credibility. If the administrator determines that the evidence is credible, the administrator must decide how best to resolve the question of the validity of the order without inappropriately spending plan assets or inappropriately involving the plan in the State domestic relations proceeding or in this instance, tax levy. The appropriate course of action will depend on the actual facts and circumstances of the particular case and may vary depending on the fiduciary's exercise of discretion. We note, however, that the levy can only be enforced against amounts that currently are payable to the participant.

Question 12: Assume that a participant in a plan quits and is rehired within a brief period of time (*e.g.*, 30 days later). Assume further that the participant recommences participation in an employee benefit plan that is subject to ERISA after the rehire date. Is the plan required to distribute a new SPD to that rehired participant?

Proposed

Answer 12: The participant need not automatically receive a new SPD upon rehire, as long as he or she would not have had to receive a new one if the individual had remained employed continuously. Of course, the participant could always request that an SPD be issued to him or her upon rehire.

DoL

Response 12: The requirement to automatically furnish the individual an SPD in the circumstances outlined in the question depends on whether the individual's status as a participant covered under the plan changed as a result of the termination of employment.

At issue is whether, in the intervening period between employment, the former employee is no longer "a participant covered by the plan" as defined in 29 CFR 2510.3-3(d). If an individual ceased to be a participant covered under the plan during the period between the termination of employment and rehire, then an SPD would have to be furnished to the individual when he or she was rehired and became a participant covered under the plan. For example, if, with respect to the 401(k) plan, the former employee did not take a complete distribution of his or her plan benefit in the intervening period and, therefore, the former employee remained a "participant covered under the plan" for the period, no summary plan description would have to be automatically issued upon reemployment. With respect to a health plan, if the plan extended coverage until the end of the month in which the employee terminates and the former employee was rehired before the end of the month in question, a summary plan description need not be automatically issued. Staff indicated that the application of this principle in

COBRA coverage situations was potentially more complicated, for example, for plans that terminate coverage and retroactively reinstate it upon a COBRA election during the applicable election period. Staff was not prepared to address the COBRA situation without reference to a specific fact pattern.

Question 13A: Has a blackout period (within the meaning of section 101(i)(7) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) occurred during a transfer of assets from one individual account plan (the “Transferor Plan”) to another individual account plan (the “Transferee Plan” and, collectively, the “Plans”), if the rights of participants whose assets are subject to the transfer are restricted (a) for two consecutive business days under the Transferor Plan prior to the transfer and (b) for two consecutive business days under the Transferee Plan following the asset transfer?

Proposed

Answer 13A: No, a blackout period has not occurred because the period in which participants cannot exercise their rights under the Transferor Plan is not more than three consecutive business days and such period under the Transferee Plan is not more than three consecutive business days. Additionally, the restrictions, with respect to the Transferor Plan are permanent. Section 101(i)(7) states that “the term blackout period means, in connection with an individual account plan, any period for any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan . . . is temporarily suspended, limited, or restricted . . . for a period of more than three consecutive business days.” Similarly, DoL Regulation § 2520.101-3(a) references a single individual account plan.

While the preamble to the DoL Regulations (68 FR 3716, 3719) does address a restriction of participant rights under two plans in the context of a corporate acquisition, the preamble does not mention the length of the restriction under each of the plans. If section 101(i) were intended to apply to situations in which the period of restriction under “an individual account plan” is not more than three consecutive business days, it is reasonable to conclude that the DoL would have addressed this situation in the preamble. Moreover, since the restrictions under the Transferor Plan are permanent, there is an argument that a restriction of rights in connection with the asset transfer, even if more than three consecutive business days, would not be a blackout period under section 101(i) of ERISA.

DoL

Response 13A: The term “blackout period” means, in connection with an individual

account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than three consecutive business days.

Staff agrees that a blackout period has not occurred in the circumstances described in the question because the period during which participants cannot exercise their rights under the Transferor Plan is not more than three consecutive business days and such period under the Transferee Plan is not more than three consecutive business days. 29 C.F.R. § 2520.101-3(d)(1)(i).

Staff agreed that the determination of whether a blackout period has occurred, in the case of a plan asset transfer, is determined separately for each plan, and the periods are not aggregated for this purpose.

There was no need for staff to address the interplay between the definition of blackout period and the issue of permanence in the circumstances described in the question. Staff did, however, note that based upon the language in the preamble to 29 C.F.R. § 2520.101-3, if the Transferor Plan were terminating, the suspension, limitations or restrictions would be considered as permanent (i.e., not temporary), and as to the Transferor Plan, a blackout period would not occur because the DOL regulation excludes permanent restrictions from the definition of blackout period.

Question 13B: Is the determination of whether a blackout period has occurred affected by the nature of the asset transfer, i.e. (i) a trust to trust transfer occurring at the time of a corporate transaction, such as a merger or (ii) a trust to trust transfer that is unrelated to a corporate transaction or (iii) an elective transfer of assets pursuant to section 411(d)(6)(D)(i) of the Code.

Proposed

Answer 13B: No, for the reasons stated in 13A above.

DoL

Response 13B: The determination of whether a blackout period has occurred is not affected by the nature of the asset transfer. If a blackout period occurs, 30-day advance notice is required. An exception to the 30-day advance notice requirement applies where the blackout period applies only to one or more participants or beneficiaries solely in connection with their becoming, or ceasing to be, participants or beneficiaries of the plan as a result of a merger, acquisition, divestiture, or similar transaction. In any case in which

the 30-day advance notice is not required, the administrator is still required to provide notice as soon as reasonably possible under the circumstances, unless such notice in advance of the termination of the blackout period is impracticable. Thus, a blackout period resulting from a trust to trust transfer occurring at the time of a corporate transaction would still be a blackout period, but notice of such blackout period would be required as soon as reasonably possible (not subject to the 30-day advance requirement). A blackout period resulting from a trust to trust transfer that is unrelated to a corporate transaction would not be covered by this exception to the 30-day advance notice requirement.

Question 14: Are the assets of an individual retirement account, Archer medical savings account, or health savings account, plan assets for purposes of ERISA if the accounts are maintained under an employee benefit plan? If the assets are plan assets, is the trustee of the account a fiduciary for purposes of ERISA?

Proposed

Answer 14: No. An individual retirement account, Archer medical savings account, or health savings account is maintained under an employee benefit plan if the employer contributes to the account or is significantly involved in establishing the accounts. *See* DoL Reg. §§ 2510.3-1(j) and 2510.3-2(d). However, neither the account nor the assets of the account are plan assets. Whether assets are plan assets is determined on the basis of ordinary notions of property rights under non-ERISA law, *e.g.*, Advisory Opinion 94-31A (Sept. 9, 1994) and Advisory Opinion 93-14A (May 5, 1993), and the plan has no rights in the account or its assets. Since the assets of the account are not plan assets, the trustee is not a fiduciary (unless it is otherwise involved in the administration of the plan).

DoL

Response 14: The Staff believed this question raised issues which they had not been able to fully consider in preparation for this session and was hard to comment on without a factual situation. However, the Staff did note previously provided guidance below.

As stated in Field Assistance Bulletin 2004-1, health savings accounts (HSAs) generally will not constitute employee welfare benefit plans established or maintained by an employer where employer involvement with the HSA is limited. In these situations, the assets of the HSA would not constitute plan assets. An Archer medical savings account with similarly limited employer involvement would generally not be characterized as an employee welfare benefit plan, and accordingly, would not contain plan assets.

Under ERISA § 404(c), plan fiduciaries are generally not liable for losses sustained by participants in individual retirement accounts covered by Title I of ERISA if the plan participant exercises discretion over investment of the plan assets. Staff noted that 404(c)(2) provides relief for assets in SIMPLE IRAs. Deemed IRAs established in accordance with § 408(q) of the Internal Revenue Code are not to be treated as part of the pension plan related to the deemed IRAs (or as a separate pension plan) except for purposes of § 403(c), 404, or 405 (relating to exclusive benefit, and fiduciary and co-fiduciary responsibilities) and part 5 (relating to administration and enforcement). Accordingly, fiduciaries need to take appropriate steps to ensure that they satisfy applicable fiduciary duties associated with implementation and operation of a deemed IRA feature related to a plan covered under title I of ERISA.

Question 15: Is the limitation on liability provided to plan fiduciaries under ERISA § 404(c) available during a blackout period when participants are unable to change their investment elections?

Proposed

Answer 15: Yes, provided that the blackout period is no longer than reasonable under the circumstances. DoL Reg. § 2550.404c-1(b)(2)(ii) states that “A plan does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it . . . (C) Imposes reasonable restrictions on frequency of investment instructions.”

DoL

Response 15: Staff disagreed with the proposed answer. To the extent that a participant is unable to affirmatively direct the investment of their account balances during a blackout period, section 404(c) would not be available as a defense to a fiduciary breach claim. The blackout period would not be considered a reasonable restriction for purposes of regulation section 2550.404c-1(b)(2)(ii)(C). The Staff did note, however, that, as explained in the preamble to the blackout notice regulation, one of the primary reasons for providing the notice of blackout periods at least 30 days before the right to direct investments is suspended is to enable participants to determine whether any changes in their investments should be made prior to that period. The provision of notice and informed decisions by participants before the blackout period might, in the view of the Staff, serve to mitigate the liability for losses during the blackout. In other words, like section 404(c), the timely furnishing of a blackout notice may serve as defense to liability for losses. The effectiveness of any such defense is likely to depend on the length of the period of advance notice, the length of the blackout period and whether the participant or beneficiary had a meaningful

opportunity to consider his or her investments in light of the scheduled blackout period.

Question 16: If a defined benefit plan has been terminated and taken over by the PBGC and, as a result, participants have had their monthly pension income reduced, do those participants have the right to bring suit pursuant to ERISA § 502(a)(2) and/or (a)(3), against former plan fiduciaries for breaches of fiduciary duty which those participants allege caused or contributed to the termination and, accordingly, the reduction in their pension benefits? Does any section of ERISA Title IV preclude such actions? If so, what is the specific statutory basis by which ERISA Title IV prevents participant suits pursuant to ERISA § 502(a)(2) and/or (a)(3)?

Proposed

Answer 16: Yes. Participants in terminated plans have the right to bring suit, pursuant to ERISA § 502(a)(2) and/or (a)(3), against former plan fiduciaries for breaches of fiduciary duty which those participants allege caused or contributed to the termination and, accordingly, the reduction in their pension benefits. Nothing in ERISA Title IV precludes such actions.

DoL

Response 16: The staff chose not to respond to this question on the basis that the issue is in active litigation and they have not had an opportunity to coordinate with PBGC.

Question 17: If a defined benefit plan has been terminated and taken over by the PBGC and, as a result participants have had their monthly pension income reduced, can the Department of Labor bring suit against former plan fiduciaries for breach of fiduciary duty pursuant to ERISA § 502(a)(2)? If not, why not?

Proposed

Answer 17: Yes. After a defined benefit plan has been terminated and taken over by the PBGC, the Department of Labor can bring suit against former plan fiduciaries for breach of fiduciary duty pursuant to ERISA § 502(a)(2).

DoL

Response 17: The staff chose not to respond to this question on the basis that the issue is in active litigation and they have not had an opportunity to coordinate with PBGC.

Question 18: If participants in a defined benefit plan trustee by PBGC bring an action against former plan fiduciaries pursuant to ERISA § 502(a)(2) and/or (a)(3), must PBGC be joined in the suit? If so, what is the statutory or regulatory basis for such a requirement?

Proposed

Answer 18: No. Nothing in ERISA requires that the PBGC be joined in an action, pursuant to ERISA § 502(a)(2) and/or (a)(3), against former plan fiduciaries of a defined benefit plan trusted by the PBGC.

DoL

Response 18: The staff chose not to respond to this question on the basis that the issue is in active litigation and they have not had an opportunity to coordinate with PBGC.

Question 19: If participants in a defined benefit plan trusted by PBGC wish to bring a suit pursuant to ERISA § 502(a)(2) and/or (a)(3), against former fiduciaries for breach of fiduciary duty, must participants obtain PBGC's approval before bringing suit? If so, what is the statutory or regulatory basis for such a requirement?

Proposed

Answer 19: No. Participants in a defined benefit plan trusted by the PBGC need not obtain the PBGC's approval before bringing suit, pursuant to ERISA § 502(a)(2) and/or (a)(3), against former fiduciaries for breach of fiduciary duty.

DoL

Response 19: The staff chose not to respond to this question on the basis that the issue is in active litigation and they have not had an opportunity to coordinate with PBGC.

Question 20A: There are some pre-USERRA court decisions on multi-employer plans (such as *Imel v. Laborers Pension Plan*, 904 F. 2d 1327 (9th Cir. 1990), *cert. denied*, 498 U.S. 939 (1990)), that where the CBA provides for a union hiring hall that a returning service person is eligible for benefits upon returning to employment by any participating employer. Is that how USERRA is to be interpreted (in effect disregarding the literal wording in sections 4318(b)(1) and 4318(c) stating rights upon an "employer re-employing")?

Proposed

Answer 20A: Yes, since that was prevailing law in decisions interpreting earlier Veterans Re-employment Rights Acts (VRRRA) and Congressional Reports on USERRA commented favorably on the Imel decision.

DoL

Response 20A: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 20B: Under USERRA section. 4312(d)(1) an employer is not required to re-employ a veteran if . . . the employment from which the person leaves to serve in the uniform services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period . . .

Does a veteran who last worked in such a job (for instance, in the construction industry) where he worked under a CBA with a union hiring hall from which job assignments are sometimes brief and not likely to continue with that same employer, qualify for re-employment and related rights under USERRA?

Proposed

Answer 20 B: Yes, for the reasons stated in Proposed Answer 20A.

DoL

Response 20 B: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 20C: Those court decisions ruled that the obligation for benefits while in military service is that of the plan and not of any employer. In light of that line of cases, if the plan sponsor takes no action to allocate liability and if the service person returns to employment for a participating employer other than the last employer (where employment may have been temporary) at the time of entering military service, is the liability for benefits that of the last employer before entering military service? If not, where does the liability to fund the benefit rest?

Proposed

Answer 20C: Yes. The wording of USERRA section 4318 (b)(1)(B) places the obligation on the last employer. This answer adopts the *Imel* case rationale to protect the veteran's rights to a pension; but the plain wording of USERRA contradicts the *Imel* conclusion that the liability should be that of the plan

and not the individual employer. However, if it is decided that it is not the liability of the last employer, it should be that of the plan.

DoL

Response 20C: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 21A: An employee regularly working for employers participating in a construction industry multi-employer plan is called into military service while temporarily unemployed is awaiting a job referral from his union hiring hall.

What if any rights, does the employee have under USERRA upon returning from military service and being referred by the union to employment by a participating employer in the plan?

Proposed

Answer 21A: The veteran should have re-employment and pension rights under USERRA and earlier VRRAs. The *Imel* case recognized that employment in industries such as construction that work for a single employer is often temporary; employers rely on the union hiring hall for their labor needs. *Imel* recognized the plan as the “employer”. Thus, a person regularly and consistently working within the industry plan should be protected while temporarily awaiting a job assignment within the industry.

DoL

Response 21A: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 21B: Under the facts assumed in Question 21A, if there is liability for pension benefits, and if the plan sponsor has not allocated liability under Clause A of section 4318(b)(1) of USERRA so that the liability then defaults to the last employer rule, with whom does that liability reside for such person not employed upon entering military service?

Proposed

Answer 21B: The liability should be solely that of the plan. USERRA does not deal with this fact situation. Under the Imel view of the plan as the employer, that is where the liability should rest.

DoL

Response 21B: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 22: Under USERRA section 4318 b(1) may a multi-employer plan sponsor (Board of Trustees) allocate the liability of the plan for benefits due to persons returned from military service to the plan itself without violating ERISA.

Section 403(c)(1) which does not ordinarily allow plan assets to inure to the benefit of an employer;

Section 404(a)(1) requiring plan fiduciaries to act solely in the interest of plan participants;

Section 406(a)(1)(D) which generally prohibits a plan fiduciary from transferring plan assets for the benefit of a party-in-interest, such a participating employer;

Section 406(b)(1) or (2) prohibiting a plan fiduciary from using plan assets for his own benefit or acting on behalf of a party whose interests are adverse to that of the plan participants?

Proposed

Answer 22: Yes, Clause A permits the Plan Sponsor to Use Plan Assets to Fund the Plan Liability

Section 4318(b) of USERRA deals with multi-employer pension benefit plans, as follows:

“(b)(1) In the case of a multi-employer plans, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated

(A) By the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) If the sponsor does not provide –

- (i) to the last employer employing the person before the period served by the person in the uniformed services; or
- (ii) if such last employer is no longer functional, to the plan.

1. Note the words at the beginning of (b)(1) “. . . any liability of the plan described in this paragraph shall be allocated . . .” That is in keeping with court decisions before 1994 which found veteran pension benefits under multi-employer plans to be a liability of the plan, to be paid by the plan; not by the employer, *Bunnell v. New Eng. Teamsters Pension*, 486 F. Supp 714 (722-3), 655 F. 2d 451 (1st Cir. 1981), cert. den. 455 U.S. 908 (1982); *Imel v. Laborers Pension*, 904 F. 2d 1327 9th Cir. 1990 cert. den. 498 U.S. 939 (1990). In one sense all USERRA does is to adopt these decisions and to provide one new option, if the trustees don’t agree on allocation, of passing the obligation to fund the plan liability to the last employer.

2. In single employer plans, funding the liability is an obligation of the employer as stated at the beginning of section 4318(b)(1); it’s collected from that employer or it’s not collected. For a multi-employer plan if the sponsor does not allocate the liability it is then a liability of the last employer. And if that employer is not functional, the funding obligation becomes a liability of the plan.

3. If Clause A is interpreted as having the sole purpose of granting the Trustees authority to fund the obligation with plan assets, it will serve a useful purpose by avoiding the considerable expense of establishing and enforcing a system for collecting the funding obligation from participating employers.

4. That interpretation would be in keeping with the intent expressed in one USERRA Congressional Committee Report which stated that the Committee intended to allow trustees “to adopt rules under which retroactive benefits would be funded out of Plan contributions and other assets without imposing a specific additional funding obligation on any one employer”. Looking just at cost to the plan, the trustees as fiduciaries would have to abdicate use of Clause A and allow the funding liability to pass the last employer under clause B. The result will be an arbitrary, sometimes substantial cost to employers which will adversely affect them and, in the long run, their support for the plan. The veteran may have been hired for a short term job for the employer when called for military service; upon the veteran’s return to the industry plan, the bill to the employer may

be large; under the principles in the Imel case, the employer can't use the temporary employee concept to avoid the pension obligation which may be substantial.

5. If DoL views clause A as intended to allow allocation of funding that remains always as an employer liability (except when an employer is not functional), then the plan Sponsor cannot allocate any significant liability to the plan without violating the ERISA sections listed in the question.

In Advisory Opinion 82-31 A, dealing with payment of an employer obligation for FICA taxes on plan disability benefits, DoL stated that the plan could pay the tax only if seeking payment from the employers would be more burdensome and costly. That would allow the plan itself to fund the liability if it was so small that sending a bill to the last employer would be more costly. Not likely that Congress would have bothered with Clause A for that insignificant result.

6. Approaching Clause A from a different perspective, does it mean that the Plan sponsor has authority or even an obligation to allocate the liability of the plan among the employers (unless the Plan Sponsor elects not to act under Clause A thereby passing the liability to the last employers)?

Generally the Board of Trustees has no authority to establish the amount of employer contributions to the pension plan, whether defined benefit or defined contribution. That amount is governed by the terms of the CBA between the employer and union.

Imposing the obligation on employers will be difficult, often not feasible for the Trustees. Consider: The amount of the retroactive liability isn't known until a veteran timely applies for re-employment, at which time in a defined contribution plan, the missed employer contributions are to be promptly credited to the veteran's individual account. What if there are 50 employers (not uncommon), how is it to be timely divided among, billed, and collected in full? What if there are 200 employers (or with a large regional or national plan, thousands)? There would be no way to timely collect the money, not to mention the expense. (A plan with a small number of employers could, but not most multi-employer plans.)

In summary, except for very small multi-employer plans, if clause A is interpreted as allowing the trustees to allocate liability among the employers, as fiduciaries the trustees will not be able to use Clause A; therefore, under Clause B it will become the liability of the last employer, no matter how inequitable that will sometimes be.

DoL

Response 22: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 23: If Clause A of USERRA section 4318(b)(1) allows the Trustees to allocate the plan liability to participating employers, do the Trustees under Clause A have authority to impose on employers a contribution to build a reserve, based on estimated liability?

Proposed

Answer 23: Yes. Then the employer obligation would not have to be billed based on separate calculations for each returned veteran. That would be less of a burden for all concerned. There would have to be a condition, allowing periodic reduction of future employer contributions if the reserve exceeds actual costs for the benefits. There would have to be clearly expressed approval by DoL and IRS of trustee authority to impose additional employer contributions based upon estimated liability, of tax deductibility for the employers for the contributions based on estimated USERRA liability, and of the trustee authority to reduce future regular employer contributions if the estimate is excessive. The ability of the trustees to use Clause A would still be limited for many plans because of the difficulty of implementing and collecting such additional employer contributions.

DoL

Response 23: Staff stated that the questions are within the purview of another agency, the Veterans Employment and Training Service (VETS), not EBSA. EBSA Staff has shared the question with VETS staff, but VETS staff did not have adequate time to prepare a response or to participate. VETS staff did, however, note that a number of issues raised by the questions are being addressed by regulations to be issued soon.

Question 24: Company X has a 401(k) Plan which is a KSOP for Internal Revenue Code purposes. All Company contributions are made in the form of Company X stock. Company X stock is publicly traded on a national exchange. Company X wishes to obtain 404(c) safe harbor status for its Plan. The Plan offers sixteen other mutual fund options. Company X amends the Plan document and SPD to notify participants of the intent that the Plan be a 404(c) plan, passes through the vote on all company stock held by the Plan, appoints a special fiduciary to protect confidentiality respecting the vote, ensures that prospectuses are timely provided to participants, and otherwise complies with the requirements of the Department's 404(c) Regulations. It also amends the Plan to eliminate any lockup or restrictions on the trading of Company X stock held by participants. Previously, participants could not diversify out of the Company stock account until they were 55 years of age. Now, participants will be free to daily trade in the Company X stock that Company X contributes to the Plan, and to invest the proceeds of any sale of Company X stock in any of the sixteen other investment options offered under the Plan. There will be no restrictions under the Plan in connection with that stock. Of course, a participant may choose not to liquidate any Company X stock contributed into the Plan. Will the Company X stock account be entitled to 404(c) protection?

Proposed

Answer 24: Yes.

DoL

Response 24: In the absence of an affirmative election to invest in the Company X stock, the contribution and continued holding of the stock would not be subject to section 404(c) relief. A decision by the participant to sell the stock, however, would be entitled to 404(c) protection, as would the exercise of voting rights appurtenant to the stock.

THE PRECEDING QUESTIONS AND ANSWERS ARE BASED ON INFORMAL DISCUSSIONS BETWEEN PRIVATE-SECTOR REPRESENTATIVES OF THE JCEB AND DEPARTMENT OF LABOR STAFF. THE QUESTIONS WERE SUBMITTED BY ABA MEMBERS AND THE RESPONSES WERE GIVEN AT A APRIL 26, 2004

MEETING OF JCEB AND GOVERNMENT REPRESENTATIVES. THE RESPONSES REFLECT ONLY UNOFFICIAL, NONBINDING STAFF VIEWS AS OF THE TIME OF THE DISCUSSION, AND DO NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE DEPARTMENT OF LABOR. FURTHER, THIS REPORT ON THE DISCUSSIONS WAS PREPARED BY JCEB REPRESENTATIVES, BASED ON THEIR NOTES AND RECOLLECTIONS OF THE MEETING.