

Legal Update



In This Issue...

Page 1

Employee Benefits

New requirements for pension plans

Intellectual Property

The Protect IP Act: Senate looks to crack down on online piracy websites

Page 4

Firm News

Page 5

Employee Benefits

Fiduciary considerations for plans when selecting recordkeepers

Page 6

Professional Recognition

PITTSBURGH, PA
BOSTON, MA
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Employee Benefits

New requirements for pension plans



Sandra R. Mihok



Malgorzata Kosturek

The U.S. Department of Labor (DOL) released two regulations to ensure greater pension plan fee and expense transparency. These regulations place a significant new disclosure burden on plan service providers and administrators.

The first regulation, which governs disclosures that plan service providers must make to fiduciaries, becomes effective January 1, 2012. The second requires disclosure of fee, expense and investment performance information to

continued on page 2

Intellectual Property

The Protect IP Act: Senate looks to crack down on online piracy websites

A new bill has been introduced that, if passed, will give IP rights holders a new avenue to try to stop the illegal sale of copyright material and counterfeit merchandise online. For some larger IP rights holders, counterfeiting of their goods is a significant concern. Some may believe that the counterfeit market is limited to luxury goods. However, this is far from the truth. According to the U.S. Customs and Border Patrol (CBP), in 2009, goods such as toys, media and pharmaceuticals were in the top ten categories for counterfeit goods



Tashia A. Bunch Henderson

continued on page 3

Employee Benefits

(continued)

participants and beneficiaries in participant-directed pension plans. This directive becomes effective for plan years beginning November 1, 2011, or January 1, 2012, for calendar year plans.

Plan Service Provider Disclosures

The first regulation affects plan service provider practices. Disclosures should include a description of services; all direct and indirect compensation, as well as fees, expenses or any termination fees; the method the plan uses to pay for the services; and, if applicable, a statement that the service provider is offering services as a fiduciary or registered investment advisor. Plan fiduciaries will remain responsible for assessing whether enough information is available to determine if service costs are reasonable. Failure to comply can expose both the service provider and the plan fiduciary to liability for engaging in a prohibited transaction.

In anticipation of the January 1, 2012, deadline, plan sponsors should take the following precautions:

- Determine which service providers are covered by the new regulation. In general, this includes fiduciary services provided directly to the plan or its assets, investment services, recordkeeping or brokerage services, and other services where compensation exceeds \$1,000.
- Mark October 2, 2011, on your calendar, which is 90 days prior to the effective date. Review service provider information at this time. Since no particular disclosure format is required, some existing service agreements may satisfy the new regulation. However, amendments may be needed to some service provider contracts to ensure they are in compliance with the new requirements. After review, requests for any missing information or agreement revisions should be sent to service providers.
- Notify the DOL of service providers who have failed to respond on January 1, 2012.

“These regulations place a significant new disclosure burden on plan service providers and administrators.”

Participant Fee Disclosures

The second regulation requires administrators of participant-directed plans to provide participants and beneficiaries with sufficient information to make informed investment decisions. These disclosures should facilitate comparison of the plan's investment options with a "dollars and cents" display of costs tied to each investment choice and associated plan-related expenses.

These disclosures must be made to anyone eligible to direct a contribution, which may include former employees. The information must be provided to eligible participants and beneficiaries on or before the date they are first eligible to direct their investments. In addition, subsequent changes to the information must be disclosed at least 30 days prior to the effective date of the modification.

These disclosures may be made electronically in accordance with existing DOL electronic disclosure rules. Further, plan-related information may be included in the summary plan description or as part of the benefit statement, if these items are distributed with the required frequency. The quarterly fee disclosure can also be included in the benefit statement. However, investment-related fee information must be provided in a comparative chart that complies with the DOL's specifications.

To prepare for the implementation of the new regulations, plan administrators should prepare a disclosure plan that covers the following items:

- Obtain the service provider's commitment to make the required information available in a timely manner. Plan fiduciaries will be

protected from incomplete and inaccurate information if they rely reasonably and in good faith on what the service provider has agreed to provide.

- Prepare and distribute the information on time. Recent guidance has extended the deadline to 120 days after the beginning of the first plan year on or after November 1, 2011. For calendar year plans, initial disclosures will need to be made by April 30, 2012.
- Anticipate participant responses and prepare to answer questions.

With these regulations, the DOL aims to help workers better manage and invest monies contributed to 401(k)-type retirement plans by facilitating access to information and requiring plan fiduciaries to disclose it in a standardized way.

Sandra R. Mihok is the Chair of the Employee Benefits Group and Malgorzata Kosturek is an Associate in the group. They focus on employee benefit and related areas, including plan design, tax compliance, fiduciary and investment issues and HIPAA privacy compliance.

Intellectual Property

(continued)

seized in the U.S. While traditional avenues for selling counterfeit goods (such as sales at flea markets) continue, the online marketplace has become increasingly popular for sales of counterfeit goods. For the makers of these and other products that have large resale markets, it is important to stem the tide of counterfeit products imported into the U.S., as well as to attempt to shut down Internet sites that sell the goods.

Currently, these IP rights holders face challenges with foreign domain owners that sell these illegal goods, because they are difficult to reach through normal channels such as the Digital Millennium Copyright Act (DMCA) notice and take down provisions and suits filed in U.S. courts. On May 12, 2011, Senator Leahy introduced the Preventing Real Online Threats to Economic Creativity and Threat of Intellectual Property Act or PROTECT IP Act, which will make it easier for IP owners to try to take down these infringing sites.

The PROTECT IP Act would allow intellectual property owners or the Attorney General to bring suit against foreign domain owners whose websites are “dedicated to infringing activities,” which are defined as those that have “no significant use other than engaging in, enabling, or facilitating” copyright infringement, circumvention of copyright protection systems, and the sale, distribution or promotion of counterfeit goods.” If the site owner cannot be located or does not have a U.S. address, then the Attorney General commences an in rem suit.

By application of the plaintiff after commencement of the suit, the court may issue an injunction or restraining order against the foreign site. The Attorney General can then serve the court order on the domain name server, financial transaction providers, Internet advertising companies and search engines, requiring them to stop providing services and links to the domain name.

“While traditional avenues for selling counterfeit goods ... continue, the online marketplace has become increasingly popular for sales of counterfeit goods.”

Critics of the PROTECT IP Act include domain owners, free speech advocacy groups and search engines. Similar to the criticism of the 2010 Combating Online Infringement and Counterfeits Act or COICA, PROTECT IP is considered to have broad language that gives too much power to federal agencies to seize domain name sites that were claimed to violate intellectual property rights without due process. Legitimate websites can be swept up in the process, which is often the case in seizures conducted by Immigration and Customs Enforcement’s (ICE’s) current program, Operation In Our Sites, which can seize domestically owned domains based on federal seizure warrants. Furthermore, the Act may encourage infringers to simply use foreign domain registrars that are out of reach of U.S. laws and may not comply with current security precautions.

PROTECT IP is supported by IP owners and organizations whose membership primarily includes IP owners, which has helped it to move quickly through the Senate. However, similar to COICA, there are some members of Congress who object. Senator Wyden, who placed a hold preventing COICA from coming to the Senate floor for a vote, has already placed a similar hold on PROTECT IP.

In the meantime, IP owners can continue to navigate current channels to deal with these infringing sites, such as participating in current ICE programs working with the CBP, using the notice and take down provisions under the DMCA, along with filing suit in state and federal courts, including the International Trade Commission (ITC). Finally,

intellectual property rights owners can take several practical steps to combat online infringement, including:

1. Developing a trademark and copyright plan that includes registering important marks and materials with the USPTO, U.S. Copyright Office and CBP.
2. Monitoring infringement hotspots, e.g., online auction websites, flea markets and other regional areas known for the sale of counterfeit merchandise, along with content hosts such as YouTube and Facebook.
3. Educating the public about counterfeits. Provide information on how to spot counterfeits of your products, lists of authorized distributors and resellers of your products and the benefits of purchasing authentic goods, e.g., quality guarantees for authentic merchandise.
4. If feasible, using technology to make goods difficult to counterfeit and reproduce.
5. Joining legal and trade associations where you can share information regarding counterfeiting, e.g., the International Trademark Association (INTA) and International Anti-Counterfeiting Coalition (IACC).

Tashia A. Bunch Henderson is an Associate in the Intellectual Property Group located in our Washington, D.C. office. Tashia advises clients on trademark prosecution and counseling, as well as enforcement issues.

Firm News

People

As a firm, we are committed to seeking out and retaining high-caliber professionals who have a passion for their work. This is exemplified by the attorneys who recently joined our firm and those attorneys who were elevated to partnership and other management positions in 2011.

Members & Special Counsel

Scott E. Blissman joined our Philadelphia, PA office as a Member. He focuses his practice primarily on management-side public and private sector labor law, including collective bargaining, interest and grievance arbitration, and employment-related litigation. Scott provides legal guidance and counseling to municipalities on matters relating to the Policemen and Firemen Collective Bargaining Act, Police Pension Fund Act, Public Employee Relations Act, Police Tenure Act, Borough Code, First and Second Class Township Codes, Local Agency Law, civil service laws, as well as other areas of law relating to municipal affairs and administration. He earned his J.D. from the Widener University School of Law with honors and his undergraduate degree from Millsaps College.

Ryan J. Cassidy joined our Philadelphia, PA office as a Member. He practices exclusively on management-side labor and employment law in both the public and private sector. Ryan represents clients in the context of grievance and interest arbitration issues; labor injunctions and collective bargaining; state and federal administrative agency charges; employment-related litigation and local agency hearings. He has devoted a significant portion of his time to the public sector in areas of law relating to municipal affairs and administration, serving as co-author of *The Model Municipal Hiring Manual for Pennsylvania Municipalities*, published by the Department of Community and Economic Development, Governor's Center for Local Government Services. Ryan earned his J.D. from the Widener University School of Law with honors and his undergraduate degree from Rutgers University.

Former Massachusetts Congressman **William D. Delahunt** joined Eckert Seamans' Boston office as Special Counsel. He will assist the firm in its provision of strategic counsel to clients on complex regulatory issues such as healthcare, financial services, energy and environmental matters. Prior to joining the firm, Bill served in Congress for 14 years, representing the 10th Congressional District of Massachusetts. In Congress he served as a member of the House Judiciary Committee and the House Foreign Affairs Committee, and most recently as the Chairman of the Subcommittee on Europe. While on the House Foreign Affairs Committee, Bill was a respected leader on policies toward Latin America and Europe. As Chairman of the Europe Subcommittee, he had oversight of key aspects of United States foreign policy in Europe. Also while serving in Congress, Bill co-chaired the bipartisan Coast Guard Caucus, Older Americans Caucus and the Congressional Working Group on Cuba. Before his service in Congress, he was the Norfolk County District Attorney in Massachusetts for over 22 years. Bill earned his J.D. from the Boston College Law School and his undergraduate

degree from Middlebury College. He also served in the Coast Guard Reserve from 1963 to 1971.

Brett Heather Freedson joined our Washington, D.C. office as a Member. She concentrates her practice on the representation of public utilities in contract negotiations with cable and telecommunications providers for lease of infrastructure and services as well as advising domestic and international telecommunications and technology companies. Brett also provides legal and strategic advice to regulated entities, including certain communications companies, on litigation, corporate and transactional matters, and has advocated the policy interests of various carrier coalitions before the Federal Communications Commission and state utility commissions. She is also very experienced in providing counsel to school districts nationwide on the regulations and policies of the federal E-Rate Program. Brett earned her J.D. from the George Washington University Law School and her undergraduate degree from the University of Chicago.

William F. Miller has rejoined our Boston, MA office as a Member in the firm's Corporate and Business Counseling Group. Bill focuses his practice on corporate and business law matters, including private company mergers and acquisitions; angel, venture capital and private equity financing; commercial contract matters; intellectual property protection and licensing and entity and investment fund formation. Bill earned an LL.M. from Boston University School of Law, his J.D., *cum laude*, from Suffolk University Law School, and his undergraduate degree from Brown University. His clients are primarily private companies, including early stage technology companies, manufacturers, service and distribution companies, as well as investors in such companies. Bill also does outsourcing and special project work for a \$10 billion public company. Bill joins the firm from Miller & Shortsleeve LLP, a boutique business law firm he owned and operated for over five years. He previously practiced with Eckert Seamans from 1993-2000.

Francis G.X. Pileggi, a leading attorney and law blogger, joined as Member-in-Charge of the firm's Wilmington, DE office. He practices primarily in the areas of corporate and commercial litigation. Francis' litigation practice emphasizes representation in high-stakes disputes of corporations, stockholders, members of boards of directors, members and managers of LLCs, and those with managerial or ownership interests in other forms of entities. He has extensive experience in matters involving fiduciary duties and corporate governance as well as summary proceedings under the Delaware General Corporation Law. Francis is also a certified mediator for the Delaware Court of Chancery and the Delaware Superior Court as well as the Bankruptcy Court for the District of Delaware. He created and maintains the "Delaware Corporate and Commercial Litigation Blog" – www.delawarelitigation.com – which summarizes recent Delaware court decisions of import about corporate and commercial law, primarily from the Delaware Court of Chancery and Delaware Supreme Court. Francis earned his J.D. from the Widener University School of Law and his undergraduate degree from St. Joseph's University.

Employee Benefits

Fiduciary considerations for plans when selecting recordkeepers

A recent ruling by the Seventh Circuit Court of Appeals leaves open the question of whether fiduciaries of 401(k) plans should periodically put the recordkeeping function for their plans out to bid. The idea that a plan sponsor needs to “test the market” every three years has highlighted the potential liability that plan fiduciaries have when selecting 401(k) plan recordkeepers.

The hiring of a 401(k) plan recordkeeper is a fiduciary function under the Employee Retirement Income Security Act of 1974 (ERISA). Recent litigation like the Kraft Foods case focuses on whether the direct and indirect fees that recordkeepers charge for their services are reasonable, but cost is only one consideration for plan fiduciaries evaluating a recordkeeper. When evaluating a recordkeeper, plan fiduciaries should engage in an objective process designed to elicit information necessary to assess the qualifications of the recordkeeper, the quality of the work product and the reasonableness of the fees charged in light of the services provided, while taking care to avoid any arrangements with self-dealing, conflicts of interest or other improper influence.

Requesting information from recordkeepers is a good way for plan fiduciaries to obtain this necessary information. When requesting information from prospective



Kathryn A. English



Malgorzata Kosturek

Kathryn A. English is Vice Chair of the Business Division and Malgorzata Kosturek is an Associate in the Pittsburgh office. Both focus on employee benefit and related areas, including plan design, tax compliance and fiduciary and investment issues.

recordkeepers, plan fiduciaries should provide each of them with complete and identical information about the plan and the services needed to make a meaningful comparison. According to a publication put out by the U.S. Department of Labor called “Meeting Your Fiduciary Responsibilities,” when looking to hire a recordkeeper, plan fiduciaries should consider: (1) information about the firm itself such as the financial condition and experience with retirement plans of similar size and complexity; (2) information about the quality of the firm’s services including the identity, experience and qualifications of professionals who will be handling the plan’s account; any recent litigation or enforcement action that has been taken against the firm; and the firm’s experience or performance record; and (3) a

description of business practices, including the proposed fee structure and whether the firm has fiduciary liability insurance.

To demonstrate compliance with ERISA’s fiduciary requirements, plan fiduciaries should document this selection (and monitoring) process, including the specific reasons for the selection of a particular provider. If plan fiduciaries end up selecting or retaining a recordkeeper with whom the plan sponsor has other business, for example a firm with whom the plan sponsor has a banking arrangement, plan fiduciaries should be even more careful about the selection process and make sure to document the appropriate reasons (not related to that other business arrangement) that particular firm was selected or retained.

Firm News (continued)

Associates and Specialists

- Jill K. Agro** (Wilmington, DE) – Litigation
- Nickolai (Nick) Bobrov** (Boston, MA) – Government Relations Specialist
- Jennifer M. (Sultzberger) Caron** (Harrisburg, PA) – Public and Municipal Finance
- Candace E. Chun** (White Plains, NY) – Litigation
- Drew M. Derco** (Washington, D.C.) – Aviation and Transportation
- Tashia A. Bunch Henderson** (Washington, D.C.) – Intellectual Property
- Thomas P. Kemp, Jr.** (Pittsburgh, PA) – Litigation
- Christopher M. Klein** (Washington, D.C.) – Immigration
- Rebecca L. Magyar** (Pittsburgh, PA) – Labor & Employment
- Joshua L. Myers** (Richmond, VA) – Government Relations Specialist
- Hanna G. Styron Symonds** (Boston, MA) – Litigation
- Samuel P. Trumbull** (Pittsburgh, PA) – Litigation
- Jessica L. Wuebker** (Philadelphia, PA) – Litigation

Promotions

Eight attorneys were elected to the firm’s partnership effective April 1, 2011. The new Members have been promoted from within the ranks of the firm’s Harrisburg, Philadelphia, Pittsburgh and White Plains offices. The new Members include: **Deborah S. Baird**, **Brian E. Calla**, **Geraldine A. Cheverko**, **Heather Russell Fine**, **Gerard J. Hickel**, **Deanne M. O’Dell**, **Amy J. Roy** and **G. Edward Schweikert, IV**. In addition, **Candace K. Gottschall** was promoted to Special Counsel.

Firm Management

Eckert Seamans is pleased to announce the appointment of two Members to new management roles within the firm: **Roberta Jacobs-Meadway** joins the firm’s Executive Committee and **Steven R. Kramer** joins the Board of Directors. Both committees oversee the strategic operations of the firm and its attorneys and staff. Bobbi is Co-Chair of Eckert Seamans’ Intellectual Property Group and also serves on the firm’s Board of Directors and Steve is the Member-in-Charge of the firm’s White Plains, New York office.

Professional Recognition

Eckert Seamans won the prestigious Burton Award for Legal Achievement for an article written by **Roberta Jacobs-Meadway**, Member and Co-Chair of the firm's



Maria L. Petrillo

Intellectual Property Group, and **Maria L. Petrillo**, a Member of the Labor & Employment Group. This prestigious legal writing award is held in association with the Library of Congress.

Thirty "Distinguished Law Firm Award" winners were chosen from entries submitted by the nation's 1,000 largest and most prestigious law firms. Jacobs-Meadway and Petrillo were recognized for their article, "Developing Airtight Confidentiality Agreements," which appeared in the November 2010 edition of *BNA's Patent, Trademark & Copyright Journal*. The Burton Awards are funded by the Burton Foundation, a non-profit, academic effort devoted to recognizing and rewarding excellence in the legal profession. The 2011 entries were judged by an academic board led by legal professors from Harvard Law School, the University of Pennsylvania Law School, the University of California Law School at Irvine as well as current and retired members of the judiciary and judicial scholars. The Burton Award winners were honored at a gala reception and dinner held at the Library of Congress on June 13, 2011.



John R. Hanger

John R. Hanger, Special Counsel to the firm and former Secretary of the Pennsylvania Department of Environmental Protection and Commissioner of the

Pennsylvania Public Utility Commission, was honored with the National Association of Water Companies - Pennsylvania Chapter, James McGirr Kelly Award for

Excellence. The award is the highest honor bestowed by NAWC. The industry association presents the award each year to a resident of Pennsylvania who most exemplifies dedication to promoting the availability of safe drinking water in the Commonwealth. The organization honored John during its awards luncheon at the NAWC Annual Meeting in the Commonwealth Keystone Building in Harrisburg on May 3, 2011.



Roberta Jacobs-Meadway

Roberta Jacobs-Meadway, Co-Chair of the Intellectual Property Group and member of the firm's Executive Committee and Board of Directors, was honored by the

Pennsylvania Bar Association with the prestigious Anne X. Alpern Award. The award is presented annually by the PBA to a female lawyer or judge who demonstrates excellence in the legal profession and who makes a significant professional impact on women in the law. Established in 1994, the award was named for Anne X. Alpern, Pennsylvania's attorney general in 1959 and the first woman state attorney general in the nation. Bobbi received the award during a luncheon at the PBA Women in the Profession Annual Conference on Thursday, May 5, 2011, at the Sheraton Philadelphia Center City Hotel, as part of the PBA's Annual Meeting.



Renee C. Mattei Myers

Renee C. Mattei Myers, a Member of the firm's Labor and Employment Group, was recently honored among the 2011 Women of Influence by the *Central Penn Business Journal*. The

award program was created in an effort to recognize women leaders in the midstate who are influential in their companies,

industries and communities. Recipients are judged based on the criteria of leadership, integrity, community service, mentoring and accomplishments. Renee received the honor during the Power of Women luncheon program on Monday, May 16, 2011 at the Hilton Harrisburg.



Robert A. Graci

Robert A. Graci, Chair of Eckert Seamans' Appellate Group and former Superior Court of Pennsylvania judge, received the PBA Special Achievement

Award for his service as chair of the Continuing Legal Education Program Development Subcommittee of the PBA Task Force on the Interbranch Commission on Juvenile Justice. The Pennsylvania Interbranch Commission on Juvenile Justice was created in 2009 for the purpose of investigating judicial corruption in the juvenile court system of Luzerne County, Pennsylvania; the investigation resulted in federal criminal charges against two judges.



Leroy S. Zimmerman

Leroy S. Zimmerman, Senior Counsel in the firm's Harrisburg office and the Commonwealth's first elected Attorney General, received the PBA Fifty-Year Member Award for his five

decades of service to the organization. Roy previously served the firm in a variety of executive leadership positions, including former Chair of the Board of Directors, Executive Committee and Member-In-Charge of the Harrisburg office. Mr. Zimmerman served for eight years as Pennsylvania's Attorney General, where he was responsible for formulating the legal and law enforcement strategies for the Commonwealth of Pennsylvania.

ECKERT SEAMANS

Pittsburgh, PA
412.566.6000

Boston, MA
617.342.6800

Charleston, WV
304.346.5500

Harrisburg, PA
717.237.6000

Philadelphia, PA
215.851.8400

Richmond, VA
804.788.7740

Southpointe, PA
724.873.2870

Washington, DC
202.659.6600

White Plains, NY
914.949.2909

Wilmington, DE
302.425.0430