Current Issues for Tennessee Employers:

Fiduciary Rules, Overtime, and the Affordable Care Act

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Tibble v. Edison and the Continuing Duty to Monitor Retirement Plan Investments

Tibble v. Edison
(factual background)

- Edison International sponsored a 401(k) Plan (the "Plan")
  - Plan had $3.8 billion in assets and approximately 20,000 participants and beneficiaries across the entire Edison International workforce
  - Plan contained employees' elective deferrals and employer matching contributions
- Before 1999, the investment line-up was limited to six investment options
- After 1999, the Plan grew to contain 10 institutional or commingled pools, 40 mutual fund-type investments, and an indirect investment in Edison stock known as a unitized fund
- Investment options selected by Edison International Trust Investment Committee (the "Investment Committee")

Tibble v. Edison (factual background)

- Six of the 40 mutual funds were similar to those offered to the general investing public, so-called retail-class mutual funds, which had higher administrative fees than alternatives available only to institutional investors
  - 3 were added in 1999, and 3 in 2002
- In 2007, several individual participants and beneficiaries of the Plan filed a lawsuit on behalf of the Plan and all similarly situated individuals ("petitioners") against Edison International and others ("respondents")
  - Argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available (with lower administrative costs)
  - Specifically, claimed that a large institutional investor with billions of dollars, like the Plan, could obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor
  - Asked, how could respondents have acted prudently in offering the six higher priced retail-class mutual funds when respondents could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the Plan?

Tibble v. Edison (Lower Courts)

- As to the 3 funds added to the Plan in 2002, the District Court agreed with the petitioners
  - Reasoned that respondents had “not offered any credible explanation” for offering retail-class, higher priced mutual funds that “cost the Plan participants wholly unnecessary fees,” and concluded that, with respect to those mutual funds, respondents had failed to exercise “the care, skill, prudence and diligence under the circumstances” that ERISA demands of fiduciaries
- As to the 3 funds added to the Plan in 1999, however, the District Court held that petitioners' claims were untimely because, unlike the other contested mutual funds, these mutual funds were included in the Plan more than six years before the complaint was filed in 2007. As a result, the 6–year statutory period had run
- The 9th Circuit affirmed the District Court as to the 6 mutual funds. With respect to the 3 mutual funds added in 1999, it held that petitioners' claims were untimely because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6–year statutory period

Tibble v. Edison
(Supreme Court)

- On May 18, 2015, the Supreme Court issued a (rare) unanimous decision holding that the 9th Circuit erred in finding that the claims regarding the three mutual funds added in 1999 were untimely
- Reasoned that the 9th Circuit failed to recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances

Tibble v. Edison (Supreme Court)

- Specifically, the Court’s decision was based on ERISA’s prudent person rule - that a fiduciary must discharge its responsibility “with the care, skill, prudence, and diligence” that a prudent person “acting in a like capacity and familiar with such matters” would use. ERISA § 404(a)(1).
- The Court acknowledged that “in determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts.”
- Held that ERISA, like trust law, imposes upon plan fiduciaries a “continuing duty to monitor trust investments and remove imprudent ones,” which is distinct from the duty to prudently select the investment options in the first instance
- This involves “systematically consider[ing] all the investments of the trust at regular intervals to ensure that they are appropriate”

Tibble v. Edison (Supreme Court)

- Thus, the Supreme Court held that breach of fiduciary duty to monitor may be timely under ERISA’s 6-year period of repose, even though the initial selection of the investment occurred outside of that period – and even though there was no “significant change in circumstances” that would have caused the fiduciary to revisit its initial selection decision

Duty to Monitor Investments – Open Issues

- Unfortunately, the *Tibble* Court expressed no view as to the scope of the duty to monitor
- The full implications of the Supreme Court's decision and the scope of the duty to monitor remain uncertain. Open issues include:
  - Frequency of Review
  - Scope of Review
  - Depth of Review
  - Special Circumstances

Who is a Fiduciary?

- Generally, a person is a fiduciary with respect to a plan to the extent he or she:
  - exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of plan assets;
  - renders investment advice for a fee or other compensation, direct or indirect, with respect to any assets of the plan, or has any authority or responsibility to render the investment advice; or
  - has any discretionary authority or discretionary responsibility in the administration of the plan. ERISA § 3(21)(A).

Who is a Fiduciary?

- A person may be a fiduciary with or without a "fiduciary" title. However, a person with a fiduciary title is a fiduciary without regard to their actions since they have the necessary discretionary authority
  - For example, plan administrators or trustees, by the very nature of their positions, are fiduciaries. DOL Reg. § 2509.75-8, Question D-3.
- On the other hand, a person lacking a "fiduciary" title can still be a fiduciary if he/she performs a fiduciary function
  - For example, courts have found that attorneys, accountants, and even insurance agents were fiduciaries when those persons performed fiduciary functions

Once a Fiduciary, Always a Fiduciary?

- A person who is a fiduciary for some purposes, may not be a fiduciary for other purposes
- For example, an employer that also acts as a plan administrator is said to wear “two hats,” and only when the employer acts in its fiduciary capacity must it comply with its fiduciary duties. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998).
  - Courts typically distinguish between employer actions that constitute “managing” or “administering” a plan and those that are said to constitute merely “business decisions” that have an effect on a plan; the former are deemed “fiduciary acts” while the latter are not. *Id.*
  - In other words, an employer is usually not acting in a fiduciary capacity when it makes plan design, plan amendment or plan termination decisions. Those are settlor and not fiduciary decisions. *See, e.g.*, *Lockheed Corp. V. Spink*, 116 S.Ct. 1783 (1996).

What are a Fiduciary's duties?

- ERISA sets forth four general fiduciary duties:
  - Exclusive Benefit Rule – The fiduciary must discharge duties with respect to the Plan for the exclusive benefit of the participants and their beneficiaries. ERISA § 404(a)(1)(A).
  - Prudent Man Rule – A fiduciary must act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity" would act
    - This is an objective standard based upon how a person with experience and knowledge of a certain area would act in a given situation
    - If a fiduciary lacks the expertise for a certain area then the fiduciary must obtain expert help. § 404(a)(1)(B).

What are a Fiduciary's duties?

- Diversification Rule – A fiduciary must diversify investments in order to minimize risk of loss unless it would be considered prudent to not diversify investments. § 404(a)(1)(C).
- Plan Document Rule – A fiduciary must act in accordance with the Plan documents but only to the extent that the Plan is consistent with ERISA requirements. § 404(a)(1)(D).
  - Thus, a fiduciary must know and act in accordance with the Plan and must have sufficient knowledge of the ERISA requirements

Application to Governmental Plans

- ERISA exempts governmental plans from its fiduciary and prohibited transaction provisions. ERISA § 4(b).

- As a result, state law governs the fiduciary requirements for the operation and investment of plans sponsored by governmental entities

What are a Fiduciary's duties? (Governmental Plans)

- Tennessee has codified the fiduciary duties of a trust fiduciary in its role as an investor under the Uniform Prudent Investor Act, T.C.A. § 35-14-101-114 (the "Act"). Duties under the Act include:
- Prudent Investor Rule – A fiduciary must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. T.C.A. § 35-14-103 and 104.
  - This is an objective standard based upon how a person with experience and knowledge would act in a given situation.
- Duty of Loyalty – A fiduciary must invest and manage the trust assets solely in the interest of the beneficiaries. T.C.A. § 35-14-107.
- Duty of Impartiality – A fiduciary must act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries. T.C.A. § 35-14-108.
- Duty to Diversify – In most cases, a fiduciary must diversify the investments of the trust. T.C.A. § 35-14-105.
- Reasonable Expenses – A fiduciary may only incur costs that are appropriate and reasonable. T.C.A. § 35-14-109.

What are a Fiduciary's duties? (Governmental Plans)

- Where the Uniform Prudent Investor Act is inapplicable, governmental plans will be guided by the common law of trusts, as well as other state statutes, plan documents, and, by analogy, ERISA and its interpretive cases. *See*, *e.g.*, *Sharma v. Washington Metro. Area Transit Auth.*, 58 F. Supp. 3d 59, 63-64 (D.D.C. 2014) (in a case involving a governmental plan, in the absence of statutory and case law, the court applied the common law of trusts)

Duty to Monitor for Governmental Plans

- The comments to the Uniform Prudent Investor Act state that the duties set out under the Act apply both to investing and managing trust assets, and clarify that “managing” includes “monitoring,” that is, the fiduciary’s “continuing responsibility for oversight of the suitability of investments already made”
- In this way, Tennessee’s Uniform Prudent Investor Act has already codified a standard very similar to the ERISA standard outlined by the Supreme Court in *Tibble*, which, of course, was based on the Uniform Prudent Investor Act and the common law of trusts
- Thus, while *Tibble* is technically an ERISA case, its holding that plan fiduciaries have a continuing duty to monitor investments applies to governmental plans as well

What is a Fiduciary's potential liability?

- A fiduciary who breaches his or fiduciary duties may be personally liable to the Plan and beneficiaries
  - Includes obligation to make the Plan whole by restoring any losses caused by the breach

Statute of Limitations

- ERISA provides a specific Statute of Limitations for breach of fiduciary duty claims. ERISA § 413.
  - Claims must be brought:
    - Three years after actual knowledge of the breach; or
    - Six years after the last act in a breach or, in the case of an omission to act that is a breach, after the last date on which the breach could be cured
- Non-ERISA plans are governed by state Statutes of Limitations

Best Practices for Fiduciary Protection

- Practice No. 1: Hold regular meetings with consultants, providers and other advisors to review information about the operation and investment activities of the plan and to evaluate methods for improvement; keep minutes
- Practice No. 2: Prudently select the investment options (including the default investment option for participant-directed plans):
  - Options should constitute a broad range of investment categories;
  - Options should be suitable and appropriate for the Plan and the participants; and
  - The investment considerations and decisions should be based on generally accepted investment theories and prevailing investment industry practices. Competent advisors may be engaged to assist in understanding and applying these principles
- Practice No. 3: Adopt a written Investment Policy Statement for the Plan, setting out the investment goals, strategies, and appropriate benchmarks. Review it annually, make any necessary changes, and document the process

Best Practices for Fiduciary Protection

- Practice No. 4: Establish a process designed to monitor the performance of the investments in accordance with the criteria and benchmarks set forth in the Investment Policy Statement, and remove or replace investments as appropriate
  - Monitor the performance of the Plan's investments on at least an annual basis; document the process, conclusions, and the basis for these conclusions
  - Monitor fees and expenses, negotiating reductions in costs when assets grow and the market changes
  - Consider a competitive benchmarking process every few years to understand the market for services
  - If mutual funds are used, understand the share classes chosen. Investigate whether cheaper classes are available and/or appropriate, and whether any of the fees can be recaptured for the participants' benefit
  - Document what services the plan is receiving in exchange for the fees that are directly or indirectly paid from Plan assets
- Practice No. 5: Document all activities including the process of selecting and monitoring investments, because regardless of the process used, the fiduciary should be able to demonstrate compliance with the legal standards

Best Practices for Fiduciary Protection

- Practice No. 6: Prudently select independent, competent advisors to assist. Once the advisor is selected, monitor the performance of the advisor, and remove and replace the advisor if it fails to perform adequately or properly
  - Identify all plan fiduciaries, and if necessary, formally delegate authority and discretion
  - Determine the level of fiduciary/investment responsibility you wish to delegate, then use a prudent process to select the provider
  - Read and understand all service contracts before they are signed; ensure they properly reflect the relationship and that the providers assume appropriate levels of responsibility
  - Identify conflicts of interest
- Practice No. 7: For participant-directed plans, comply with the requirements of ERISA § 404(c) to obtain relief from liability for losses that are the direct result of a participant's exercise of control over his or her account

Fair Labor Standards Act Update

FLSA History and Purpose

- The FLSA is a federal law enacted in 1938 to ensure a fair wage for a fair day's work. It is a wide-ranging law that covers the vast majority of American employees
- The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments
- Covered nonexempt workers are entitled to a minimum wage of not less than $7.25/hr. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek

Who is subject to the FLSA?

- Employees may be covered in two ways under the FLSA: enterprise or individual

  a) Enterprise: A covered enterprise has two or more employees engaged in commerce or in the production or handling of goods for commerce, and (2) annual gross sales of $500,000

  Other organizations which are specifically covered regardless of sales include: hospitals and nursing homes, public agencies, educational institutions, manufacturing companies, transportation companies, public utilities, retail and service establishments (hotels and restaurants), physician offices, law firms, accounting services, and financial institutions

  b) Individual: An individual who engages in interstate commerce, in the production of goods for interstate commerce, or in activities essential to goods used in interstate commerce are covered

FLSA Enforcement
(Why employers should care)

- Suits can be brought individual employees in a private lawsuit or by the Department of Labor
- Two-year statute of limitations
- EXPENSIVE:
  - Suits brought by employees can be brought “collectively”
  - Attorneys’ fees are mandatory for successful plaintiffs’ counsel

FLSA Exemption

- The FLSA and its interpretive regulations published by the Department of Labor, however, exempt certain groups of employees from the overtime pay requirements
- The most common overtime exemption relates to employees working in jobs that the FLSA describes as executive, administrative, or professional – the so-called "white collar" exemptions. 29 U.S.C. 213(a)(1).

White Collar Exemption

In order for employees to fall within one of the white collar exemptions, they must meet two requirements:

1. They must perform executive, administrative, or professional duties (“duties test”);
2. They must make a certain weekly salary (“salary requirement”)

White Collar Exemption

Duties Test:

<u>Executive Exemption</u>: Primary duty must be managing the enterprise or department and must supervise two or more full-time employees. Courts often look at whether "executive" had hiring or firing authority or whether hiring or firing decisions given weight

<u>Administrative Exemption</u>: Office or non-manual work. Primary duty is management policies or general business operations

<u>Professional Exemption</u>: Advanced knowledge in a field of science or long course of specialized study

White Collar Exemption

Salary Requirement:

- Currently: Employees must be paid $455 per week to meet the salary requirement

- The $455 per week was instituted in 2004 and results in an annual salary of $23,660

“The Times They Are a-Changin” – Bob Dylan, 1964

- On July 6, 2015, the Department of Labor announced a “Notice of Proposed Rulemaking (“NPRM”) which announced proposed changes to the salary requirement of the White Collar Exemptions
- The featured change in the NPRM is the proposed increase in the minimum weekly salary to the 40th percentile of weekly earnings for full-time salaried workers
- For 2016, the 40th percentile is estimated to be $970 per week, or $50,440 per year
- Double the current rate

Increased Salary Requirements

- Perhaps more importantly, for the first time in the FLSA's over 75 year history, **the salary and compensation levels would be indexed to Bureau of Labor Statics data and would be updated annually**

- As a result, while the current figures have been in place over a decade, the DOL now proposes to change these figures annually

- Additional burden on employers to ensure compliance annually

Increased Salary Requirements

In support of the proposed increase, the DOL cites the following statistics:

- The new FLSA regulations will result in employers transferring 1.5 billion in wage increases during the first year;
- Based on current reporting, by raising the salary requirement to the 40th percentile, there will be 10.9 million fewer white collar exempt employees

Increased Salary Requirements

- What does this mean to employers? Currently, nothing; however, the future impact will be far reaching
- Keeping in mind these are proposed regulations (and we won't have a final version until early to mid-2016), any substantial increase in salary requirements will have a corresponding impact on employers and their bottom lines
- As noted above, DOL estimates 10.9 million workers will no longer be exempt. Because of the difference in standards of living, businesses in the South and in rural areas will feel the salary level increase most acutely

Silver Lining

- The silver lining to the expected salary hike is that it should, theoretically, substantially decrease the amount of FLSA litigation due to the decrease in the number of white collar exempt employees

- Most FLSA litigation revolves around whether the employees' duties are those of a manager or a professional. The salary requirement is almost never litigated because the employee is either paid $455/week or they are not

- By doubling the salary requirement, fewer employees should be exempt by employers

What to do now?

- When the DOL finalizes the proposed rule next year, it will likely not provide a long grace period for compliance
- For instance, in 2004 when the current salary levels were implemented, the DOL gave employers 120 days to comply with the new rules
- It is safe to assume the DOL will give a similar (if not shorter) compliance period with the changes in 2016
- Thus, planning should begin now. Employers should work with wage and hour counsel and internal HR to complete a preliminary assessment of all positions they currently treat as exempt to determine if they will be impacted in 2016

What to do now?

- Determine how many hours each person actually works
- Some exempt employees regularly work only 40 hours per week
- Some previously exempt employees may be working 50 or 60 hours per week. For these employees you must carefully consider how to handle this situation

What to do now?

- Three options:
  1) Pay your salaried employees the statutory minimum (current proposed amount: $50,440);
  2) Convert salaried employees into hourly employees and pay them the same amount annually;
  3) Convert salaried employees into hourly employees and pay overtime

What to do now?

1. **Bump up the employee's salary to $50,440**

- Makes sense for employees making close to $50,440 anyway

What to do now?

2. **Convert salaried employees into hourly employees and pay them the same amount annually**
   - Can be done even if the employee generally works a lot of overtime
     - For example: to figure out the right hourly rate for someone who normally works 50 hours a week, begin with X*40 + ((X*1.5)*10) = weekly salary. Solve for X

What to do now?

- So if the annual salary = $26,000

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	$9.10	$364.00	10	$136.50	$500.50

- "X" = $9.10
- $500.50 x 52/weeks = $26,026.00

What to do now?

3. **Divide the annual salary into an hourly rate and pay the extra in overtime**

- This is what the DOL hopes employers will do and what they base their estimated $1.5 billion in increased wages on

What to do now?

- While this is the DOL's hope, this will result in significant increases in employer's costs
- Using the previous example of an employee who makes $26,000/year:
  - $26,000/52 weeks = $500/week
  - $500/40 hours = $12.50/hour
  - But you still have to calculate the 10 hours of overtime

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	$12.50	$500.00	10	$187.50	$687.50

<u>Results in over $9,000 of increased wages</u>

What to do now?

- Since it would seem unlikely that employers will use the previous calculation, the proposed changes will likely result in lower average earnings for many employees
- Using the previous example:

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	$9.10	$364.00	10	$136.50	$500.50

- The above calculation assumes that the employee will always work 10 hours of OT. But, if an employee does not work 50 hours each week, they will be making less than before

Additional Considerations

- In addition to how you work the pay, employers will need to consider the following issues, among many others:
  - Time clocks
  - Rules around email and phone calls
  - Employers are no longer required to pay for short absences
  - Unhappy employees

Conclusions

- Once an employer has identified which employees it considers as exempt employees, it will need to decide whether that employee's current salary meets the increased salary requirement or whether the employee merits a raise to bring their salary into compliance with the increased salary requirements
- For employees who do not meet the increased salary requirements, employers will need to implement plans to change those employees to hourly workers who are entitled to overtime wages
- Employer's need to expect employees to be unhappy. Moving from a salary to an hourly wage may be seen by employees as a "demotion"

Employees vs. Independent Contractors

- The issue of whether a person is an employee or an independent contractor has been one of the biggest sources of litigation in recent years
- On July 15, 2015, the DOL issued an Administrative Interpretation (the "Interpretation")
- The Interpretation does not have the force of a regulation; however, the Interpretation warns employers that the DOL considers the definition of employ under the FLSA* to be very broad

* The same is true for the FMLA which uses the same definition of employ as the FLSA.

How Broad is Broad?

- “In light of the broad statutory definition of employ, a worker who is economically dependent on an employer is suffered or permitted to work by the employer” and, thus, is an “employee”
- DOL will look to six factors:

1. The extent to which the work performed is an integral part of the employer’s business;
2. The worker’s opportunity for profit or loss depending on his or her managerial skills;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer

1. The extent to which the work performed is an integral part of the employer's business

- If work performed by a worker is integral to the employer's business, it is more likely the worker is an employee. Work can be integral even if it is just one component of the business and/or performed by hundreds of workers

2. The worker’s opportunity for profit or loss depending on his or her managerial skills

- Main objective is determine if the worker’s managerial skill can affect his or her profit and loss. A worker’s decision to hire others, purchase materials and equipment, advertise, rent space, and manage time tables may reflect opportunity to manage profit or loss
- A worker’s ability to work more hours does not separate an employee from an independent contractor

3. The extent of the relative investments of the employer and the worker

- The investment of an independent contractor will most likely support a business as a business beyond any particular job

4. Whether the work performed requires special skills and initiative

- Technical skills are not determinative; business skills, judgment and initiative are more important factors. For special skills to be indicative of independent contractor status, they should be used in an independent way, such as business initiative

5. The permanency of the relationship

- An employee normally has an indefinite relationship with an employer. An independent contractor is only hired to complete a specific job/task

6. The degree of control exercised or retained by the employer

- The worker must control meaningful aspects of the project. This control cannot be theoretical. An independent contractor has the ability to pick and chose certain aspects related to their employment

What does all of this mean?

- According to the Interpretation: as a result of the above factors, “most workers are employees under the FLSA’s broad definitions”
- In pretty clear language, the DOL is saying that they will look at employee/independent contractor questions with a presumption that the individual is an employee
- Thus, employers who hire or contract significantly with “independent contractors” need to reassess that relationship to insure they do not result in misclassification issues

Employees Covered under the Family Medical Leave Act (FMLA)

FMLA History and Purpose

- The FMLA became effective August 5, 1993, and entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave
- Eligible employees are entitled to:
  - Twelve workweeks of leave in a 12-month period for:
    - the birth of a child and to care for the newborn child within one year of birth;
    - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement
    - to care for the employee's spouse, child, or parent who has a serious health condition;
    - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
    - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or
  - Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave)

Who is covered by the FMLA?

- The FMLA applies to all:
- Public agencies, including State, local and Federal employers, and local education agencies (schools); and
- Private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year - including joint employers and successors of covered employers

Who is covered by the FMLA?

- The FMLA defines an eligible employee as one who meets all three of the following criteria:
- (1) the employee has worked for the covered employer for at least 12 months (not necessarily consecutively);
- (2) the employee has worked for the covered employer for at least 1,250 hours in the previous consecutive 12-month period; and
- (3) the employee works at or is assigned to a worksite that has 50 or more employees or which is within 75 miles of worksites that taken together have a total of 50 or more employees
- Whether an employee has worked the minimum 1,250 hours is determined by counting the actual number of hours the employee has worked in the previous 12-month period. Therefore, paid vacations, holidays, and sick leave are not counted. In addition, eligibility is determined as of the date the leave will actually begin, not when the employee requests the leave
- For an employee who does not have a fixed worksite, such as a truck driver, construction worker, or sales representative, the location used to determine eligibility is the one which is considered the employee's "home base," i.e., the employer office or facility from which the employee's work is assigned, or the location to which the employee reports

Same-Sex Marriage Update

Obergefell v. Hodges

- On June 26, 2015, the Supreme Court ruled that states must issue marriage licenses to same-sex couples <u>and</u> recognize same-sex marriages that have been legally performed in other states
- Effectively, the decision legalized same-sex marriage nationwide
- 5 to 4 decision
- Tennessee employers must treat a same-sex married couple exactly the same as an opposite-sex married couple

Affordable Care Act Update

King v. Burwell

- On June 25, 2015, the Supreme Court ruled that individuals purchasing insurance through a Federal Exchange are entitled to a premium tax credit
- 6 to 3 decision
- Preserved benefits for an estimated 6.4 million Americans
- Left Individual and Employer Mandate intact

Cadillac Tax

- IRS Notice 2015-52
- Guidance on definition of "coverage provider"
- Clarifies that if a person other than the employer is determined to be the "coverage provider," that person may be reimbursed for all or part of the excise tax assessed
  - Resulting additional income tax may also be reimbursed
- Request comments on development of age and gender adjustment procedures

ACA Reporting

- The ACA requires employers to report health coverage under § 6055 and § 6056
- Employers must file returns and transmittals by February 28, 2016, (March 31 if filed electronically) and annually thereafter
- Employers must also furnish to each full-time employee a copy of the 1095-C by January 31, 2016, and annually thereafter
- Although the Employer Mandate has been delayed for some employers, reporting is still required for the 2015 calendar year

Additional Information on the Firm

Kennerly Montgomery is a general practice law firm that has provided legal advice to clients for almost 100 years. KM attorneys practice in a variety of areas, representing municipal clients, including local governments, agencies and public utilities.

Bill Mason, Kathy Aslinger, and Ashley Trotto practice extensively in employee benefits law, which includes design, documentation, administration, audit, litigation, termination and qualification of employee health and welfare and pension plans for public, tax-exempt and private employers. The Firm sponsors various prototype retirement plans and prepares both interim amendments and discretionary amendments for all plan types as well as counsels with fiduciaries on ERISA and Federal & state law obligations. They represent clients before various agencies regulating employee benefits.

Ben D. Cunningham focuses his practice on representing businesses and individuals in the areas of business and corporate law, labor and employment law, civil litigation and appeals, and construction law.

A Little About Your Presenters

Bill Mason received his JD from Harvard Law School in 1974, and has been practicing law for 40 years, most of that time in employee benefits for governments. He worked for the Tennessee Valley Authority from 1974 – 1986, Wagner Myers & Sanger PC, from 1986 – 1988, and William E. Mason PC from 1988 – 2009. Bill joined Kennerly Montgomery in 2009. Mr. Mason serves on the Board of Directors for the Legacy Park Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors.

As a leader of Kennerly Montgomery's employee benefits practice, Kathy Aslinger focuses on advising fiduciaries for the benefit of participants, assisting both private and governmental clients in the design, implementation and maintenance of their employee benefit plans, including 401(k), pension, cafeteria, and health plans. She commonly assists clients in maneuvering through the complex world of audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, as well as Affordable Care Act compliance. Kathy has been practicing law for over 15 years and has been with Kennerly Montgomery since January 2010. In addition, Kathy serves on the Board of Directors for Uplands Village, a continuing care retirement community in Pleasant Hill, Tennessee.

Ashley Trotto joined Kennerly Montgomery as a law clerk in 2012 and as an associate attorney in the Firm's employee benefits practice in 2013. Ashley concentrates on the Affordable Care Act and has been a frequent speaker on Affordable Care Act issues. She graduated *cum laude* from the University of Tennessee College of Law in 2013, and she also earned a Bachelor of Science in Psychology, *summa cum laude*, from the University of Tennessee in 2009. She's the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

Ben Cunningham earned his Doctor of Jurisprudence *cum laude* from the University of Tennessee College of Law in 2011 with a concentration in advocacy and dispute resolution. Prior to joining Kennerly Montgomery in January 2014, Mr. Cunningham served as a federal prosecutor in the Eastern District of Tennessee representing the United States in a variety of civil and criminal health care related cases, including: False Claims Act cases related to procurement fraud, Stark Law violations, and cases under the Anti-Kickback Act. Mr. Cunningham's criminal caseload focused on health care fraud and Food Drug & Cosmetic Act violations. Prior to joining the Department of Justice, Mr. Cunningham practiced at a regional defense litigation firm representing employers in the areas of labor and employment law.

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