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HIGHLIGHTS

No ERISA Breach in Using Higher Rates for Opening Balances, Court Says

U.S. Bancorp's cash balance pension plan did not violate the Employee Retirement Income Security Act when it used an 8 percent discount rate to compute plan participants' opening balances, the Eighth Circuit rules (*Sunder v. U.S. Bancorp Pension Plan*, 8th Cir., No. 07-3485, 11/9/09).

Reversing a lower federal court, the three-judge appellate panel says that nothing in ERISA prohibited U.S. Bancorp from using the 8 percent rate, which at the time was higher than the statutory 30-year Treasury rate of just over 6 percent. The rate used by U.S. Bancorp was significant for plan participants because the higher the interest rate used, the lower the participants' opening account balances would be when U.S. Bancorp converted from a traditional defined benefit plan to a cash balance plan.

The appeals court finds that while tax code Section 417(e)(3) requires that cash balance plans use a statutorily prescribed rate when calculating plan participants' lump-sum distributions, Section 417(e)(3) does not speak to the interest rates used when establishing participants' opening account balances following a plan conversion. **AA-1** The ruling appears in the Text section. **E-1**

Paid Sick Leave Bills Pushed by Backers, Criticized by Opponents

Supporters urge lawmakers at a Senate subcommittee hearing to require employers with 15 or more employees to provide paid sick leave, while opponents strongly criticize the idea as costly to businesses.

Before the Senate Health, Education, Labor and Pensions Committee's Children and Families Subcommittee, supporters push for passage of the Healthy Families Act (H.R. 2460, S. 1152) that would require employers to provide workers with up to seven days of paid sick leave on an accrued basis.

Supporters also push for passage of emergency paid sick leave legislation (H.R. 3991) that would provide for five days leave for employees with flu-like symptoms in cases where employers tell an employee to go home or not to come to work. **A-9**

EEOC, Restaurant Settle Same-Sex Harassment Suit for \$345,000

The Equal Employment Opportunity Commission and the Cheesecake Factory have reached a \$345,000 settlement of an EEOC suit claiming the restaurant chain permitted the sexual harassment of six male employees by male co-workers at its Chandler, Ariz., location (*EEOC v. Cheesecake Factory Inc.*, D. Ariz., No. 08-1207, consent decree entered 11/5/09).

Under a two-year consent decree approved by a federal district court in Arizona, the Cheesecake Factory will pay six male former employees amounts ranging from \$15,000 to \$175,000 for the alleged harassment. The decree also requires the company to provide equal employment opportunity training for Chandler employees, designate an ombudsman outside Chandler to handle fu-

ALSO IN THE NEWS

SEXUAL HARASSMENT: EEOC and Regal Entertainment Group have settled for \$175,000 an EEOC suit alleging that the movie theater company permitted the sexual harassment of a male employee by a female co-worker and retaliated against the male employee and two supervisors who complained, the agency announces. **A-7**

EMPLOYMENT: The number of attorneys at the 250 largest U.S. law firms declined this year to 126,669, down 5,259 from 131,928 attorneys last year, according to the *National Law Journal*. **A-10**

LAYOFFS: Nonfarm businesses conducted 1,776 extended mass layoffs involving 50 or more workers in the third quarter, an increase of 12.3 percent from 1,581 such layoffs of 31 days or more a year earlier and the most on record for any third quarter, DOL's Bureau of Labor Statistics reports. **D-1**

EMPLOYMENT: The number of full-time and part-time jobs open at the end of September stood at 2,480,000, a slight increase of 57,000 from August's total of 2,423,000, data show. **D-15**

TEXT

RETIREE BENEFITS: Eighth Circuit decision in *Sunder v. U.S. Bancorp Pension Plan*. **E-1**

labor and management as inherently in conflict—to one that is less militant, that recognizes that the interests of management and labor in the modern workplace are often largely compatible.”

Such a discussion should examine whether there is “a role for internal work councils” that work with external labor organizations, a model that is used in Europe, Schaumber said. He also asked whether our current “union model can be modified to be integrative with legitimate management interests” and better serve union members.

“Employers are in the business of making a profit for the benefit of their shareholders and the workers they employ,” Schaumber said. He asserted that “rigid workplace rules, fixed pay without regard to performance, and reactive opposition to well-deserved employee discipline or principled management decisions threatens the enterprise for all concerned and fuels employer opposition.”

“If the decline in unionization is the result even in part of increased employer opposition to unionization, these discussions alone could have a salutary effect,” Schaumber said.

BY SUSAN J. MCGOLRICK

Alternative Dispute Resolution

Panelists Agree Employment Arbitration Neither ‘Panacea’ Nor ‘Horror Story’

Mandatory arbitration of employment discrimination and other employment claims is “not a panacea or a horror story,” neutral arbitrator Michael Lewis of JAMS said, summing up the views of the panelists at a Nov. 7 session of the American Bar Association Section of Labor & Employment Law’s annual meeting.

Charles Coleman of the Raytheon Co., which has a large, voluntary alternative dispute resolution program that culminates in employment arbitration, noted that ADR is still less expensive than litigation. But, he observed, arbitration does not give employers the change to end cases through dispositive motions.

Robert W. McKinney, a management lawyer with Lathrop & Gage, agreed that mandatory employment arbitration is “not the greatest thing since sliced bread for employers, and not a bane for employees.”

McKinney said although labor arbitration is less expensive than litigation, employment arbitration is not, and has many of the same features as litigation. He also pointed to his belief that arbitrators “split the baby” in their decisions.

On the other hand, he said people should “never underestimate the value of a good catharsis.”

Attorney Cites Advantages for Employees. Pearl Zuchlewski, who represents employees in her firm of Kraus & Zuchlewski, pointed to some advantages of arbitration for her clients.

Zuchlewski said some of her clients prefer the privacy of arbitration. She also noted that there is some control over who serves as the factfinder, since the two parties mutually select the arbitrator rather than have a judge selected by lottery.

In addition, the employee can actually keep the award, she said, since arbitrations are rarely appealable.

Speedy Decisionmaking. Lewis said that one advantage of employment arbitration is speed in decision-making. He said JAMS requires arbitrators write awards in 30 days, while some “judges sit on decisions for ever and ever.”

He also said speed in the arbitration process overall is of value to employees, some of whom wait many years for a resolution to their dispute.

Mark Irvings, a Massachusetts neutral in the audience, questioned whether it was appropriate for management lawyers to compare the value of arbitration with federal courts, since in Massachusetts at least, employees bring discrimination claims in friendlier state courts. McKinney agreed that employees are much more amenable to arbitration than to state court claims.

BY KEN MAY

Religious Discrimination

Examine Specific Situation When Weighing Accommodation of Belief, Panelists Say

When confronted with issues of religious expression in the workplace, employers generally should try to work out an accommodation with the employee seeking to perform the religious practice, a panel of employment lawyers said Nov. 6 at the American Bar Association’s Labor and Employment Law conference.

In a discussion entitled “Claims Arising from Religious Expression at Work: Lessons for the Multicultural Workplace,” panelists discussed the ramifications of Title VII of the 1964 Civil Rights Act, which requires employers to accommodate employees’ religious beliefs that are sincerely held and can be accommodated without an undue hardship.

Jeanne Goldberg, a senior attorney at the Equal Employment Opportunity Commission, said the trickiest issues arise when an employee requests an accommodation for something that some people do for religious reasons and others do for personal preference. “Courts are loathe” to find that such practices are not religious, she said, pointing out that a practice need not be mandated to be a religious belief. “Variable observance by an individual” is “relevant but not dispositive,” she said.

Helena Hall, a lawyer for NANA Department Corporation, said usually there are “really minor things” that an employer could do to accommodate an employee. She said an employer should perform an individual assessment in each case and avoid the “blue-penciling of an entire profession” out of Title VII’s protection.

In situations where employees claim their body piercings are a form of religious expression, an employer could propose that an employee use clothing or a bandage to cover a piercing, Goldberg suggested. She said some employees have agreed to adapt their religious head garb to be in the same color and fabric as the rest of their company uniform. The outcome could differ for a police officer, however, Goldberg said, remarking that some courts have ruled that the wearing of religious