K&L | GATES

MEMORANDUM

TO: William Gersten

FROM: Norman S. Milks
Heidi Eckel Alessi

DATE: August 24, 2007

RE: Effective Date of July 1, 2005 Negotiated Retirement Benefit Changes

The following is our analysis in response to San Diego City Employees Retirement System's (SDCERS) assertion that negotiated changes to the defined benefit plan do not take effect until February 17, 2007. Our analysis is based on the tax qualification requirements of the Internal Revenue Code of 1986, as amended, and principles of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) that are applied in analogous situations. Although ERISA is not applicable to governmental plans, case law interpreting ERISA's written plan requirement and amendment procedures is persuasive authority since the Internal Revenue Code has a parallel writing requirement. In addition, SDCERS purports to rely on tax qualification rules and ERISA requirements by analogy.

Background

SDCERS sent a letter dated August 3, 2007, to "confirm that SDCERS is using an effective date of February 16, 2007 for the benefit changes that were negotiated in 2005." The letter further advises that "SDCERS will continue to advise City employees hired before February 17, 2007 that they are eligible for the retirement benefits in place prior to the 2006[1] MOU changes." SDCERS asserts that the MOU is not a "Plan document" and that the Plan was not amended until January 17, 2007, when the City passed Ordinance O-19567.

SDCERS's position is based on a legal opinion from Reed Smith, referred to as its fiduciary counsel, dated May 4, 2007. Reed Smith's legal opinion asserts that "[a]ccording to SDCERS's tax counsel, Ice Miller, LLP, SDCERS' 'plan document' is comprised of portions of the state Constitution, the City Charter, the City Municipal Code, and portions of specified MOUs not codified in the City's charter or Municipal Code but incorporated by specific reference in the Code (these MOUs relate to credit for certain union presidents' service and compensation)." Notably, the alleged opinion of Ice Miller is stated as an "undisputed fact"

[1] We assume that this is a typographical error and that SDCERS intended to refer to the 2005 Memorandum of Understanding.

which compels Reed Smith to conclude that the MOU can be disregarded until its terms were codified.

According to Reed Smith's letter, the City of San Diego entered into a series of Memoranda of Understanding (collectively referred to as MOU), dated as of July 1, 2005, which documented negotiated changes to "ancillary benefits" of the defined benefit plan including (1) a 13th retirement check payable whenever there are excess earning available in the retirement system at the end of the year, (2) a Deferred Option Program (DROP), (3) the right to purchase up to five years of additional service credit, and (4) retiree medical benefits. The MOU provides that employees first hired on or after July 1, 2005, would not be eligible for these "ancillary benefits." The MOU is also described as changing the retirement allowance formula for the "new hires" to a fixed formula not subject to future increases. Reed Smith also notes that the City Counsel passed Resolution No. R-300600, on June 27, 2005, approving and ratifying the MOU to be effective July 1, 2005. On January 17, 2007, the City adopted an Ordinance to codify the changes included in the MOU and ratified in the Resolution.

Also according to Reed Smith, SDCERS has advised employees hired since July 1, 2005, that it would disregard the terms of the MOU until an ordinance is passed to codify the changes in the Municipal Code. As you know, on July 21, 2006, the Board of Administration adopted Resolution No. R 6-05, which purports to require that all changes to the City's retirement plan be effected only when enacted by ordinance. The Resolution provides, in part:

> WHEREAS, in order for SDCERS to properly administer the retirement benefits established by the City for its employees, and to satisfy its duties under federal tax law, all retirement benefit changes effecting City employees must be enacted by ordinance amending SDMC Chapter 2, Article 4 ...
>
> NOW THEREFORE, BE IT RESOLVED, that the Board will administer retirement benefits of City employees and retirees in accordance with the terms of the City's retirement plan, as set forth in SDMC Chapter 2, Article 4, and will not implement any benefit changes that have not been enacted by an ordinance amending the plan and, where required, a majority vote of the SDCERS membership....

In essence, the SDCERS Resolution purports to prescribe the plan amendment procedures.

For the purpose of responding to the arguments regarding the effective date, we have assumed that these facts (not including Ice Miller's legal opinion) are accurate because. We would conclude that the MOU is a "plan document" and that the Plan was amended by the City Council's resolution ratifying the MOU. It would be helpful to review the MOU and the City Council's resolution because there may be additional terms not described by Reed Smith that

would support our analysis. We were unable to find Resolution No. R-300600 on the City's website.

Analysis

A. Plan Documents

One of the basic tax qualification requirements for a retirement plan is that the plan must be "a definite written program and arrangement" established and maintained by the employer. Treas. Reg. 1.401-1(a)(2). "A failure to follow the terms of the plan" *may* be an "operational failure" *if* it cannot be corrected. Rev. Proc. 2006-27, §5.01(2)(b). This does not mean, however, that a pension plan may consist of only one document or certain types of documents. *See e.g., Pegram v. Herdrich,* 503 U.S. 211, 223 (2000). A "plan" is a group of rights, benefits, and procedures set up by an employer to create pension and welfare benefits. *Orth v. Wisconsin State Employees Union Council,* 2007 WL 1556542 (Slip. Op. May 25, 2007), citing *Pegram,* 503 U.S. at 223. "The plan may be evidenced by a summary plan description (SPD) and any other documents, such as a CBA, that describes the rights of beneficiaries or such things as how the plan is administered ..." *Orth,* at *9 (emphasis added). ERISA, which mirrors the tax code's writing requirement, specifically refers to plan documents and instruments in the plural form. 29 U.S.C. §1104(a)(1)(D) (a plan must be administered in accordance with the documents and instruments governing the plan"). "There is no requirement that documents claimed to collectively form the employee benefit plan be labeled as such." *Horn v. Berdon, Inc. Defined Benefit Pension Plan,* 938 F.2d 125 (9th Cir. 1991).[2]

Courts typically consider "what constitutes the plan documents" by examining whether one or more of the proposed documents set forth terms related to the benefits and whether the employer intended to be bound by the terms set forth in such documents. *See Cinelli v. Security Pacific Corp.,* 61 F. 3d 1437 (9th Cir. 1995). Informal letters or resolutions describing benefits that might be offered in the future would not be considered plan documents because such documents were never intended to bind the employer. *See id.*

In contrast, where a negotiated agreement contains terms related to a pension plan, the negotiated agreement is considered to be one of the plan documents. *See e.g., Bozetarkik v.*

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[2] Reed Smith's letter states that "for government plans qualified under Internal Revenue Code ("Code") section 401(a), such as SDCERS, the "plan document consists of its governing statutes and laws, rules and regulations." The Internal Revenue Code, however, does not define what documents may be considered "plan documents" for government plans. *See* Treas. Reg. 1.401-1(a)(2). Notably, the assertion that a government plan document may only consist of such things would contradict the alleged opinion of Ice Miller that the plan documents include "portions of specified MOUs."

Mahland, 195 F.3d 77, 81 (2d Cir. 1999) (finding that the collective bargaining agreement and other pension plan statements must be read together "as a whole"); *Wilson v. Moog Auto., Inc. Pension Plan & Trust for U.A.W. Employees,* 193 F. 3d 1004, 1008 (8th Cir. 1999) (noting that ERISA's goals of putting "participants on notice of the benefits to which they are entitled and their own obligations under the plan," and of "providing guidelines, that likewise are known to the participants, for the plan administrator as he makes coverage decisions," "are not thwarted by counting the [collective bargaining] Agreement among the plan documents to be considered in administering the Company's Pension Plan."); *Central States, Southeast and Southwest Areas Pension Fund v. McClelland,* 23 F. 3d 1256 (7th Cir. 1994) ("the collective bargaining and contribution agreements establish the employer's obligation to the pension fund") (emphasis added); *Int'l Union of Elec. Salaried, Mach. & Furniture Workers, AFL-CIO v. Murata Eria N. Am. Inc.,* 980 F. 2d 889, 894 (3d Cir. 1992) (explaining that "the collective bargaining agreement is considered part of the Plan documents under ERISA.").

The *Picard* case cited in Reed Smith's letter does not stand for the proposition that union agreements are not plan documents or that their terms do not become plan terms. *See Picard v. Members of the Employee Retirement Board of Providence,* 275 F. 3d 139 (1st Cir. 2001). In that case, representatives for the City of Providence, Rhode Island and its bargaining units negotiated and agreed to a series of collective bargaining agreements providing for a 5% compounded cost of living increase. The Providence Code required the City Council to ratify all collective bargaining agreements and it was undisputed that the City Council did not ratify the CBAs. The First Circuit explained:

> "Plaintiff's assert that a series of CBAs negotiated but never ratified by the City Council created a vested right in the higher COLA benefit. Yet, the Supreme Court of Rhode Island has repeatedly held that a CBA that is not ratified by the City Council is void and unenforceable."

Id. at 144. Thus, in that case, there was no CBA. We believe the result would have been different if, as in this case, the CBA had been ratified by the city council. Reed Smith's letter acknowledges that the MOU was indeed ratified by the City Council on June 27, 2005.

We believe that the MOU would most likely be considered to be a "plan document" by a court and the Internal Revenue Service because the employer and the bargaining units' representatives intended for it to represent their final agreement regarding certain benefits, intended for it to be effective on a specific date, and it was ratified by the City Council. There is no claim that the MOU was void, defective or unauthorized.

Reed Smith's letter does not provide any analysis or authority to conclude that the MOU should not be considered a plan document. Instead, the letter starts with an analysis of the duty to administer plan benefits in accordance with the plan documents while assuming as a matter of "undisputed fact" that the MOU is not a plan document. The letter argues that the parties did not intend for the benefit changes to take effect until an ordinance was passed by referring to Article

2, Section 2, which states that "The City shall, in a timely manner, complete necessary changes in ordinances, resolutions, rules, policies and procedures to conform to this agreement, using September 30, 2005 as a target date for such completion." The letter argues that "this language is indicative that the parties knew, and intended, that the changes in retirement benefits could and would not become effective until necessary changes in ordinances were carried out by the City."

We do not believe that Article 2, Section 2 can reasonably be read as a statement of intent regarding the effective date of the benefit changes. It is our understanding that the MOU explicitly provides the benefit changes will apply to employees first hired after July 1, 2005. Article 2, Section 2 simply sets forth a "target date" for completing administrative tasks. The "target date" is neither a firm deadline nor the date that the changes take effect. Under Reed Smith's argument even if the City had enacted an ordinance on September 30, 2005, the changes would not take effect for another 30 days. There would have been no reason for the MOU to set forth July 1, 2005 as the effective date if the parties truly intended for the effective date to be 30 days after an ordinance is enacted. Reed Smith's analysis also disregards the fact that the City passed a resolution on June 27, 2005, well before the target date, ratifying the changes and their effective date of July 1, 2005.

B. Amendments to the Plan

Whether the MOU is a plan document is not the only inquiry to determine the effective date of the negotiated changes. A plan may be amended, without creating additional "plan documents," through action taken by the body with the authority to amend the plan. In this case, the MOU and the City Counsel's resolution ratifying the MOU together constitute an amendment to the plan. Under ERISA, every employee benefit plan must set forth a procedure for amending the plan and for identifying the persons who have authority to amend the plan. 29 U.S.C. §1102(b)(3). The Supreme Court has held that this is ordinarily satisfied by stating "the Company reserves the right at any time to amend the plan." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 75 (1995). The Supreme Court also noted that more elaborate statements or procedures are not necessary because "principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company." *Id.* at 101. The Supreme Court explained that under corporate law principles "[a] corporation is bound by contracts entered into it by its officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers." *Id.* at 81. The Supreme Court also noted that amendment authority may be either "by express delegation or impliedly" and that, if the amendment "is found not to have been properly authorized when issued, the question would then arise whether any subsequent actions ... served to ratify the provision ex post." *Id.* at 85.[3]

[3] We assume that California law contains similar principles holding that a city is bound by the acts of its legislative body, but note that we have not researched that issue.

Thus, courts have typically found amendments to plans to be effective, regardless of the form of the action, as long as the person or entity acting had the authority to amend the plan. *See e.g., Johannssen v. District No. 1 Pacific Coast Dist. MEBA Pension Plan,* 136 F. Supp. 2d 480 (D. Md. 2001) (holding that successor employer amended plan by resolution); *Yenyo v. Communications Satellite Corp.,* 899 F. Supp. 1423, 1425 (D. Md. 1995) (where plan document vested the employer with the authority to amend the plan and the employer's board of directors adopted the amendments, the amendment was valid); *Averhart v. U.S. West Mgmt. Pension Plan,* 46 F. 3d 1480, 1489 (10th Cir. 1994) (where the pension plan expressly provides for amendments by a committee subject to approval of the board of directors, amendment was valid even though the board of directors did not pass a formal resolution authorizing the amendment); *Spacek v. Trustees of the Agreement of Trust for Maritime Assoc.-I.L.A. Pension Plan,* 923 F. Supp. 960, 962 (S.D. Tex. 1996) (where plan document authorized the board of trustees to amend the plan, the amendment was valid even if the board did not comply with its own formal procedures for amending the plan), *rev'd on other grounds,* 134 F. 3d 283 (5th Cir. 1998).

The Ninth Circuit has specifically held that corporate action may effectively amend a plan, even when the action is not labeled as a plan amendment, so long as those who took the action have the authority to amend the plan. *Horn v. Berdon, Inc. Defined Benefit Pension Plan,* 938 F. 2d 125 (9th Cir. 1991). The dispute in *Horn* involved the termination of a pension plan, which stated that the company could distribute any surplus to itself upon plan termination if the surplus was the result of an actuarial error. Prior to the termination, the company's board of directors adopted a resolution stating that the plan assets would be distributed to the plan beneficiaries. The company was later sold and the successor company discovered that the plan had a large surplus as a result of an actuarial error. The successor company's board ordered that the surplus be distributed to the successor company, pursuant to the written plan document's terms. However, the Ninth Circuit held that the resolution to distribute the assets to plan participants amended the plan because the resolution was adopted by those who were also authorized to amend the plan on behalf of the company. *Id.* at 127. While no document entitled "Amendment to Pension Plan" was adopted, the Ninth Circuit held that the resolution had the effect of amending the plan because "the only difference between a Plan amendment and a Board resolution is a matter purely of form – the title of the document." *Id.*

In the present situation there is no claim that the City Council lacked the authority to amend the retirement plan. Following the logic of ERISA cases, the June 27, 2005 resolution should be considered to be a plan amendment because it was passed by the same body with the authority to amend the plan. Furthermore, as explained by the Supreme Court, if the resolution was somehow defective, "the question would then arise whether any subsequent actions ... served to ratify the provision ex post." *Curtiss-Wright Corp.,* 514 U.S. at 85. Ordinance O-19567, which merely codified the MOU and the resolution, was a proper ratification.[4]

[4] In contrast, we believe it follows that SDCERS's attempts to bind the plan through resolutions and representations to participants that are not approved by the City Council would have no legal effect if local law does not grant the Board of Administration authority to amend the plan. *See*

The IRS would likely reach the same conclusion if it were reviewing the plan because it has ruled that government resolutions regarding plan benefits are plan amendments. For example, in 1997 the IRS issued a Private Letter Ruling holding that a resolution by a county's board of supervisors was a plan amendment. PLR 9721027. The plan at issue was a multiple employer defined benefit plan for county and municipal employees pursuant to a state statute. In 1982 the state statute provided that members may be eligible for additional service credit if certain conditions were met. One condition was that the service credit provision would not be applicable in a county until it is adopted by ordinance in that county. The county who requested the private letter ruling passed an enabling ordinance on May 12, 1992. In March of 1995, the county's board of supervisors adopted a resolution offering certain employees who retired between March 16, 1995 and March 30, 1995 up to two additional years of service credit. The county asked the IRS to rule that the 1995 resolution was not an amendment because the plan, as embodied by the statute, contained early retirement incentives. The IRS, however, disagreed and found that both the 1992 enabling ordinance and the 1995 resolution "outlining the specific terms and conditions of the early retirement incentive program constitute amendments of [the plan]."

Additionally, the IRS has treated the date of a collective bargaining agreement as the date the plan was amended where the agreement contains terms affecting the plan. *See e.g.,* PLR 8744051 ("the Service is recognizing the collective bargaining agreement as the date the plan was amended for purposes of section 412(c)(8)"). Thus, we think that the IRS would most likely agree that the effective date of the 2005 negotiated changes is July 1, 2005, because that is the date stated in the MOU.

Please note that we have not fully analyzed Reed Smith's arguments regarding the Meyers-Milias Brown Act or proper procedures under the City Code or Charter. However, on the surface, their arguments seem to favor a July 1, 2005 effective date. Reed Smith points out that California courts hold that "when dealing with [public employee benefit contracts] every effort should be made to give full effect to the actual understanding of the parties so as to uphold the integrity of the agreement." (May 4, 2007 Letter, p. 7 citing *Chula Vista Police Officers' Assn. v. Cole,* 107 Cal. App. 3d 242, 248 (1980)). As discussed above, we believe that the MOU sets forth a clear intent to make July 1, 2005 the effective date, regardless of subsequent formalizing action that the City might take. Additionally, Reed Smith argues that the City Charter "expressly" provides that the only manner of amending the retirement plan is by ordinance. But if that were the case, one would have to ask why SDCERS felt the need to pass a resolution stating the same thing. Similarly odd, Reed Smith argues that a plan amendment cannot "operate as an amendment" unless there is a specific reference in the plan incorporating the amendment. (May 4, 2007 letter, p. 5). However, if the "amendment" was already referenced in the plan there would be no need for an amendment.

Section D, below. Our understanding is that the Board of Administration's authority is limited to administration.

Our brief review of the City Code and the Charter leaves us with the impression that they do not "expressly" set forth the method of amending the retirement plan. The Charter does set forth a voter approval requirement that became effective on January 1, 2007, in the event that there is an ordinance amending the retirement system. (Section 143.1). But this does not necessarily mean that an ordinance is the only method of amending the retirement plan. Reed Smith also ignores that the members already voted on the amendments by voting on and approving the MOU. In addition, there would never be members affected by changes for new hires that could vote an amendment that affects only new hires.

C. Anti-Cutback Rules

Reed Smith noted that "state and federal 'anti-cutback' laws likely prohibit a retroactive decrease in vested benefits." It is not just likely but certain that federal law prohibits a retroactive decrease in vested benefits. However, the amendment was not retroactive because it occurred with the execution and ratification of the MOU. For example, the IRS found that there was no retroactive "cut back" where the reduction in benefits was approved as part of a collective bargaining agreement on September 29, 1986, but the "formal plan amendment" was not adopted until February 11, 1987. PLR 8744051. In that case the IRS explained it was "recognizing the date of the collective bargaining agreement as the date the plan was amended." *Id.* Here, no benefits were taken away from any employee who had already accrued them since the changes only apply to employees hired after the date of the City Council's resolution approving the MOU.

Furthermore, the federal "anti-cutback" rules do not prohibit all retroactive plan amendments. *See* Treas. Reg. 1.411(d)-4. Indeed, the correction method for an operational failure (such as failing to follow the plan document) is often to make a retroactive or conforming amendment. *See* Rev. Proc. 2007-26. The anti-cutback rules apply to a limited class of "protected benefits" to the extent that they have already accrued. *Id.* The tax code regulations define "protected benefits" as normal retirement benefits, early retirement benefits, retirement-type subsidies, and optional forms of benefits (meaning where the employee has a choice in how the benefits are paid out). *Id.* Under ERISA the "accrued benefit" is typically expressed in the form of an annual benefit commencing at normal retirement age or the actuarial equivalent. *Robinson v. Sheet Metal Workers' National Pension Fund, Plan A,* 441 F.Supp. 2d 405 (D. Conn. 2006).

The definition of "protected benefits," for purposes of the anti-cutback rules, does not include contingent benefit or "ancillary" benefits such as payment of medical expenses, disability benefits, or social security supplemental benefits. Treas. Reg. 1.411(d)-3(b)(3); Treas. Reg. 1.411(d)-3(g)(2); *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union,* 980 F.2d 465 (7th 1992). The anti-cutback rules also do not apply to the elimination of the right to future benefit accruals. Treas. Reg. 1.411(d)-3(b)(3)(ii). For example, an amendment to a plan which eliminates the ability to obtain a retirement plan subsidy in the future

does not violate the anti-cutback rules. *See Lindsay v. Thiokol Corp.*, 112 F.3d 1068 (10th Cir. 1997). Reed Smith's letter acknowledges that the 2005 negotiated changes were to "ancillary benefits," not changes to the retirement benefits. While we have not specifically analyzed each of the affected benefits (and the results may be different for different benefit plan features), according to Reed Smith's letter, the "13th check" and purchase of service credit appear to be unvested contingent benefits, the DROP program is an alternative method of accruing future credit, and the health benefits are clearly "ancillary" benefits.

Although we have not analyzed whether these benefits were "vested" under California law for those hired between July 1, 2005, and February 16, 2007, we note that the *Betts* case cited by Reed Smith's letter does not support that proposition. *See Betts v. Board of Administration of the Public Employees' Retirement System,* 21 Cal. 2d 859 (1978). That case held that a state "employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." *Id.* at 863 (emphasis added). However, the court also explained:

> "the employee does not obtain, prior to retirement, any absolute right to a fixed or specific benefit, but only to a substantial or reasonable pension."

Id. at 863.

D. Correction Methods to Preserve Tax Qualified Status

"Where, as here, the employer has the authority to amend a pension plan and the employer amends the plan through a resolution or vote of a board of directors ... such an amendment is valid." *Johannssen v. Dist. No. 1-Pacific Coast Dist.*, 136 F. Supp. 2d 480, 493 (D. Md. 2001). "Plan administrators are required to follow the plan document and enforce every amendment actually adopted to a plan." *Id.* at 496 citing *Curtiss-Wright,* 514 U.S. at 82. This requires the plan administrator to "sort out" plan communications and implement official actions that are amendments. *Id.* The *Johannsenn* case involved a plan administrator who unilaterally chose to ignore action taken by the employer/plan sponsor because the administrator erroneously believe that the action was not an effective plan amendment. The court noted that a plan administrator has no right to "veto the action taken by the plan's governing body." 136 F. Supp. 2d at 496-97. Likewise, a plan administrator who has no authority to amend the plan cannot "amend or rescind amendments" made by the governing body and any attempt to do so "has no legal effect." *Id.*

In this case, the Board of Administration's resolution purporting to mandate a specific procedure for amending the plan should have no legal effect because it does not appear to have any authority to amend the plan or disregard action taken by the City Council. Likewise, any representation by SDCERS stating that it would disregard the MOU until codified should have no effect because it was a decision to disregard the governing body's resolution amending the Plan. SDCERS does not appear to us to have authority to unilaterally disregard the resolution

and decide upon a different effective date; this should be particularly true where the City Council was ratifying changes already approved by a vote of SCDERS's members ratifying the MOU.[5]

Reed Smith's letter references the Voluntary Correction Program (VCP) available through the Internal Revenue Service. However, the VCP is only one component of the Employee Plans Compliance Resolution System. The component that is available for an "operational failure" caused by failing to comply with plan documents and amendments is the Self Correction Program (SCP). *See* Rev. Proc. 2006-27. SCP does not involve a filing with the Internal Revenue Service or a fee. Rather, it merely requires the plan administrator and/or plan sponsor to take and document "reasonable and appropriate action" to correct the mistake. The City, as the Plan Sponsor, has already done its part by passing the resolution ratifying the MOU and by codifying it by passing an ordinance. The "reasonable appropriate action" for SDCERS would be to comply with the City Council's resolution and not make unilateral decisions to disregard action by the City Council.

Conclusion

It is our position that a court and the Internal Revenue Service applying federal law would consider the MOU to be a part of the plan document and would consider the plan as having been amended by the City Council's resolution ratifying the MOU. Thus, the effective date for the 2005 negotiated changes, as applied to those hired after July 1, 2005, should be July 1, 2005.

This communication is not intended or written by Kirkpatrick & Lockhart Preston Gates Ellis LLP to be used, and it may not be used by you or any other person or entity, for the purpose of avoiding any penalties that may be imposed on you or any other person or entity under the United States Internal Revenue Code.

[5] SDCERS actions may also be *ultra vires* under California law and may violate statutory administrative procedures. However, that analysis is beyond the scope of this memorandum.