

# EMPLOYMENT SERVICES

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## Performance Appraisals Really Do Matter



In *Haselmann v. Kelly Services, Inc., et al.*, Civil Action No. 04-3213 (MLC) (D.N.J. Aug. 22, 2006), the U.S. District Court for the District of New Jersey held that an employee's receipt of a "satisfactory" performance review five months prior to the employee's termination was sufficient evidence to deny the employer's motion for summary judgment and to allow a jury to determine whether the employer's articulated reason for terminating the employee was pretext for age discrimination.

Kelly Services, Inc. (KSI) hired Ralph Haselmann in March 1999 as an account manager in its New Brunswick branch office. Haselmann was 60 years old at the time he began working for KSI.

In the summer of 2000, Kelly Financial Resources (KFR), a new business unit affiliated with KSI, offered Haselmann the position of Branch Manager of KFR's New Jersey branch office. The promotion was effective as of September 2000 and resulted in an increase in salary grade. Haselmann was 61 years old when the promotion became effective.

In his new role, Haselmann reported to Bob Lyons. In May 2002, Lyons gave Haselmann a performance review that noted both Haselmann's strengths and deficiencies. In April 2003, Haselmann received his second performance review from Lyons. Along with some criticism of Haselmann's performance, Lyons pointed out, "I have been very pleased with the way 2003 has started out for Ralph's branch. He and his staff continue to show the same strong trends that were established last year with better performance on [certain] targets. I believe 2003 can be [Haselmann's] strongest year ever."

Later that month, Haselmann began reporting to Sharon Stahl, director of the newly formed Eastern Region. In September 2003, Stahl provided Haselmann with a mid-year review that stated, "Very nice year-to-date performance on all fronts" and explained areas on which Haselmann needed to improve. Overall, the review was characterized as "satisfactory."

The following month, Stahl implemented a new sales call requirement and shortly thereafter, Stahl sent Haselmann

a congratulatory note and gave him a quarterly bonus. Just two weeks later, Stahl placed Haselmann on a performance improvement plan (PIP). During the PIP period, Haselmann's performance declined, as a result of which his employment was terminated. Five months later, KFR hired a 44-year-old to replace him.

Haselmann brought suit against KFR, claiming that he was fired in violation of the New Jersey Law Against Discrimination (LAD). The defendants moved for summary judgment, arguing that Haselmann could not show that his performance was at a satisfactory level and that Haselmann did not demonstrate that KFR's reasons for terminating him were pretextual.

The court held that there were disputed issues of fact as to both of defendants' arguments and denied their motion. Central to the court's holding was the fact that Haselmann received a satisfactory performance review only five months prior to his termination. The court reasoned that, given the fact that Haselmann's performance was satisfactory only months before the decision was made to terminate his employment, a jury could infer that KFR's actual motivation in reaching its decision to terminate Haselmann was his age.

The *Haselmann* decision underscores the importance of performance reviews in employment law. As demonstrated by the court's decision, giving an employee a review that he or she does not

deserve, while perhaps easier for the manager at the time it is delivered, can cause not only that manager, but an organization as a whole, serious difficulties, particularly if litigation arises. Employers must ensure that their managers are taking the time necessary to draft fair appraisals that accurately reflect their employees' performance. Otherwise, as made clear in the *Haselmann* decision, the performance appraisal itself may be used against the organization in litigation.

Managers often state that they do not have the time to draft appraisals or at least do not have the time to draft them appropriately. Managers must appreciate, however, that the time a manager saves on quickly or inaccurately drafting a performance review will cost that same manager, and the organization, a great deal more time and money should litigation arise.

If you have any questions about the *Haselmann* decision or would like to discuss how you can ensure that your managers are handling the performance review process appropriately, please contact Michael Cohen at 215-977-2592 or [mscohen@wolfblock.com](mailto:mscohen@wolfblock.com) or any other member of the Employment Services Practice Group.

## WolfBlock Adds John Nixon as Partner in Employee Benefits Practice Group

We are pleased to announce that John A. Nixon has joined WolfBlock as a partner in the Employee Benefits Practice Group of the Employment Services Department. He will be resident in the firm's Philadelphia office.

Mr. Nixon focuses his practice on the design and implementation of executive compensation, pension and retirement programs. He advises employers, executives, plan sponsors and ERISA providers on a variety of issues and is a frequent lecturer, commentator and author on executive compensation and employee benefit issues. He currently serves on the national Advisory Panel on Employee Benefits for the American Law Institute-American Bar Association Program Committee and is a former vice president of the Barristers' Association of Philadelphia. Mr. Nixon holds degrees from the University of Michigan Law School (J.D.) and the University of Pennsylvania's Wharton School (B.S.).

"John's addition to WolfBlock adds strength to strength," said Warren E. Fusfeld, chair of the Employee Benefits Practice Group. "His depth of experience and excellent reputation in the field of employee benefits and executive compensation expand our ability to provide outstanding service to a broader spectrum of clients, especially those in the public sector."

"The Pension Protection Act of 2006 and changes in the laws pertaining to how and what executives can be compensated add new complexities to an already complex and highly regulated portion of the relationship between employers and employees," said Mr. Nixon. "I am delighted to have the opportunity to work with all of the fine lawyers and benefits specialists already in WolfBlock's Benefits Group and look forward to assuming a leadership position in the development of an already vibrant practice."

### **Recent Title VII Case Reminds Employers of Potential 'Direct Method' Claims by Plaintiffs**

The Seventh Circuit Court of Appeals recently ruled that a Hispanic cook could proceed with her claim of national origin discrimination, pregnancy discrimination and retaliation based on "a mosaic of direct evidence" she presented. The ruling is a reminder to employers that plaintiffs need not use the familiar *McDonnell Douglas* burden-shifting analysis but can also prove their cases through the "direct method" to support "an inference of intentional discrimination." *Paz v. Wauconda*

*Healthcare and Rehab. Ctr.*, No. 05-2837 (7th Cir. Sept. 19, 2006).

Plaintiff Rosaura Paz brought a claim against her employer alleging that her supervisor, Charlene Li, discriminated against her on the basis of her national origin (Mexican) and pregnancy. Although Paz received positive performance evaluations from Li for three years, Paz alleged that Li made regular derogatory comments about Mexicans to her and treated her and other Hispanic employees less favorably than white workers by, for instance, giving them less desirable assignments and shorter break periods and turning off the radio when it was tuned to a Spanish-language station.

In addition, Paz alleged that when she informed Li she was pregnant, Li began repeatedly suggesting to Paz that she have an abortion. Paz testified that Li generally made Paz feel so uncomfortable about her pregnancy that she made an initial decision to have an abortion. When Paz informed Li of this decision, Li expressed excitement at the idea and began acting more nicely towards Paz. However, when Paz ultimately decided against the abortion, Li only furthered her harassing behavior, which included following Paz around the kitchen and screaming at her in front of other employees.

Finally, Paz reported Li's actions to a company administrator who, upon meeting with Li to discuss the situation, was informed by Li of numerous complaints about Paz's performance. The company administrator, however, told Li that she did not believe the complaints since Li did not have any supporting documentation about Paz's performance. It was only after this meeting that Li wrote up an employee warning for Paz, although she never notified Paz about it. The next day at work, Li told Paz she was fired. Shocked, Paz left work and Li then wrote up another warning notice that indicated Paz walked off the job. The next day when Paz did not return to work, believing she was fired, Li wrote another warning that indicated Paz abandoned her job.

The Seventh Circuit reversed the district court's grant of summary judgment for the employer, correctly noting that there were numerous factual disputes that existed between the parties. The court stated that Paz had demonstrated a "mosaic of direct evidence" that did not necessitate use of the *McDonnell Douglas* burden-shifting analysis. Rather, Paz could proceed with her claim and allow a fact-finder to "infer intentional discrimination on the part of the employer through certain types of circumstantial evidence," including suspicious timing, ambiguous statements, actions towards other employees in the protected group and "other bits and pieces from which an inference of discriminatory intent might be drawn."

In reversing the district court, the Seventh Circuit remarked that the

lower court mistakenly believed that Paz could not proceed under the "direct method" because many of Li's comments at issue were made months before she fired Paz. However, such timing, the court concluded, is only one of many pieces of evidence that could be used to determine whether there was discrimination. The circuit court reminded the district court not to view the record in small pieces but to see whether, when all the evidence by the plaintiff is put together, there exists a "mosaic of discrimination."

Thus, the *Paz* case is a reminder to employers that plaintiffs can proceed with claims outside of the *McDonnell Douglas* analysis and may be able to defeat summary judgment by presenting evidence that would allow a fact-finder to infer discriminatory intent by the decision-maker based on direct and circumstantial evidence. If you have questions regarding difficult encounters with employees, proper documentation of discipline or training supervisors to properly deal with employee-related concerns, please contact Marc Scheiner at 215-977-2697 or [mscheiner@wolfblock.com](mailto:mscheiner@wolfblock.com) or any other member of the Employment Services Practice Group.

## **Year End/New Year Planning**

The year 2006 is drawing to a close, and for those employers on a calendar fiscal year, it is budget time for 2007. For your guidance, listed below are some items that you should be accomplishing before the end of this calendar

year and some that you should be putting into your budget for next year.

### **To Do Before the End of 2006**

#### *Stock Option Plans*

Employers that sponsor stock option plans should self-audit their plans to make sure all stock option grants are properly documented, all board resolutions granting stock options are accounted for and all stock option grants are in accordance with the terms of the plan.

#### *Executive Compensation Arrangements*

Public companies now have new requirements for a Compensation Disclosure and Analysis that will require the company to file a disclosure that is certified by the company's principal executive officer and principal financial officer. This disclosure will need to describe the operation and material features of each element of a named executive officer's compensation. Employers should begin to review all aspects of executive compensation plans and arrangements.

#### *Section 409A and Deferred Compensation Plans*

All arrangements for the payment of deferred compensation must be reviewed for compliance with the new tax rules and documentation must be revised to the extent necessary to come into compliance no later than December 31, 2007. Failure to do this will result in tax penalties to participants in these arrangements. All such reviews

# Benefits

## CORNER

### 401(k) Fee Class Action Lawsuits

There has been a recent wave of class action lawsuits that have been filed against the fiduciaries of 401(k) plans sponsored by several *Fortune* 500 companies, and more lawsuits are expected. Some reports anticipate that at least 20 more lawsuits will be filed by year end.

The complaints filed to date differ in some respects (e.g., excessive management and administrative fees charged by company stock funds, use of a master trust arrangement to avoid full disclosure of fees). In many important respects, however, the complaints are nearly identical in that they attack the practice of “revenue sharing,” which plaintiffs allege are “hidden fees” that reduce plan participants’ retirement savings.

“Revenue sharing” is the payment of asset-based compensation from brokers or investment managers (for example, mutual funds or insurance companies offering investment products to retirement plans) to administrative service providers (recordkeepers, trustees, etc.) that exceeds the actual cost of the services provided. In these lawsuits, plaintiffs allege that the plans’ fiduciaries failed to disclose the plans’ revenue sharing arrangements to the participants or government regulators. Accordingly, plaintiffs allege, the plan fiduciaries cannot take advantage of ERISA section 404(c), which might otherwise be available to insulate the fiduciaries from any loss arising from a participant’s investment decisions.

Plaintiffs also claim that the plan fiduciaries failed to monitor the total fees and expenses paid by the plans. This failure allowed plan service providers (through the use of revenue sharing agreements) to overcharge plan participants.

The lawsuits ask the courts to require the fiduciaries to make the plans whole for any losses resulting from the fiduciaries’ breach of their duties under ERISA and for attorneys’ fees. Alternatively, the complaint seeks an accounting of all transactions, disbursements and dispositions of plan assets. To the extent a plan cannot provide a full accounting, the complaint asks the court to impose a surcharge on the fiduciaries.

At this early stage in the litigation, it is too soon to know whether any of plaintiffs’ claims will prove successful or whether these cases may give rise to more widespread litigation (perhaps aimed at mid-size or small employers). We will continue to monitor the progress of the litigation and provide you with regular updates.

The Employee Benefits Practice Group at WolfBlock is available to assist employers in all aspects of ERISA compliance. For more information regarding the lawsuits discussed in the article or retirement plans generally, please contact Karen Toth at 215-977-2268 or [ktoth@wolfblock.com](mailto:ktoth@wolfblock.com), Melissa Kurtzman at 215-977-2072 or [mkurtzman@wolfblock.com](mailto:mkurtzman@wolfblock.com) or any other member of the Employee Benefits Practice Group.

must identify and deal with the changes that may be necessary if there is any interest in modifying the time and manner of payment of amounts that otherwise would be payable in 2007.

It is important to remember that the concept of what is a "nonqualified deferred compensation plan" is a very broad one and extends beyond those arrangements that are clearly formal plans for the deferral of income. The concept can include provisions of employment agreements, severance plans or agreements, equity-based benefits and "phantom" equity arrangements and any other plan or arrangement that potentially provides for compensation that will be paid/received after the period of service to which that compensation relates. If this analysis has not been done already, it is extremely important to conduct a review of all arrangements that potentially provide for deferred compensation benefits as soon as possible and certainly before the end of the year.

#### *Performance Evaluations*

If your policy or practice is that performance evaluations must be done annually, make sure they are completed within the times required.

#### *Releases*

Recent assaults in numerous courts on General Releases used by employers when providing separation pay and benefits to employees who are being terminated from employment

require that all forms be reviewed for compliance with new or developing requirements. Improperly drafted releases may be found to be unenforceable and in some cases have been found themselves to be in violation of the retaliation provisions of various laws.

#### Planning for Next Year

##### *Employee Handbook Modifications*

Update your EEO policy in light of the 2006 Supreme Court decision regarding retaliation.

Ensure that your exempt employee policy includes the FLSA safe harbor.

Include policies regarding instant messaging and blogging.

Update the military leave policy in light of the new USERRA regulations.

##### *Training*

Supervisors require training with respect to your harassment and other EEO policies on a regular basis to ensure that you will be able to take advantage of the defenses available to you if an employee alleges a violation. Even if you have one employee in California, you must ensure that the training has been done in compliance with that state's statute. California's sexual harassment prevention training law requires that this training be completed every two years. Accordingly, those employers that provided sexual harassment prevention training for their California managers in 2005 must

ensure that the managers are retrained in 2007, within two years of the date of the 2005 training.

##### *EEO-1 Form*

There is a new one. Make sure you use the correct form since the information requirement has changed.

##### *Affirmative Action Plans*

The new EEO-1 categories and expected revisions to the VETS 100 and race/ethnic categories may have to be incorporated into your new plans.

Internet Applicant standards require substantial revisions to your recordkeeping and reporting.

Prime federal contractors especially should be doing some kind of compensation review in connection with their plans. OFCCP has been placing special emphasis on compensation analyses and prefers the analysis to be multiple regression.

The OFCCP is expected to send pre-audit notices to many employers near the end of November 2006 for audits in 2007. These audits will require analysis of 2005 and 2006 data.

##### *I-9 Audits*

Federal, state and local governments have focused recently on the issue of immigration and in particular on the issue of the employment by U.S. companies of those who are not authorized to work in the United States. The increased attention being paid to

immigration issues and illegal immigration could result in an increase in I-9 audits, and employers should be sure that their I-9s and related documentation are in order and are being maintained properly.

### *Union Organizing*

Following the recent NLRB decisions, there is an increased focus on who is and who is not a supervisor. You should be evaluating where you draw your lines in light of the new rules.

Unions are attacking unit definitions much more aggressively than in the past in an attempt to reduce the size of units for organizing purposes. The theory seems to be that smaller units are easier to organize and will provide a foothold from which organizing can be expanded.

### *Retirement Plans*

As a result of the recently passed Pension Protection Act of 2006 (the PPA), employers should be determining the changes that may have to be made to their qualified retirement plans. For example, the PPA includes "safe harbor" provisions designed to encourage employers to adopt "automatic enrollment" 401(k) plans. While these provisions of the act are not effective until 2008, employers need not wait until then to implement an automatic enrollment feature.

Additionally, beginning after 2007, single employer defined benefit plans will be subject to more stringent funding standards under the PPA. As a result, employers contemplating freezing or

terminating their pension plans may wish to do so in 2007, prior to the date the funding requirements go into effect.

If you have any questions about this topic, please contact James Redeker at 215-977-2298 or [jredeker@wolfblock.com](mailto:jredeker@wolfblock.com) or any other member of the Employment Services Practice Group.

## **NJ Supreme Court: Same-Sex Couples Must Be Given Same Rights and Benefits as Married Opposite-Sex Couples**

On October 25, 2006, the New Jersey Supreme Court issued a unanimous opinion holding that same-sex couples have a constitutional right under the New Jersey constitution to receive the same legal benefits, protections and obligations provided to married opposite-sex couples. *Lewis v. Harris*, No. A-68-05, (N.J. Oct. 25, 2006). While the court was unanimous in this holding, the court split 4-3 in holding that same-sex couples did not have a right for their relationships to be classified as marriages under state law. The court left the decision of how to classify committed same-sex relationships up to the legislature, which now has 180 days to either amend the state's marriage laws to include same-sex couples or to create a statutory structure for same-sex couples that is equivalent in all respects to marriage.

The plaintiffs, seven same-sex couples, had been denied marriage licenses by the state. The court, in describing the

plaintiffs, recognized that the "seeming ordinariness of plaintiffs' lives is belied by the social indignities and economic difficulties that they face daily due to the inferior legal standing of their relationships compared to that of married couples." These difficulties included higher health insurance premiums for domestic partner coverage, adverse tax consequences and a lack of entitlement to family leave related to a same-sex partner.

There were no factual disputes in the case and the court's opinion and analysis focused squarely on the legal questions at issue. The plaintiffs argued that under the state constitution they had a liberty interest and a fundamental right to marry their chosen partners. They also argued that the denial of their right to marry, which is given to opposite-sex couples, violates the state constitution's equal protection guarantee. In defending its marriage laws, the state argued that same-sex marriage has "no historical roots" and that limitation of marriage to opposite-sex couples is a "rational exercise of social policy by the legislature." While the court found that plaintiffs had no fundamental right to marry a person of the same sex, it proceeded to consider whether the denial to same-sex couples of the rights of marriage offended the equal protection principles of the state constitution. The court's analysis separated plaintiffs' equal protection claim into two components: whether committed same-sex couples have a constitutional right to the benefits and privileges given to married opposite-sex couples; and, if so, whether plaintiffs have

the constitutional right to have their relationships recognized by the title of marriage.

The court's equal protection analysis began by recognizing that under New Jersey law it is "just as unlawful to discriminate against individuals on the basis of sexual orientation as it is to discriminate against them on the basis of race, national origin, age, or sex." After a review of state statutes, judicial opinions and legislative findings, the court found that committed same-sex couples had a strong interest in equality of treatment relative to committed opposite-sex couples.

The court then considered whether New Jersey law, even after passage of the Domestic Partnership Act (DPA), continued to restrict committed same-sex couples from enjoying the full benefits and privileges of marriage. The DPA, passed in 2004, granted limited rights to same-sex couples, such as hospital visitation, medical decision-making and the ability to claim joint status for state taxation purposes. The court observed, though, that even under the DPA, gay and lesbian couples were still denied "many benefits and privileges accorded to their similarly situated heterosexual counterparts." For instance, regarding workplace protections, the DPA does not require employers to provide health insurance coverage for an employee's domestic partner nor does it amend the New Jersey Family Leave Act to include domestic partners in the definition of "family member" in order to provide gay and lesbian employees family leave to take care of an ill domestic partner.

Further, due to the documentation needed, it is more difficult for same-sex couples to obtain a domestic partnership than it is for opposite-sex couples to obtain a marriage license. In light of the above, the court concluded that same-sex couples are not afforded the same benefits and protections available to married opposite-sex couples.

Continuing with its analysis, the court reasoned that because state law protects gay and lesbian individuals, there is "no rational basis for . . . giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships." The court also recognized the unfairness of current law to the children of same-sex couples, who would be denied certain benefits provided to children of opposite-sex parents. Thus, the court ultimately concluded that it "cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages same-sex couples."

The main disagreement among the justices was over whether, in granting same-sex couples all of the same benefits and privileges of marriage, the state was required to recognize same-sex couples under the classification of marriage. The court held that this was a decision to be made by the legislature and ordered it, within 180 days, to either amend the state's marriage laws to include same-sex couples or to enact a parallel statutory structure for same-sex couples. While the minority opinion argued that same-sex couples should be allowed to marry under state law,

the court's opinion, nevertheless, requires the state to "provide committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples."

Whatever path the New Jersey legislature decides upon, a multitude of New Jersey laws will be affected, including many that affect the workplace. Whether the legislature allows for marriage (similar to Massachusetts) or some type of civil union arrangement (similar to Connecticut or Vermont), New Jersey employers will almost certainly need to provide or extend their benefits coverage, expand their leave policies and make other changes in their workplace policies in order to treat same-sex couples the same as married opposite-sex couples. In addition, employers located outside of New Jersey may need to make similar changes for their New Jersey employees. And because federal law does not recognize same-sex marriage or civil unions, the changes in New Jersey law will also put affected employers in the position of needing to recognize same-sex couples for some purposes but not for others.

The New Jersey laws impacted by marital status will receive much scrutiny and undergo much debate in the coming weeks. In light of the changing nature of New Jersey law after this decision, WolfBlock is planning a seminar in May 2007 (after the 180-day time period has elapsed) as part of its WolfInstitute in order to address how the court decision and the legislature's implementation of it will affect employers. In the meantime,

## Question: When is a woman of color like a white male?

Answer: Sometimes, only during the resumé review.

Candidate X looks fantastic on paper. A woman of color, she has all the right credentials and experience, and her background seems a perfect fit for the position you are seeking to fill. But, after the initial interview by a white male interviewer, suddenly, she's no longer a contender for the job. What happened? "My gut tells me that she's just not the right fit for this job," you are told. Did her race and/or gender contribute, consciously or unconsciously, to that conclusion?



The EEOC singled out this so-called "good-fit" rationale earlier this year in its updated Compliance Manual. The EEOC reminded employers of the dangers inherent in hiring on what it calls the "like-me" bias, particularly when it concerns the issue of race or other impermissible factors. While the EEOC concludes that it is a human tendency, often unconscious, to seek out employees who are like oneself, doing so when there is a lack of diversity from top to bottom in an organization can set the stage for potential systemic discrimination.

In the enclosed article, "'Good Fit' Isn't Always Legit," Jonathan Segal points out that it is possible for employers to avoid unconscious systemic bias by developing consciously systemic checks without inadvertently creating

reverse discrimination claims. The article walks readers through steps and practices employers can implement to minimize the potential for any "like-me" hiring bias in their organizations.

This article, the second of a two-part series on systemic discrimination in hiring practices, first appeared in the November 2006 issue of *HR Magazine*. Part one, "Land Executives, Not Lawsuits," appeared in the October 2006 issue of *HR Magazine* and was included as an insert in the October issue of WolfBlock's Employment Services Update.

If you have questions or would like more information about anything contained in the article, please contact the author directly at 215-977-2628 or [jsegal@wolfblock.com](mailto:jsegal@wolfblock.com).

should you have any questions about the *Lewis v. Harris* decision, the distinctions between and the potential implications of same-sex marriage and civil-union-type statutory schemes or other questions relating to sexual orientation or same-sex couple recognition in the workplace, please contact Marc Scheiner at 215-977-2697 or [mscheiner@wolfblock.com](mailto:mscheiner@wolfblock.com) or any other member of the Employment Services Practice Group.

### Protection for Plan Fiduciaries: Department of Labor Issues Proposed Default Investment Guidance for 401(k) and 403(b) Plans

On the heels of the enactment of the Pension Protection Act of 2006 (the PPA), the Department of Labor (the DOL) has issued proposed default investment guidance for 401(k), 403(b) and other employee-directed plans

covered by the PPA. The guidance is intended to protect plan fiduciaries that provide approved default investments (qualified default investment alternatives or QDIA) for participants who fail to elect affirmatively an investment option. A plan fiduciary who complies with the proposed regulations will not be liable for any loss that occurs as a result of such investments. Plan fiduciaries, however, remain responsible for the prudent selection and

monitoring of the QDIA. Although these regulations are in proposed form, it is expected that the DOL will issue final regulations no later than early 2007.

Prior to the enactment of the PPA, fiduciaries of individual account plans that had default investment provisions assumed fiduciary liability for decisions made on behalf of those participants. The PPA amended Section 404(c) of ERISA to provide relief for these fiduciaries.

Under the proposed regulations, in order for a fiduciary to qualify for relief from liability for a participant's plan losses arising from investments in a default fund, the following conditions must be met:

- The participant's assets must be invested in a QDIA. A QDIA is an investment alternative that does not hold or permit the acquisition of most securities of the employer;
- The investment must not impose financial penalties or otherwise restrict the ability of

a participant to transfer, in whole or in part, his or her investment from the investment alternative to any other investment alternative available under the plan;

- The investment must be managed by certain investment managers or an investment company registered under the Investment Company Act of 1940;
- The investment must be diversified in order to minimize the risk of large losses;
- The investment must be one of the following three types of investment products:
  1. A "life cycle" or "targeted-retirement-date" fund or account that provides varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date or life expectancy;
  2. An investment product, such as a "balanced fund," which is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants in the plan as a whole; or
  3. An investment product, such as a "managed

account," in which an investment manager allocates the assets of a participant's individual accounts to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures.

- The participant must have had the opportunity to direct the investment of the assets in his or her account but did not direct the investment of the assets;
- At least 30 days in advance of the first such investment and within at least 30 days in advance of each subsequent plan year, the participant must be furnished with a summary plan description, summary of material modification or other notice that meets the requirements set forth in the proposed regulation;
- Any material provided to the plan relating to the participant's investment in a QDIA must be provided to the participant; and
- The plan must provide plan participants with a broad range of investment alternatives.

The proposed regulations make clear that a money market or a stable value fund will not qualify as a QDIA. This has created controversy because most plans utilize money market or stable value funds as a plan's default fund, and thus will not be afforded

### **WolfBlock's Employment Services Newsletter Available Via E-Mail**

If you would like to receive this newsletter and other employment-related alerts and news from WolfBlock via e-mail, please contact us at [wbmarketing@wolfblock.com](mailto:wbmarketing@wolfblock.com) with the subject line "ESUG Subscriber" and provide us with your e-mail address.

the fiduciary liability protection under ERISA Section 404(c). The final regulations, due by early 2007, may add additional funds that qualify as a QDIA. We recommend that plan sponsors with a default investment feature contact their investment professionals to review the current default investment fund offered to plan participants and, if necessary, to discuss the changes to the plan's investment lineup that would be implemented after the regulations become final. If the plan's default investment fund does not meet the requirements as outlined above to be a QDIA, the plan's investment committee should meet to review the plan's investment policies in accordance with the final regulations.

For more information, contact Melissa Kurtzman at 215-977-2072 or [mkurtzman@wolfblock.com](mailto:mkurtzman@wolfblock.com), Kathryn Larkin at 215-977-2018 or [kelarkin@wolfblock.com](mailto:kelarkin@wolfblock.com) or any other member of the Employee Benefits Practice Group.

The logo for Wolf Institute, featuring the name "Wolf Institute" in a serif font. The word "Wolf" is in a lighter shade of gray, and "Institute" is in a darker shade. The background behind the text consists of several vertical bars of varying shades of gray and black.

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Visit our web site in January 2007 for our spring seminar course listing.

Contact Allison Bean (215.977.2007 or [abean@wolfblock.com](mailto:abean@wolfblock.com)) for more information.

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# EMPLOYMENT SERVICES PRACTICE GROUP

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