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Retirement Plan Developments

Fiduciary Rule – Possible Changes Coming

Recent activities in Congress and at the Department of Labor ("DOL") indicate that changes to the DOL's fiduciary rule may be coming.

First, the U.S. House of Representatives passed the Financial CHOICE Act (the "CHOICE Act") to repeal the fiduciary rule, which went into effect on June 9, 2017. The bill would also replace much of the Dodd-Frank Wall Street Reform Act. The CHOICE Act still requires approval by the U.S. Senate and the signature of the President before becoming law.

Second, on June 29, 2017, the DOL issued a request for information ("RFI") concerning the fiduciary rule. The RFI seeks comments regarding additional exemptions from the fiduciary rule, as well as the advisability of extending the transition period beyond January 1, 2018.

Tenth Circuit Rules ESOP Plaintiffs Must Prove All Elements, Including Causation, in a Breach of Fiduciary Duty Claim

The Tenth U.S. Circuit Court of Appeals recently ruled, in *The Pioneer Centres Holding Company Employee Stock Ownership Plan and Trust and its Trustees vs. Alerus Financial, N.A.*, that an ESOP must prove all elements of a breach of fiduciary claim, including that the defendant's conduct resulted in losses, for the action to proceed.

In this case, the plan was a partial owner of several automobile dealerships. The plan sought to acquire the remaining interests in the dealerships from the company's founder and hired Alerus Financial to act as a transactional trustee. However, Alerus and the company's founder could not agree on the terms and so the transaction was abandoned. The company's founder later sold his remaining interest to a third party at a price $10 million greater than the plan would have paid for the interests in the dealerships, and the plan sued Alerus for breach of fiduciary duty, alleging that Alerus had impeded the sale.

The district court ruled that the plan had not demonstrated that Alerus's actions resulted in any loss to the plan. On appeal, the Tenth Circuit agreed with the

district court, and further stated that nothing in the language of ERISA section 409(a) or in its legislative history indicates a Congressional intent to shift the burden to the fiduciary to disprove causation. Where the statute is silent, the court reasoned, the default rule is that plaintiffs bear the risk of failing to prove their claims.

The Tenth Circuit's ruling is consistent with a majority of other U.S. Circuit Courts that have considered the issue. A minority of circuits have ruled that a defendant in a breach of fiduciary claim must disprove causation, as opposed to the plaintiff proving causation, in order for a breach of fiduciary claim to proceed.

Employer Cannot Challenge Payment Obligations Under Rehabilitation Plan

The Eleventh U.S. Circuit Court of Appeals struck down a contributing employer's suit against a multiemployer plan challenging a contributing employer's payment obligations under a rehabilitation plan.

In *WestRock RKT Company v. Pace Industry Union-Management Pension Fund*, a multiemployer pension plan adopted a rehabilitation plan requiring, among other things, that any withdrawing employer pay a portion of the fund's accumulated funding deficiency. WestRock, one of the plan's contributing employers, sued the plan, seeking a declaratory judgment that the rehabilitation plan violated ERISA.

WestRock argued that ERISA section 502(a)(10) gave it a broad cause of action to raise procedural and substantive challenges to the plan's actions when adopting or updating a rehabilitation plan. WestRock also argued that ERISA section 4301, which authorizes an employer to bring certain actions under the withdrawal liability rules, permitted it to challenge the rehabilitation plan on grounds that it adversely affected WestRock. In defense, the plan argued that ERISA section 502(a)(10) only provides a narrow cause of action where the plan has not followed specific statutorily-required procedures.

The Eleventh Circuit found in favor of the plan, stating that WestRock did not allege that the rehabilitation violated ERISA, either procedurally or substantively, in a manner so as to allow it to bring an action under section 502(a)(10). The court also found that WestRock's challenge under section 4301 was not valid because the rehabilitation plan did not fall under the withdrawal liability rules.

Excess Fee Suit Filed against Washington University

Washington University in St. Louis faces a proposed class action suit substantially similar to the claims recently brought against Duke and Emory Universities. (The

Duke and Emory cases allege that the schools' 403(b) retirement plans charged excessive fees and offered poor investment options. A district court recently ruled that these claims could continue.) Since 2016, many universities, including Columbia, Cornell, Princeton and Yale, have been sued on similar claims. The allegations include claims that plan fiduciaries breached their duties by selecting underperforming investment options and by failing to leverage their plans' size to negotiate lower record-keeping fees.

Health and Welfare Plan Developments

U.S. Senate Releases its Draft Healthcare Bill

On June 22, 2017, the U.S. Senate released a discussion draft of the Better Care Reconciliation Act of 2017 ("BCRA"). This follows the passage of the U.S. House of Representatives' bill, the American Health Care Act ("AHCA") in early May.

There are several key differences between the Senate's BCRA and the House's AHCA:

- The BCRA does not modify the Affordable Care Act's ("ACA") approach to pre-existing conditions—the ACA's prohibition on pre-existing condition exclusion remains intact. The AHCA permits insurers to impose a 30% surcharge for up to one year on individuals who have a break in coverage.
- The BCRA retains the ACA's refundable tax credit structure but caps eligibility at 350% of the federal poverty line (reduced from the ACA's 400% limit). The BCRA also provides that individuals who receive coverage under an employer-sponsored health plan are blocked from receiving the tax credit, regardless of the plan's cost or actuarial value. The AHCA replaces the ACA tax credit structure with a flat tax credit generally based on age.

The BCRA permits the creation of "small business health plans," similar to the current ability to join multiple employer welfare arrangements but with reduced requirements. There is no similar provision in the AHCA.

After a number of Republican Senators refused to publicly support the BCRA, a vote on the bill was delayed until after the Senate's 4th of July recess. It is likely further modifications will be made to the BCRA prior to a vote by the Senate; however, it is unclear whether the Senate will bring the BCRA to a vote before its August recess.

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DOL Issues 38th ACA FAQ

On June 16, 2017, the DOL, in conjunction with the Internal Revenue Service ("IRS") and Department of Health and Human Services ("HHS"), released the 38th FAQ regarding implementation of the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"), as amended by the ACA and the 21st Century Cures Act. This is the first ACA FAQ issued since the new administration took office.

The FAQ consists of two key items. First, the DOL is soliciting comments on a draft model form that participants can use to request information from their health plan or issuer regarding non-quantitative treatment limits ("NQTLs") that could affect their mental health/substance use disorder ("MH/SUD") benefits, or to obtain documentation to support an appeal involving MH/SUD benefits.

Second, the FAQ confirms that any benefits offered under a plan or insurance coverage for treatment of an eating disorder will be subject to the MHPAEA. The FAQ clarifies that eating disorders are mental health conditions, and therefore treatment of an eating disorder is a "mental health benefit" for purposes of the MHPAEA.

HHS Issues Checklist for Cyber Attacks

The HHS Office of Civil Rights ("OCR") released guidance regarding the steps a HIPAA-covered entity or business associate should take following a cybersecurity-related incident. In brief, an entity:

1. must execute its response and mitigation procedures and contingency plans;
2. should report the crime to other law enforcement agencies;
3. should report all cyber threat indicators to federal and information-sharing and analysis organizations; and
4. must report the breach to OCR as soon as possible, but no later than 60 days after the discovery of a breach affecting 500 or more individuals.

The guidance also notes that OCR considers all mitigation efforts taken by the entity during a breach investigation.

Summary Plan Description May Serve as Plan Document

The Fifth U.S. Circuit Court of Appeals upheld a lower court's holding that a plan's summary plan description ("SPD") could serve as a plan's written instrument under ERISA.

In *Reha v. Alan Ritchey, Inc. Welfare Benefit Plan*, the spouse of a plan participant settled a malpractice claim and the plan sought reimbursement of covered medical expenses under the SPD's subrogation and reimbursement provision. The SPD referenced an "official Plan Document" that was to control in the event of a discrepancy between the SPD and the plan document, but the plan document did not in fact exist.

The spouse refused to reimburse the plan, arguing that the plan could not seek reimbursement in the absence of a formal plan document. The Fifth Circuit rejected the spouse's argument and concluded that the SPD could serve as the plan's written document. Further, the Fifth Circuit noted that, although the reference to a nonexistent plan document was "sloppy," it did not make the plan's terms unenforceable.

Upcoming Compliance Deadlines and Reminders

2016 Form 5500 for Calendar-Year Plans. Plan administrators generally have seven months after the end of a plan year to file a Form 5500 (e.g., for plan years ending December 31, 2016, the Form 5500 deadline is July 31, 2017). Plan administrators can apply for a deadline extension to October 15, 2017, by filing Form 5558 by July 31, 2017.

Upcoming Health Plan Compliance Deadlines and Reminders

1. **PCORI Fee Due July 31.** Plan sponsors of self-funded plans must report and pay the annual Patient-Centered Outcomes Research Institute ("PCORI") fee by filing IRS Form 720 by July 31, 2017. The PCORI fee is based on the average number of lives covered under the plan during the plan year that ended in the preceding calendar year (i.e., for calendar-year plans, the plan year that ended December 31, 2016). The PCORI fee sunsets with plan years ending before October 1, 2019.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. Annual Funding Notice. Calendar-year defined benefit plans with more than 100 participants must provide the annual funding notice to required

recipients within 120 days of the end of the plan year. Plans with 100 or fewer participants generally have until the Form 5500 filing deadline to provide the annual funding notice.

2. Change in Due Date for FBAR Filing for Certain Foreign Investments. In prior years, persons who have a financial interest in, or signature or other authority over, foreign financial accounts were generally required to report on the Treasury Department Form TD F 90 22.1 (the "FBAR") by June 30 of each year. As a result of a recent law change, beginning in the 2017 calendar year, the annual due date for filing FBAR reports was moved up from June 30 to April 15. However, the U.S. Department of the Treasury recently granted an automatic extension for filing the FBAR to October 15 (i.e., specific requests for this extension are not required).While investments in most foreign hedge funds and private equity funds are not required to be reported on the FBAR, other accounts in foreign jurisdictions might be. Plan sponsors should consult with tax advisors or legal counsel to determine if any FBAR filing is required to be filed by the October 15, 2017 deadline.