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Benefits Counselor – 2022 Year-End

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RETIREMENT PLAN DEVELOPMENTS

PBGC Proposes Rule on Actuarial Assumptions for Determining an Employer's Withdrawal Liability

The Pension Benefit Guaranty Corporation (PBGC) has proposed a rule to clarify permissible interest rate assumptions to calculate an employer’s withdrawal liability under a multiemployer pension plan. PBGC published these proposed rules in response to increased litigation over withdrawal liability assessments.

The Employee Retirement Income Security Act of 1974 (ERISA) authorizes the PBGC to regulate the actuarial assumptions and methods to determine an employer's withdrawal liability. Under the proposed rule, plan actuaries may use the settlement rate presumptions issued by the PBGC, the interest rate used for minimum funding purposes for the plan year in which the withdrawal liability is determined, or any rate in between. If finalized, PBGC expects the rule to decrease litigation risk for plans and increase withdrawal liability assessments to discourage employers from exiting plans.

The proposed rule would apply to withdrawal liability determinations for employer withdrawals occurring on or after the effective date of the PBGC’s final rule.

IRS Delays Changes to Required Minimum Distribution Rules

The Internal Revenue Service (IRS) announced in Notice 2022 53 that it will issue final regulations related to required minimum distributions (RMDs) that will apply beginning in the 2023 distribution calendar year. The IRS also provided relief for plans and certain individuals related to RMDs for 2021 and 2022.

As we previously discussed here and here, the IRS published proposed regulations regarding RMDs early in 2022 to implement the SECURE Act changes. The regulations, when finalized, were to apply beginning with the 2022 distribution calendar year. However, some commentators advised the IRS that they thought the new RMD rule would apply differently than what the IRS intended.

In response, the IRS confirmed that final regulations regarding RMDs will apply no earlier than the 2023 distribution calendar year. Further, the IRS provided some

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transition relief to defined contribution plans that did not make an RMD that would have been required under the proposed regulations and to certain taxpayers that did not take such an RMD.

DOL Issues Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

The U.S. Department of Labor (DOL) released a final rule under ERISA clarifying that fiduciaries may consider climate change and additional environmental, social and governance (ESG) factors when they make investment decisions and when exercising shareholder rights such as proxy voting. The final rule supersedes previous guidance from the DOL released in late 2020, which also addressed ERISA fiduciaries' obligations when selecting investments, voting proxies and exercising other shareholder rights. The final rule makes several modifications to the approach put forward in the 2020 guidance, including the following:

- The 2022 final rule replaces the requirement in the 2020 guidance that fiduciaries consider only pecuniary factors in selecting investments and investment courses of action with a risk return analysis that clarifies such factors may include the economic effects of climate change or other ESG considerations.
- The 2022 final rule removes the special rules in the 2020 guidance that restricted offering qualified default investment alternatives (QDIAs) that included, considered or indicated use of non pecuniary factors. Under the 2022 final rule, the standards applied to offering QDIAs are the same as those that generally apply to the selection of investments or an investment course of action.
- The 2022 final rule replaces the "tiebreaker" test set forth in the 2020 guidance with a standard that requires the fiduciary to prudently conclude that competing investments or investment courses of action shall equally serve the interests of a plan over an appropriate time horizon. The 2022 final rule also eliminates the heightened documentation requirements associated with the application of the tiebreaker test when considering climate change or other ESG factors.
- The 2022 final rule clarifies that ERISA fiduciaries will not violate the duty of loyalty solely by considering participants' non-financial preferences when establishing a participant directed defined contribution plan menu.
- The 2022 final rule removes the statement in the 2020 guidance that stated,

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"the fiduciary duty to manage shareholder rights [. . .] does not require the voting of every proxy or the exercise of every shareholder right," and suggests that such statement may be misread to indicate that fiduciaries should be indifferent to the exercise of their shareholder rights. The 2022 final rule removes two proxy non voting safe harbors that permitted plan sponsors to adopt a non voting position where the proposal was not substantially related to the issuer's business activities or anticipated to have a material effect on the value of the investment or if the plan's holding in a single issuer relative to the plan's total investment assets was below a quantitative threshold.

- The 2022 final rule also removes the 2020 guidance's requirement that plans maintain records on proxy voting activities and special monitoring obligations when utilizing investment managers and proxy voting firms.

The new rules will be effective 60 days from publication in the Federal Register.

DOL Proposes Revisions to the VFCP

On November 18, 2022, the DOL proposed a restated Voluntary Fiduciary Correction Program (VFCP) to make it easier for fiduciaries to correct certain errors and breaches than under the current VFCP protocols. The proposal would allow plan sponsors to self-correct late transmittal of employee contributions when the "lost earnings" due to the plan does not exceed $1,000. Rather than filing a full VFCP application, the plan sponsor would provide notice to the DOL, allowing the plan sponsor to obtain no-action relief. Separately, the proposal seeks to expand the scope of specified transactions that would be eligible for correction through VFCP. For instance, an innocent plan official may be eligible to apply for VFCP relief in certain situations even if there is evidence of a criminal violation. Additionally, a service provider may be able to submit an application covering several plans for the same problematic transaction where one or more plans are under investigation. Comments from the public about the proposed VFCP must be submitted by January 17, 2023.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Cafeteria Plan Changes Allowed Following Regulations to Correct "Family Glitch" for Premium Tax Credit Eligibility

The IRS published final regulations on eligibility for the premium tax credit (PTC) to end the "family glitch." Starting in 2023, for purposes of determining PTC eligibility, the "affordability" of employer sponsored minimum essential coverage for family members of an employee is determined based on the employee's share

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of the cost of covering the employee and those family members, not the cost of covering the employee alone.

These final regulations do not directly affect plan sponsors, who are still considered to offer affordable coverage based on the cost of self only coverage for the employee. The IRS specifically noted that the final regulations have no effect on Form 1095 B and Form 1095 C reporting, and that it does not intend to revise the Forms as a result of the new regulations. Additionally, the IRS confirmed that employers may continue to use the safe harbors to determine affordability.

Plan sponsors may, however, decide to amend their cafeteria plans based on IRS Notice 2022 41, which was published concurrently with the final regulations. The Notice allows participants to make a prospective election change to revoke their election for other than self only coverage under a group health plan (that is not a health flexible spending arrangement (FSA) and provides minimum essential coverage) in order to allow one or more family members to enroll in a Qualified Health Plan (QHP) through an Exchange. The employee could also then prospectively elect into self only coverage (or family coverage including one or more already covered individuals) under that health plan. Cafeteria plans must be amended to provide for this election change event. The prospective elections can then be effective on or after January 1, 2023.

The specific conditions that must be met for an employee to be allowed to make this type of election change are:

- One or more related individuals are eligible for a special enrollment period to enroll in a QHP, or one or more already covered related individuals seek to enroll in a QHP during the Exchange's annual open enrollment period; and
- The election change corresponds with the related individual's intended enrollment for QHP coverage effective by the next day after the last day of the original, revoked coverage. In other words, there can be no gap in coverage between the employer's group health plan and the QHP. Plans can rely on an employee's reasonable representation for this purpose.

Employers that decide to allow an election change for this reason will need to amend their cafeteria plans. Employers may adopt the new rule for a plan year that begins in 2023 at any time on or before the last day of the plan year that begins in 2024. Otherwise, employers must amend their cafeteria plans on or

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before the last day of the plan year in which the elections are allowed. The amendment may be effective retroactively to the first day of that plan year, as long as the cafeteria plan operates accordingly and the employer informs participants of the amendment.

OCR Provides Insight on HIPAA Rules Requirements for Tracking Technologies

The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) issued a bulletin to highlight obligations of entities covered under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) when using online tracking technologies that collect information and track user data. OCR confirms that the HIPAA Privacy, Security, and Breach Notification Rules (HIPAA Rules) apply to online tracking technologies when the information collected contains protected health information (PHI). As such, regulated entities may not use tracking technologies in a manner that would cause impermissible disclosures of PHI. The bulletin further addresses how HIPAA Rules apply to regulated entities' use of tracking technologies. Regulated entities have certain requirements they must fulfill when using tracking technologies such as:

- Ensuring all disclosures of PHI to tracking technology venders meet HIPAA requirements;
- Obtaining business associates agreement with tracking technology venders that meet the criteria of a "business associate"
- Including the use of tracking technologies in the regulated entity's risk analysis and risk management procedures; and
- Providing breach notification to affected individuals of an unauthorized or impermissible disclosure of PHI to a tracking technology vendor that compromises the security or privacy of PHI.

The OCR administers and enforces all HIPAA Rules by investigating breach reports and claims of noncompliance against regulated entities.

HHS Seeks to Align HIPAA with Federal Substance Use Disorder Laws

The HHS issued a Notice of Proposed Rulemaking for changes to 42 C.F.R. Part 2, which would revise the federal substance use disorder regulations to decrease the administrative burdens on patients and providers while ensuring compliance with HIPAA. The proposed rule incorporates several noteworthy changes, such as easing the ability to share Part 2 records for treatment, payment and health care

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purposes and giving self-pay patients the right to restrict disclosures of Part 2 information to health plans. The proposed rule would ensure that Part 2's Patient Notice requirements are consistent with HIPAA's Notice of Privacy Practices and that Part 2 accounting requirements will be aligned with HIPAA's final rule on accounting matters. Additionally, the proposed rule would subject Part 2 violations to the HIPAA Breach Notification Rule and the HHS would have the authority to enforce Part 2 violations through substantial civil penalties. HHS is accepting public comments on the proposed rule through January 21, 2023.

GENERAL BENEFITS DEVELOPMENTS

IRS Announces 2023 Limits

The IRS has announced the dollar limits on benefits and contributions under qualified retirement and the limitations that apply to flexible spending arrangements, qualified small employer health reimbursement arrangements (QSEHRAs), qualified transportation fringe benefits and adoption assistance benefits.

	2023	2022
Qualified Retirement Plans		
Maximum annual benefit under a defined benefit plan	$265,000	$245,000
Maximum annual addition for a defined contribution plan	$66,000	$61,000
Maximum 401(k), 403(b), and 457 plan elective deferrals	$22,500	$20,500
Defined compensation catch-up contribution limit	$7,500	$6,500
Annual compensation limit	$330,000	$305,000
Key employee annual compensation threshold	$215,000	$200,000
Highly compensated employee annual compensation threshold	$150,000	$135,000
FSAs, QSEHRAS and Fringe Benefits		

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	2023	2022
Employee contributions to health FSAs	$3,050	$2,850
FSA carryover maximum	$610	$570
QSEHRA maximum reimbursement	$5,850/person $11,800/family	$5,450/person $11,050/family
Qualified transportation fringe benefits	$300/month	$280/month
Adoption Assistance	$15,950	$14,890

SEC Implements Final Clawback Rules

On October 26, 2022, the U.S. Securities and Exchange Commission (SEC) approved final rules requiring public companies to comply with new policies to "clawback" extra incentive based compensation from executive officers in the event of an accounting restatement, regardless of fault for the restatement. The final rules apply broadly to all public companies. These new clawback rules include certain disclosures in the company's annual report on Form 10 K and proxy statement for filing the clawback policy as an exhibit to the Form 10 K and reporting whether the filing contains any corrections to errors on previous financial statements and if those errors triggered a clawback analysis.

The final rules are effective 60 days after the date they are published in the Federal Register; however, stock exchanges will have up to 90 days after the publication date to submit their proposed listing standards that require approval from the SEC. Once approved, companies that have been listed will have 60 days to adopt clawback policies.

SEC Votes to Expand Proxy Voting Reporting and New Say-On-Pay Reporting Requirements

On November 2, 2022, the SEC adopted final form and rule amendments that (1) expand the proxy voting information that registered investment funds report on Form N PX under the Investment Company Act; and (2) require institutional investment managers that file Form 13F reports to begin reporting annually on Form N PX how they voted proxies relating to shareholder advisory votes on executive compensation matters. Reporting persons are now required to:

- Categorize each proxy voting matter by type;

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- Disclose the number of shares that were loaned and not recalled;
- Report information using specific data language;
- Identify proxy voting matters using the same language and order as on the issuer's form of proxy; and
- Disclose the number of shares voted and how those shares were voted.

The final amendments will permit joint reporting by affiliated managers and managers on say on pay votes on Form N PX and will offer the opportunities for increased levels of confidentiality for managers. The SEC is delaying the effective date of the final amendments until July 2024 in order for reporting persons to have time to properly prepare.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Retirement Plan Compliance Deadlines and Reminders

Year End SECURE Act Deadline

December 31, 2022, remains the deadline for Code section 403(b) plans and governmental Code section 457(b) plans to make necessary amendments under the SECURE Act. Absent future guidance from the IRS, these plans must be amended by the end of this year to incorporate the SECURE Act's changes to required minimum distribution provisions.

New Withholding Rules and Forms for Retirement Plan Distributions

Effective January 1, 2023, plan sponsors must start using the new Form W 4R and revamped Form W 4P. Plan sponsors are also required to calculate withholding on annuity payments based on the new tables.

Temporary Relief from the Physical Presence Requirement Is Scheduled to Expire After December 31, 2022

Under Notice 2022-27, the IRS extended the temporary relief from the requirement that participant elections under qualified plans be witnessed in the physical presence of a notary or plan representative to December 31, 2022. Notice 2020-42 allowed plan representatives to witness participant elections through an electronic system that relied on live audio-video conferencing technology (e.g., Zoom) as long as it satisfied certain requirements. Absent further extension, the physical presence requirement for such elections will be in effect

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again as of January 1, 2023.

Health Plan Compliance Deadlines and Reminders

Prescription Drug Data Reports for 2020 and 2021

These reports are required under the Consolidated Appropriations Act, 2021, and must be filed by December 27, 2022. Detailed reporting instructions are available on the Centers for Medicare and Medicaid Services website and may be downloaded here.

Cafeteria Plan Amendment Deadline

The Consolidated Appropriations Act, 2022 (CAA) permitted plan sponsors to promptly implement certain mid year changes to their cafeteria plans during the 2020 and/or 2021 plan years without first having to adopt plan amendments. Employers that implemented such relief are required to adopt certain retroactive plan amendments by December 31, 2022.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

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