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Benefits Counselor – April 2019 Update

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GENERAL EMPLOYEE BENEFITS

IRS Announces Changes to EIN Application Process

The Internal Revenue Service ("IRS") has announced that beginning May 13, 2019, only individuals with a valid IRS tax identification number or Social Security number may request an Employer Identification Number ("EIN") to use as the "responsible party" on the EIN application. An EIN is a nine digit tax identification number assigned to various entities, including corporations, partnerships, and employee retirement plans, for tax filing and reporting purposes. Generally, the designated responsible party is the person who ultimately owns, controls or exercises ultimate effective control over the entity. The new rule is intended to prohibit entities from using their own EINs to obtain additional EINs, which will provide additional security to the EIN process and increase transparency.

DOL Clarifies Claims Procedure Rules for Authorized Representatives

The Department of Labor ("DOL") has released an information letter regarding an entity's ability to act as an authorized representative for participants and/or beneficiaries in group health plans subject to the Employee Retirement Income Security Act ("ERISA"). The DOL issued the letter in response to an inquiry by an entity that serves as a "patient advocate and healthcare claim recovery expert" for initial claims and appeals of adverse benefit determinations. The information letter explains that, under the DOL claims procedure rules, plans cannot preclude participants and/or beneficiaries from appointing an authorized representative of their choice to act on their behalf throughout the claims process. However, plans may establish reasonable procedures for determining whether an authorized representative has been designated (other than in certain circumstances involving urgent care); provided the procedures are clearly set out in the plan's claims procedures and summary plan description. The information letter further notes any communication or notices from the plan should be directed to a properly designated authorized representative unless the claimant specifically directs otherwise.

RETIREMENT PLAN DEVELOPMENTS

Tenth Circuit Upholds Decision Limiting Great-West Fiduciary Liability

In *Teets v. Great West Life*, Case No. 18 1019 (10th Cir. Mar. 27, 2019), the

U.S. Court of Appeals for the Tenth Circuit affirmed a district court decision holding that Great West Life & Annuity Insurance Co., an investment fund manager, was not liable to a class of plan participants as either a functional ERISA fiduciary or a nonfiduciary party in interest to prohibited transactions when it set the rate at which 401(k) participants would receive profits under its stable value fund. By way of background, Great West invested participant money in its stable value fund, which earned interest at a rate set quarterly by Great West. Plans were permitted to terminate their relationship with Great West due to changes to the stable value fund, and participants were permitted to withdraw both principal and accrued interest at any time without paying a fee, subject to a 12 month waiting period. In 2016, participants filed a class action against Great West, alleging the mandatory 12 month waiting period constituted a violation of Great West's fiduciary duties under ERISA, or, in the alternative, constituted a violation of ERISA's prohibited transaction rules with respect to a nonfiduciary party in interest. The district court held that, notwithstanding the 12 month waiting period, Great West was not a functional fiduciary under ERISA because participants could "vote with their feet" and take their money out of the fund at any time. The district court also noted Great West's power to quarterly set the interest rate did not, in and of itself, make Great West a functional fiduciary. However, the district court did not address the question of whether Great West was a nonfiduciary party in interest to a prohibited transaction.

In affirming the district court's decision, the Tenth Circuit noted that, in addition to participants' ability to "vote with their feet," plaintiffs did not provide an example of participants who were deterred from withdrawing their money specifically because of the waiting period or any other restriction on competing for investment options. With respect to Great West's alleged nonfiduciary liability, the Tenth Circuit noted that to recover against a non fiduciary party in interest under ERISA section 502(a)(3), a plaintiff must properly assert the remedy sought constitutes appropriately equitable (not merely legal) relief. Because plaintiffs could not identify the particular property in Great West's possession over which plaintiffs could assert title or right to possession, the Tenth Circuit found plaintiffs failed to establish a required element of their claim and did not hold Great West liable as a nonfiduciary party in interest under the prohibited transaction rules.

IRS Issues Notice 2019-18 Permitting Retiree Lump-Sum Distribution Windows

On March 6, the IRS issued Notice 2019 18, permitting sponsors of defined

benefit plans to offer a one time only lump sum "window" to retired participants in pay status wherein they receive their full remaining benefit in a lump sum. Generally, the Internal Revenue Code's (the "Code") minimum required distribution regulations provide that pension annuity payments cannot be changed once they commence and must be "non increasing," with the exception of increased benefits resulting from a plan amendment. While a series of private letter rulings appeared to permit defined benefit plans to offer retirees a one time only window to receive their remaining benefit in a lump sum, the IRS subsequently issued Notice 2015 49, which announced the IRS's intent to amend the minimum required distribution regulations so as to disallow plan amendments permitting retiree lump-sum windows. Notice 2019 18 reverses this position, announcing that, while the IRS will continue to study the issue, it will no longer prohibit retiree lump-sum windows.

IRS Updates Operational Compliance List for 2019

The IRS has updated its operational compliance list for the 2019 calendar year. The IRS maintains the operational compliance list to identify changes to qualification requirements effective during a calendar year, including matters that may involve mandatory or discretionary plan amendments, thereby assisting plan sponsors and practitioners in maintaining compliance. The operational compliance list is only available on the IRS website and does not include annual, monthly or other periodic changes that routinely occur (*e.g.*, cost of living increases, mortality table adjustments). For the 2019 calendar year, the operational compliance list contains a variety of updates relating to hardship distributions under the Bipartisan Budget Act of 2018 and proposed regulations, relief for victims of certain hurricanes, and the extension of temporary nondiscrimination relief to closed defined benefit plans.

IRS Issues Updated Mortality Improvement Rates and Static Mortality Tables for Defined Benefit Plans

On March 22, the IRS issued Notice 2019 26, which specifies updated mortality improvement rates and static mortality tables to be used by nonmultiemployer defined benefit plans to calculate target minimum funding requirements and other items for valuation dates in the 2020 calendar year. The Notice also includes a modified unisex version of the mortality tables to be used in determining minimum present value under ERISA section 417(e) and provisions for distributions with annuity starting dates that occur during stability periods beginning in the 2020 calendar year.

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HEALTH AND WELFARE PLAN DEVELOPMENTS

D.C. Circuit Court Blocks Key Part of DOL Association Health Plan Rule

In *State of New York, et al. v. U.S. Dep't of Labor, et al.*, Case No. 1:18 cv 01747 (D.D.C. Mar. 28, 2019), a Washington D.C. federal judge struck down a key portion of the DOL's final rule regarding association health plans. Finalized in June 2018, the association health plan rule permitted small businesses and self employed individuals to band together to purchase employee health care plans from the large group insurance market. Several states sued the DOL, claiming the rule violated the text and purpose of the Affordable Care Act ("ACA") based on an impermissible interpretation of the definition of "employer" under ERISA. In a March 28 ruling, the D.C. Circuit agreed the DOL's expansion of the definition of "employer" under ERISA ignored "Congress's clear intent" to cover benefit plans for large companies, not plans for small businesses or individuals. Further, the court held, by permitting small businesses and individuals to purchase health care plans from the large group insurance market, the rule also violated the ACA, which clearly "distinguish[ed] rules that apply to individuals, small employers and large employers."

CMS Extends Nonenforcement Policy for Certain Plan Insurers

The Centers for Medicare and Medicaid Services ("CMS") has announced a further extension of its nonenforcement policy which allows states to permit insurers to renew certain nongrandfathered health insurance coverage that would be otherwise noncompliant with certain insurance market reforms under the ACA. Under the most recent guidance, states may permit insurers to again renew eligible nongrandfathered individual and small group policies that have been continuously renewed since January 1, 2014. Insurers may renew these policies for a policy year beginning on or before October 1, 2020, provided the policies end by January 1, 2021. Insurers relying on CMS's nonenforcement policy must also send an informational notice to affected individuals and employers noting the policies' status.

Court Rules Overly Restrictive Mental Health Claim Guidelines Violate ERISA

In *Wit v. United Behavioral Health*, 2019 WL 1033730 (N.D. Cal. 2019), a federal court ruled an insurer breached its fiduciary duty to health plan participants by adhering to restrictive internal claim guidelines that were inconsistent with generally accepted behavioral health care standards and was improperly influenced by financial incentives to lower costs. Participants brought a class action against the insurer, alleging the insurer (1) improperly denied benefits for

treatment of mental health and substance use disorders because the insurer's internal claim guidelines were inconsistent with the terms of its insurance policies (which required coverage consistent with generally accepted behavioral health care standards), (2) violated state laws requiring adherence to certain treatment standards for mental health and substance use disorders, and (3) violated its fiduciary duty under ERISA to administer the plan in the best interest of participants and in accordance with plan documents by arbitrarily and capriciously denying benefits.

The court analyzed the internal claim guidelines and found the review criteria deviated from generally accepted behavioral health care standards by emphasizing the treatment of acute symptoms and stabilizing crises while ignoring the treatment of underlying issues. The guidelines also imposed mandatory reductions in care levels even when generally accepted behavioral health care standards required a higher level of care, such as ceasing residential treatment coverage in favor of outpatient treatment. Further, the court found the insurer failed to adopt and follow standards of care required by state law because of the potential financial impact on the insurer. Ultimately, the court concluded that developing and adhering to unreasonably restrictive claim guidelines constituted a breach of fiduciary duty and arbitrary and capricious denial of benefits under ERISA, although the court has not yet considered the appropriate relief to be granted.

Sixth Circuit Holds General Durational Clause Governs Retiree Health Benefit Vesting Absent Explicit Language to the Contrary

In *Zino v. Whirlpool Corp.*, 2019 WL 644883 (6th Cir. 2019), a Sixth Circuit panel reversed a trial court's determination that three collective bargaining agreements ("CBA") vested lifetime health benefits for certain retirees. Following the U.S. Supreme Court's ruling in *M&G Polymers USA v. Tackett* and subsequent Sixth Circuit precedent, a CBA's general durational clause will govern the duration of retiree health benefits unless the CBA contains affirmative and explicit language to the contrary. In *Zino*, the three CBAs under consideration contained various provisions regarding the duration of retiree health benefits, including provisions that the company would pay retiree premiums in accordance with the terms of its overall welfare benefit plan, retirees would have the "opportunity to continue" their health coverage, and coverage for retirees under the CBA "shall be [for] pre 65 coverage only." The court found none of the three provisions contained adequately affirmative and explicit language to vest retiree benefits, noting a CBA must expressly state its general durational clause does not control the length of

retiree benefits or that such benefits continue past the CBA's expiration.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. Annual Funding Notice. Calendar year defined benefit pension plans with more than 100 participants must provide their annual funding notice to required recipients by April 30, 2019 (*e.*, within 120 days of the end of the plan year [December 31, 2018]). Defined benefit pension plans with 100 or fewer participants generally must provide their annual funding notice by the Form 5500 filing deadline.

2. Electronic VCP Submissions. The IRS recently updated the instructions to Form 8950 (Application for Voluntary Correction Program ("VCP")) to reflect the new electronic filing procedures. As of April 1, 2019, all VCP applications and materials (including the application, a description of failures, Form 14568 [Model VCP Compliance Statement], and other relevant materials) must be converted into a single .pdf file and uploaded electronically through pay.gov. As of April 1, 2019, the IRS will no longer accept paper VCP filings.