



Benefits Counselor – April 2024

RETIREMENT PLAN UPDATES

Plan Fiduciaries Face Lawsuits Over Pension Risk Transfers with Athene

In March 2024, three class action lawsuits were filed by former plan participants against plan fiduciaries in connection with pension risk transfers to Athene Holding Ltd. (Athene). The lawsuits allege that the plan fiduciaries violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA) in the selection of Athene as the annuity provider and engaged in prohibited transactions. AT&T Inc. and AT&T Services, Inc. (AT&T) and State Street Global Advisors Trust Company were hit with two lawsuits relating to a pension risk transfer in 2023. Former participants in Lockheed Martin Corporation's two pension plans filed a similar lawsuit relating to transfers to Athene that occurred in 2021 and 2022.

Seventh Circuit Reverses Decision on Withdrawal Liability

On March 22, 2024, the U.S. Court of Appeals for the Seventh Circuit reversed a district court's decision upholding an arbitration award of approximately \$2 million in withdrawal liability in *Bulk Transport Corp. v. Teamsters Union No. 142 Pension Fund*, No. 23-1563 (7th Cir. Mar. 22, 2024). The Seventh Circuit held that under the National Labor Relations Act (NLRA) and ERISA, the terms of pension contributions to multiemployer plans must be in writing and "cannot be changed orally." In this case, there was not a written collective bargaining agreement requiring contributions to the plan. However, the plan asserted that the employer had adopted the applicable agreement by its conduct. The Seventh Circuit held that the precise terms of pension contributions to the plan must be in writing and that any such written agreement controls over the parties' conduct. The court remanded the case to the district court and ordered the plan to return the withdrawal liability it had collected, with interest.

HEALTH AND WELFARE PLAN UPDATES

IRS Issues Reminder that Personal Expenses for General Health and Wellness are not Medical Expenses

The Internal Revenue Service (IRS) issued a news release on March 6, 2024, to remind taxpayers and administrators that health spending arrangements, such as flexible spending accounts (FSAs), health reimbursement arrangements (HRAs)

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and health savings accounts (HSAs), and personal expenses for general health and wellness are not considered medical expenses and, therefore, cannot be deducted or reimbursed under these health spending arrangements. The IRS issued this alert amid concerns that companies are misrepresenting the circumstances under which food and wellness expenses can be paid or reimbursed by health spending arrangements. For example, the IRS noted that some companies are offering to provide a doctor's note for a fee, cautioning that a doctor's note based on self-reported health information cannot convert personal expenses into medical expenses.

HHS Announces Investigation and Reminds HIPAA Covered Entities of Obligations Following Change Healthcare Cyberattack

Following the unprecedented February 2024 ransomware cyberattack on Change Healthcare, a technology unit of United Healthcare Group (UHG), the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced in a letter that it would investigate whether a breach occurred as well as Change Healthcare's and UHG's compliance with the privacy, security and breach notification requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). According to the letter, OCR is not prioritizing investigations of health plans, health care providers and business associates that were affected by the attack; however, such entities should ensure that business associate agreements are in place and that they provide timely breach notifications to affected individuals and HHS. The letter identifies several resources that HIPAA-covered entities and business associates may consult to prevent cyberattacks and comply with HIPAA.

HHS Updates Guidance Addressing Use of Tracking Technologies

On March 18, 2024, HHS issued a bulletin updating its December 2022 Bulletin regarding the obligations of HIPAA-covered entities and business associates (together, regulated entities) when using online tracking technologies. Tracking technologies are used to collect information about how users interact with regulated entities' websites or mobile applications ("apps"). HHS reminded regulated entities that HIPAA prohibits the use of tracking technologies in a manner that would result in impermissible disclosures of protected health information to tracking technology vendors or result in any other violations of the HIPAA privacy, security or breach notification rules.

Claim Alleging Discriminatory Coverage in Fertility Treatment Survives Motion to Dismiss

A district court concluded that a health plan participant plausibly alleged that the



plan's coverage standards for fertility treatments were discriminatory in violation of section 1557 of the Affordable Care Act (ACA). *Berton v. Aetna Inc.*, 2024 WL 869651 (N.D. Cal. 2024). After being denied coverage for her fertility treatment by her ERISA-covered health plan, a participant filed a class action lawsuit against Aetna (the plan's third-party administrator) alleging that the plan impermissibly discriminated against participants based on their sexual orientation. The plan required a determination of infertility as a condition for receiving coverage for fertility treatments. The participant alleged the plan imposed different and more onerous prerequisites for fertility treatment access on LGBTQ participants than those applicable to heterosexual couples. Aetna filed a motion to dismiss. The court denied the motion, concluding that the complaint pled sufficient facts to state a claim of discrimination.

GENERAL/PUBLIC PLAN/INVESTMENT UPDATES

ERISA Advisory Council Report on Recordkeeping in the Electronic Age

The ERISA Advisory Council recently issued a report to the U.S. Department of Labor (DOL) regarding the implications of the shift to electronic recordkeeping. Among other items, the ERISA Advisory Council explored: (1) the reliability, accuracy and completeness of electronic records; (2) the long-term availability and retention of plan and participant records; and (3) the transfer of records during plan-level transactions and duties of service providers during these transactions. The report identified various topics regarding which the DOL should provide guidance and education. For example, the report makes several recommendations related to guidance that clarifies the documents that must be retained under ERISA sections 107 and 209 and the retention periods for such documents. The report also discusses the importance of controls over electronic records and encourages the DOL to provide education in this regard. According to the report, future guidance needs to be flexible enough to accommodate rapidly evolving technologies.

COMPLIANCE DEADLINES AND REMINDERS

Retirement Plan Deadlines

Annual Funding Notice: Administrators of calendar-year defined benefit plans consisting of more than 100 participants must provide the Annual Funding Notice no later than April 29, 2024.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or



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Reinhart's [Employee Benefits Practice](#) is one of the largest and most tenured in the country:

Attorneys: Thomas Funk, Jeffrey Fuller, Kristin Bergstrom, Bennett Choice, John Mossberg, William Tobin, Jussi Snellman, Gregory Storm, Rebecca Greene, Lynn Stathas, Philip O'Brien, Beth Bulmer, Pete Rosene, Pam Nissen, Michael Joliat, Lucas Pagels, Andrew Christianson, Stacie Kalmer, Jessica Culotti, Bryant Ferguson, Justin Musil, Amanda Cefalu, John Barlament, Woomin Kang, Nicholas Zuiker, Martha Mohs, Katherine Kratcha, Karyn Durkin, Emily Pellegrini, Xavier Prather, Paul Beery, Joshua Hernandez, Matthew Barron.

Paralegals: Colleen McGuire Schmitz, Laurie Matthews, Mary Kaminski, Amanda Klein, Cheryl Yerkes, Stacy Heder, Pamela Martinez, Patrice Wright and Lucretia Anderson.