

Benefits Counselor August 2017

General Employee Benefits

Fifth and Ninth Circuits Rule Separate Plan Document Not Required

The Fifth Circuit confirmed that a plan document and a summary plan description ("SPD") need not be separate documents. In doing so, the Fifth Circuit rejected the argument that the Supreme Court's decision in *Amara* requires separate documents. The Fifth Circuit acknowledged that maintaining separate documents is the best practice, but concluded a failure to do so does not preclude enforcement of the SPD, provided all ERISA required plan document components are included.

The Ninth Circuit ruled that an SPD and trust agreement constitute an enforceable plan document under ERISA. Here, a health plan was established under a trust agreement and the plan's board adopted an SPD to address eligibility, benefits and other provisions. The Ninth Circuit found that because there was no separate plan document, the SPD could serve as the governing document.

Retirement Plan Developments

IRS to Streamline Its Retirement Plan Approval Process

The Internal Revenue Service ("IRS") recently combined its master and prototype and volume submitter programs. Plans will now be considered either standardized or nonstandardized. A nonstandardized plan may be customized, within IRS limits, without becoming an individually designed plan. The IRS announced several additional changes designed to encourage employers to transition to a preapproved plan document, including:

- 401(k) and profit sharing plans may be combined with money purchase plans;
- A nonstandardized plan that contains an employee stock ownership plan ("ESOP") may also include a 401(k) feature;
- A nonstandardized plan with a cash balance formula may include an interest crediting rate based on the actual return on plan assets;
- A nonstandardized plan may provide for hardship distributions regardless of whether it utilizes the safe harbor rules; and

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- Nonelecting church plans may submit an application for an opinion letter.

DOL Abandons Fiduciary Rule's Anti Arbitration Requirement

The Department of Labor ("DOL") reversed its position regarding the anti arbitration condition included in the best interest contract exemption. In a brief filed in a current Fifth Circuit case regarding the fiduciary rule, the DOL asserted that it would no longer prevent financial advisors from utilizing the best interest contract exemption if the agreement contained a class litigation waiver. This change in position is the latest example of the DOL's efforts to roll back the fiduciary rule.

Excess Fee Suit Filed Against Brown University

Participants in two Brown University plans recently filed suit against the University alleging plan fiduciaries breached their duties by offering too many duplicative investment choices with unreasonable and excessive fees. Since 2012, according to the complaint, the University has contracted with two recordkeepers, which led to an "inefficient and costly" investment structure. Since 2016, 15 other prominent colleges and universities have been sued based on similar claims.

American Airlines Reaches Settlement in 401(k) Fee Litigation

American Airlines recently agreed to a \$22 million settlement to resolve a proposed class action for breach of fiduciary duties. In *Main v. American Airlines, Inc.*, plaintiffs claimed the defendant breached its fiduciary duties by selecting high cost mutual funds offered by American Beacon, an investment manager affiliated with American Airlines. If approved, the settlement will be one of the largest in cases involving self dealing allegations for selecting in house investment funds.

Treasury Approves Second Application to Reduce Multiemployer Plan Pension Benefits

On July 20, 2017, the Department of the Treasury (the "Treasury") approved an application filed by the United Furniture Workers Pension Fund A to reduce participants' pension benefits. If approved by participants, the plan would be divided into an original plan and a successor plan. The successor plan, which would receive Pension Benefit Guaranty Corporation ("PBGC") financial assistance, would consist of guaranteed benefit liabilities of terminated vested participants, as well as a majority of benefits owed to retirees, beneficiaries, and participants receiving disability retirement benefits. Under the proposal, 71.5% of



participants will experience no reduction in benefits and only 6% of participants would receive a reduction of more than 10%.

Treasury Modifies Application Procedures for Benefit Reductions and Suspensions

The Treasury released Revenue Procedure 2017 43, which modifies the application procedures for multiemployer plans in critical or declining status to reduce or suspend pension benefits. The revised procedures require applicants to submit additional information in greater detail than did the previous procedures. Significant changes include:

- The application must now include a description of why the plan is in critical or declining status and the accountant's report from the plan's most recently filed Form 5500;
- Applications filed in conjunction with a PBGC request to partition a plan no longer must include a demonstration that the proposed benefit suspensions are distributed equally;
- Withdrawal liability payments must be broken down into employers which have already withdrawn and employers which are projected to withdraw, with a schedule of expected payments; and
- A new Appendix B is required to provide a detailed description of the actuarial assumptions used to project the plan's status, including supporting data, past experience regarding each assumption and the justification for such assumptions.

Health and Welfare Plan Developments

Affordable Care Act ("ACA") Reform Update

By a vote of 51 49, the U.S. Senate failed to pass the Health Care Freedom Act ("HCFA"), which would have repealed both the individual mandate and the employer mandate included in the ACA. The HCFA was introduced after it was determined that both the Better Care Reconciliation Act and the Obamacare Repeal Reconciliation Act failed to garner enough support to pass in the Senate.

On August 2, 2017, Senator Lamar Alexander announced that, beginning in September, the Senate Health Committee will hold bipartisan hearings focused on stabilizing the individual market and improving the ACA.

IRS Announces ACA Payments Due Despite Executive Order

Through multiple information letters, the IRS announced it will continue to enforce the ACA's payment provisions, including the employer shared responsibility and individual mandate. The IRS clarified that all provisions of the ACA remain enforceable and that it intends to enforce the ACA until the ACA is amended or repealed by Congress. These information letters directly contradict the executive order released earlier this year. Despite the conflicting notices from the government, clients should expect that the IRS will require payment of all applicable ACA mandated fees.

DOL to Review Disability Claims Rule

According to the Trump Administration's regulatory agenda, the DOL will review its latest claims procedure regulations for questions of law and policy. The final rule, effective January 18, 2017, amended the disability claims procedure to require full and fair reviews of disability claims regulations. Based on its review, the DOL will determine whether to amend or delay the final rule's applicability date of January 1, 2018.

Cigna Becomes First Insurer to Defeat "Wilderness Therapy" Challenge

In *Welp v. Cigna Health & Life Insurance Co.*, the Southern District of Florida held that the Mental Health Parity and Addiction Equity Act ("MHPAEA") does not require Cigna to pay for a man's treatment at a "wilderness therapy" program, an experiential, adventure based treatment aimed at behavior modification. Plaintiffs accused Cigna of implementing a blanket exclusion for all mental health services offered through a wilderness therapy program. The court found that, the case, which was based on an individual denial of coverage and not a coverage limitation, plaintiffs failed to state a claim under the MHPAEA. The court reiterated that MHPAEA does not require all mental health claims to be approved by a plan.

Upcoming Compliance Deadlines and Reminders

Summary Annual Report ("SAR") Deadline for Calendar Year Defined

Contribution Plans. Plan administrators must distribute SARs to participants and beneficiaries within nine months of the plan's year end (*e.g.*, for plan years that ended December 31, 2016, the SAR is due September 30, 2017). However, if a plan has received an extension for filing its Form 5500, the nine month SAR deadline is extended by two months.

Form 5500 Filing Deadline for Calendar Year Plans with Extensions. For



plans that obtained an extension for filing their Form 5500, the Form 5500 must be filed by October 16, 2017.

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