

Benefits Counselor December 2016

Retirement Plan Developments

District Courts Uphold Fiduciary Rule

District courts in Washington D.C. and Kansas recently rejected challenges to the Department of Labor's ("DOL") fiduciary rule.

On November 4, the U.S. District Court for the District of Columbia, in *National Association for Fixed Annuities v. Perez*, denied the National Association for Fixed Annuities' ("NAFA") request for an injunction blocking enforcement of the fiduciary rule. The court rejected each of the three particular arguments made by NAFA: (1) that the DOL's decision to include fixed indexed annuities within the rule was arbitrary and capricious; (2) that the DOL unlawfully created a private right of action; and (3) that the regulation is "void for vagueness" because the Best Interest Contract Exemption (the "BICE") limits compensation to a "reasonable" level.

On November 28, the U.S. District Court for the District of Kansas rejected a challenge to the DOL's fiduciary rule in *Market Synergy v. DOL*. The plaintiff in that case alleged, similar to NAFA, that the DOL unlawfully excluded fixed income annuity sales from the BICE and, specifically, that the DOL gave no notice that it might exclude fixed income annuities from the BICE. The court found that although the DOL did not specifically request comments regarding exclusion of fixed income annuities from the BICE, the notice of proposed rulemaking was sufficiently broad to put the public on notice of this possibility.

Two additional lawsuits challenging the fiduciary rule are pending at the district court level, one in Dallas, Texas, and another in St. Paul, Minnesota. NAFA has appealed the D.C. District's decision, but it is doubtful that a decision is imminent.

Treasury Department Denies Two More Multiemployer Plan Applications to Reduce Benefits

The Treasury Department ("Treasury") denied separate petitions to reduce benefits by the Iron Workers Local 16 and the Teamsters Local 469 multiemployer plans.

In the case of the Iron Workers petition, Treasury noted that the plan's

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assumptions regarding mortality and mortality improvement were not reasonable because, among other factors, they did not account for relevant historical and current demographic data. Treasury also determined that the plan's assumptions regarding hours of service were not reasonable because it assumed contribution base units would remain constant for the next 30 years and disregarded the decrease in contribution base units in the preceding 10 years.

Treasury made a similar determination in the Teamsters' case, noting that the plan's assumptions regarding investment forecast data were inappropriate. For example, Treasury found it unreasonable that the petition assumed a 7.25% annual investment rate of return for the plan's entire 45-year period, which Treasury believed to be overly optimistic.

Implicit Interest PEPs not Eligible for Transition Relief

Recent IRS guidance clarified that Pension Equity Plans ("PEPs") that use a deferred annuity factor (i.e., implicit interest) to calculate a participant's benefit do not need to comply with IRS regulations providing that PEPs may not credit more than a market rate of return.

Certain plan sponsors amended implicit interest PEPs to comply with the final regulations permitting plans to reduce the interest crediting rate without violating the anti-cutback rules under Code section 411(d)(6). IRS Notice 2016-67 clarifies that implicit interest PEPs are not subject to the market rate of return requirement. Accordingly, implicit interest PEPs cannot rely on the transition relief provided under the final regulations and the accompanying exception to the anti-cutback rules.

Health and Welfare Plan Developments

Adjusted PCORI Fee Announced

The IRS announced that the Patient-Centered Outcomes Research Institute ("PCORI") fee for plan years that end on or after October 1, 2016 and before October 1, 2017 will be \$2.26 per covered life. The prior PCORI fee was \$2.17 per covered life.

Arizona and Washington State Require Paid Sick Leave

Voters in Arizona and Washington approved ballot measures requiring employers in those states to provide paid sick leave to certain employees.



Arizona

Effective July 1, 2017, employers in Arizona with 15 or more employees must provide workers with up to 40 hours of paid sick leave per year. Smaller employers (with fewer than 15 employees) must provide 24 hours of paid sick leave per year. In each case, leave will accrue at one hour per 30 hours worked until the cap is reached. Employers may require a 90 day waiting period after an employee begins employment before the employee may use paid sick leave, but the employee is entitled to accrue leave during the waiting period.

Washington

Washington's paid sick leave act takes effect on January 1, 2018 and applies to all employees who are covered under the state's Minimum Wage Act. Employees will earn an hour of paid sick leave for every 40 hours worked. Similar to the Arizona law, employers may impose a 90-day waiting period on employees. Notably, because certain cities in Washington impose paid sick time requirements, employers in Washington are now subject to both the statewide law and, if applicable, city laws requiring paid sick leave (i.e., the new state law does not invalidate the city requirements).

IRS Extends ACA Reporting Deadlines

The IRS extended the deadline for employers to distribute Forms 1095-B and 1095-C to individuals for the 2016 calendar year until March 2, 2017.

The Affordable Care Act ("ACA") requires applicable large employers to file with the IRS, and distribute to employees, forms containing information relating to employees' health coverage. Generally, employers are required to distribute the required forms to employees by January 31 of each year and to file the forms with the IRS by February 28, if filing on paper, or March 31, if filing electronically.

The IRS extended the deadline to distribute Forms 1095-B and 1095-C to employees by 30 days, until March 2, 2017. There is no extension to file Forms 1094-B, 1095-B, 1094-C or 1095-C with the IRS. However, employers may still obtain an automatic 30-day extension to file the forms by submitting Form 8809 (Application for Extension of Time to File Information Returns) by the due date. (An additional 30-day extension is also available, but employers must provide a reason for needing this additional extension.)

In addition to the extension of the distribution deadline, the good faith compliance standard continues to apply for forms filed with the IRS. Under this standard, the IRS will not penalize an employer for incomplete or incorrect



information so long as the employer demonstrates that it made a good faith effort to comply with the reporting requirements.

Upcoming Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. **Summary Annual Report for Calendar Year Group Health Plans.** Summary Annual Report for Calendar Year Group Health Plans. For calendar year plans that obtained an extension to file their annual report (Form 5500), the Summary Annual Report must be distributed to participants and beneficiaries no later than December 15, 2016 (two months after the close of the extension period).
2. **Health Plan Open Enrollment Requirements.**
 - a. **SBCs.** Plan sponsors of group health plans must issue a new summary of benefits and coverage ("SBC") to participants and beneficiaries covered under the plan with each open enrollment. Group health plans without open enrollment must issue the SBC 30 days in advance of the plan year (December 2, 2016 for calendar year plans).
 - b. **HRA Opt Out.** Plan sponsors of health reimbursement arrangements ("HRA") must offer participants an annual opportunity to opt out of and waive all future reimbursements from their HRA. This opt out notice can be provided with the open enrollment materials.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Discretionary Amendments.** All discretionary amendments to qualified retirement plans must be adopted no later than the end of the plan year in which they are effective. A discretionary amendment generally includes any change to the terms of a plan that is not required for plan qualification. Plan sponsors of calendar year plans must ensure discretionary amendments effective in 2016 are adopted no later than December 31, 2016.
2. **Form 1099-R.** IRS Form 1099 R—Distributions From Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.—must be sent to recipients of retirement plan distributions during the prior plan year by January 31, 2017.
3. **Partial Annuity Payments.** Administrative compliance with the IRS's



recent guidance regarding partial annuity payments is required immediately. The IRS expects to issue further guidance on the deadline to adopt required plan amendments.

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