

Benefits Counselor December 2017

Retirement Plan Developments

DOL Announces 18 Month Delay of Fiduciary Rule

On November 27, 2017, the Department of Labor ("DOL") officially extended the transition period and delay on enforcement of key provisions of the fiduciary rule. The fiduciary rule's expanded definition of "fiduciary" became applicable on June 9, 2017. However, the DOL previously issued a transition period and temporary nonenforcement policy under which the DOL would not pursue claims against fiduciaries working in good faith to comply with the rule and its related exemptions. Originally scheduled to expire on January 1, 2018, the transition period is now extended to July 1, 2019. Certain provisions of the Best Interest Contract Exemption, Principal Transaction Exemption, and amendments to Prohibited Transaction Exemption 84-24 have also been delayed until July 1, 2019. During the extended transition period, the DOL will reexamine the rule and determine if further changes are required.

PBGC Guarantee Limit for Single Employer Plans Increases for 2018

The Pension Benefit Guaranty Corporation ("PBGC") announced that its guarantee limit for single employer plans is increasing in 2018. The increase will only apply to plans terminating in 2018 (payments to retirees whose plans terminated before 2018 will not change). Beginning in 2018, the age adjusted annual maximums for a single life annuity are: age 55—\$29,270; age 60—\$42,279; age 65—\$65,045; age 70—\$107,975. Annual maximums for a joint and 50% survivor annuity are also increasing. The guarantee for multiemployer plans has not changed.

IRS Issues Revised LRMs for ESOPs and 401(k) Plans

The Internal Revenue Service ("IRS") issued a revised listing of required modifications ("LRM") for employee stock ownership plans ("ESOPs") and cash or deferred arrangements (commonly known as 401(k) plans). The revised LRMs provide sample plan provisions that satisfy various requirements of the Internal Revenue Code. The ESOP LRM and 401(k) LRM are to be used for pre approved ESOPs and master and prototype 401(k) plans, respectively.

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Health and Welfare Plan Developments

HHS Issues Proposed Notice of Benefit and Payment Parameters for 2019

The Department of Health and Human Services ("HHS") issued proposed regulations that include benefit and payment parameters for 2019. Notable provisions include:

- **Increased Annual Limits on Cost Sharing.** The annual limit on cost sharing, also known as the out of pocket maximum, would increase from \$7,350 to \$7,900 for self only coverage, and from \$14,700 to \$15,800 for family coverage.
- **Essential Health Benefits.** For plan years beginning on or after January 1, 2019, states would have more flexibility in selecting and changing their benchmark plans establishing essential health benefits under the Affordable Care Act. A state would be permitted to change its benchmark plan annually. In addition, a state could (1) adopt another state's benchmark plan as its own, (2) replace one or more of the 10 categories of federally mandated essential health benefits under its benchmark plan with the same categories of benefits from another state's benchmark plan, or (3) select a new benchmark plan, provided it meets certain requirements. If a state does not select a new benchmark plan, its current benchmark plan would continue to apply.

IRS Releases Updated Guidance and Forms Regarding Employer Shared Responsibility Payment

The IRS updated its Frequently Asked Questions ("FAQs") and issued sample forms regarding the employer shared responsibility payment ("ESRP"). The Affordable Care Act imposes the ESRP on applicable large employers that fail to offer minimum essential coverage that is "affordable" and provides "minimum value" to full time employees and their dependents. The FAQs describe the IRS's procedures for notifying an employer of an ESRP assessment and how the employer must respond and pay.

Specifically, when the IRS determines that an employer may be responsible for an ESRP, the IRS will issue a "Letter 226J." The Letter 226J will include:

- a brief explanation of the statutory basis for the ESRP;
- an itemized list of the proposed ESRP assessment indicating each month of liability;



- Form 14764, "ESRP Response," for the employer to use to respond to the IRS and make the ESRP;
- Form 14765, "Employee Premium Tax Credit (PTC) Listing," citing the employer's assessable full time employees;
 - a description of the actions the employer should take if it either agrees or disagrees with the proposed ESRP; and
- a description of the actions the IRS will take if the employer does not timely respond to Letter 226j.

The employer's response must be submitted by the deadline cited in Letter 226j (generally 30 days from the date of the Letter 226j's issuance).

In conjunction with the updated FAQs, the IRS released sample versions of Forms 14764 and 14765.

IRS Issues Guidance on Qualified Small Employer HRAs

In Notice 2017 67, the IRS provided detailed guidance on qualified small employer health reimbursement arrangements ("QSEHRAs"). QSEHRAs are a type of stand alone HRA and are generally not considered group health plans under the Internal Revenue Code, the Employee Retirement Income Security Act ("ERISA") or the Public Health Service Act. QSEHRAs can only be offered by employers that do not offer group health plans, and are not applicable large employers under the Affordable Care Act. Notice 2017 67 includes 79 FAQs relating to the following topics:

- Eligible employers;
- Eligible employees;
- "Same terms" requirement;
- Dollar limits;
- Written notice requirement;
- Minimum essential coverage requirements;
- Substantiation;
- Reimbursements;

- Coordination with the premium tax credit;
- Interaction with health savings accounts; and
- Errors and correction procedures.

Notice 2017 67 applies to plan years beginning on or after November 20, 2017. A QSEHRA established before that date and operated "in accordance with a reasonable good faith interpretation" of the statutory provisions may continue to operate per its current terms until the end of the plan year that began in 2017.

Court Refuses to Impose Penalties on Employer for Failing to Provide COBRA Notice

A federal district court refused to impose statutory penalties on an employer for failing to provide a COBRA election notice to a former employee. *Sanders v. Temenos USA, Inc.*, 2017 WL 4577235 (S.D. Fla. 2017). While acknowledging the plan administrator failed to provide the required notice, the court, highlighting the applicable ERISA notice provisions, stated that imposition of statutory penalties (up to \$110 per day) on a plan administrator for failing to timely provide a COBRA notice is always within the court's discretion. Here, because the employer had provided the terminated employee close to a year's worth of health coverage at no cost, the court held that the employee suffered no real prejudice and the employer had not acted in bad faith, thereby making the imposition of statutory penalties inappropriate.

Court Rejects Multiemployer Health Plan's Request for Dismissal in Autism Coverage Case

A federal district court rejected a multiemployer health plan's motion to dismiss participants' claims that the plan had violated federal law when it denied coverage for Applied Behavior Analysis ("ABA") therapy for autism. *D.T. v. NECA/IBEW Family Med. Care Plan* (W.D. Wash., No. 2:17 cv 00004 RAJ, *order denying motion to dismiss*, Nov. 28, 2017). Although the plan's terms included coverage for mental health disorders (including autism), the plan denied coverage for ABA therapy, which seeks to improve autistic patients' communication and relationship skills, citing a plan provision excluding coverage for services related to "developmental delays." The court ruled that the plan's denial of coverage for ABA therapy may violate the federal Mental Health Parity and Addiction Equity Act, as it does not cover mental health benefits under the same terms and conditions as medical



and surgical benefits. This case is illustrative of an increasing number of lawsuits targeting health plan sponsors and fiduciaries regarding their coverage of ABA therapy.

General Employee Benefits

DOL Delays Application of Disability Claim Rule by 90 Days

On November 24, 2017, the DOL released a final rule delaying the disability claim rule's applicability date by 90 days. The disability claim rule, which imposes additional procedural protections and safeguards on disability claims, was scheduled to take effect for claims filed on or after January 1, 2018. The DOL has now moved the applicability date to April 2, 2018.

Federal Agencies Release Advance Copies of 2017 Form 5500 Annual Return/Report

The DOL, IRS and PBGC released advance informational copies of [the 2017 Form 5500](#) annual return/report and its instructions. Official electronic versions of the forms will be available on EFAST in the future.

Cyber Thieves Steal Retirees' Pensions in Attack on Large Public Pension Plan

Over 100 retirees in the Iowa Public Employees' Retirement System ("IPERS") had their pension benefits stolen in a recent cyber attack. Using stolen Social Security numbers and birth dates, the cyber thieves registered for IPERS online account access and diverted hundreds of thousands of dollars in monthly pension payments to a financial institution of their choosing. IPERS reported that only those retirees who had no established username and password were affected by the attack. IPERS, serving 115,000 retirees, has \$31 billion in plan assets.

Upcoming Compliance Deadlines and Reminders

Discretionary Amendments to Qualified Retirement Plans.

All discretionary amendments to qualified retirement plans must be adopted by the end of the plan year in which they are effective. A discretionary amendment generally includes any change to a plan's terms not required by statute, regulation or other guidance. Plan sponsors of calendar year plans must adopt discretionary amendments effective in 2017 no later than December 31, 2017



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