



## Benefits Counselor – December 2019

### RETIREMENT PLAN DEVELOPMENTS

#### **IRS Proposes Update to Mortality Tables for Required Minimum Distributions**

The Internal Revenue Service ("IRS") has issued a notice of proposed rulemaking to amend the regulations governing the life expectancy and distribution period tables used to calculate required minimum distributions ("RMDs"). The life expectancy and distribution period tables included in the proposed regulations are based on mortality rates for 2021. The proposed tables reflect longer life expectancies and generally smaller RMDs. As a result, the life expectancy for most individuals under the proposed tables will be one to two years longer than under the current tables.

If adopted, the tables would apply to RMDs made in calendar years beginning on or after January 1, 2021.

#### **Plaintiffs Agree to Dismiss Actuarial Equivalence Suit against PepsiCo**

On November 22, 2019, three retirees who brought a suit against PepsiCo alleging the company violated the Employee Retirement Income Security Act of 1974 ("ERISA") by failing to provide actuarially equivalent alternate forms of retirement benefits agreed to dismiss the case. The retiree plaintiffs and PepsiCo submitted a stipulation dismissing all claims with prejudice. Initially filed in December 2018, this case was part of a wave of similar cases alleging that sponsors of defined benefit pension plans violated ERISA by providing alternate forms of benefits *not* actuarially equivalent to a single life annuity. As a result of the stipulation, PepsiCo became the first plan sponsor to successfully dismiss such a suit.

The dismissal follows an eventful few months in the litigation. In September 2019, a federal judge dismissed the case, ruling the retiree plaintiffs failed to adequately plead a violation of ERISA's anti forfeiture provision. The ruling explained that ERISA provision only applies to normal retirement benefits granted upon the attainment of normal retirement age, and therefore offered no protection to the retiree plaintiffs, who each took early retirement. On November 8, the court granted the retiree plaintiffs' motion for reconsideration, allowing them to amend the complaint so as to only address the ERISA section 205(d) (pertaining to qualified joint and survivor annuities) allegations.

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However, they never amended the complaint, and two weeks later agreed to dismiss.

## **IRS Announces 2020 Cost of Living Adjustments for Retirement Plan Limits**

The IRS has announced the following dollar limits and thresholds for retirement plans for 2020 to reflect the cost of living adjustments:

- **Elective Deferrals.** The annual limit on elective deferrals will increase to \$19,500 for 401(k), 403(b), and 457 plans. For SIMPLE plans and SIMPLE IRAs, the limit will increase to \$13,500.
- **Catch Up Contributions.** The annual limit on catch up contributions for individuals age 50 and over will increase to \$6,500 for 401(k) plans, 403(b) contracts, and 457 plans. The limit for SIMPLE plans and SIMPLE IRAs remains \$3,000.
- **Annual Additions.** The limit on annual additions to defined contribution plans will increase to \$57,000.
- **Code Section 415(b) Limit.** The limit on annual benefits under a defined benefit plan will increase to \$230,000.
- **Highly Compensated Employees.** The threshold for determining who is a highly compensated employee will increase to \$130,000.
- **Key Employee.** The threshold for determining whether an officer is a key employee under the top heavy rules will increase to \$185,000.
- **Compensation.** The annual limit on compensation that can be taken into account for contributions and deductions will increase to \$285,000.

## **First Circuit Rules Two Sun Capital Private Equity Funds Cannot Be Held Jointly and Severally Liable for Withdrawal Liability**

On November 22, 2019, the U.S. Court of Appeals for the First Circuit ruled that two Sun Capital private equity funds ("Sun Capital Funds") did not create a partnership-in-fact for purposes of determining common ownership of a portfolio company and therefore could not be held jointly and severally liable for the portfolio company's multiemployer pension fund withdrawal liability.

### **Background**

Upon going bankrupt, Sun Brass, Inc. ("SBI"), a Sun Capital Funds portfolio company, withdrew from a multiemployer pension fund in which it participated. The pension fund then sought to assert withdrawal liability against the Sun Capital Funds, arguing that they were jointly and severally liable for SBI's withdrawal liability. Previously, the First Circuit held that one of the Sun Capital Funds, Sun Fund IV, was engaged in a "trade or business" and could potentially be

held liable for SBI's withdrawal liability

### **New First Circuit Decision**

The First Circuit's decision centered on whether the Sun Capital Funds created a "partnership in fact." Examining the particular facts of the case, the First Circuit held that on balance, the record indicated the Sun Capital Funds did not form a "partnership in fact," and that their ownership interests could not be aggregated for the purpose of determining "common control" over SBI. Because the ownership interests could not be aggregated, neither of the Sun Capital Funds achieved the 80% ownership threshold necessary to be under "common control," and neither entity could be held jointly and severally liable for SBI's withdrawal liability.

## **HEALTH AND WELFARE PLAN DEVELOPMENTS**

### **Agencies Issue Proposed Regulations Regarding Transparency in Health Coverage Costs**

The Departments of Labor, Health and Human Services, and Treasury (collectively, the "Departments") have issued proposed regulations regarding transparency in health coverage costs. The proposed regulations require insured and self-funded, nongrandfathered plans to give participants, dependents, and enrollees real-time, personalized access to cost-sharing information online (or in paper form, upon request), including an estimate of their cost-sharing liability for any covered item or service from a particular provider or providers. The proposed regulations also require such plans to disclose on a public website the negotiated rates for in-network providers and the allowed amounts paid for out-of-network providers. If finalized, the proposed regulations would become effective for plan years beginning on or one year after the effective date of the final rule. For a calendar-year plan, the earliest rule could be effective is January 1, 2022. The rule would not apply to grandfathered plans, health reimbursement arrangements or other account-based group health plans, or excepted benefits.

### **HHS Announces Increases to Civil Monetary Penalties for HIPAA and Medicare Secondary Payer Violations**

The Department of Health and Human Services ("HHS") has announced increases of civil monetary penalties for violations relating to the Health Insurance Portability and Accountability Act ("HIPAA") and the Medicare secondary payer rules.



### HIPAA Administrative Simplification

HHS has announced the following penalty amounts for each violation tier of a HIPAA administrative simplification provision.

	Minimum Penalty	Maximum Penalty	Calendar Year Cap
Tier 1 – Lack of Knowledge	\$ 117	\$ 58,490	\$ 1,754,698*
Tier 2 – Reasonable Cause and Not Willful Neglect	\$ 1,170	\$ 58,490	\$ 1,754,698*
Tier 3 – Willful Neglect, Corrected Within 30 Days	\$ 11,698	\$ 58,490	\$ 1,754,698*
Tier 4 – Willful Neglect, Not Corrected Within 30 Days	\$ 58,490	\$ 1,754,698	\$ 1,754,698

\*Note: These penalties do not reflect the alternate interpretation of the Health Information Technology for Economic and Clinical Health ("HITECH") Act that the HHS's Office of the General Counsel announced as the "better reading" of the HITECH Act in April 2019. The adoption of this alternative interpretation would significantly reduce the calendar year caps for Tiers 1 through 3.

### Medicare Secondary Payer Rules

The penalty for offering an incentive to a Medicare eligible individual not to enroll in a plan that would otherwise be primary increased to \$9,472. The penalty for willful or repeated failure to provide requested information regarding group health plan coverage increased to \$1,542. The penalty for responsible reporting entities that fail to provide information identifying situations where the group health plan is primary increased to \$1,211.

### IRS Releases Draft Forms 1094 and 1095 for 2019 Tax Year and Extends Deadline and Transition Relief

The IRS has released draft Forms 1094/1095 B and 1094/1095 C, along with related instructions, for the 2019 tax year. The 2019 drafts include only minor



changes from previous versions, including deleting references to the individual shared responsibility penalty. Following an extension by the IRS, the deadline for distributing Forms 1095 B and 1095 C to individuals is March 2, 2020. The deadline for filing with the IRS is not extended. Plan sponsors and applicable large employers must file with the IRS no later than February 28, 2020, for paper filings and March 31, 2020, for electronic filings.

The IRS has also extended the good faith transition relief from penalties and, new for this year, has advised that if a plan sponsor fails to provide the Forms 1095 B to participants, the IRS will not impose penalties for this year's filing. To rely on this penalty relief, the plan sponsor must post a notice on its website advising participants they can request a copy of their Form 1095 B.

### **Agencies Issue New SBC Template for 2021**

The Department of Labor ("DOL") and HHS have released a new template for the Summary of Benefits and Coverage ("SBC"), along with updated instructions and related materials. Plans must use the updated materials for plan years beginning on or after January 1, 2021. The updated materials include only minor changes, most of which relate to the elimination of the individual mandate payment. Of note, the instructions for completing the coverage examples include new guidance on the interaction between the cost sharing amount and the out of pocket maximum when applying the permitted rounding rules. A "crosswalk" document explaining the updates made to the coverage examples calculator and scenario descriptions is available on the HHS website.

## **GENERAL EMPLOYEE BENEFITS**

### **Agencies Release 2019 Form 5500**

The DOL, IRS, and Pension Benefit Guaranty Corporation ("PBGC") have released advance informational copies of the 2019 Form 5500 series. Overall, the changes to the 2019 versions are not extensive. Notably, the instructions have been updated to reflect the current maximum penalty for Form 5500 failures, clarification has been provided for reporting a plan sponsor's business code for multiemployer plans, and the instructions for Schedule H have been updated to correspond with changes to generally accepted auditing standards impacting benefit plans.



## 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. Therefore, plan sponsors of calendar year plans must adopt discretionary amendments effective in 2019 no later than December 31, 2019.

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