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RETIREMENT PLAN DEVELOPMENTS

DOL Finalizes Pooled Plan Provider Registration Requirements

The U.S. Department of Labor (DOL) finalized registration requirements for "pooled plan providers" offering "pooled employer plans" through its final regulation, which became effective on November 16, 2020. Beginning on January 1, 2021, the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) authorizes newly permitted pooled plan providers to begin offering pooled employer plans. The pooled plan provider is named fiduciary for a pooled employer plan and is responsible for performing most administrative and fiduciary functions for the plan. Pooled plan providers are required to register with both the DOL and the U.S. Department of the Treasury (Treasury) and provide any requisite information. The final regulation adopts the proposed registration requirements without significant changes, but makes some alterations to clarify registration deadlines and simplify reporting requirements. The final regulation requires the following three-part registration process:

1. An initial filing, due 30 days before the pooled plan provider begins operations for the pooled employer plan, containing basic identifying information about the pooled plan provider and its affiliated service providers, structure and any pending legal actions.
2. A supplemental filing to report (a) each pooled employer plan before its operations begin; or (b) any changes to information in earlier filings and any significant financial and operational events affecting the pooled plan provider or any of its plans.
3. A final filing after a pooled plan provider has terminated all of its pooled employer plans and ceased operations as a pooled plan provider.

Pooled plan providers must submit all registrations and supplemental filings to the DOL's Employee Benefits Security Administration (EBSA) using a new Form PR, which will satisfy the SECURE Act's requirements, to be filed at least 30 days before the pooled plan provider begins operations.

IRS Final Rules Update Retirement Plan Payouts

The IRS issued final rules adjusting the mortality tables used to calculate required

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minimum distributions from qualified retirement plans. The purpose of these rules is to increase the effectiveness of tax favored retirement programs by allowing retirees to retain more retirement savings in these programs for their later years. Additionally, the rules address Code section 401(a)(9), which dictates when plan participants must begin drawing down tax favored retirement accounts (e.g., 401(k), 403(b), etc.).

Final ERISA Regulations Circle Back to Allow ESG Investing

This topic was previously discussed in the November 2020 *Benefits Counselor*. The DOL recently published a final rule on November 13, 2020, which prevents fiduciaries from selecting investments based primarily on non pecuniary considerations. However, plan fiduciaries may, in limited circumstances, offer environmental, social and governance (ESG) interests or other investment options that focus on non pecuniary interests as an available investment alternative. The final rule adds several key provisions to the current investment duties regulations under the Code of Federal Regulations: (i) a new provision regarding the fiduciary's duty of loyalty under the Employee Retirement Income Security Act of 1974, as amended (ERISA); (ii) a new provision prohibiting plans from adding or retaining any investment fund or model portfolio as a qualified default investment alternative (QDIA), if the goal of the plan is to use non pecuniary factors; (iii) a new provision requiring fiduciaries to consider reasonable alternatives that are available; and (iv) a new provision confirming an ERISA fiduciary's obligation to evaluate investments based primarily on pecuniary factors, while providing the ERISA fiduciary with discretion to consider investment funds or model portfolios that may support non pecuniary goals (subject to additional investment analysis and documentation), if the ERISA fiduciary has first satisfied the duty of loyalty and prudence under ERISA.

The final rule, scheduled to be effective as of January 12, 2021, does not single out ESG investing for differential treatment. The final rule is more accepting of defined contribution plan investment options that take material ESG factors into consideration. This topic was discussed in depth in an article published by Reinhart shareholders Keith Johnson and Tiffany Reeves, titled "Final ERISA Rules Circle Back to Allow ESG Investing."

HEALTH AND WELFARE PLAN DEVELOPMENTS

COVID-19 Vaccines Covered by the CARES Act

On November 6, 2020, the DOL, Treasury, and the Department of Health and Human Services (HHS) published its interim final rule regarding the coverage of

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preventive health services to implement section 3203 of the CARES Act, which shortens the timeframe within which non grandfathered group health plans and health insurance issuers offering non grandfathered coverage must begin to cover, without cost sharing, qualifying Coronavirus preventive services (including certain COVID 19 immunizations). The interim final rule requires that non grandfathered plans cover COVID 19 vaccines with no cost sharing within 15 business days after the vaccine has been recommended by the U.S. Preventive Services Task Force or the Advisory Committee on Immunization Practices and adopted by the Centers for Disease Control. Additionally, the rule confirms that non-grandfathered group health plans and health insurance issues must also cover the COVID-19 related preventive care provided by out-of-network providers for the duration of the public health emergency (currently set to expire January 21, 2021).

Proposed ACA Cost-Sharing Limits for 2022

HHS has issued the proposed Notice of Benefit and Payment Parameters for 2022, which sets forth the proposed maximum out-of-pocket cost-sharing limit applicable to non-grandfathered health plans. For 2022, the proposed out-of-pocket maximums are $9,100 for self-only coverage and $18,200 for other than self-only coverage. If finalized, these maximums would be a 6.4% increase above the 2021 maximums.

CASES

Supreme Court Hears Oral Arguments on Latest ACA Case

On November 10, 2020, the U.S. Supreme Court heard oral arguments on the latest constitutional challenge to the Affordable Care Act ("ACA"). In *California v. Texas*, the Court was presented with the issue of whether the ACA could survive without the tax that was used as the primary basis to uphold the law in 2012. This challenge was originally brought by 20 states and 2 individual plaintiffs, however the Federal Government declined to defend the ACA. The House of Representatives would subsequently join the states to defend the ACA, and the case was brought before the Fifth Circuit Court of Appeals. The appellate court held that the individual mandate was an unconstitutional exercise of Congress's power under the Commerce Clause. It will be important to keep an eye on this case as the Supreme Court decides on the following legal questions:

- Whether Texas and the individual plaintiffs have standing to bring the lawsuit to challenge the individual mandate.

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- If the plaintiffs have standing, whether the Tax Cuts and Jobs Act of 2017 rendered the individual mandate unconstitutional.
- If unconstitutional, whether the remaining portions of the ACA can survive.
- If the entire ACA is found to be unconstitutional, whether the entire law should be unenforceable nationwide or whether it should be unenforceable only to the extent that provisions injure the individual plaintiffs.

Jimenez v Laborer's Welfare Fund

A participant in the Laborers' Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity, a Taft-Hartley multiemployer health plan, sued her union, Local 225 of the Laborer's International Union and the Fund, for sex discrimination, alleging that in light of the recent Supreme Court decision in *Bostock v. Clayton County, Georgia*, both violated Title VII by refusing to enroll her same sex spouse in the plan. The District Court for the Northern District of Illinois recently denied the Fund's and the Union's motions to dismiss. While this case is still in the early stages, it could clarify the extent to which Title VII applies directly to a multiemployer health plan and a union.

Amy's Kitchen's Win in DaVita Dialysis Suit Affirmed by Ninth Circuit

The U.S. Court of Appeals for the Ninth Circuit affirmed a victory for Amy's Kitchen Inc. on December 1, 2020, against DaVita Inc.'s claims that it discriminated against kidney patients by changing how it covers dialysis treatments. DaVita Inc. sued several employers, including Amy's Kitchen Inc., for hiring consultants specializing in "dialysis cost containment" and revising their health plans to eliminate network coverage and reduce reimbursement rates for dialysis. This resulted in employees with kidney disease allegedly feeling encouraged to drop out and instead take advantage of Medicare's generous dialysis coverage. Both this case and the Marietta case (discussed in the November 2020 *Benefits Counselor* involve lawsuits by DaVita Inc. claiming employees were incentivized to drop plan coverage and switch to Medicare. However, what distinguishes these cases from each other is the holding of the court. In this case, the U.S. District Court's decision, which was upheld by the appellate court, held that DaVita Inc. could not bring equitable claims under the Employee Retirement Income Security Act of 1974, as amended (ERISA) on behalf of an affected patient because their agreement only authorized DaVita Inc. to sue to recover ERISA plan benefits. However, in Marietta the Sixth Circuit ruled that antidiscrimination provisions of the Medicare Secondary Payer

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rules prohibit indirect discrimination against those individuals with end stage renal disease, and DaVita Inc. properly alleged the plan violated antidiscrimination provisions. The Marietta case is still waiting to be heard in district court.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Implementation of the CARES Act Extended to January 1, 2021, Due Date for Contributions to Defined Benefit Plans

IRS Notice 2020 82 provides that the IRS will treat a contribution to a single employer defined benefit pension plan with an extended due date of January 1, 2021 pursuant to section 3608(a)(1) of the CARES Act, as timely if it is made no later than January 4, 2021 (which is the first business day after January 1, 2021). This extension is intended to allow employers sponsoring these plans to defer payment obligations until 2021 and help alleviate an additional adverse impact on their business resulting from COVID 19.

Discretionary Amendments to Qualified Retirement Plans

All discretionary amendments to qualified retirement plans generally 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 2020 no later than December 31, 2020.

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