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General Employee Benefits

DOL Announces Intent to Review Disability Claims Final Rules.

Seventh Circuit Upholds Plan's Forum Selection Clause.

The Seventh Circuit Court of Appeals recently joined the Sixth Circuit in deciding that the Employee Retirement Income Security Act of 1974, as amended ("ERISA") does not prohibit forum selection clauses in plan documents. A split court decided that, although ERISA suggests that claims be litigated "where the plan is administered, where the breach took place, or where a defendant resides or may be found," a forum selection clause in a plan document would override the permissive language. The case is *In re Mathias*, No. 16-3808, 2017 WL 3431723 (7th Cir. Aug. 10, 2017).

Federal Agencies Grant Relief to Hurricane Victims.

- **DOL**. The DOL's retirement plan relief includes modified verification procedures for plan loans and hardship distributions, the timely remittance of participant contributions and loan repayments, and notices of blackout periods. Relief for group health plans includes grace periods and extensions for deadlines for sponsors and providers, when appropriate. The DOL directed fiduciaries to "act reasonably, prudently and in the interest of the workers and their families," including by making reasonable accommodations to prevent the loss of group health plan benefits.
- **IRS**. Relief from the IRS includes extended benefits-related deadlines, including for filing the Form 5500 Annual Return/Report, and relaxed requirements for participants to obtain a plan loan or a hardship distribution. The relief, available to individuals in localities receiving Individual Assistance from FEMA, now extends to all of Florida and Georgia.
- **PBGC**. The PBGC has provided an extended deadline of January 31, 2018 for certain single employer plan termination filings, reportable event notices, and PBGC premium filings otherwise due between August 23, 2017 and January 31, 2018. The PBGC may also grant extensions to individual plan sponsors for certain other filings.

SEC Releases Guidance to Assist Compliance with CEO Pay Ratio Disclosure Rule.

The U.S. Securities and Exchange Commission ("SEC") issued guidance to provide flexibility and to aid companies in complying with its soon to be implemented pay ratio disclosure rule. The SEC will not take enforcement against ratios that are based on reasonable assumptions, estimates and methodologies applied in good faith. The rule, which is scheduled to go into effect next year, requires public companies to disclose, as a ratio, how the annual total compensation of its principal executive officer compares to the annual total compensation of its median employee. The new guidance addresses how to determine which employees count toward determining a median employee's pay, and provides examples of how to use reasonable estimates and statistical sampling.

Retirement Plan Developments

DOL Continues to Delay and Roll Back Parts of Fiduciary Rule, Issues FAQs.

The DOL proposed to delay implementation of the fiduciary rule's best interest contract ("BIC") exemption (PTE 2016 01), principal transactions exemption (PTE 2016 02), and the exemption relating to an insurance company's compensation for the sale of an insurance or annuity contract (PTE 84 24). Originally scheduled to become effective January 1, 2018, the DOL proposed to amend the exemptions so as to extend the transition period until July 1, 2019.

The DOL also issued, in Field Assistance Bulletin 2017 03, a nonenforcement policy for the arbitration limit in the BIC exemption and the principal transactions exemption. Under the arbitration limit, investment advisors could not require that individuals waive their right to participate in class actions or other representative court actions and instead only arbitrate disputes. The DOL intends to continue the nonenforcement policy as long as the exemptions include the arbitration limit.

Finally, the DOL published a fourth FAQ regarding the fiduciary rule that required "fiduciary status disclosure" under ERISA section 408(b) for pension plans, clarifying that certain recommendations to participants, IRA owners or employers are not fiduciary investment advice.

DOL Settlement Agreement Provides Transaction Guidance for ESOP Plan Sponsors.

In a settlement agreement (the "Agreement") with First Bankers Trust Services Inc. ("FBTS"), filed in the U.S. District Court for the Southern District of New York, the DOL provided transaction guidance for employee stock ownership plan ("ESOP") transactions. The Agreement, which largely mirrors a 2014 DOL settlement agreement with GreatBanc Trust Company, sets forth a number of policies and procedures FBTS agreed to follow when serving as an ESOP trustee in a stock purchase or sale transaction. Significant new requirements in the Agreement include:

- **Selection and Use of a Valuation Advisor ("VA")**. A trustee must select an unaffiliated VA for any ESOP transaction. The Agreement expands the scope of disqualifying work for the selection process. The Agreement also sets forth additional requirements that a trustee must document before hiring a VA.
- **Expanded Oversight of the VA**. The Agreement sets forth three new requirements that a trustee must confirm in the VA's valuation report, and additional substantive items that must be addressed before the trustee can rely on the report.
- **Financial Statements**. A trustee may approve a transaction with unaudited or qualified financial statements. However, if a trustee approves a transaction with such statements, the Agreement requires the stock purchase agreement for the transaction to contain a provision requiring the selling shareholders to compensate the ESOP for any losses or harms caused by the unaudited or qualified financial statements.
- **Fiduciary Review**. The Agreement also contains additional requirements for the trustee to document during the fiduciary review process.

IRS Memo Addresses Optional Loan Cure Period under Code Section 72(p).

The IRS released a Chief Counsel Advice ("CCA") memorandum addressing the cure period under Internal Revenue Code ("Code") section 72(p) for missed 401(k) plan participant loan repayments. Under Code section 72(p), 401(k) plans are permitted, but not required, to offer a cure period under the loan program. For plans that elect to offer a cure period, the CCA memorandum sets forth two illustrations to show how participants can make up missed installment payments if the actions occur within the loan cure period. The first illustration provides that a participant may use subsequent larger payments to cure missed payments within the cure period. The second illustration provides that a participant may

refinance the original loan by replacing it with a new loan that pays off the missed payments within the cure period, provided that the new loan satisfies Code section 72(p)(2)'s requirements for multiple outstanding loans.

Nondiscrimination Relief Extended through 2018 for Closed Defined Benefit Plans.

The IRS renewed its temporary nondiscrimination relief for closed defined benefit plans through 2018. To qualify for the relief, closed defined benefit plans must continue to meet the equivalent benefit requirements in Notice 2014 5.

Model Amendments to Add Bifurcated Distribution Options to Defined Benefit Plans Now Available.

The IRS published model amendments for plan sponsors of qualified defined benefit plans to allow participants to receive part of their benefit as an annuity and part of their benefit in an accelerated form, such as a lump sum. The IRS first allowed these bifurcated distribution options in the final regulations issued under Code section 417(e) in September 2016. If a plan satisfies the conditions for the amendments in Notice 2017 44, and the plan sponsor adopts the amendment by December 31, 2017, the amendment will not violate the anti cutback rules of Code section 411(d)(6).

PBGC Eases Reporting Requirements for Active Participants.

The PBGC issued guidance easing the reporting requirements for pension plan sponsors that must disclose whether they have seen a reduction in the number of active participants. The PBGC intends to issue a new rule to amend the reportable events regulation, at which time Technical Update 2017 1 will be superseded.

PBGC Multiemployer Program Projected to be Insolvent by End of 2025.

The PBGC is predicting that its program insuring the benefits provided under multiemployer plans will be insolvent by the end of 2025, according to its Projections Report for Fiscal Year 2016. However, the PBGC noted that the President's Fiscal Year 2018 budget contains a proposal to aid the multiemployer plan program's funding status.

University of Pennsylvania First School to Win Dismissal of Retirement Plan Fee Lawsuit.

On September 21, 2017, a federal judge granted the University of Pennsylvania's motion to dismiss in a proposed class action suit that challenged fees, investment options and the use of multiple record keepers associated with the University's retirement plan. The University of Pennsylvania is the first college to win complete dismissal of such a lawsuit since a series of cases against college retirement plans began to be filed in August 2016.

Fiduciaries Breached Duty to Monitor by Keeping Retail Class Shares.

On remand from the Ninth Circuit Court of Appeals, the district court ruled in the long-running *Tibble v. Edison* case that the plan fiduciaries breached their duty to monitor the plan's investments by not switching from retail class shares to less costly institutional class shares. In 2015, The U.S. Supreme Court ruled that fiduciaries have an ongoing duty to monitor and remove imprudent investments, regardless of ERISA's six year statute of limitations. Because institutional class shares were available at the time the fiduciaries invested in retail class shares, the district court ruled that the fiduciaries knew or should have known of the option to buy institutional class shares, and thereby breached their fiduciary duty to monitor.

Health and Welfare Plan Developments

EEOC to Reconsider Incentive Limit in Wellness Regulations.

In *AARP v. EEOC*, the U.S. District Court for the District of Columbia ordered the Equal Employment Opportunity Commission ("EEOC") to reconsider its 2016 final regulations regarding wellness programs. Under the EEOC wellness regulations, plan sponsors can use an incentive, in the form of a penalty or reward, of up to 30% of the cost of self only coverage to encourage participation in a wellness program without rendering the wellness program "involuntary" for the purposes of the Americans with Disabilities Act or the Genetic Information Nondiscrimination Act. The court ordered the EEOC to reconsider its regulations because the EEOC could not offer a sufficient explanation as to why the 30% threshold represented the line between voluntary and involuntary incentives.

Court Orders Review of Final ACA Regulations for Emergency Out of Network Services.

A district court for the District of Columbia ruled that the DOL, IRS, and Department of Health and Human Services ("HHS") (collectively, the "Departments") acted arbitrarily and capriciously in adopting final regulations

under the ACA patient protections for emergency services with regard to setting an appropriate reimbursement rate. In *American College of Emergency Physicians v. Price*, the court held that the Departments did not adequately consider comments from providers and advocacy groups and remanded the rule to the Departments to address the comments. The rule remains in effect while under reconsideration.

Percentage of Income to Determine Affordable Coverage Reduced.

The IRS reduced the threshold for determining whether coverage is affordable under the ACA in Revenue Procedure 2017 36. The affordability threshold for 2017 was 9.69% of a person's household income, but the new affordability threshold for plan years beginning after December 31, 2017 has decreased to 9.56%. If a plan's self only coverage is considered unaffordable in 2018, the employer may be subject to an employer shared responsibility penalty under Code section 4980H(b).

Ninth Circuit Holds SMMs Insufficient to Notify of Lifetime Dollar Limit in Retiree Only, Self Insured Health Plan.

The U.S. Ninth Circuit Court of Appeals held that a retiree only group health plan could impose a lifetime limit, so long as the limit is adequately disclosed to participants. In *King*, a participant in a self insured, retiree only group health plan challenged the plan's imposition of a lifetime dollar limit on benefits, claiming that such limits are prohibited for essential health benefits under the ACA and that the plan had failed to adequately disclose the limit to participants. On appeal, the Ninth Circuit held that lifetime dollar limits are permitted for retiree only plans under the ACA and ERISA. However, the Ninth Circuit also held that the plan's communications with participants did not provide sufficient notice of the lifetime dollar limit. Specifically, the plan's summary plan description and subsequent summaries of material modifications did not adequately communicate the fact that the retiree only plan retained the lifetime dollar limit, even though nonretiree plans had eliminated the limit under the ACA.

ERISA Does Not Preempt Montana Mental Health Parity Law.

A Montana district court has ruled that ERISA does not preempt Montana's mental health parity law, as applied to an ERISA group disability income plan, and that the Montana law required the plan to provide a participant the same benefits for a mental health illness as it would if the disability had been physical. In *Sand Smith v. Liberty Life Assurance Co. of Bos.,* (D. Mont. Sept. 20, 2017), a

participant became disabled due to bipolar disorder and was approved for long term disability benefits under the plan. The plan included a provision limiting benefits related to mental illness to 24 months, which violated a provision of Montana's mental health parity law requiring insurers to cover treatments for specified mental health disorders on the same terms as medical and surgical treatments. Since the mental health parity law regulated insurance, the court held that ERISA did not preempt the Montana mental health parity law in this case.

Upcoming Compliance Deadlines and Reminders

Summary Annual Report Deadline for Calendar Year Defined Contribution Plans.

Plan administrators must distribute the Summary Annual Report ("SAR") 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 was due September 30, 2017). However, if a plan received an extension for filing its Form 5500, the nine month SAR deadline is extended by two months.

Medicare Part D Notice of Creditable Coverage.

All group health plans that offer prescription drug coverage to Medicare-eligible participants (under either an active plan or a retiree plan) should have provided an annual creditable coverage disclosure notice to their Medicare eligible participants (and dependents) no later than October 15, 2017. The Centers for Medicare and Medicaid Services ("CMS") provides a model notice that can be accessed through the CMS website. Plan sponsors should review the model notice to ensure it accurately reflects plan provisions.

Plan sponsors must also notify CMS if the group health plan offers creditable coverage within 60 days after the beginning of the plan year, or within 30 days after the termination of the prescription drug plan or after any change in the creditable coverage status of the prescription drug plan.

Health Plan Open Enrollment Requirements - SBC.

Plan sponsors of group health plans must distribute a new summary of benefits and coverage ("SBC") to participants and dependents covered under the plan in conjunction with open enrollment. Group health plans without open enrollment must distribute the SBC no later than 30 days in advance of the plan year

(December 1, 2017 for calendar year plans).

Defined Contribution Plan Annual Notices.

Plan sponsors of defined contribution plans must provide the following notices, if applicable, at least 30 but not more than 90 days in advance of the next plan year (October 3 to December 1 for calendar year plans). These notices may be combined.

- A qualified default investment alternative ("QDIA") notice, required if participant contributions are invested in the QDIA if the participant failed to make an investment election.
- An eligible automatic contribution arrangement or a qualified automatic contribution arrangement notice, required to be provided to all participants on whose behalf contributions may be automatically contributed to the plan.
- A safe harbor 401(k) notice, required for all safe harbor plans to describe the safe harbor contribution and other material plan features.

Forms 1094 and 1095.

Filers will need to provide copies of Forms 1095-B and 1095-C to individuals by January 31, 2018, and file the Forms with the IRS by February 28, 2018, or April 2, 2018, if filing electronically. The recently-released instructions for the 2017 Forms remain largely unchanged from prior years.