

Benefits Counselor February 2018

General Developments

DOL Confirms Final Disability Claim Regulations to Apply After April 1, 2018

The Department of Labor ("DOL") announced its final decision that the new disability claim regulations will apply to claims filed after April 1, 2018. The DOL had delayed the applicability date of the final regulations to allow commenters the opportunity to submit data and information on the regulation's costs and benefits. The DOL determined that the comments it received did not establish that the final regulations impose unnecessary regulatory burdens or significantly impair workers' access to disability benefits.

Sixth Circuit: City Can Require Winning Bidders to Contribute to Training Fund and Provide Benefits

In *Allied Constr. Indus. v. City of Cincinnati*, 879 F.3d 215 (6th Cir. 2018), the U.S. Court of Appeals for the Sixth Circuit held that the City of Cincinnati can require winning bidders for city construction projects to contribute to an apprenticeship fund and certify whether they provide health and retirement benefits. According to the court, the city's "responsible bidder ordinance" is enforceable because it is not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). The court held that the ordinance does not interfere with ERISA because the city was acting as a market participant, not a regulator, when it established the requirements for winning bidders. This is the first case wherein the Sixth Circuit has adopted the "market participant" doctrine with respect to ERISA. The market participant doctrine exempts a state law or local ordinance from federal preemption when the legislating body acts as a participant, not as a regulator, of a market. Five out of twelve circuits (Second, Third, Fifth, Sixth and Ninth) now apply various forms of the market participant doctrine in ERISA cases.

Retirement Plan Developments

PBGC Increases Civil Monetary Penalties

The Pension Benefit Guarantee Corporation ("PBGC") published final regulations increasing the maximum civil penalties for failures to provide certain notices or other material information under ERISA sections 4071 and 4302.

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The maximum penalties under ERISA section 4071 are increased from \$2,097 per day to \$2,140 per day. Section 4071 penalties apply if a plan fails to provide a notice or other information required under subtitles A, B, C or D of Title IV of ERISA, or ERISA sections 303(k)(4) or 306(g)(4). Among other things, these include: annual reports; plan termination insurance coverage and plan termination provisions; employer liability (other than multiemployer plan withdrawal liability); payment of the variable rate portion of PBGC's premium; the financial condition of contributing sponsors of certain underfunded, single employer plans; and notices regarding the nonpayment of contributions.

The maximum penalties under ERISA section 4302 are increased from \$279 per day to \$285 per day. Section 4302 penalties apply to multiemployer plans that fail to provide certain notices regarding withdrawal liability.

IRS Publishes Compensation Tables for 2018

On January 8, 2018, the Internal Revenue Service ("IRS") issued compensation tables for 2018 for employers to calculate "permitted disparity" when integrating benefits under tax qualified pension, profit sharing and stock bonus plans with Social Security benefits. The taxable wage base to determine covered compensation increased from \$127,200 for 2017 to \$128,400 for 2018. The tables replace those released in November 2017.

PBGC Releases Premium Filing Instructions for 2018

The PBGC published its premium filing requirements for 2018 plan years. The annual premium rates for 2018 increased as follows:

	2017 Rate	2018 Rate
Flat Rate Premium for Single Employer Plan	\$69	\$74
Variable Rate Premium (per \$1,000 of unfunded vested benefits)	\$34	\$38
Cap on Variable Rate Premium	\$517 x Number of Participants	\$523 x Number of Participants

The premium filing requirements for 2018 are substantially similar to those for

2017, but plan sponsors should review their specific circumstances.

Seventh Circuit Upholds Slayer Statute, Plan Not Required to Provide Surviving Spouse Benefits

The U.S. Court of Appeals for the Seventh Circuit held that a woman who killed her husband, but was later found not guilty by reason of insanity, is not entitled to receive surviving spouse pension benefits. The court held that ERISA does not preempt Illinois' "slayer statute," which prohibits a person from financially benefitting from a murder. The U.S. Supreme Court has not yet addressed the issue of whether ERISA preempts slayer statutes, which nearly every state has adopted. Other courts have also held that ERISA does not preempt slayer statutes in North Dakota, New York, and Nevada. The case is *Laborers' Pension Fund v. Miscevic*, No. 17 2022, 2018 BL 28557 (7th Cir. Jan. 29, 2018).

Seventh Circuit Refuses to Consider Arguments Not Raised in Withdrawal Liability Arbitration

The U.S. Court of Appeals for the Seventh Circuit ruled that a Taft Hartley pension fund must refund over \$600,000 in disputed withdrawal liability payments to an employer because the fund did not first raise its arguments in the arbitration. The dispute began after the employer paid the fund's withdrawal liability assessment, but then successfully challenged the assessment in arbitration under an exemption for companies in the business and construction industry. The fund argued that the arbitrator misinterpreted the exemption and asked that the Seventh Circuit overturn the award. The court refused, holding that the fund should have raised the statutory interpretation arguments in the arbitration. The case is *Laborer's Pension Fund v. W.R. Weis Co., Inc.*, No. 16 2944, 2018 BL 5953 (7th Cir. Jan. 8, 2018).

Health and Welfare Plan Developments

Short Term Spending Bill Extends CHIP Funding, Delays Cadillac and Other ACA Taxes

On January 22, 2018, Congress passed a short term spending bill that re-opened the federal government after a three day shutdown. The bill extends the Children's Health Insurance Program until fiscal year 2024. The bill also extends the existing suspensions of the Affordable Care Act ("ACA") tax on high cost, employer sponsored health coverage (the "Cadillac Tax") until fiscal year 2022 and the medical device excise tax until fiscal year 2020, and suspends the annual

fee on health insurance providers for fiscal year 2019.

EEOC Can Revise Wellness Plan Regulations on Own Timeline

The U.S. District Court for the District of Columbia held that the Equal Employment Opportunity Commission ("EEOC") is no longer required to notify the public by August 31, 2018 as to whether it will amend its regulations on incentives for wellness programs. However, consistent with the district court's prior orders in *AARP v. EEOC*, No. 1:16 cv 02113 (D.D.C. Jan. 18, 2018), the EEOC's existing wellness regulations under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act will become ineffective on January 1, 2019.

HIPAA Covered Entities to Pay HHS \$3.5 Million for Breaches

Fresenius Medical Care North America ("Fresenius") agreed to pay \$3.5 million to the U.S. Department of Health and Human Services ("HHS") Office for Civil Rights to settle potential violations of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy and Security Rules. Fresenius also agreed to adopt a comprehensive corrective action plan. Fresenius provides products and services for people with chronic kidney failure. In 2013, Fresenius filed five breach reports for separate incidents implicating the electronic protected health information ("ePHI") of five covered entities owned by Fresenius. The breaches included: (1) failures to conduct a risk analysis for ePHI; (2) providing unauthorized access to ePHI for purposes not permitted by the Privacy Rule; (3) failures to implement policies and procedures to address security incidents and vulnerabilities; and (4) failures to encrypt and decrypt ePHI when it was reasonable and appropriate to do so. The corrective action plan requires the covered entities to perform a risk analysis, develop a risk management plan, revise current policies and procedures on device, media and facility access controls, develop an encryption report, and educate its workforce on the revised policies and procedures.

HHS Recommends Software Upgrades to Protect Against a Computer Processor Vulnerability

HHS published a report regarding a vulnerability present in most computer processors sold over the last decade that could potentially expose protected health information. HHS considers the vulnerability of moderate significance because a breach generally could not occur without local access to the computer or device, and vendors are releasing software patches. HHS recommends installing operating system patches to Mac, Linux, and Microsoft systems to mitigate the risks of this widespread processor vulnerability. As the patches may

slow processor performance, HHS recommends that organizations test patches before implementation.

Upcoming Compliance Deadlines and Reminders

Retirement Plan Compliance Deadlines and Reminders

Quarterly Fee Disclosure and Benefit Statements for Participant Directed Defined Contribution Plans. Sponsors of plans that permit participants to direct the investment of their accounts must provide participants with a fourth quarter benefit statement, as well as a disclosure of fees and administrative expenses deducted from the participants' accounts during the fourth quarter of the plan year, by February 14, 2018 (or within 45 days after the fourth quarter).

Health Plan Compliance Deadlines and Reminders

1. **HIPAA Breach Reporting.** Plans must file their annual breach reports with HHS's Office for Civil Rights by February 28, 2018. The annual breach report is for breaches involving fewer than 500 individuals that occurred during the preceding year. Breaches involving 500 or more individuals must be reported no later than 60 calendar days from the date of the breach's discovery.
2. **Medicare Part D Creditable Coverage Disclosure.** Calendar year plans providing prescription drug coverage must provide the annual creditable coverage disclosure to the Centers for Medicare and Medicaid Services by March 1, 2018 (or, for noncalendar year plans, 60 days after the beginning of the plan year).
3. **Form M 1.** Multiple employer welfare plans providing health coverage must electronically file the annual Form M 1 by March 1, 2018. Employers may request a 60 day automatic extension for the filing.
4. **Forms 1095 B and 1095 C.** Forms 1095 B and 1095 C must be annually distributed to participants and filed with the IRS. Plan sponsors of self funded health plans and Applicable Large Employers ("ALEs") must distribute Forms 1095 B and 1095 C to participants by March 2, 2018, and must file with the IRS by April 2, 2018 if filing electronically (February 28, 2018 if filing by U.S. Mail).
5. **Forms 1094 B and 1094 C.** Plan sponsors and ALEs must file Forms 1094 B and 1094 C with the IRS by April 2, 2018 if filing electronically (February 28, 2018 if filing by U.S. Mail). These forms serve as transmittal forms for Forms 1095 B and 1095 C.



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