

Benefits Counselor – February 2020

RETIREMENT PLAN DEVELOPMENTS

Supreme Court Sends IBM Stock Drop Suit Back to Second Circuit

After being presented with new arguments by the fiduciaries of the IBM retirement plans and the federal government, the Supreme Court vacated the Second Circuit Court of Appeals' prior decision in the stock-drop case *Retirement Plans Committee of IBM v. Jander* and remanded to that court.

[As we previously reported in early 2019](#), this case against IBM is noteworthy for being the first stock-drop case since the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* to survive a motion to dismiss stage at a Court of Appeals. The plaintiffs allege that the IBM fiduciaries violated their duties under the Employee Retirement Income Security Act ("ERISA") by failing to disclose to participants that the company's microelectronics division was overvalued, which led to a 7% drop in stock price.

The Supreme Court declined to hear the case after IBM and the federal government failed to focus on the question presented to the Court, namely, what it takes to plausibly allege an alternative action that a prudent fiduciary "would not have viewed as more likely to harm the fund than help it," as required by *Dudenhoeffer*. Instead, IBM argued that ERISA does not require an employee stock ownership plan ("ESOP") fiduciary to act on inside information. Similarly, the federal government argued that if ERISA did impose a duty to disclose inside information not otherwise required to be disclosed under securities laws, such a duty would conflict at least with the objectives of those laws. The Supreme Court noted that it is a court of review, and the Second Circuit should have the opportunity to address these arguments first.

Interestingly, Justice Kagan, joined by Justice Ginsberg, wrote a concurring opinion that indicated that fiduciaries sometimes may have a duty to act on inside information under ERISA, in accordance with *Dudenhoeffer*. However, Justice Gorsuch wrote a separate concurring opinion in which he stated that he does not read *Dudenhoeffer* so broadly.

Second Circuit Holds that Plans Cannot Retroactively Change Interest Rate Assumption for Withdrawal Liability

The Second Circuit Court of Appeals recently held that, for purposes of calculating

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an employer's withdrawal liability from a multiemployer pension plan, interest rate assumptions must be determined as of the last day of the plan year preceding the employer's withdrawal (the "Measurement Date"). Further, the court held that the interest rate assumption in place from the previous plan year will roll over automatically unless the actuary makes any change by the Measurement Date. As a result, if an actuary for a multiemployer pension plan is considering changing the plan's interest rate assumption, it should ensure that it adopts any change before the last day of a plan year.

The case, *National Retirement Fund v. Metz Culinary Management, Inc.*, arose after an employer withdrew from the National Retirement Fund (the "Fund") in 2014. For a number of years before 2014, the Fund's actuary used a 7.25% interest rate assumption to determine the Fund's unfunded vested benefits and calculate withdrawal liability. However, in 2014 the Fund replaced its actuary and began using a 3.25% interest rate assumption.

The change in the interest rate assumption teed up the case. Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), plans must calculate the withdrawal charge as of the Measurement Date. Because the employer withdrew from the Fund in 2014, the applicable Measurement Date was December 31, 2013. The interest assumption in effect as of that date was 7.25%. However, in calculating the employer's withdrawal liability, the Fund applied the 2014 revised interest rate of 3.25%. Using the 3.25% rate resulted in a withdrawal liability charge of nearly \$1,000,000, rather than the \$250,000 that would have applied if the Fund applied the 7.25% rate. By holding that the applicable interest rate assumption is the rate that was in effect on the Measurement Date, the Second Circuit confirmed the commonly understood interpretation of MPPAA.

IRS Updates Determination Letter Program

The Internal Revenue Service ("IRS") recently updated its determination letter program rules in Revenue Procedure 2020-4. Among other minor changes, the Revenue Procedure reflects the following changes, some of which the IRS announced previously:

- Determination letters will include the exempt status for any related trusts or custodial accounts under Internal Revenue Code ("Code") section 501(a), except for certain pre-approved plans;
- The IRS will accept determination letter applications for certain statutory hybrid plans until August 31, 2020;
- The IRS will accept determination letter applications for certain individually

- designed merged plans on an ongoing basis;
- The Revenue Procedure includes a list of documents that should be submitted to enable the IRS to more efficiently process applications;
- The Revenue Procedure revises procedures and adds a category of determination requests for pre-approved plans with respect to the third and subsequent remedial amendment cycles;
- Determination letters will no longer include a caveat expressing no opinion regarding the federal tax consequences of a lump sum risk transferring program; and
- Voluntary Compliance Program ("VCP") filings and fee payments must be made online – paper filings are no longer accepted.

IRS Requires Sponsors to Maintain a Signed Plan Document

The IRS opined in Chief Counsel Memorandum 2019-002 that a plan is considered adopted only if the sponsor can provide proof of its adoption. Sponsors should retain a validly executed plan document to support the qualified status of the plan in the event of an audit. If the sponsor cannot produce an executed plan, the sponsor has the burden to prove that it executed a plan document as required. The IRS may disqualify the plan if the sponsor cannot produce a signed plan document.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HHS Announces Proposed ACA Cost-Sharing Limits for 2021 and Changes to Cost Sharing for Prescription Drugs

The Department of Health and Human Services ("HHS") recently proposed that the 2021 maximum annual cost-sharing limits under the Affordable Care Act ("ACA") be \$8,550 for self-only coverage and \$17,100 for other than self-only coverage. These amounts represent an approximately 4.9% increase above the 2020 limits of \$8,150 for self-only coverage and \$16,300 for other than self-only coverage. HHS included these amounts in its proposed Notice of Benefit and Payment Parameters for 2021.

HHS also proposed to revise the ACA's cost-sharing regulations to generally provide that plans and issuers may, but are not required to, count drug manufacturer coupon amounts toward the annual cost-sharing limit. Specifically, the rule would apply to amounts paid toward reducing an enrollee's cost sharing via any form of direct support (*i.e.*, coupon) from drug manufacturers for specific prescription drugs, regardless of generic availability, to the extent consistent with applicable state law.



This proposed rule would change the rule that HHS adopted in its Notice of Benefit and Payment Parameters for 2020 (the 2020 Rule). Under the 2020 Rule, for plan years beginning on or after January 1, 2020, plans and issuers could exclude the value of coupons from the annual limit on cost sharing only when a medically appropriate generic equivalent is available. However, [HHS, the Department of Labor \(DOL\) and the Department of the Treasury later announced](#) a non-enforcement policy with respect to the 2020 Rule so that plans and issuers could exclude coupon amounts from the annual cost-sharing limit, regardless of whether the drug has a generic equivalent.

The proposed rule in the Notice of Benefit and Payment Parameters for 2021 would follow the spirit of the nonenforcement policy and officially provide non-grandfathered health plans and issuers with the flexibility to determine whether to include or exclude coupon amounts from the annual cost-sharing limit, regardless of whether a generic equivalent of the drug is available.

Additional Privacy Rules for Certain Substance Use Disorder Patient Information Take Effect

Group health plan sponsors that pay for services provided by federally-funded substance use disorder treatment programs and disclose information to vendors for payment or health care operations must confirm that their contracts or business associate agreements contain additional privacy protections, effective February 2, 2020.

In 2018, the Substance Abuse and Mental Health Services Administration within HHS issued final regulations governing the confidentiality of substance use disorder patient records when treatment is performed at a federally-funded provider that is subject to 42 C.F.R. Part 2 (a "Clinic"). These "Part 2" protections are similar to, but are distinct from and slightly more stringent than the privacy protections under the Health Insurance Portability and Accountability Act ("HIPAA"). Because of the overlap with HIPAA, however, we expect only business associates will receive information protected by Part 2.

Patients at Part 2 Clinics have the option to allow the Clinic to disclose their information to any person or entity, including a group health plan. Normally, patients will allow Clinics to disclose their information to plans so the plans can cover their expenses. A plan that receives this type of patient information becomes a "lawful holder" of the information under the Part 2 regulations. As a lawful holder, the plan may then pass along the information to its business associates for the purposes of payment and health care operations.

If a plan will disclose patient information that is protected under Part 2 to a business associate, the Part 2 regulations require that the plan have specific contract terms in place with the business associate to require the business associate's compliance with Part 2. Although many of the Part 2 privacy requirements are the same as under HIPAA and therefore will already be provided for in the business associate agreement, the agreement in these instances must also:

- Specifically provide that the business associate is fully bound by the provisions of Part 2 upon receipt of the patient identifying information; and
- Prohibit re-disclosure of the information to a third party unless that third party has a written agreement with the business associate to help provide the services described in the contract, and the third party agrees to only further disclose the information back to the business associate or the plan from which the information originated.

Further, in making any such disclosure, the plan must provide the recipient with one of two notices required under the regulations, the shorter option of which states, "42 CFR part 2 prohibits unauthorized disclosure of these records."

District Court Invalidates Parts of HHS Guidance on Individually-Directed Disclosures to Third Parties under HIPAA

On January 23, 2020, the U.S. District Court for the District of Columbia invalidated aspects of HHS guidance related to an individual's right to access protected health information ("PHI") under HIPAA in *Ciox Health, LLC v. Azar, et al.*, No. 18-cv-0040. The case, brought by a medical records provider, specifically dealt with an individual's right to direct a covered entity to provide PHI to a third party. Under HIPAA, individuals have the right to instruct a covered entity to provide PHI maintained in an electronic health record to a third party. In 2013, HHS issued a rule that expanded this right to include most PHI, and required that electronic PHI be provided in the electronic format requested by the individual, if readily producible in that format. Then, in 2016, HHS took the position in sub-regulatory guidance that HIPAA's fee limitations apply to individual-directed disclosures of PHI to third parties. The medical records provider challenged these parts of the 2013 rule and 2016 guidance as violating the Administrative Procedure Act, the federal law governing administrative actions. The court agreed, and vacated the 2013 rule's requirement to deliver PHI to third parties regardless of the records' format and the 2016 guidance that applied the fee limitations. As a result, covered entities and business associates need to disclose only electronic health records in an electronic format to a third party upon an individual's request.

Further, the fee limitations will no longer apply to individual-directed disclosures to third parties, unless HHS adopts the requirement through a formal rule.

GENERAL DEVELOPMENTS

Congress Repeals "Parking Tax" for Tax-Exempt Organizations

Congress has retroactively repealed the Tax Cuts and Jobs Act rule under which tax-exempt employers were required to pay unrelated business taxable income ("UBTI") for any expenses for qualified parking or other qualified transportation fringe benefits provided to employees. The repeal is effective as of December 22, 2017, and any non-profit entity that paid UBTI may seek a refund.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Qualified 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, 2020 (or within 45 days after the fourth quarter).

Form 1099-R: Plan sponsors must file the Form 1099-R with the IRS by February 28, 2020 (March 30, 2020 if e-filing).

403(b) Plan Restatements: Sponsors of 403(b) plans have until March 31, 2020 to adopt a pre-approved plan document or amend an individually-designed plan and update any noncompliant provisions retroactive to January 1, 2010 (or, if later, the 403(b) plan's original effective date).

Health Plan Compliance Deadlines and Reminders

HIPAA Breach Reporting: Plans must file their annual breach reports with HHS's Office for Civil Rights by February 29, 2020. 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.

Medicare Part D Creditable Coverage Disclosure: Calendar year plans providing prescription drug coverage must provide the annual creditable coverage disclosure to CMS by March 1, 2020 (or, for fiscal year plans, 60 days after the beginning of the plan year).



Form M 1: Multiple employer welfare plans providing health coverage must electronically file the annual Form M 1 by March 2, 2020. Employers may request a 60 day automatic extension for the filing.

ACA Reporting Information

1. **Furnish Forms 1095-B and 1095-C to Participants:** Subject to limited exception, 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, 2020.
2. **File Forms with IRS:** Plan sponsors and ALEs must file the transmittal Forms 1094-B and 1094-C with their corresponding Forms 1095 with the IRS by February 28, 2020 (March 31, 2020 if e-filing).

Nonqualified Plan Compliance Deadlines and Reminders

Incentive Stock Options: Corporations must file an information return on Form 3921 with the IRS for any employee or former employee who exercised an incentive stock option within the meaning of Code section 422 during 2019. The deadline for filing is February 28, 2020 (March 31, 2020 if e-filing).

Employee Stock Purchase Plans: Corporations must file an information statement on Form 3922 with the IRS for any employee or former employee who first transferred legal title to shares acquired under the corporation's employee stock purchase plan within the meaning of Code section 423 during 2019 and:

1. the purchase price of the shares was less than the fair market value of the shares of stock on the date of grant, or
2. the purchase price of the shares was not fixed or determinable on the date of grant.

The deadline for filing is February 28, 2020 (March 31, 2020 if e-filing).

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