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Benefits Counselor January 2017

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Compliance Deadlines And Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. **ACA Information Reporting**
    1. **Furnish Forms 1095 B and 1095 C to Participants.** Plan sponsors of self funded health plans and applicable large employers ("ALEs") must provide copies of the Form 1095 B or 1095 C to participants or employees by March 2, 2017. Internal Revenue Service ("IRS") Notice 2016 70 automatically extended this deadline from the general January 31 deadline. According to its updated Questions and Answers about Information Reporting by Employers on Form 1094 C and Form 1095 C, the IRS does not intend to grant additional extensions for providing the Forms 1095 B and 1095 C to participants and employees.
    2. **File Forms with IRS.** Plan sponsors and ALEs must file the transmittal Forms 1094 B and 1094 C with their corresponding Form 1095 with the IRS by February 28, 2017 (March 31, 2017 if e filing). Unlike the deadline for furnishing Forms 1095 B and 1095 C to participants or employees, the deadline for filing information returns with the IRS was not automatically extended. However, the normal extensions may still apply.
    3. **New Q&As on ACA Reporting and Employer Shared Responsibility.** In December, the IRS updated three Affordable Care Act ("ACA") Tax Provisions Questions and Answers for employers. These Q&As, titled "Employer Shared Responsibility," "Information Reporting by Employers on Forms 1094-C and 1095-C," and "Information Reporting of Offers of Health Insurance Coverage by Employers (Section 6056)," can provide guidance on employers' questions about ACA information reporting requirements and shared responsibility provisions.
2. **Privacy Notice for Wellness Programs.** Plan sponsors of wellness programs that use health risk assessments or medical exams and tests must distribute a privacy notice in 2017 describing what information will be collected as part of the wellness program, who will receive it, how it will be

used and how it will be kept confidential. The notice is required for plan years beginning on or after January 1, 2017. Plan sponsors should ensure that the notice is distributed before the wellness program collects information for the new plan year.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Determination Letter Filing.**
    1. Sponsors of individually designed Cycle A3 plans must submit their final five year remedial amendment determination letter applications to the IRS by January 31, 2017. Cycle A3 plans are those sponsored by employers with tax identification numbers ending in one or six, and certain plans sponsored by a controlled group or affiliated service group.
    2. Effective January 1, 2017, the IRS terminated the staggered five year remedial amendment cycle system for all other individually designed plans. Sponsors of individually designed plans may now submit determination letter applications only for initial plan qualification, qualification upon plan termination or as the IRS otherwise determines.
2. **Form 1099-R.** By January 31, 2017, plan sponsors must send a Form 1099 R to participants who received distributions during the previous year. Sponsors must file the Form 1099 R with the IRS by February 28, 2017 (March 31, 2017 if e filing).
3. **Corrective Distributions for Failed ADP/ACP Test.** Plan sponsors of plans that failed the actual deferral percentage or actual contribution percentage tests must make corrective contributions by March 15, 2017 to avoid the 10% excise tax. If the plan has an eligible automatic contribution arrangement, the deadline is June 30, 2017.

Retirement Plan Developments

ERISA Plan Sponsors May Exercise Shareholder Rights, Including Proxy Voting

On December 29, 2016, the Department of Labor ("DOL") issued guidance setting forth the DOL's supplemental views on the Employee Retirement Income Security Act of 1974's ("ERISA") prudence and exclusive purpose requirements as they

relate to proxy voting, exercise of shareholder rights and investment policies. Interpretive Bulletin ("IB") 2016 1 largely revives a prior interpretive bulletin, IB 94 2, and withdraws IB 2008 2, which the DOL cited as causing an incorrect belief that plan sponsors could not exercise shareholder rights without performing a cost benefit analysis and concluding for each case that the action is more likely than not to increase the plan's investments. In contrast, IB 2016 1 encourages fiduciaries to exercise their shareholder rights, including proxy voting, as long as they meet ERISA's prudence and exclusive purpose requirements. IB 2016 1 differs from IB 94 2 in providing updated examples of how monitoring or communication with management will likely increase the value of the plan's investment.

Proposed Mortality Tables for Defined Benefit Plans Affect Minimum Funding and Payout Costs

On December 29, 2016, the IRS issued proposed regulations updating the mortality tables that defined benefit plans use to calculate the present value of benefits and funding. The mortality tables would be effective for plan years beginning on or after January 1, 2018. The updated tables reflect longer life expectancies, and correspondingly are expected to increase minimum funding and lump sum payout costs. However, the proposed regulations would also relax the requirements for plan sponsors to use custom mortality tables for minimum funding purposes.

Seventh Circuit: Multiemployer Plan May Collect Contributions after Union Decertified

The Seventh Circuit Court of Appeals recently ruled in Midwest Operating Engineers Welfare Fund v. Cleveland Quarry that multiemployer welfare and pension funds (the "Funds") could continue to collect contributions from an employer under collective bargaining agreements set to expire in 2015, even though union members decertified the union responsible for the collective bargaining agreements in 2013. The Funds sued for delinquent contributions under ERISA when the employer stopped contributing to the Funds following the union's decertification. The court reasoned that the Funds could enforce the employer's obligation to contribute under the collective bargaining agreement as third party beneficiaries, regardless of the union's decertification and attendant inability to enforce the agreement. The court found that the agreement did not terminate until it expired, as scheduled, in 2015, and so the Funds had a continuing right to collect contributions as third-party beneficiaries until that time.

PBGC May Examine Credit and Cash Flow for Early Warning Program

The Pension Benefit Guaranty Corporation ("PBGC") recently updated guidance on its website regarding what events may trigger an inquiry under its Early Warning Program. The agency website now identifies "significant credit deterioration" and "a downward trend in cash flow or other financial factors" as being trends that may increase agency concern that a plan is at risk. However, the PBGC states it has always reviewed a plan sponsor's credit and cash flow as part of the program.

Defined Benefit Plans with Option to End Current Annuity Stream for Lump-Sum Payment Face Additional Determination Letter Application Requirements

Defined benefit plans that request determination letters must now identify whether the plan has lump sum risk transfer language in either the cover letter to their application or an attachment. Affected plans include those that allow participants that receive annuity payments to receive a lump sum in lieu of the future annuity payments. Plans that include such language should identify the plan section and whether the plan satisfies one of the conditions in Notice 2015 49. The IRS may then approve the risk transfer language in the determination letter.

Treasury Approves First MPRA Application

On December 16, 2016, the Treasury approved the first application to reduce benefits under the Multiemployer Pension Reform Act of 2014 ("MPRA") for the Iron Workers Local 17 Pension Fund. MPRA permits trustees of underfunded multiemployer pension plans to reduce benefits to participants under limited circumstances. The Treasury's approval of the Iron Workers Local 17 MPRA application may provide guidance to other plans seeking approval for their own MPRA applications.

DOL Finalizes Regulations on State Savings Programs for Private Sector Workers

The DOL recently issued final regulations that would allow qualified political subdivisions of states to establish government-run payroll deduction savings programs for private sector workers. The final regulations follow similar regulations for states issued in August 2016. States and qualified political subdivisions may now follow the regulations' safe harbor rules to reduce the risk of ERISA preemption.

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IRS Releases 2016 Required Amendments List for Qualified Retirement Plans

The IRS released its Required Amendments List for 2016 in IRS Notice 2016 80, which will be published annually. The 2016 Required Amendments List includes one change in qualification requirements that may require an amendment for some plans: collectively bargained defined benefit plans may need an amendment to reflect restrictions on accelerated distributions from underfunded single-employer plans in employer bankruptcy under Internal Revenue Code ("Code") section 436. Affected sponsors must adopt any necessary amendments by December 31, 2018.

This first Required Amendments List provides insight into how the IRS will help plans ensure that they continue to be qualified following the IRS's downsizing of the determination letter program. This year's Required Amendments List states that the annual list will include statutory and administrative changes in qualification requirements that are first effective during the plan year in which the list is published. Plan sponsors must make any necessary amendments by the end of the second calendar year that begins after the IRS issues the Required Amendments List. This period may be extended for a governmental plan. The Required Amendments List also specifies that plan sponsors should treat periodic changes to dollar limits adjusted for cost of living increases, spot segment rates for determining the Code section 417(e)(3) applicable interest rate, and the Code section 417(e)(3) applicable mortality table as included in the Required Amendments List for the year in which the changes are effective, even though they are not directly referenced on such Required Amendments List.

Health and Welfare Plan Developments

District Court Injunction Prevents Enforcement of ACA Section 1557 Gender Identity and Termination of Pregnancy Nondiscrimination Requirements

Following a federal district court's nationwide injunction, the Department of Health and Human Services ("HHS") cannot enforce the ACA's "gender identity" and "termination of pregnancy" nondiscrimination requirements. Reinhart reviewed the injunction and its implications for plans in more detail in our "Nationwide Injunction of Select ACA Nondiscrimination Requirements" e-alert . All other aspects of the ACA section 1557 regulations, and other laws prohibiting discrimination, continue to apply.

DOL Issues Final Rule on Apprenticeship Equal Employment Opportunity

On December 16, 2016, the DOL finalized regulations updating equal employment opportunity and affirmative action program requirements for sponsors of apprenticeship programs registered with the DOL or a State Apprenticeship Agency. The equal employment opportunity regulations for apprenticeship programs were last updated in 1978.

The regulations are generally effective January 18, 2017, with certain requirements taking effect at various later dates. New requirements include:

- adding age (40 and older), genetic information, sexual orientation and disability to the list of bases upon which a sponsor of a registered apprenticeship program must not discriminate, and clarifying that sex discrimination includes discrimination based on gender identity and pregnancy;
- updating equal opportunity standards applicable to all sponsors;
- revising affirmative action plan requirements, including five specific required elements for an affirmative action program and reviewing personnel processes; and
- updating utilization analyses for race, sex, and ethnicity, and adding utilization goals for individuals with disabilities.

Additional MHPAEA Compliance and Stand-Alone HRAs Allowed Under Cures Act

On December 13, 2016, President Obama signed the 21st Century Cures Act (the "Cures Act") into law. Although primarily concerned with appropriating funds for biomedical research, the Cures Act also has several provisions regarding the Mental Health Parity and Addiction Equity Act ("MHPAEA") compliance for health and welfare plans. First, the Cures Act instructs federal agencies to issue additional guidance related to compliance with the MHPAEA. Second, the Cures Act requires audits of plans with five or more MHPAEA violations, but the law does not clarify how the "five times" will be defined and interpreted. Finally, the Cures Act clarifies that if plans cover eating disorder treatment, the treatment (including residential treatment) must comply with MHPAEA.

The Cures Act also allows small employers to sponsor stand-alone health reimbursement arrangements ("HRA"), which guidance under the ACA from the IRS and the DOL previously disallowed. Eligible small employers include those with fewer than 50 full-time employees or full-time equivalents that do not sponsor a group health plan. These new HRAs, named "qualified small employer health reimbursement arrangements," or QSEHRAs, allow reimbursement for

qualified out-of-pocket medical expenses and nongroup health plan premiums, including premiums for plans purchased through an ACA Marketplace. However, employees with HRAs, including QSEHRAs, may lose eligibility for ACA tax credits.

HHS Updates Cost-Sharing Limits for 2018

On December 22, 2016, HHS set the maximum annual limitation on cost sharing limits at $7,350 for individual coverage and $14,700 for family coverage for 2018. The limits were $7,150 and $14,300, respectively, for 2017. Plans should continue to follow present law, but be alert to changes to health care reform under the 115th Congress and the new administration.

General Developments

ERISA Plans with Disability Benefits Must Revise Claims and Appeals Procedures

On December 16, 2016, the DOL issued final regulations on claims and appeals procedures for ERISA plans that provide disability benefits. Reinhart reviewed the regulations in more detail in our "Department of Labor Issues Final Regulations on Disability Claims and Appeals Procedures" e-alert . In summary, the final regulations require plans, plan fiduciaries, and insurance providers for pension and health plans to comply with additional procedural protections for disability claims. The final rule is effective for disability claims filed on or after January 1, 2018, regardless of the plan year. The regulations do not apply to plans that rely on a finding of disability by a third party for purposes other than making a benefit determination. For example, plans that rely on a determination by the Social Security Administration or the employer's long-term disability plan are exempt from the regulations. Pension and grandfathered health plans may face more significant compliance burdens than their nongrandfathered group health plan counterparts, which likely already implemented similar claims and appeals procedures for health claims under the ACA.