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Retirement Plan Developments

IRS Streamlines VCP Fees.

In Revenue Procedure 2018-01, the Internal Revenue Service ("IRS") announced new fees for voluntary correction program ("VCP") filings, as well as other user fees. Most VCP submissions are now subject to a new fee structure based on the total amount of net assets in the retirement plan, rather than the total number of participants. Additionally, the IRS has eliminated the availability of most alternative or reduced fees. For VCP submissions made on or after January 2, 2018, the fees are as follows:

- $1,500 for plans with total net assets of $500,000 or less;
- $3,000 for plans with total net assets between $500,000 and $10,000,000; and
- $3,500 for plans with total net assets of over $10,000,000.

Under the new Schedule, the user fee for a VCP filing is the same for any type of error, and there is no limit on the number of errors that may be reported in a single submission.

In addition to modifying the VCP fee, the IRS also increased the user fee for the following filings:

- For a Form 5310 filing (a determination letter application for a terminating plan) the user fee is $3,000, up from $2,300; and
- For opinion letters on prototype individual retirement accounts and annuities, SEPs, SIMPLE IRA Plans, Roth IRAs and dual-purpose IRAs, the user fee is $2,500, up from $1,000.

The IRS did not did not change the user fee for group submissions or submissions for orphan plans.

Final Rule Expands PBGC's Missing Participant Program to Include Terminating 401(k)s.

On December 22, 2017, the Pension Benefit Guaranty Corporation ("PBGC") issued final regulations expanding its current Missing Participants Program to include terminating defined contribution plans and terminating small professional service defined benefit plans with 25 or fewer participants, effective on or after January 1, 2018. Pursuant to the new regulations, these terminating plans now have the option to transfer missing participant benefits to the PBGC rather than establishing an IRA if certain requirements have been met.

District Court in Eleventh Circuit Enforces Arbitration Agreement Containing Class Action Waiver.

In *Am. Family Life Assurance Co. of Columbus v. Hubbard*, the District Court for the Middle District of Georgia granted American Family Life Assurance Co.'s ("Aflac") request to compel former and current sales associates to arbitrate allegations that the insurer misclassified them as independent contractors. Aflac and the sales associates entered into an associate agreement that contained an arbitration clause and a class action waiver. The court rejected the defendants' argument, which relied on the decisions of other Circuit Courts of Appeals and the opinion of the National Labor Relations Board ("NLRB"), that the arbitration agreement was unenforceable because it contained a class action waiver, thereby violating the National Labor Relations Act ("NLRA"). The court explained it was bound by the Eleventh Circuit's decisions, concluding that federal labor law does not preclude enforcement of arbitration agreements containing class action waivers.

The U.S. Supreme Court recently heard arguments regarding these same issues in three consolidated cases—*National Labor Relations Board v. Murphy Oil USA, Inc., Epic Systems Corp. v. Lewis, and Ernst & Young LLP v. Morris*. Unlike the Eleventh Circuit, the Seventh and Ninth Circuits agree with the NLRB's opinion that arbitration agreements containing a class action waiver violate the NLRA. The forthcoming Supreme Court decision will address this circuit split.

Health and Welfare Plan Developments

DOL Issues Proposed Rule to Expand Access to Healthcare Through AHPs.

On January 4, 2018, the Department of Labor ("DOL") issued a proposed rule that would expand the opportunity to offer employment-based health insurance to small businesses through Small Business Health Plans, also known as Association Health Plans ("AHPs"). The proposed rule would expand the criteria under the Employee Retirement Income Security Act of 1974 ("ERISA") for determining when employers may join together in an association that is treated as the "employer" sponsor of a health or welfare plan. In a News Release, the DOL stated the proposed rule would provide small businesses and sole proprietors more freedom to join together to offer affordable, quality health insurance to employees.

The proposed rule would allow:

- Employers to form AHPs on the basis of geography or industry (e.g., a plan could include employers in a given state, city, county, or a multi-state metro area, or it could serve all the businesses in a particular industry nationwide).
- Sole proprietors to join AHPs.

The proposal also includes individual-level protections, such as prohibiting AHPs from either charging higher premiums or refusing to admit employees because of health-related factors.

The DOL will accept comments on the proposed rule until March 6, 2018.

Federal Court Vacates Incentive Provisions of EEOC Wellness Regulations.

In *AARP v. EEOC*, the D.C. District Court vacated—effective January 1, 2019—the incentive provisions of the Equal Employment Opportunity Commission's ("EEOC") wellness regulations. This follows the D.C. District Court's August 2017 order requiring the EEOC to reconsider these incentive provisions. The regulations, which address the impact of the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") on wellness programs, permit incentives of up to 30% of the cost of coverage if employees voluntarily participate in a wellness program. The court had previously determined that the EEOC had failed to provide sufficient justification for the 30% threshold, and ordered the EEOC to provide additional reasons for this particular incentive level.

The court expressed concern that the EEOC did not intend to issue a final rule until October 2019, and that the new regulations would not be applicable until 2021, at the earliest. However, to avoid disruption and to provide employers sufficient notice of the rule change, the court delayed vacating the rules until 2019.

The court also ordered the EEOC to reconsider the incentive regulations and promulgate any new proposed rules by August 31, 2018, and strongly encouraged the EEOC to move forward its timeframe for issuing new proposed rules.

Claims Administrator's Decision Reviewed *De Novo* Due to Inadequate Delegation of Discretionary Authority.

In *Miller v. PNC Fin. Servs. Grp., Inc.*, the Southern District of Florida held that a long-term disability ("LTD") claims administrator did not have discretionary authority to review claims. Accordingly, the court reviewed the claims administrator's decision in question using the *de novo* standard, which does not give any deference to the claims administrator's decision. Under this review, the court overturned the decision to terminate an employee's LTD benefits. The claims administrator argued that its decision should have been reviewed only for abuse of discretion because the plan granted the claims administrator the authority to review claims. The administrator pointed to a statement in the summary plan description (“SPD”) instructing participants to submit claims for benefits to the "Plan Administrator or to any person delegated by it." The SPD also provided that the claims administrator had the authority to determine whether a claimant's disability was covered under the plan's definition thereof. Finally, the administrative services agreement provided that the claims administrator would make determinations on certain ERISA appeals. The court concluded that none of these provisions was sufficient to authorize the claims administrator to determine eligibility for benefits or construe terms of the plan, and accordingly, *de novo* review was proper.

District Court Blocks Enforcement of Expanded Contraceptive Exemptions.

The Eastern District of Pennsylvania issued a preliminary injunction blocking the federal government from enforcing two interim final regulations that expanded exemptions to the Affordable Care Act's ("ACA") requirement to provide contraceptive coverage. The interim final regulations extended the existing exemption for sincerely-held religious beliefs to nongovernmental entities and individuals, and added an exemption for certain entities and individuals with sincerely-held moral objections to providing contraceptive coverage.

In *Pennsylvania v. Trump*, the court held that Pennsylvania demonstrated the state was likely to succeed on its claims that, in issuing the regulations, the IRS, DOL, and Health and Human Services ("HHS") failed to follow proper procedures, such as comment and notice procedures, and that the regulations exceeded statutory authority. The court further concluded that Pennsylvania had shown it is likely to suffer irreparable harm in the absence of an injunction. This injunction prohibits the expanded exemptions from being enforced throughout the country.

General Employee Benefits

Tax Cuts and Jobs Act's Employee Benefits Provisions

On December 22, 2017, President Trump signed into law H.R. 1, the Tax Cuts and Jobs Act (the "Act"). Although the final Act includes fewer benefits-related provisions than the first versions of the legislation, the Act still includes changes impacting the tax treatment of benefits, many of which are effective January 1, 2018. Below are some highlights of the changes impacting employee benefits plans and participants.

Retirement Savings Provisions

Extended Rollover Period for Plan Loan Offsets. For plan loan offsets caused by termination of employment or plan termination, the Act extends the period during which a participant may roll over an outstanding loan balance into an eligible retirement plan or IRA. Under pre-Act law, to avoid taxation, a loan offset amount had to be rolled over to an eligible retirement plan or IRA within 60 days. The Act extends the rollover deadline to the due date (including extensions) for filing the participant's income tax return for the year that the loan offset occurred.

IRA Recharacterization Repealed. The Act eliminates the ability to re-characterize a Roth IRA conversion. While a contribution made to a traditional IRA may still be re-characterized as a Roth IRA contribution, individuals are no longer permitted to re-characterize a Roth conversion (i.e., can no longer use re-characterization to undo a Roth conversion).

Relief from Early Withdrawal Tax for “Qualified 2016 Disaster Distributions." The Act provides an exception to the 10% early withdrawal penalty for “qualified 2016 disaster distributions." A qualified 2016 disaster distribution is a distribution of up to $100,000 for disaster victims residing in an area that the President declared a major disaster during calendar year 2016. In addition to the early withdrawal tax relief, the amount of a qualified 2016 disaster distribution can be re-contributed to an eligible retirement plan within three years. Finally, plan amendments made pursuant to these disaster relief provisions that are adopted before the last day of the plan year beginning after December 31, 2018 may be retroactively effective.

Fringe Benefits Provisions

Transportation Benefits. Although transportation benefits (*e.g.*, parking and mass transit) are still excludable from income for employees, the Act eliminates employer deductions for qualified transportation fringe benefits. Additionally, employers are no longer allowed a deduction for expenses incurred in providing transportation equivalent to an employee's commute, except as provided to ensure the employee's safety. This change also requires tax-exempt employers to pay unrelated business income tax for any transportation assistance.

Bicycle Commuter and Moving Expense Benefits Suspended. Prior to the Act, employees could exclude up to $20 per month for bicycle commute reimbursements. The Act suspends the bicycle commute exclusion until 2026. Additionally, moving expenses paid by an employer are no longer excludable to the employee or deductible by the employer through 2026.

Employee Achievement Awards. An employee achievement award, which is generally excludable from the employee's income, is a transfer of tangible personal property to the employee in recognition of either length of service or safety achievement. For awards after December 31, 2017, "tangible personal property" does not include cash, cash equivalents, gifts cards, gift coupons, gift certificates (other than where the employer pre-selected or pre-approved a limited selection) vacations, meals, lodging, tickets for theatre or sporting events, stock, bonds and other similar items.

Health Care Provisions

ACA Individual Mandate Repealed. The ACA's penalty for failing to comply with the individual mandate is eliminated as of 2019.

DOL Confirms Applicability Date of Disability Claims Rule.

On January 5, 2018, the DOL confirmed April 1, 2018 as the applicability date for plans to comply with the disability claims rule. The rule, which adopts additional procedural protections and safeguards for disability claims, was originally scheduled to take effect for claims filed on or after January 1, 2018. In November 2017, The DOL announced a 90-day delay and sought comments regarding the final rule. In its recent announcement, the DOL explained that the comments it received did not establish that the rule imposes unnecessary regulatory burdens on or significantly impedes access to disability benefits.

DOL Announces Annual Adjustments to Penalties for Benefits-Related Violations.

In a final rule effective January 2, 2018, the DOL announced the annual adjustments of civil monetary penalties for various employee benefits-related violations. Under the final rule, the civil penalties the DOL assesses for ERISA violations that occurred after November 2, 2015 will increase about 2% across the board. Some of the highlights of the final rule are as follows:

- The maximum penalty for failing to timely file Form 5500 increased from $2,097 per day to $2,140 per day.
- The failure to furnish information requested by the DOL under ERISA section 104(a)(6) may now result in a penalty of $152 per day, up from $149 per day.
- The maximum penalty for failing to provide the summary of benefits and coverage ("SBC") increases from $1,105 per failure to $1,128 per failure.

Upcoming Compliance Deadlines and Reminders

ACA Reporting Information

Furnish Forms 1095-B and 1095-C to Participants. Plan sponsors of self-funded health plans and applicable large employers ("ALEs") must distribute copies of the Form 1095-B or 1095-C to participants or employees by March 2, 2018. The IRS announced an automatic 30-day extension from the general January 31 deadline.

File Forms with IRS. By February 28, 2018 (April 2, 2018 if e-filing), plan sponsors and ALEs must file with the IRS the transmittal Forms 1094-B and 1094-C with their corresponding Form 1095. Similar to last year, the IRS did not extend the due dates for filing 2017 information returns.

Due to the extension, individuals will likely not receive Forms 1095-B or 1095-C by the time they file their 2017 individual income tax return. Accordingly, the IRS has indicated taxpayers do not need to wait for Forms 1095-B or 1095-C to file; taxpayers can file returns using other information about their health coverage.

Privacy Notice for Wellness Programs. Plan sponsors of wellness programs that use health risk assessments or medical exams must distribute a privacy notice that complies with EEOC regulations prior to collecting information (*i.e.*, before employees are asked to answer disability-related questions or undergo medical examinations) for the new plan year. The privacy notice should describe 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. This notice was first required for plan years beginning on or after January 1, 2017.

Form 1099-R. Plan sponsors must send a Form 1099-R to participants, retirees and beneficiaries who received distributions during the previous year by January 31, 2018, and must file the same with the IRS by February 28, 2018 (April 2, 2018 if e-filing).