

## Benefits Counselor June 2018

### General Employee Benefits

#### U.S. Supreme Court Upholds Arbitration Agreements Barring Employee Class-Action Suits

On May 21, 2018, in three consolidated cases, the U.S. Supreme Court held that employers can enforce class action waivers in employee agreements. *Epic Systems Corp. v. Lewis*; *Ernst & Young v. Morris*; *NLRB v. Murphy Oil USA*. In each of the cases, the employer and employees had entered into employment contracts mandating individualized arbitration to resolve employment disputes. Nonetheless, the employees brought wage-and-hour claims under the Fair Labor Standards Act and related state law through class or collective actions in federal court. The Supreme Court ruled against the employees, concluding the Federal Arbitration Act ("FAA") requires that arbitration agreements be enforced by their terms, and neither the FAA's "savings clause" nor the National Labor Relations Act guaranteed workers' rights to class action lawsuits.

Although the Supreme Court's decision applies directly to wage-and-hour claims, the Court's endorsement of arbitration agreements may indicate how it would likely rule on a similar class action waiver in a plan document governed by ERISA. Further, in light of the Supreme Court's decision, lower courts may be more likely to uphold agreements mandating individual arbitration of ERISA claims. However, it remains to be seen whether the Supreme Court's decision will have a broader application on ERISA plans.

#### EU's General Data Protection Regulation Takes Effect

The General Data Protection Regulation ("GDPR"), the European Union's ("EU") comprehensive data security law, became effective May 25, 2018. The GDPR governs the collection and processing of personal data relating to EU citizens and will impact not only organizations with EU operations but also organizations operating entirely outside of the EU. Because the GDPR's reach is broad, and the law's compliance requirements are lengthy, organizations subject to the GDPR will need to take steps to ensure compliance, such as updating their privacy policies and notifying vendors. It is currently unclear the extent to which the GDPR may impact benefit plan administration is currently unclear. E-alerts posted by Reinhart on the GDPR can be found [here](#) and [here](#).

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[Employee Benefits](#)

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## **IRS Introduces Tax-Exempt Organization Search Tool**

The Internal Revenue Service ("IRS") has replaced its online search tool "Exempt Organization Select Check" with "Tax Exempt Organization Search (TEOS)." According to the IRS, the new search tool has expanded search capability and is more user-friendly. Users can now search for the following information on tax exempt organizations:

- Organizations eligible to receive tax-deductible charitable contributions (Publication 78 data);
- Organizations that have had their tax-exempt status automatically revoked (listed by date of revocation);
- A limited number of IRS determination letters dated on or after January 1, 2014, with a list of all determination letters issued on or after January 1, 2014 coming soon;
- Form 990-series returns, to be updated monthly; and
- Organizations that have filed a Form 990-N (e-Postcard).

Tax Exempt Organization Search (TEOS) is available at:

<https://apps.irs.gov/app/eos/>

## **Retirement Plan Developments**

### **DOL Continues Temporary Enforcement Policy for Fiduciary Rule**

On May 7, 2018, the Department of Labor ("DOL") issued Field Assistance Bulletin ("FAB") 2018-02, which continues the temporary enforcement policy relating to the DOL's fiduciary rule and associated prohibited transaction exemptions. Initially announced in FAB 2017-02, the temporary enforcement policy became effective on June 9, 2017. FAB 2018-02 comes in response to the Fifth Circuit Court of Appeals' March 15, 2018 decision vacating the DOL's fiduciary rule (and subsequent decision refusing to rehear the case). In the wake of the Fifth Circuit's decision, the DOL recognizes that the retirement industry has implemented necessary changes and devoted substantial resources to comply with the fiduciary rule's regulatory framework. Accordingly, FAB 2018-02 states that for the period from June 9, 2017 until after new regulations or other administrative guidance is issued, the DOL will not pursue prohibited transactions claims against

investment fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the Best Interest Contract Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. FAB 2018-02 further states that investment advice fiduciaries may also choose to rely on other available exemptions to the extent applicable after the Fifth Circuit's decision, but the DOL will not treat an adviser's failure to rely upon such other exemptions as resulting in a violation of the prohibited transaction rules if the adviser meets the terms of the temporary enforcement policy. Finally, FAB 2018-02 states that the DOL is evaluating the need for additional temporary or permanent prohibited transaction relief for investment advice fiduciaries.

### **Northwestern University Excessive Fee Lawsuit Dismissed; University of Chicago Settles for \$6.5 Million**

On May 25, 2018, a federal district court judge dismissed the proposed class action lawsuit filed against Northwestern University over its mishandling of employees' retirement plan investments. Plaintiffs alleged that Northwestern University failed to monitor excessive fees, did not replace expensive, poor-performing investments with lower-cost alternatives, and offered an unreasonable number of investment options. The ruling marks the second complete dismissal of such a lawsuit since a series of cases against university retirement plans began to be filed in 2016. Other universities have had some claims dismissed while other claims were allowed to proceed.

Two days before the Northwestern University ruling, the University of Chicago became the first university to settle a lawsuit—agreeing to pay \$6.5 million—over excessive fees in its retirement plan.

### **PBGC Releases FY Annual 2017 Projections Report**

The Pension Benefit Guaranty Corporation ("PBGC") released its Fiscal Year Annual 2017 Projections Report estimating the long-term financial solvency of its single employer and multiemployer defined benefit plan insurance programs. For its single employer program, the PBGC projects a steady increase in future funding and a zero funding deficit by fiscal year 2019. The PBGC attributes these funding improvements to recent increases in asset returns and decreases in expected future claims. Conversely, for its multiemployer program, the PBGC projects a "very high likelihood" of insolvency during fiscal year 2025 and a "near certainty" of insolvency during fiscal year 2026, citing factors such as large funding

deficits and approximately a quarter of insured multiemployer plans being in Critical, or Critical and Declining, status.

## Health and Welfare Plan Developments

### **IRS Announces 2019 Limits on HSAs and High-Deductible Health Plans**

The IRS released Revenue Procedure 2018-30 setting dollar limits on health savings accounts ("HSAs") and high-deductible health plans ("HDHPs") for 2019. For 2019, the maximum HSA contribution (employee + employer) for an individual with self-only coverage will increase from \$3,450 to \$3,500, and for an individual with family coverage it will increase from \$6,900 to \$7,000. In addition, the HDHP out-of-pocket maximums for self-only and family coverage will increase in 2019. Please note that the Affordable Care Act ("ACA") imposes separate out-of-pocket maximum requirements applicable to essential health benefits, which are higher than the HDHP maximums and differ in their application.

### **IRS Raises ACA Employer Mandate Affordability Threshold for 2019**

In Revenue Procedure 2018-34, the IRS announced an increase in the ACA's employer mandate affordability threshold for 2019. Under the Affordable Care Act's employer mandate, an applicable large employer must extend to eligible full-time employees an offer of health care coverage that is affordable, or the employer may be subject to a penalty under Internal Revenue Code section 4980H(b) (*i.e.*, the employer shared responsibility payment). The affordability threshold is a percentage that changes based on indexing methodology. For plan years beginning after December 31, 2018, an offer of health care coverage is not considered affordable unless the employee's share of the premium for self-only coverage is no more than 9.86% of the employee's household income, up from 9.56% in 2018. Accordingly, an employer may require the employee to pay more for coverage in 2019 without being subject to penalty.

### **IRS Provides Additional Information on Letter 227**

A new IRS webpage provides additional information to help employers understand and comply with the various forms of Letter 227. Letters 227J through N are acknowledgment letters the IRS sends to employers at the close of an employer shared responsibility payment ("ESRP") inquiry. The ESRP inquiry usually begins with the IRS issuing a Letter 226J outlining a proposed penalty assessment. The employer has 30 days to respond to Letter 226J by using IRS Form 14764.



There are five different versions of Letter 227, depending on the IRS's review of the information provided by the employer (samples are provided of each version):

- **Letter 227-J** acknowledges receipt of the signed [Form 14764](#), ESRP Response, and that the ESRP will be assessed because the employer agrees with the proposed ESRP. Upon issuance of Letter 227J, the case is closed. No response is required.
- **Letter 227-K** acknowledges receipt of the information provided and shows the ESRP has been reduced to zero. Upon issuance of Letter 227K, the case is closed. No response is required.
- **Letter 227-L** acknowledges receipt of the information provided and shows the ESRP has been revised. Letter 227L includes an updated [Form 14765](#) (PTC Listing) and a revised calculation table. The employer can agree to the revised ESRP or request a meeting with the manager and/or appeal the determination.
- **Letter 227-M** acknowledges receipt of information provided and shows the ESRP has not changed. Letter 227M provides an updated [Form 14765](#) (PTC Listing) and a revised calculation table. The employer can agree to the ESRP or request a meeting with the manager and/or appeal the determination.
- **Letter 227-N** acknowledges the decision reached on appeal and shows the ESRP based on the review conducted by the IRS appeals office. Upon issuance of Letter 227N, the case is closed. No response is required.

The Letter 227 webpage is:

<https://www.irs.gov/individuals/understanding-your-letter-227>.

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