Reinhart

Benefits Counselor - June 2020

POSTED:

Jun 16, 2020

RELATED PRACTICES:

Employee Benefits

https://www.reinhartlaw.com/practices/employee-benefits

Retirement Plan Developments

DOL Releases Final Regulations for Electronic Delivery of Retirement Plan Disclosures

On May 27, 2020, the U.S. Department of Labor (DOL) released final regulations addressing the electronic delivery of retirement plan disclosures. The final regulations are similar to the proposed regulations the DOL released in October 2019, but create an additional safe harbor method for electronic disclosure, called the "notice and access" safe harbor, which applies to documents the plan administrator is required to furnish. The safe harbor allows electronic disclosures to be provided to any covered individual who provides an email address, including employer-provided email addresses, or mobile telephone number to the plan administrator. The final regulations require plan administrators to send a notice of internet availability to covered individuals whenever a disclosure is made available on a website. The final regulations take effect on July 27, 2020. For more information, please see Reinhart's alert on the subject.

IRS Provides Temporary Relief for Witnessing Spousal Consents

On June 3, 2020, the Internal Revenue Service (IRS) issued Notice 2020-42, which provides temporary relief from the requirement that a notary public or plan representative be physically present to witness spousal consent to certain participant elections if certain conditions are satisfied. The relief is effective from January 1, 2020 through December 31, 2020.

The relief permits online notarization, provided the notarization process is executed via live audio-video technology that otherwise satisfies the requirements for participant elections and complies with state law requirements applicable to the notary.

The relief also permits elections witnessed by a plan representative to be made remotely if four requirements are satisfied:

- The individual signing the participant election must present a valid photo ID to the plan representative during the live audio-video call.
- The audio-video call must allow for direct interaction between the plan representative and the signing individual. The relief explicitly prohibits

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

prerecorded video of the signature.

- The signing individual must send, by fax or electronic means, a legible copy of the signed document directly to the plan representative on the same date it was signed.
- After receiving the signed document, the plan representative must acknowledge the signature has been witnessed and transmit the signed document back to the individual.

Supreme Court Rules Retirees who Have Received All Promised Payments Lack Standing to Sue Pension Fiduciaries

On June 1, 2020, the Supreme Court of the United States issued a 5 4 decision in *Thole v. U.S. Bank*. Justice Kavanaugh authored the majority opinion, ruling that the putative class action must be dismissed for lack of standing. Justice Sotomayor authored a dissent. Although the district court and U.S. Court of Appeals for the Eighth Circuit previously ruled the case should be dismissed, the Supreme Court's opinion adopted new reasoning for the dismissal, stating that defined benefit plan participants whose benefits have not been reduced or limited do not have standing to bring a suit for breach of fiduciary duty.

<u>Background</u>

Two retired employees of U.S. Bank, James Thole and Sherry Smith (Plaintiffs) filed the putative class action in 2013. The Plaintiffs alleged that U.S. Bank and certain fiduciaries mismanaged the U.S. Bank Pension Plan (Plan) between September 30, 2007 and December 31, 2010. The complaint alleged that U.S. Bank breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA) by failing to diversify Plan assets and by adopting an investment strategy that directly benefitted U.S. Bank. The Plaintiffs sought to recover Plan losses and the disgorgement of profits, along with equitable and injunctive relief.

<u>Supreme Court Decision</u>

Writing for the five-justice majority, Justice Kavanaugh ruled the Plaintiffs lacked Article III standing to bring the suit because "win or lose, they would still receive the exact same monthly benefits they are already entitled to receive." The majority rejected the Plaintiff's argument that ERISA participants have an equitable or property interest in their plan, analogous to the interests of beneficiaries of a private trust. Justice Kavanaugh noted that although such an

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

analogy may be appropriate for a defined contribution plan, a defined benefit plan's relationship to participants was more akin to a contract, because an individual's entitlement to benefits would not change. The Supreme Court also rejected Plaintiffs' arguments that they had standing because ERISA section 502 provides participants a general cause of action to sue for restoration of plan losses and other equitable relief. A statutory right to sue, the opinion stated, cannot satisfy the injury in fact requirement necessary for Article III standing.

EBSA Issues Information Letter Concerning Inclusion of Private Equity in Defined Contribution Plans

On June 3, 2020, the Employee Benefits Security Administration (EBSA) of the DOL issued an information letter addressing use of private equity investments as an investment option within defined contribution plans. The letter states that a plan fiduciary of a defined contribution plan may offer an asset allocation fund with a private equity component in a manner consistent with ERISA's fiduciary requirements. The letter outlines certain considerations a prudent fiduciary should undertake before including such an investment in the plan, including:

- Whether adding the particular asset allocation fund will offer participants the opportunity to invest their accounts among more diversified investment options;
- Whether the asset allocation fund will be overseen by plan fiduciaries or managed by investment professionals with the sophistication to understand the complexities of private equity; and
- Whether the asset allocation fund has limited the allocation of investments to private equity in a way that is designed to address the unique characteristics associated with such an investment.

IRS Issues First Guidance on CARES Act Provisions Applicable to Retirement Plans

As discussed in previous Benefits Counselors, the CARES Act provides that eligible retirement plans may allow a qualified individual to take a coronavirus related distribution of up to $100,000, may allow an increase in the loan limit for a qualified individual up to the lesser of $100,000 or 100 percent of the individual's vested benefit, and may permit a qualified individual with up to an additional year to repay plan loans. The first piece of guidance from the IRS on these issues, a series of FAQs published on the IRS website, states that additional guidance addressing the CARES Act provisions for retirement plans is forthcoming. For now,

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

the FAQs confirm that plan sponsors may choose whether to adopt the CARES Act provisions for coronavirus-related distributions and loans. The FAQs also provide that any benefit distribution may be treated as a coronavirus related distribution if the participant satisfies the eligibility requirements. Additionally, the FAQs clarify that repayments of coronavirus-related distributions will be treated as rollover contributions and plans that do not otherwise accept rollover contributions are not required to accept repayments of coronavirus related distributions. For a more in depth summary, please see Reinhart's alert.

Two District Courts Address Use of Segal Blend in Withdrawal Liability

Two recent district court opinions considered whether the Segal blend is appropriate for the calculation of withdrawal liability and reached differing conclusions. In both cases, an arbitrator previously ruled that the actuary's use of the Segal blend when calculating withdrawal liability was reasonable based on the requirements set forth in ERISA section 4213.

On May 19, 2020, a court in the Southern District of Ohio published a decision in *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*. Persuaded by the decision in *New York Times Co. v. Newspaper & Mail Deliverers' Publishers' Pension Fund*, 303 F. Supp 3d 236 (S.D.N.Y. 2018), the court ruled that the arbitrator erred in finding that use of the Segal blend was appropriate when calculating withdrawal liability. The fund's actuary testified that he used a 7.25 percent interest rate to determine funding levels based on "a review of past experience and future expectations," while he used the Segal blend rate to calculate withdrawal liability because it represented his "best estimate calculation of anticipated experience under the plan." The opinion focused on these two pieces of testimony, finding they could not be reconciled, particularly because use of the 7.25 percent rate would have resulted in almost no withdrawal liability for the employer.

In contrast, the U.S. District Court for the District of Columbia affirmed the reasonableness of the Segal blend on May 22, in *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Company*. The District Court noted that during arbitration, an actuarial expert witness for the employer conceded that the use of the Segal blend to calculate withdrawal liability comported with professional guidelines. The Court also emphasized that ERISA section 4213 requires withdrawal liability to be based on the actuary's best estimate, and that absent any interference from interested parties such as the fund's trustees, the actuary's estimate should be given weight.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

The two opinions confirm that district courts remain split on the validity of the Segal blend.

Health & Welfare Plan Developments

IRS Relief and Clarification for Cafeteria Plans

In two recent publications, Notice 2020 29 and Notice 2020 33, the IRS announced sweeping relief for section 125 cafeteria plans. Utilizing the relief is optional, and employers are free to implement some of the optional changes and not others. Additionally, the publications announced an increased maximum flexible spending account (FSA) carryover amount.

Mid Year Election Changes

Notice 2020 29 allows sponsors of section 125 cafeteria plans to permit employees to make certain prospective mid year election changes for employer-sponsored health coverage, health FSAs and dependent care assistance programs (DCAP) during calendar year 2020. Specifically, a cafeteria plan may be amended to allow employees to:

- Make a new election for employer-sponsored health coverage on a prospective basis, if the employee did not initially elect employer-sponsored health coverage.
- Revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.
- Revoke an existing election for employer-sponsored health coverage on a prospective basis. In order to accept such a revocation, the employer must receive a written attestation from the employee that the employee is enrolled, or will immediately enroll, in health coverage not sponsored by the employer. A sample attestation is included in the Notice.
- Revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis. This relief is applicable to all health FSAs, including limited purpose health FSAs.
- Revoke an election, make a new election, or decrease or increase an existing election regarding a DCAP on a prospective basis.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

Employers may determine the extent to which these election changes will be permitted, provided changes are permitted and applied on a prospective basis only, and the changes do not result in a violation of the applicable nondiscrimination rules. Employers permitting changes should also consider the potential for adverse selection of health coverage by employees. This relief may be applied retroactively to January 1, 2020.

Extended Claims Period for Health FSAs and DCAPs

Notice 2020 29 also allows employers to amend one or more of its cafeteria plans to permit employees to apply unused amounts remaining in a health FSA or DCAP as of the end of a grace period ending in 2020, or a plan year ending in 2020, to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020. Health FSAs with a carryover may also utilize the relief. This relief may be applied on or after January 1, 2020, and on or before December 31, 2020.

Increase to FSA Carryover Amounts

Notice 2020 33 increases the maximum carryover amount to 20 percent of the maximum health FSA contribution for the year. Previously, the maximum carryover amount was capped at $500. For 2020, the maximum health FSA contribution is $2,750, which means the maximum amount that can be carried over from 2020 to 2021 is $550. This amount will be indexed in future years for inflation.

Plan Amendments

An employer wishing to use any of the relief offered in Notice 2020 29 or increase the permissible FSA carryover amount per Notice 2020 33 must adopt a plan amendment for the 2020 plan year before December 31, 2021. Amendments may be retroactively effective to January 1, 2020, provided the employer operates in accordance with the Notice and informs all employees eligible to participate in the plan of the changes.

IRS Clarifies COVID-19 Relief for HDHPs and Timing of Reimbursement of Health Premiums Under Individual Coverage HRAs

In addition to the cafeteria plan guidance discussed above, IRS Notice 2020-29 also clarified high deductible health plan (HDHP) requirements related to

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

COVID 19 testing, remote testing and the timing for an individual coverage health reimbursement arrangement (HRA) to reimburse health insurance premiums.

Clarification of HDHP Reimbursable Expenses

In Notice 2020 29, the IRS confirmed that HDHPs may properly reimburse expenses related to the testing and treatment of COVID 19 incurred on or after January 1, 2020. It further clarifies that diagnostic testing for influenza A and B, norovirus and other coronaviruses, respiratory syncytial virus, and any items or services required to be covered with zero cost sharing under section 6001 of the Families First Coronavirus Response Act, are part of testing and treatment for this purpose.

Similarly, telehealth and other remote care services under section 3701 of the Coronavirus Aid, Relief, and Economic Security Act applies with respect to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021. As such, a plan will not fail to be a HDHP if it reimbursed the above expenses before application of the deductible and an eligible individual may continue to contribute to a health savings account (HSA).

Timing for Reimbursements

Notice 2020 33 also clarifies when an individual coverage HRA may reimburse health coverage premiums. The general rule is that an individual coverage HRA can reimburse only those expenses incurred during the plan year. Recognizing the practical difficulties posed by this rule, the IRS has clarified that an individual coverage HRA may treat a premium for health insurance coverage as incurred on: (1) the first day of each month of coverage on a *pro rata* basis; (2) the first day of the period of coverage; or (3) the date the premium is paid. For example, an individual coverage HRA with a calendar year plan may immediately reimburse a premium for health insurance coverage that begins in January, even if the participant pays the premium in December.

IRS Announces HSA Contribution and Out-of-Pocket Limits for 2021

In Revenue Procedure 2020 32, the IRS announced that the limits on HSA contributions for 2021 will increase to $3,600 for self only coverage and $7,200 for family coverage. The maximum out of pocket amounts for high deductible health plans also increased to $7,000 for self only coverage and $14,000 for family coverage.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

IRS Announces PCORI Fee Amount

On June 8, 2020, the IRS published the amount of the Patient-Centered Outcomes Research Institute Fee (PCORI fee) for the upcoming payment due July 31, 2020. For plan years that end on or after October 1, 2019, and before October 1, 2020, the fee is $2.54 per covered life.

General Benefits Updates

IRS Extends Certain Plan Deadlines Due to COVID-19

In Notice 2020 35, the IRS announced that certain deadlines applicable to employee benefit plans will be extended due to the ongoing COVID 19 pandemic.

- Section 403(b) Plans: The deadline with respect to the remedial amendment period and plan amendment rules is extended to June 30, 2020.
- Single Employer Defined Benefit Plans: The deadline to apply for a funding waiver is extended to July 15, 2020.
- Multiemployer Defined Benefit Plans: The deadlines to (1) certify funded status and give notice to interested parties of that certification; (2) adopt and notify the bargaining parties of the schedules under a funding improvement or rehabilitation plan; and (3) provide an annual update of a funding improvement plan and its contribution schedules, or a rehabilitation plan and its contribution schedules, and file those returns with the annual return, are all extended to July 15, 2020.
- Preapproved Defined Benefit Plans: The deadlines to (1) adopt a preapproved defined benefit plan that was approved based on the 2012 Cumulative List; (2) submit a determination letter application under the second six year remedial amendment cycle; and (3) take actions that are otherwise required to be performed regarding disqualifying provisions in a plan during the remedial amendment period that would otherwise have ended on April 30, are all extended to July 31, 2020.
- Plans Filing Form 5330: The deadline to file Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, and pay the associated excise tax is extended until July 15, 2020.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Form 5500 for Calendar Year Plans. Plan administrators generally have seven

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

months after the end of a plan year to file a Form 5500, including applicable schedules and attachments. Thus, for plan years ending December 31, 2019, the Form 5500 filing deadline is July 31, 2020. However, by filing Form 5558 by July 31, 2020, plan administrators can apply for a deadline extension to October 15, 2020.

SMM for Calendar Year Plans. Plan administrators generally have 210 days after the end of a plan year to provide a Summary of Material Modifications (SMM) of a plan change. Thus, for a plan change adopted in 2019, the deadline to provide the SMM to participants is July 29, 2020. However, as described in the May Benefits Counselor, the deadline for providing the SMM is tolled during the COVID-19 Outbreak Period, provided the plan administrator acts in good faith and provides the SMM as soon as administratively feasible.

Health Plan Compliance Deadlines and Reminders

PCORI Fee. Plan sponsors of self funded plans must report and pay the annual PCORI fee by filing Form 720 by July 31, 2020. As noted above, the amount of the PCORI fee for plans ending in October, November and December is $2.54 per covered life.

Retirement Plan Compliance Deadlines and Reminders

Annual Funding Notice. Defined benefit plans with 100 or fewer participants generally must provide the annual funding notice to required recipients by the Form 5500 filing deadline. Similar to the deadline for SMMs, this deadline is tolled during the COVID-19 Outbreak Period.

Form 8955 SSA. Like the Form 5500, Form 8955 SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) is due seven months after the end of a plan year (July 31, 2020 for calendar year plans). Also like the Form 5500, by filing Form 5558 by July 31, 2020, plan administrators can obtain an extension. Plan administrators must also provide the individual statements to those separated participants identified on the Form 8955 SSA *prior* to the deadline for filing the Form 8955 SSA.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.