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Benefits Counselor – June 2022

POSTED:

Jun 14, 2022

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BENEFIT PLAN DEVELOPMENTS

Sixth Circuit Holds That Arbitration Mandates Not Enforceable Unless Included in Plan Document

In *Hawkins v. Cintas Corporation*, the U.S. Court of Appeals for the Sixth Circuit held that an arbitration clause included in an individual employment agreement was insufficient to compel arbitration of class action claims under the Employee Retirement Income Security Act of 1974 (ERISA). The Sixth Circuit held that claims under ERISA "belong" to the plan and arbitration cannot be compelled without the plan's consent. In *Hawkins*, two former employees filed suit alleging violation of fiduciary duties of loyalty and prudence. Cintas attempted to compel arbitration based on language in the named plaintiffs' individual employment agreements. However, the district court held, and the Sixth Circuit agreed, that because the retirement plan did not consent to mandatory arbitration, the arbitration requirement could not be enforced against the plaintiffs. The Sixth Circuit declined to weigh in on whether arbitration mandates in ERISA plans are enforceable noting that "Cintas could amend the plan documents to include an arbitration provision which *might* accomplish the . . . goal." [emphasis added] Regardless, the *Hawkins* decision makes clear that absent the language in a plan document, an arbitration mandate is unenforceable.

ERISA Advisory Council Names Cybersecurity Top Concern

The ERISA Advisory Council agreed to spend the upcoming year researching the cyber risks employee benefit plans face, and how those risks may differ between health and retirement plans. Following this research, the ERISA Advisory Council will brief the Labor Secretary and submit recommendations for regulatory action.

RETIREMENT PLAN DEVELOPMENTS

IRS Extends Physical Presence Relief

The Internal Revenue Service (IRS) issued Notice 2022 27 on May 13, 2022, which provides a six month extension for the previously announced relief from the physical presence requirement. The IRS Regulations require that the spousal consent required for a participant to waive his or her qualified joint and survivor annuity must be witnessed in person by a notary or plan representative. Under the extension, spousal consent may be witnessed through electronic notarization

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or video conferencing through December 31, 2022.

IRS Releases Guidance Addressing Failure to Timely Restate Plans

On May 23, 2022, in its latest edition of *Employee Plan News*, the IRS provided an overview of the impact of missing the upcoming restatement deadline for prototype and volume submitter 401(a) and 403(b) plans. If a plan sponsor fails to timely adopt its restatement, the retirement plan would no longer be considered a preapproved plan. If, upon review of the prior restatement, the plan sponsor determines that any changes to the plan are required to satisfy the Internal Revenue Code (Code) requirements, then such defects must be corrected as required under the Employee Plans Compliance Resolution System (EPCRS).

IRS Launches Pre-Audit Compliance Pilot Program

On June 3, 2022, the IRS announced it would establish a pre-audit retirement plan compliance program. The program will permit plan sponsors of retirement plans selected for audit a 90-day period during which the sponsor may review its plan documents and administration to ensure it meets all legal requirements and no operational errors exist. Any errors or discrepancies identified during this pre-audit period may be corrected under EPCRS. In the event the plan sponsor does not respond, or the IRS is not satisfied with the plan sponsor's internal review and proposed corrections, if any, the IRS will initiate a full scope audit.

The IRS noted that the goal of the program is to reduce taxpayer burden and the amount of time spent on qualified plan audits. While the IRS did not specify the duration of the program, it noted it would evaluate the effectiveness on an ongoing basis to determine whether this program should become a permanent fixture in the IRS's audit and examination process.

SEC Issues Pair of Proposals Addressing ESG Investment Practices

On May 25, 2022, the U.S. Securities and Exchange Commission (SEC) issued a pair of rule proposals addressing the use of environmental, social and governance (ESG) investment practices. The SEC noted that one significant impediment to investing in funds considering ESG factors is the lack of ongoing transparency regarding progress made toward any ESG related goals, which makes it difficult for investors to evaluate the ESG fund on an ongoing basis.

Proposed Rule Addressing ESG Fund Disclosures. The first proposal creates a detailed and thorough disclosure and reporting framework for investment funds regarding any applicable ESG investment practices, including:

- The role ESG factors have on investment making decisions;

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- Strategies designed to achieve a specific ESG outcome and progress made toward achieving such an outcome;
- Descriptions of ESG investing approaches;
- Information regarding how proxies were voted with regard to ESG issues;
- Whether and how many ESG engagement meetings were held throughout the course of the year and whether those engagement meetings led to meaningful progress on any ESG related goals;
- Whether any of the fund's service providers also prioritize ESG factors; and
- Release of census information about any ESG related matters.

Additionally, for any funds that consider environmental factors, the SEC would require an additional report to disclose additional information regarding the greenhouse gas emissions for environmental funds addressing greenhouse gas emissions metrics.

Proposed Amendments to the "Names Rule." The second proposal would amend the Names Rule to require that a fund's name accurately reflects its investments and any related risks. As background, the Names Rule currently requires an investment fund with a name that suggests an investment in a specific geographic region or industry to invest at least 80 percent of the value of the fund in the suggested focus areas. Historically, the SEC has taken the position that a name which describes an investment strategy rather than an investment focus is not subject to the 80 percent requirement. However, under the proposed change, the 80 percent requirement would apply to any fund that suggests a specific investment strategy (*e.g.*, growth, value, global, international, income).

Agencies Release Final Rule Addressing Form 5500 Changes Required Under SECURE Act

The U.S. Department of Labor (DOL), IRS and Pension Benefit Guaranty Corporation (PBGC) released a Federal Register Notice announcing changes to the Form 5500 and Form 5500 SF that are required for plan year reporting in 2022 and beyond. The changes are generally to the actuarial and retirement plan schedule and are intended to clarify the benefit and funding information provided as required under the Setting Every Community Up for Retirement Enhancement (SECURE) Act.

Debate Over Availability of Cryptocurrency in 401(k) Plans Continues

The DOL released guidance in March urging plan sponsors to "exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants." The guidance all but prohibited plan

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sponsors from permitting cryptocurrency as an investment option under an ERISA 401(k) plan. However, following this guidance, the debate over the permissibility of cryptocurrency has only begun to heat up.

- Fidelity Offers Bitcoin on Its Investment Platform. Fidelity recently announced its intention to allow plan sponsors to add bitcoin to any 401(k) plan's investment lineup. In its announcement, Fidelity noted a variety of protections for participants choosing to invest in bitcoin, including investment limits, employer oversight and educational materials and resources.

After the announcement, Senator Elizabeth Warren (D-MA) and Senator Tina Smith (D-MN) issued a letter to Fidelity chastising the company for its inclusion of cryptocurrency in its investment platform, noting that "investing in cryptocurrencies is a risky and speculative gamble" and their concern over Fidelity's willingness to take "risks with millions of Americans' retirement savings."

- Introduction of the Financial Freedom Act. In response to the DOL guidance, Senator Tommy Tuberville (R-AL) introduced the Financial Freedom Act which would prohibit the DOL from limiting the kinds of investment options and products that may be offered through a 401(k) plan brokerage window.
- First Lawsuit Related to Cryptocurrency Guidance Filed Against DOL. In response to the DOL's March guidance, ForUsAll Inc., a plan administrator that was one of the first to offer cryptocurrency as an investment option, filed a lawsuit against the agency claiming a breach of statutory purview in its threatened "investigative program" aimed at plan sponsors offering cryptocurrency investment options in either a core investment lineup or through a brokerage window. The lawsuit claims that under the Administrative Procedure Act, the DOL was unable to issue such guidance without a formal notice and comment rulemaking process.

Change in Underwriting Standards for Fiduciary Liability Insurance Policies May Increase Personal Liability for Fiduciary Breaches

In response to the significant increase in excessive fee lawsuits, fiduciary liability insurance carriers have begun requiring completion of a new comprehensive questionnaire. The questionnaire is designed to address many of the claims made in these lawsuits, including:

- How fiduciaries are selected;
- Whether a periodic review is conducted to determine the reasonableness of service provider fees;
- How often benchmarking studies are done;

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- How benchmarking and other fee studies are documented;
- How fees are calculated on a *per capita* basis;
- Whether a process is in place to recoup excess compensation for the benefit of participants;
- Whether the plan offers the least expensive share class available to each index fund and, if not, why;
- Confirmation that the plan does not use any funds proprietary to an affiliate of the recordkeeper or investment consultant; and
- Whether a law firm has attempted to solicit participants to contact a law firm regarding excess investment fees.

Based on the information provided through the detailed questionnaire, fiduciary liability insurance carriers may provide an increased rate, or decline to renew a plan sponsor's coverage outright. This shift in focus for fiduciary liability insurance carriers is another reason plan sponsors should focus on implementing and following procedures to evaluate and track recordkeeping, investment and other related fees charged to defined contribution plans.

Bipartisan Bill Aims to Reduce Retirement Plan Administrative Expenses for Small Businesses

Under ERISA, costs associated with any plan design change must be paid using non plan assets. This requirement may serve as an impediment to certain plan sponsors adding elective features such as automatic enrollment or Roth contributions, which improve participant retirement savings. To address this impediment, Senator Jacky Rosen (D-NV) and Senator Tim Scott (R-SC) introduced the Increasing Small Business Retirement Choices Act, which would permit small business employers to use retirement plan assets to pay expenses related to plan design changes.

IRS Proposes Updated Mortality Tables for Valuing Annuities

On May 5, 2022, the IRS released proposed regulations updating the actuarial tables used to value annuities, interests for life or a specific term of years, and reversionary interests. The updated mortality tables include updates based on information compiled through the 2010 census and would affect testamentary transfer of certain annuity interests. The IRS requests comments and requests for public hearing by July 5, 2022.

HEALTH AND WELFARE PLAN DEVELOPMENTS

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Wells Fargo Sued Over COBRA Notices

A lawsuit was filed against Wells Fargo & Company on May 3, 2022, alleging violations of the Consolidated Omnibus Budget Reconciliation Act (COBRA) due to the content of its COBRA notice. COBRA requires employers to permit employees to continue health coverage following termination of employment. The statute also requires employers to notify employees of this right and includes very specific guidelines regarding the content of the notice. In its notices, Wells Fargo included language warning employees that they may be "subject to civil or criminal penalties if they submit incomplete information when applying for coverage." Plaintiffs claim that this language was included in an attempt to "scare individuals away from electing coverage." This lawsuit was filed following the voluntary dismissal of a similar claim in April 2022, and is the latest in a string of lawsuits alleging deficient notices or a notice that discouraged qualified beneficiaries from enrolling in COBRA coverage.

Eighth Circuit Weighs in on Fiduciary Oversight of Insured Benefits

The U.S. Court of Appeals for the Eighth Circuit held that an insurer of an employee benefit plan may become a fiduciary due to the administration and delegation of duties between the parties. In *Skelton v. Radisson Hotel Bloomington,* Ms. Skelton attempted to enroll in her employer sponsored supplemental life insurance benefit. She submitted her application and was subsequently sent a letter from Reliance Standard Life Insurance Company (Reliance), the plan's insurer, requesting evidence of insurability (EOI). Despite her failure to submit any EOI, she received confirmation of her coverage under the plan, and her employer began payroll deductions. Following her death, her husband submitted a claim for benefits, but was denied because the insurance company never received her EOI. After settling with Ms. Skelton's employer, Mr. Skelton filed suit against Reliance for the remainder of the policy's benefit, claiming breach of fiduciary duty.

Reliance attempted to argue that it was a fiduciary for eligibility, but not for enrollment, and was therefore not responsible. Following a review of the delegation of administration of the benefit, the Eighth Circuit found that enrollment in the plan occurred automatically as a result of Reliance's eligibility determinations. Additionally, the court noted that Reliance maintained a "haphazard" enrollment system that ensured Reliance and the employer would never have the same list of eligible, enrolled participants.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

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All Benefit Plans

Summary of Material Modifications for Calendar Year Plans

Summary of Material Modifications (SMMs) must be distributed within 210 days of the close of the plan year in which a material amendment was adopted. For calendar year plans, all required SMMs describing amendments adopted during the 2021 plan year must be distributed by July 27, 2022.

Retirement Plans

SECURE and CARES Act Amendments

SECURE Act and Coronavirus Aid, Relief, and Economic Security (CARES) Act amendments for non governmental plans must be adopted by the last day of the plan year beginning on or after January 1, 2022. Accordingly, for calendar year plans, these amendments must be adopted by December 31, 2022.

Defined Contribution Plan Restatement Deadline for Prototype and Volume Submitter Plans

The deadline to adopt prototype or volume submitter plan restatements for retirement plans qualified under Code sections 401(a) or 403(b) is July 31, 2022.

Health Plan Deadlines

Machine Readable Files for In and Out of Network Medical Payment Rates

The DOL, U.S. Department of Health and Human Services (HHS) and Department of the Treasury will begin enforcing the Transparency in Coverage final rule's requirement for non grandfathered group health plans to publicly disclose on a website two machine readable files with information on the plan's payment rates for medical benefits on July 1, 2022 (for all plans with plan years beginning on or before July 1). One file will disclose in network provider rates and the other will disclose historic non network allowed amounts and billed charges.

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