

Benefits Counselor March 2018

General Employee Benefits

Plan Participant Waived Remedy for Untimely Benefits Determination

The United States Court of Appeals for the Seventh Circuit recently ruled that a participant forfeited his right to a de novo appeal because he delayed filing a lawsuit. In *Dragus v. Reliance Standard Life Ins. Co.*, Reliance Standard failed to render a timely decision on the participant's claim. However, instead of filing a lawsuit, the participant filed an appeal with the plan administrator. By filing an administrative appeal, the Court concluded that the participant waived his right to a remedy for an untimely decision. As a result, the Court could only review whether Reliance Standard's disability determination was arbitrary and capricious.

DOL Issues Individual Exemptions Allowing Asset Managers to Use QPAM Exemption

The Department of Labor ("DOL") issued a series of individual prohibited transaction exemptions allowing asset managers affiliated with J.P. Morgan Chase & Co., Deutsche Bank AG, Citigroup, Barclays Capital Inc., and UBS AG to continue managing Employee Retirement Income Security Act of 1974, as amended (ERISA) plan assets under the Qualified Professional Asset Manager ("QPAM") Exemption. The QPAM Exemption prohibits the QPAM, or any affiliate, from being convicted of certain crimes arising out of the business conduct of a broker, dealer, investment advisor, bank, insurance company, or fiduciary or any crime of which fraud is an element. Because these entities have been convicted of such a crime, they are unable to serve as a QPAM without first receiving a DOL exemption. The Individual Exemptions require each asset manager to adopt procedures and training programs to ensure continued compliance with the QPAM Exemption.

Retirement Plan Developments

Bipartisan Budget Act of 2018 Includes Retirement Plan Provisions

The Bipartisan Budget Act of 2018 (the "Budget Bill") not only increases discretionary budget caps for 2018 and 2019, but also includes several policy

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"riders" that were included in prior versions of the Tax Cuts and Jobs Act but dropped from that legislation. The provisions in the Budget Bill affecting qualified retirement plans include:

- **Relaxation of Hardship Distribution Rules.** The Budget Bill directs the Internal Revenue Service ("IRS") to change administrative guidance and rules to:
 - Remove the sixmonth prohibition on contributions to qualified retirement plans following a hardship withdrawal;
 - Allow qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), profitsharing contributions, and earnings to be included in a hardship withdrawal; and
 - Remove the requirement for a participant to receive a plan loan prior to receiving a hardship distribution.
- **California Wildfire Relief.** Qualified Individuals affected by the presidential-declared disaster are eligible to withdraw up to \$100,000 without incurring any early withdrawal penalties, if permitted by the plan.
- **Multiemployer Pension Plan Committee.** The Budget Bill establishes the "Joint Select Committee on Solvency of Multiemployer Pension Plans," which is directed to provide recommendations and legislative language by the end of November 2018 to remedy the financial conditions of both multiemployer pension plans and the Pension Benefit Guaranty Corporation (PBGC).

Ninth Circuit Rules Transamerica Is Not a Fiduciary

The United States Court of Appeals for the Ninth Circuit recently held that Transamerica Life Insurance Company was not liable as a fiduciary simply for negotiating its compensation with plan sponsors and receiving the agreed-upon payments. In *Santomenno v. Transamerica Life Ins. Co.*, plaintiffs asserted that Transamerica served as a fiduciary by withdrawing predetermined compensation directly from 401(k) plan accounts. The Court agreed with the Third and Sixth Circuits in finding that such action was ministerial rather than fiduciary. The Court noted, however, that if Transamerica's fees were determined based on any subjective measures, it is possible the direct withdrawal could be deemed a fiduciary act.

RadioShack Defeats Stop Loss Suit

The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of a lawsuit against RadioShack alleging imprudence by allowing participants to continue investing in company stock despite the company's financial decline. In *Singh v. RadioShack Corp.*, participants alleged that the plan's administrative committee violated its duty of prudence by failing to limit investment in company stock despite publicly available information warning of the company's financial decline and impending bankruptcy. The plaintiffs further argued that RadioShack's economic health constituted special circumstances which entitle them to relief. The Fifth Circuit found that under the *Dudenhoeffer* standard, the plan fiduciaries did not act imprudently in relying on market price as an indicator of the financial health of RadioShack stock.

Excessive Fee Case Against NYU is Heading to Trial

A federal judge denied New York University's ("NYU") summary judgment motion in *Sacerdote v. N.Y. Univ.*, finding that several disputed issues require trial to be resolved. The case against NYU is the first of retirement plan cases filed against a university to be certified as a class action and is scheduled for trial in April 2018. As a reminder, the plaintiffs in the NYU case allege that NYU failed to monitor excessive fees, did not replace expensive, poor-performing investments with lower-cost alternatives, and offered an unreasonable number of investment options.

Court Grants Class Certification in Excessive Fee Suit Against Oracle Corporation

Current and former participants in Oracle Corporation's 401(k) plan were recently certified as a class in *Troudt v. Oracle Corporation, et al.* The suit alleges that plan administrators deliberately failed to disclose sufficient information to participants regarding the plan's revenue sharing arrangement with Fidelity Management Trust Company, the plan's recordkeeper. The plaintiffs assert that concealment of such information made it impossible for participants to determine the amount of fees being paid and allowed Oracle Corporation to "conceal their breaches of fiduciary duty." The complaint also alleges that plan administrators had not conducted a request for proposal or any other competitive bidding process in over 25 years.

Health and Welfare Plan Developments

Supreme Court Declines to Extend Coverage for Retiree Health Benefits

The Supreme Court of the United States unanimously found that absent contrary language, retiree health care benefits end when a collective bargaining agreement ("CBA") expires. In *CNH Industrial N.V. v. Reese*, a group of retirees asserted that the CBA, effective between 1998 and 2004, created a vested right to lifetime retiree benefits. The CBA contained a clause providing that the CBA expired in May 2004 and included no language extending coverage for retiree benefits beyond that date. The United States Court of Appeals for the Sixth Circuit had found that the CBA was ambiguous, and subsequently relied on extrinsic evidence to find support for lifetime vesting of the retiree medical benefits. The Supreme Court rejected that interpretation, relying on its decision in *M&G Polymers USA, LLC v. Tackett*, which held that without any language in the CBA to suggest otherwise, lifetime vesting of any benefit may not be inferred.

AT&T Health Plan Instructed to Cover Horse Therapy

In *Lynn R. v. Valueoptions*, the United States District Court of Utah held that an AT&T health plan's denial of coverage for inpatient mental health treatment that combined psychotherapy with riding horses was impermissible. In its denial, the health plan used the facility's lack of national accreditation as a basis to determine the treatment was not "in accordance with generally accepted United States medical standards" as required by the plan. The Court found that because the national accreditation standard was not included in the plan, it could not be the basis for the denial. The Court ordered the plan to cover the over \$117,000 in medical claims related to the horse therapy treatment.

Upcoming Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. **Forms 1094C and 1095C.** If filing electronically, plan sponsors and applicable large employers ("ALEs") must file 2017 Forms 1094C and 1095C with the IRS no later than April 2, 2018.
2. **Forms 1095B and 1095B.** If filing electronically, plan sponsors of self-funded health plans and ALEs must file 2017 Forms 1095B and 1095C with the IRS by April 2, 2018.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Form 1099R.** The deadline for electronically filing Form 1099R to report the



prior year's distributions is April 2, 2018.

2. **Required Minimum Distributions.** Initial required minimum distribution (RMD) payments for eligible participants who attained age 70½ in 2017 must begin by April 1, 2018.
3. **Annual Funding Notice.** Calendar year defined benefit pension plans with over 100 participants must provide the annual funding notice to required recipients by April 30, 2018 (*i.e.*, within 120 days of the end of the plan year). Defined benefit pension plans with 100 or fewer participants generally have until the Form 5500 filing deadline to provide the annual funding notice.

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