

Benefits Counselor – March 2020

RETIREMENT PLAN DEVELOPMENTS

U.S. Supreme Court Rules Receipt of Disclosure Does Not Constitute Actual Knowledge

The U.S. Supreme Court ruled employers are unable to shorten the statute of limitations for claims of plan mismanagement by posting plan information online or mailing disclosures. Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), plan participants generally have six years to sue plan fiduciaries for failure to prudently manage investments. However, the statute of limitations is reduced to three years if participants have "actual knowledge" of the alleged failure.

In *Intel Corporation Investment Policy Committee v. Sulyma*, participants claimed Intel's retirement plan committee over allocated retirement plan assets into hedge funds and private equity investments from 2010 to 2012 without proper disclosure to participants. Intel argued that participant notices distributed during the same time period contained sufficient information to give rise to such a claim (*i.e.*, the participants had "actual knowledge") and, as a result, the claim should be barred [dismissed?] because the statute of limitations had run out [tolled?]. In a unanimous decision, the Court ruled that plan participants do not have actual knowledge of an alleged violation if the participants did not read, or cannot recall reading, the applicable notices.

Eighth Circuit Finds Setting Guaranteed Interest Rate is a Fiduciary Act

In *Rozo v. Principal Life Insurance Co.*, the court held that a plan service provider acted as a fiduciary under ERISA section 3(21) in setting a fixed rate of return for a defined contribution plan investment option. In *Rozo*, participants alleged that Principal breached its fiduciary duties and engaged in self dealing as a fiduciary of a retirement plan investment option. Principal provided a "Fixed Income Option" through a group annuity contract. The Fixed Income Option set a guaranteed rate of investment return, which was recalculated every six months. The group annuity contract required plan sponsors to provide participants advance notice of the new investment rate of return so as to allow them to withdraw from the Fixed Income Option. Participants who withdrew were required to either pay a 5% surrender charge or provide 12 months' advance notice.

POSTED:

Mar 10, 2020

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The court applied the two part test developed in *Teets v. Great West Life Insurance Annuity Insurance Co.*, and held that Principal was a fiduciary because: (1) Principal exercised discretionary authority in setting the investment rate of return, and (2) plan sponsors did not have "an unimpeded ability" to reject the investment rate of return.

[Reinhart Comment: This case is an important reminder that control over plan assets could make an entity a fiduciary under ERISA, even if the terms of a contract govern the relationship. Plan sponsors should review both agreement language and the resulting service provider determinations to ascertain whether a third party may also have fiduciary authority.]

PBGC Issues New Guidance

On February 4, 2020, the Pension Benefit Guaranty Corporation ("PBGC") issued final regulations incorporating the June 2019 proposed rules and clarifying prior guidance. Key changes include:

- Providing a low default risk safe harbor exception for reporting certain events;
- Eliminating duplicative reporting of active participant reductions;
- Providing additional clarification and examples for reportable events;
- Simplifying the Form 4010 filing requirements for controlled groups by reducing the required amount of financial detail for individual controlled group members, and requiring an organizational chart;
- Clarifying the dates on which participants are counted for premium calculations; and
- Clarifying that a plan does not qualify for the variable rate premium exemption for the year in which it completes a standard termination if it also engages in a non *de minimis* spinoff in the same year.

The new rules generally became effective on March 5, 2020.

The PBGC also announced it will launch a new searchable, indexed database containing all of the agency's guidance documents.

HEALTH AND WELFARE PLAN DEVELOPMENTS

U.S. Supreme Court Agrees to Hear Case on Constitutionality of the ACA

On March 2, 2020, the U.S. Supreme Court announced it will review the constitutionality of the Affordable Care Act ("ACA") following the elimination of the individual mandate. Oral arguments are expected to be scheduled for October or November 2020. A decision is not anticipated until spring 2021.

IRS Announces Assessment of Employer Shared Responsibility Payment Not Subject to Statute of Limitations

On February 21, 2020, the Internal Revenue Service ("IRS") released a Chief Counsel Memorandum announcing that the Employer Shared Responsibility Payment assessed under Internal Revenue Code ("Code") section 4980H is not subject to any statute of limitations. Under Code section 6501, any tax imposed by Code Title 26 shall generally be assessed within three years after the return is filed. The IRS reasoned that, because there is no filing or return containing the necessary information to calculate the appropriate penalty, there is no date to trigger the commencement of a statute of limitations period.

The Departments Release FAQs Addressing the New SBC Template

On February 3, 2020, the Departments of Labor, Health and Human Services, and Treasury (collectively, the "Departments") issued FAQs regarding the modified summary of benefits and coverage ("SBC") template and accompanying instructions released in late 2019. The FAQs reiterated that the modified SBC template and instructions must be used beginning on the first day of the first open enrollment period for any plan years beginning on or after January 1, 2021. The FAQs also clarified that use of the SBC Calculator is not required and plan sponsors may instead provide their own method of calculating estimated out of pocket expenses for the coverage examples.

CMS Proposes Penalties for Medicare Secondary Payer Reporting

On February 14, 2020, the Centers for Medicare & Medicaid Services ("CMS") proposed to impose monetary penalties when a group health plan fails to comply with Medicare Secondary Payer reporting requirements. All group health plans are required to provide a quarterly report which includes specific information about Medicare enrollees who also have coverage provided by the plan. Under this proposal, CMS could apply a \$1,000 per person per day penalty for any group health plan that fails to meet its reporting obligation under the following circumstances:



- General failure to satisfy its reporting obligation;
- Reporting, but, in response to Medicare's recovery efforts, subsequently providing data that contradicts the previously reported data; and
- Providing a report that contains poor quality data.

This proposal contains two exceptions to the application of penalties:

- If a plan provides the report within one year of the coverage effective date; and
- If the report does not exceed reporting error thresholds.

The proposed penalties are subject to a 60 day public comment period, and are therefore not yet effective.

[Reinhart Comment: If this proposal is finalized in its present form, it appears plan sponsors would be liable for penalties even where responsibility to file lies with a third-party (e.g., the plan's PPO provider or pharmacy benefit manager.)

DOL Confirms Health Plan Sponsored by Limited Partnership Is Not an ERISA Plan

On January 24, 2020, the Department of Labor ("DOL") issued Advisory Opinion 2020-01A, confirming that the health benefit programs of a limited partnership were not ERISA group health plans. The limited partnership, which manages the day-to-day administration of various limited partners, sponsored a single employer, self-insured group health plan for the benefit of its employees and its limited partners. Upon review, the DOL determined there was no established employer-employee relationship between the partners and the limited partners, and the primary purpose of the arrangement was for the provision of health benefits. The DOL reasoned that ERISA's coverage hinges on the provision of benefits in the employment context. Accordingly, the health plan is not an ERISA covered health plan.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. Form 1099-R. The deadline for electronically filing Form 1099-R to report 2019's distributions is March 31, 2020.

2. Required Minimum Distributions. Initial required minimum distribution payments for eligible participants who attained age 70 1/2 in 2019 must begin by April 1, 2020.
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 29, 2020 (*i.e.*, within 120 days of the end of the previous 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.
4. ADP/ACP Corrective Distributions. Corrective distributions for a failed ADP/ACP test must be processed by March 15, 2020 for calendar year defined contribution plans.
5. 403(b) Plan Remedial Amendment Period. The remedial amendment period for sponsors of individually designed 403(b) plans that did not receive a determination letter expires on March 31, 2020.

Upcoming Health Plan Compliance Deadlines and Reminders

1. Medicare Creditable Coverage Disclosure. Calendar year plans providing prescription drug coverage to Medicare Part D eligible individuals must provide the annual creditable coverage disclosure to CMS by March 1, 2020.
2. Forms 1094-C and 1095-C. If filing electronically, plan sponsors and applicable large employers ("ALEs") must file 2019 Forms 1094-C and 1095-C with the IRS by March 31, 2020.
3. Forms 1094-B and 1095-B. If filing electronically, plan sponsors of self-funded health plans and ALEs must file 2019 Forms 1094-B and 1095-B with the IRS by March 31, 2020.

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