

Benefits Counselor – March 2024

RETIREMENT PLAN UPDATES

IRS Launches Second Phase of Pre-Audit Compliance Pilot Program

On February 7, 2024, the Internal Revenue Service (IRS) announced it has commenced the second phase of its Pre-Examination Retirement Plan Compliance Program Pilot. The program notifies plan sponsors by letter that their retirement plan has been selected for an examination. Plan sponsors then have 90 days to review their plan documents and operations and identify any errors. If errors are identified the plan sponsor may use the Employee Plans Compliance Resolution System to correct the errors prior to examination. Correcting errors prior to examination can save plan sponsors significant amounts on sanctions and correction fees. The IRS is still determining whether it wishes to make the pre-audit compliance program permanent.

Federal Court Rules Pension Plan May Retroactively Change Interest Rate Assumptions

On February 9, 2024, the U.S. Court of Appeals for the D.C. Circuit issued its ruling in *Trustees of IAM National Pension Fund v. M & K Employee Solutions, LLC*. In 2018, two employers withdrew from the International Association of Machinists National Pension Fund (the "Fund"). Generally, withdrawal liability is based on a plan's unfunded liabilities of the last day of the plan year preceding the year of withdrawal. As of December 31, 2017, the Fund had been using an interest rate assumption of 7.5 percent. However, after meeting with the Fund's trustees in January 2018, the Fund's actuary adopted a new interest rate of 6.5 percent and elected to apply it retroactively. As a result, the withdrawal liability assessed against the withdrawing employers was significantly higher than it would have been using the previous interest rate assumption. Following arbitration, an arbitrator agreed with the withdrawing employers that retroactively changing the interest rate assumption violated the Employee Retirement Income Security Act of 1974 (ERISA). The district court, however, overturned the arbitrator's decision, holding that ERISA allowed for retroactive changes to actuarial assumptions so long as the assumptions were "as of" the measurement date for withdrawal liability. The D.C. Circuit Court upheld the district court's ruling. The ruling creates a circuit split, as the U.S. Court of Appeals for the Second Circuit previously ruled in 2020 that actuaries are obligated to use the assumptions which are actually in

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Mar 20, 2024

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effect as of a measurement date.

HEALTH AND WELFARE PLAN UPDATES

IRS Announces Adjustments for 2025 Employer Shared Responsibility Penalties Under the ACA

On February 12, 2024, the IRS announced the 2025 indexing adjustments to the applicable dollar amounts used to calculate employer shared responsibility payments under the Affordable Care Act (ACA) in Revenue Proclamation 2024-14. For failures occurring in the 2025 calendar year, the penalty under Internal Revenue Code Section 4980H(a) for failure to offer coverage will be \$2,900 and the penalty for failure to offer affordable or minimum value coverage will be \$4,350 per full-time employee that receives subsidized coverage through an exchange. Both figures are a slight decrease from the penalties applicable to calendar year 2024.

New FAQs Address Transparency in Coverage Requirements for Low Utilization Items

On February 2, 2024, the U.S. Department of Labor (DOL), U.S. Department of Health and Human Services (HHS) and the U.S. Department of the Treasury (collectively the Departments) jointly issued FAQ About Affordable Care Act Implementation Part 65 to provide guidance on how the cost-sharing disclosure requirements under the Transparency in Coverage (TIC) rules apply to low utilization items. The guidance advises that internet-based self-service tools designed to comply with the TIC requirements should clearly indicate when an item or service is covered but a specific cost estimate is not available due to insufficient data. In such instances, the self-service tool should also advise participants of their rights to contact their plan or insurer to request additional information. The guidance further states that the Departments will exercise discretion on a case-by-case basis when determining whether information disclosed regarding low utilization items sufficiently complies with the TIC requirements.

CMS Publishes Updated MSP User Guide for Group Health Plans

On January 22, 2024, the Centers for Medicare & Medicaid Services (CMS) published version 7.0 of the MMSEA Section 111 Reporting User Guide for Group Health Plans. The new version includes two notable updates. First, a new section has been added regarding the applicable civil monetary penalties for responsible reporting entities which fail to comply with the Section 111 reporting requirements. The new section also clarifies the process CMS will use beginning in



October 2025, to randomly audit Medicare secondary payer (MSP) reporting compliance and that responsible reporting entities may be charged up to \$1,000 per each day of noncompliance. Second, the updated User Guide now includes instructions for how representatives of responsible reporting entities can sign up to receive updates regarding MSP reporting requirements through the CMS website.

HHS and NIST Publish Updated HIPAA Security Rule Guide

On February 16, 2024, the Office of Civil Rights for HHS and the National Institute of Standards and Technology jointly released an updated version of a compliance guide which addresses what is known as the "Security Rule" of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The compliance guide is a resource for HIPAA-covered entities and includes guidance regarding how to perform a cybersecurity risk assessment and risk management efforts regarding their obligations under the HIPAA Security Rule. The updated guide is largely similar to the previous version, which was released in July of 2022, but includes additional information regarding how the size and nature of a covered entity affects the unique security risks faced by the entity.

GENERAL/PUBLIC PLAN/INVESTMENT UPDATES

Court Rules Plan Sponsor That Failed to Timely Disclose Documents During COVID-19 Outbreak Period is Subject to Some Statutory Penalties

On January 31, 2024, the U.S. District Court for the Northern District of California issued a decision in *Zavislak v. Netflix Inc.* which may have implications for plan sponsors who, in reliance on guidance issued by the DOL, exceeded the statutory deadline for responding to an ERISA § 104 request for plan documents. In 2021, the plaintiff in the case requested certain plan documents from Netflix via letter but never received a response. A year later, the plaintiff sent a follow-up letter to Netflix which highlighted that failure to comply with the disclosure deadlines under ERISA § 104 can result in penalties of up to \$110 per day. Although Netflix immediately disclosed plan documents to the plaintiff following receipt of the second letter, the plaintiff ultimately sued, seeking the maximum per day penalty for each day between his first request and when Netflix ultimately furnished documents. In its arguments to the court, Netflix argued that the normal 30-day deadline to disclose documents was not applicable at the time of plaintiff's first request because the deadline was tolled by the DOL's Outbreak Period relief. The court acknowledged the validity of this argument in its opinion, but noted that the core purpose of ERISA was to protect the interest of plan participants and



beneficiaries. The court proceeded to award the plaintiff statutory penalties equal to \$15 per day – approximately 14 percent of the maximum possible statutory penalty – without explaining why the relief granted by the DOL during the Outbreak Period would not totally excuse noncompliance.

COMPLIANCE DEADLINES AND REMINDERS

Plan sponsors should prepare to take action on the following upcoming deadlines. If you have any questions or need any assistance on these items, please reach out to your Reinhart attorney.

Retirement Plans

- Form 1099-R. Plans must e file Forms 1099-R with the IRS by March 31, 2024.
- RMDs. Plans must begin to pay initial Required Minimum Distribution (RMD) payments by April 1, 2024.
- Annual Funding Notice. Calendar year defined benefit plans with more than 100 participants must provide the Annual Funding Notice (AFN) by April 30, 2024.

Health and Welfare Plans

- ACA Information Reporting. If e filing, plan sponsors and applicable large employers (ALEs) must file the transmittal Forms 1094-B and 1094-C, along with their corresponding Forms 1095, with the IRS by March 31, 2024.

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.

Reinhart's [Employee Benefits Practice](#) is one of the largest and most tenured in the country:

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