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General Employee Benefits

SEC Releases Fiduciary Rule Proposals

On April 18, 2018, the Securities and Exchange Commission ("SEC") released a package of proposals regarding the standards of conduct and required disclosures for broker-dealers and investment advisers who provide services to retail investors. One of the proposals is to require broker-dealers to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities, without putting the financial or other interest of the broker-dealer ahead of the retail customer. A broker-dealer would discharge this duty by complying with each of the following obligations:

- Disclosing to the retail customer the key facts about the relationship, including material conflicts of interest;
- Exercising reasonable diligence, care, skill, and prudence to understand the product and to have a reasonable basis to believe that the product and a series of transactions are in the retail customer's best interest; and
- Establishing, maintaining and enforcing policies and procedures reasonably designed to identify and then at a minimum to disclose and mitigate or eliminate material conflicts of interest arising from financial incentives.

The SEC also proposed a requirement that broker-dealers and investment advisers provide retail investors with information intended to clarify the relationship through the proposed Form CRS — Relationship Summary. This standardized form would address the types of services offered to retail investors, the legal standards of conduct that apply to those services, the fees that retail investors might pay, and certain conflicts of interest that may exist. Further, the SEC proposed to (a) require broker-dealers and investment advisers to disclose their registration status in communications with investors and prospective investors and (b) restrict standalone broker-dealers and their financial professionals from using the terms "adviser" and "advisor" as part of their name or title.

Lastly, the package contains a proposed interpretation regarding the fiduciary

duty that investment advisers owe to their clients. The SEC's view is that the Investment Advisers Act of 1940 establishes a federal fiduciary standard for investment advisers, which includes both a duty of care and a duty of loyalty. The duty of care includes a duty to seek best execution of a client's transactions and to provide ongoing monitoring over the course of the client relationship.

Retirement Plan Developments

EBSA Releases New Guidance on ESG and Shareholder Engagement

The Employee Benefits Security Administration ("EBSA") released new guidance on economically targeted investments and shareholder engagement. In the new guidance, EBSA restates its longstanding view that plan fiduciaries may not sacrifice investment returns or take on additional investment risk to promote collateral social policy goals, but may use collateral considerations as tiebreakers. EBSA adds that plan fiduciaries must not too readily treat environmental, social and governance ("ESG") factors as economically relevant to the particular investment choices at issue when making a decision. Rather, plan fiduciaries "must always put first the economic interests of the plan in providing retirement benefits," and the evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons.

In the case of an investment platform that allows participants and beneficiaries to select from a broad range of investment alternatives, EBSA advised that a "prudently selected, well managed, and properly diversified ESG-themed investment alternative" could be added to the available investment options on a 401(k) plan platform without requiring the plan to remove other non-ESG investment options. However, in the case of a qualified default investment alternative ("QDIA"), selection of an investment fund is not the same as simply offering participants an additional investment alternative. Nothing in the QDIA regulation suggests that plan fiduciaries should choose QDIAs based on collateral public policy goals, and plan fiduciaries have to ensure that they comply with the duty of loyalty under the Employee Retirement Income Security Act of 1974 ("ERISA"). Specifically, selecting an ESG-themed target date fund as a QDIA would not be prudent if the fund would provide a lower expected rate of return than a non-ESG alternative target date fund with a similar risk-return profile.

With regard to shareholder engagement activities, EBSA highlights that shareholder activities intended to monitor or influence corporations may be

permissible under ERISA if such activities are likely to enhance the economic value of an investment after considering the costs to the plan. However, EBSA cautioned this does not imply individual plans should regularly undertake significant expenses to engage in shareholder activism. The guidance recommends that a plan fiduciary have a documented cost-benefit analysis if the fiduciary is considering a routine or substantial expenditure of plan assets to actively engage with management on environmental or social factors.

PBGC Issues Guidance on Alternative Payment Rules for Employer Withdrawal Liability

The Pension Benefit Guaranty Corporation ("PBGC") issued guidance to assist multiemployer pension plans that request its review of alternative plan rules for satisfying employer withdrawal liability. The guidance describes the PBGC's review process, the information needed, and factors the PBGC considers in reviewing plan proposals. The PBGC will review proposed alternative terms and conditions on a case-by-case basis, and will typically consider the following factors:

- Are the proposed alternative terms and conditions in the interests of participants and beneficiaries, do not create an unreasonable risk of loss to the PBGC, and are otherwise consistent with ERISA and the PBGC regulations?
- Do the proposed alternative terms and conditions realistically maximize projected contributions and the net recovery of withdrawal liability for the plan compared to the income generated by the statutory withdrawal liability rules?
- Are the assumptions used to support the plan's submission reasonable and supported by credible data?
- Are the proposed alternative terms and conditions reasonable in scope and application, and do they operate and apply uniformly to all employers?

The PBGC also finds it helpful to see support for an assertion that (a) the alternative would retain employers in the plan long-term and secure income that would otherwise be unavailable to the plan, and (b) absent the alternative, employers would withdraw from the plan or significantly reduce contributions in ways that would undermine plan solvency.

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Health and Welfare Plan Developments

IRS Readjusts HSA Annual Contribution Limit for 2018

For the second time this year, the Internal Revenue Service ("IRS") announced an adjustment to the annual limitation on deductions for contributions to a health savings account ("HSA") allowed for taxpayers with family coverage under a high-deductible health plan for calendar year 2018. Under Revenue Procedure 2018-27, the IRS restored the original 2018 contribution limit for family coverage (i.e., $6,900), up from the $6,850 limit published in March this year. Revenue Procedure 2018-18 published in March 2018 had reduced the contribution limit from $6,900 to $6,850 due to a change in the inflation adjustment calculations for 2018 under the Tax Cuts and Jobs Act. However, based on comments from individual taxpayers, employers and other stakeholders, the IRS determined that it was in the best interest of "sound and efficient" tax administration to restore the $6,900 contribution limit.

CMS Issues Final Rule on HHS Notice of Benefit and Payment Parameters for 2019

On April 9, 2018, the Centers for Medicare & Medicaid Services ("CMS") issued a final rule on benefit and payment parameters included in the Affordable Care Act ("ACA"). The final rule sets forth 2019 payment parameters and additional guidance on other key provisions of the ACA, such as essential health benefits ("EHB"), qualified health plan ("QHP") certification standards, and risk adjustments. Highlights of the final rule are as follows:

- States are offered more options in what they can select as an EHB-benchmark plan. Instead of being limited to 10 options, states will now be able to choose from the 50 EHB-benchmark plans used for the 2017 plan year in other states or select specific EHB categories (e.g., drug coverage or hospitalization) from among the categories used for the 2017 plan year in other states.
- States hold an expanded role in the QHP certification process, and CMS will continue to defer to states' network-adequacy standards.
- States in which the Department of Health and Human Services ("HHS") operates the risk adjustment program will be able to request to reduce risk adjustment transfers in the individual, small group or merged market by up to 50% beginning with the 2020 benefit year.

- The final rule removes several regulatory requirements on the Small Business Health Options Program ("SHOP") and outlines a new enrollment process in the SHOP exchanges using the Federal platform. This change allows SHOPs to eliminate the online enrollment process and allows employers to enroll directly with a SHOP-registered agent, broker or issuer.

IRS Issues Guidance on Paid Family and Medical Leave Tax Credit

The IRS issued its initial guidance on section 45S (Employer Credit for Paid Family and Medical Leave) of the Internal Revenue Code. To qualify for this credit, employers must have a written policy that provides at least two weeks of paid family and medical leave to all qualifying full-time employees (prorated for part-time employees), and the paid leave cannot be less than 50% of the wages normally paid to the employee. A qualifying employee is any employee under the Fair Labor Standards Act ("FLSA") who has been employed for at least one year and earns no more than 60% of the FLSA's highly-compensated employee threshold. For an employer claiming a credit for wages paid to an employee in 2018, the employee must not have earned more than $72,000 in 2017.

The credit is available for any of the following reasons:

- Birth of an employee's child and to care for the child;
- Placement of a child with the employee for adoption or foster care;
- To care for the employee's spouse, child or parent who has a serious health condition;
- A serious health condition that makes the employee unable to perform the functions of his or her position;
- Any qualifying exigency due to an employee's spouse, child or parent being on covered active duty (or having been notified of an impending call or order to covered active duty) in the Armed Forces; or
- To care for a service member who is the employee's spouse, child, parent or next of kin.

If an employer provides paid vacation leave, personal leave, medical or sick leave (other than leave specifically for one or more of the above-stated reasons), such paid leave is not considered family and medical leave, and thus is not eligible for this credit. Also, any leave paid by a state or local government or required by state or local law will not be taken into account in determining the amount of employer-provided paid family and medical leave.

This credit is available for up to 12 weeks of paid family and medical leave per

taxable year. The credit starts at 12.5% and increases by 0.25% for each percentage point by which the amount paid to a qualifying employee exceeds 50% of the employee's wages, with a maximum of 25%. Please note this credit is generally effective for wages paid in taxable years of the employer beginning after December 31, 2017, but is not available for wages paid in taxable years beginning after December 31, 2019.

Departments Issue Proposed Guidance on Mental Health Parity and Substance Use Disorder Rules

The Department of Labor, HHS and IRS (collectively, "Departments") jointly issued proposed guidance regarding (a) non-quantitative treatment limitations ("NQTL") and (b) disclosure requirements in connection with the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"). In general, the MHPAEA mandates that the financial requirements and treatment limitations imposed on mental health or substance use disorder ("MH/SUD") benefits cannot be more restrictive than the predominant financial requirements and treatment limitations imposed on substantially all medical/surgical benefits in a classification. The MHPAEA also prohibits group health plans from imposing an NQTL on MH/SUD benefits that is more stringent than comparable limitations applied to medical/surgical benefits in the same classification.

Highlights of the proposed guidance include the following:

- A medical management standard limiting or excluding benefits based on whether a treatment is experimental or investigative is an NQTL under the MHPAEA. Thus, a group health plan that applies the NQTL more stringently to MH/SUD benefits than to medical/surgical benefits is not in compliance with the MHPAEA.
- Health plans cannot set dosage limits for prescription drugs used to treat MH/SUDs that are less than the professionally-recognized treatment guidelines, when the dosage limits set by those plans for medical/surgical benefits equal or exceed the treatment guideline limits.
- An exclusion of all benefits for a particular condition or disorder is not a treatment limitation for purposes of the definition of "treatment limitations" in the MHPAEA regulations.
- If a health plan uses a provider network, its summary plan description must provide a general description of the network and an up-to-date, accurate and complete list of providers.

- Health plans that use provider networks can satisfy applicable disclosure requirements by including in enrollment and plan summary materials a hyperlink or uniform resource locator (URL) address for a provider directory where information relating to MH/SUD providers can be found.

Upcoming Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. PCORI Fee. Plan sponsors of self-funded plans must report and pay the annual Patient-Centered Outcomes Research Institute ("PCORI") fee by filing IRS Form 720 by July 31, 2018.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. Deadline for SMM. The deadline for providing a Summary of Material Modifications ("SMM") of a plan change that was adopted in 2017 (for calendar year plans) is July 28, 2018 (210 days after the end of the plan year in which the change was adopted).