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POSTED:

Dec 5, 2019

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RETIREMENT PLAN DEVELOPMENTS

DOL Proposes New Electronic Delivery Regulations for Retirement Plans

The Department of Labor ("DOL") has issued proposed regulations updating and expanding the electronic delivery requirements for ERISA-covered retirement plans, including pension plans and 401(k) plans. The proposed regulations establish a new safe harbor permitting plan administrators to post participant disclosures on the internet or a website if a participant has provided an electronic address and has not affirmatively opted out of electronic delivery. While this new safe harbor only applies to retirement plans, the proposed regulations include a section reserved for welfare plans to address potential future rulemaking.

The proposed safe harbor applies to all plan-related disclosures required under Title I of ERISA: summary plan descriptions, summaries of material modifications, pension benefit statements, etc. Plan administrators must satisfy various delivery, security, and technical standards, including furnishing paper versions upon request, distributing a notice of internet availability, keeping accurate records, and protecting sensitive information, before adopting the proposed safe harbor as the plan's default delivery method.

A more detailed summary of the DOL's electronic delivery regulations can be found here.

PBGC Announces Premium Rates for 2020

The Pension Benefit Guaranty Corporation ("PBGC") has issued a notice outlining premium increases for 2020. The per participant flat rate premium for the PBGC's single employer plan termination insurance program increases from $80 to $83. The per participant flat rate premium for multiemployer plans increases from $29 to $30. The variable rate premium per $1,000 of unfunded vested benefits for single-employer plans increases from $43 to $45 (multiemployer plans do not pay a variable-rate premium). The variable rate premium cap increases from $541 times the number of participants to $561. (However, plans sponsored by small employers—generally, employers with fewer than 25 employees—may be subject to a lower variable rate premium cap.)

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PBGC Guarantee Limit for Single-Employer Plans Increases in 2020

The PBGC has announced that its guarantee limit for single employer plans is increasing in 2020. The increase will only apply to plans terminating in 2020 (payments to retirees whose plans terminated before 2020 will not change). Beginning in 2020, the age adjusted annual maximums for a single life annuity are: age 55—$31,388; age 60—$45,338; age 65—$69,750; age 70—$115,785. Annual maximums for a joint and 50% survivor annuity are also increasing.

Ninth Circuit Upholds Plan's Interpretation of In-Service Distribution Rules

In *Meakin v. California Field Ironworkers Pension* Trust, No. 18-15216 (9th Cir. June 5, 2019) (unpublished), the U.S. Court of Appeals for the Ninth Circuit held that a plan sponsor's revised interpretation of its plan's in-service distribution rules was enforceable and not an abuse of discretion. The plan at issue, a multiemployer defined benefit pension plan, had a provision requiring participants to "withdraw completely and refrain from any employment activity in the building and construction industry" (*i.e.*, retire) before becoming eligible to receive an early retirement benefit. The plan did have a limited exception allowing continued employment for certain construction positions, provided the participant submitted a retiree work application to the Board of Trustees ("Board") for approval. Here, the plaintiff participant requested the Board's approval to receive an early pension while continuing to work as a Safety Director and Estimator. The Board approved the participant's application and he began receiving a pension in 2008.

In 2011, following newly-released guidance from the Internal Revenue Service ("IRS"), the Board reviewed its interpretation of the plan's in-service distribution rules. The Board entered into a Voluntary Correction Program with the IRS, disclosing that the plan had been improperly administered, and agreeing to stop payments to retirees who had never actually retired under the terms of the plan.

In 2014, the Board informed the participant that it was stopping his pension payments prospectively, stating that he had never actually retired under the terms of the plan. The participant unsuccessfully appealed the decision to the Board and then filed a lawsuit in federal court. After the district court ruled in favor of the plan, the participant appealed to the Ninth Circuit. The Ninth Circuit held that, as a matter of law, the Board's reinterpretation of the plan's in-service distribution rules must be upheld unless it was made in bad faith or was unreasonable—and such unreasonableness does not hinge on which interpretation is most persuasive, but on whether the Board's reinterpretation was illogical, implausible, or without support in inferences that may be drawn

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from the facts. The participant conceded that the Board's reinterpretation had not been made in bad faith and that he had, in fact, continued working in the building and construction trade contrary to the plan's terms. However, the participant argued, the Board's reinterpretation was *unreasonable* because it was either an unlawful, impermissible cutback of an accrued benefit under ERISA and the plan or because equitable estoppel barred the Board from imposing the reinterpreted provision on him.

The Ninth Circuit found the participant's arguments unpersuasive, holding that the Board was permitted to change its position on plan terms, and a reinterpretation, by itself, does not constitute unreasonableness. Furthermore, the Ninth Circuit held the reinterpretation was not an impermissible cutback under U.S. Supreme Court precedent because the Board had not introduced a new "suspension condition" on the participant's right to receive early retirement benefits. Rather, the Board had imposed an "existing suspension provision" under the plan resulting in an "actual suspension" of the participant's benefit. Finally, because the participant had failed to establish the "extraordinary circumstances" necessary to be granted equitable estoppel relief in the ERISA context, the Ninth Circuit ruled the participant could not be exempted from the plan's terms requiring suspension of his early pension.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HHS Rescinds Health Plan Identifier Requirement Under HIPAA

In final regulations, effective December 27, 2019, the Department of Health and Human Services ("HHS") officially rescinded the Health Plan Identifier ("HPID") requirement. As background, the Health Insurance Portability and Accountability Act ("HIPAA") and the Affordable Care Act ("ACA") required "controlling health plans" to obtain an HPID as part of complying with HIPAA's electronic transaction standards. Most group health plans and health plan issuers meet the definition of "controlling health plans" and would have needed to obtain an HPID or face penalties. In 2014, based on industry input, HHS delayed enforcement of the HPID requirement "until further notice."

HHS states that it will deactivate each HPID and OEID record in its system and send notices to users regarding the same. Entities themselves need not take action to deactivate.

HHS Imposes HIPAA Penalties on Covered Entities for Posting PHI on Social

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Media

In two enforcement actions under HIPAA's Privacy, Security and Breach Notification Rules, HHS's Office for Civil Rights ("OCR") imposed civil monetary penalties and corrective action plans on health care provider covered entities that posted individuals' protected health information ("PHI") on social media without the individuals' authorizations. OCR also found that, among other violations, the covered entities failed to conduct adequate, enterprise-wide risk analyses; failed to restrict employees' access to PHI to the minimum necessary to accomplish their job duties; and failed to adopt adequate policies and procedures concerning PHI. In one case, the individual to whom the PHI related was a professional athlete who suffered reputational and financial harm after his photographed PHI was posted on Twitter. In the other case, the covered entity disclosed an individual's PHI when it responded to the individual's review of the covered entity on its Yelp page. These cases serve as a reminder for covered entities to use and disclose PHI, on whatever medium or outlet, only as strictly required or permitted under the Privacy Rule, and to implement, enforce, review and update policies and procedures to protect PHI.

IRS Publishes Latest Version of AIR Submission Composition and Reference Guide

The IRS has posted the latest version of Publication 5258, Affordable Care Act Information Returns (AIR) Submission and Composition Reference Guide. Publication 5258 provides guidance to employers, plan sponsors and other reporting entities on how to successfully compose and electronically file Forms 1095 B and 1095-C ("ACA Returns"). As a reminder, any entity submitting 250 or more ACA Returns must electronically file them with the IRS (though the IRS encourages all filers to electronically file even if submitting fewer than 250 ACA Returns). Beginning in January 2020, the IRS will accept electronically-filed 2019 Forms 1094/1095-B and 1094/1095-C, as well as original prior-year forms and corrections.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

SAR. For calendar-year plans that obtained an extension to file their Form 5500, the plan's Summary Annual Report ("SAR") must be distributed to participants and beneficiaries no later than two months following the expiration of the extension period (December 15, 2019). As December 15 falls on a Sunday, this year's deadline is December 16, 2019.

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Health Plan Open Enrollment

1. SBC. Plan sponsors of group health plans must issue a new Summary of Benefits and Coverage ("SBC") to participants and beneficiaries covered under the plan as part of the plan's open enrollment. Group health plans without open enrollment must issue the SBC no later than 30 days prior to the beginning of the next plan year (December 1, 2019, for calendar-year plans).

1. HRA Opt Out. Plan sponsors of Health Reimbursement Arrangements ("HRAs") must annually offer participants an opportunity to opt-out of and waive all future reimbursements from their HRA. This opt out notice can be provided with annual open enrollment materials.

Retirement Plans

Defined Contribution Plan Annual Notices. Plan sponsors of defined contribution plans must annually provide the following notices, if applicable, at least 30 but not more than 90 days prior to the beginning of the plan year (between October 3 and December 1, 2019, for calendar-year plans).

1. QDIA Notice. Plan sponsors of defined contribution plans that invest participant contributions in a qualified default investment alternative ("QDIA") for participants who fail to make an investment election must annually provide a QDIA notice to all participants.

2. Automatic Enrollment Notice. Plan sponsors of defined contribution plans with an eligible automatic contribution arrangement or a qualified automatic contribution arrangement must annually provide a notice to all participants on whose behalf contributions may be automatically contributed to the plan. This notice can be combined with the QDIA notice.

3. Safe Harbor 401(k) Notice. Plan sponsors of safe harbor 401(k) plans must annually provide participants a safe harbor notice that describes the safe harbor contribution and other material plan features. The safe harbor notice can be combined with other required notices, such as the QDIA notice.

Pre-approved Defined Benefit Plan Deadline. Plan sponsors must adopt a restatement of their pre-approved defined benefit plan by April 20, 2020. This deadline also applies to plan sponsors switching from an individually-designed to

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a pre-approved defined benefit plan.

Pre-approved 403(b) Plan Deadline. Employers must adopt a pre-approved 403(b) plan under Revenue Procedure 2017-18 by March 31, 2020. Eligible employers may adopt a pre-approved plan as a restatement to correct any form defects dating back to January 1, 2010.

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.

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