Benefits Counselor – November 2021

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RETIREMENT PLAN UPDATES

IRS Publishes Guidance Regarding Rehiring Pension Participants Following Retirement

On October 22, 2021, the IRS amended its existing FAQs regarding the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to address whether an employer may rehire a former employee who commenced retirement distributions under a qualified pension plan that does not provide for in service distributions due to unforeseen hiring needs related to the COVID 19 pandemic. In particular, the guidance considers whether such circumstances would result in the participant's retirement no longer being considered a "*bona fide* retirement" and thus jeopardize the tax qualification status of the pension plan.

As the guidance notes, a pension plan that does not permit in service distributions may commence benefit distributions to an individual only when the individual has a "*bona fide* retirement." Whether an individual's retirement under a plan is *bona fide* is, in the absence of plan terms specifying the conditions under which a retirement will be considered *bona fide*, based on a facts and circumstances analysis. However, the guidance provides a general rule that the rehire of a retired individual due to unforeseen circumstances (such as a labor shortage) will not cause the individual's prior retirement to no longer be considered a *bona fide* retirement under the plan.

DOL Proposes Amendment to Investment Duties Regulation to Address ESG Considerations

On October 13, 2021, the U.S. Department of Labor (DOL) published a notice of proposed rulemaking which would amend the "Investment Duties" regulation to allow increased consideration of environmental, social or governance (ESG) factors when selecting plan investments. The Investment Duties regulation addresses the duties of prudence and loyalty when selecting plan investments and when exercising shareholder rights, including proxy voting. As previously reported, in November 2020, the DOL published a final rule that generally required plan fiduciaries to select investments and investment courses of action based solely on consideration of "pecuniary factors." This rule, along with a December 2020 rule addressing fiduciary duties regarding proxy voting and shareholder rights, intended to address perceived uncertainty in these areas and

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to respond to concerns that some investment products may have been marketed to fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA) based on purported benefits unrelated to financial performance. In March 2021, the DOL announced that, pending publication of further guidance on these issues, it would not enforce the 2020 rules or otherwise pursue enforcement action against any plan fiduciary based on a failure to comply with those rules.

The proposed rule would again amend the Investment Duties regulation. Significant changes included in the proposed rule include the following:

- Permissibility of Considering ESG Factors. This change clarifies that when considering projected returns, a fiduciary's duty of prudence may often require an evaluation of the effects of climate change and other ESG factors on the particular investment. The proposed rule includes numerous examples to illustrate an appropriate risk return analysis.
- QDIA Provisions. The proposed rule would remove the special rules currently applicable to qualified default investment alternative provisions (QDIAs). Instead, the proposed rule would apply the same standards to QDIAs as apply to other investments. However, the preamble to the proposed rule reiterates that other standards besides those under the Investment Duties regulation apply to the selection of QDIAs.
- Shareholder Rights and Proxy Voting Provisions. The proposed rule would make three significant changes to the current rule regarding the exercise of shareholder rights, which includes proxy voting. First, it would eliminate the regulation's statement that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right." Second, it would remove the two safe harbor examples for proxy voting policies included in the current regulation. And third, it would eliminate the requirement that when exercising shareholder rights, plan fiduciaries must maintain records on proxy voting activities and all other exercises of shareholder rights.

The DOL is accepting public comments on the proposed rule until December 12, 2021.

DOL Announces Extension of Enforcement Relief for Investment Advice Fiduciaries

On October 25, 2021, the DOL published Field Assistance Bulletin (FAB) No. 2021 02, which announced a short extension of the DOL's temporary nonenforcement policy for investment advice fiduciaries. In 2016, the DOL

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published regulations expanding who is an ERISA fiduciary when providing investment advice for a fee to a retirement plan. However, the U.S. Court of Appeals for the Fifth Circuit later vacated the regulations, resulting in uncertainty regarding the fiduciary definition and available prohibited transaction exemptions. As a result, in 2018, the DOL announced that until further guidance was issued, it would not pursue prohibited transaction claims against investment advice fiduciaries who were working "diligently and in good faith" to comply with the impartial conduct standards for transactions that would have been exempted under the prohibited transaction rules but for the Fifth Circuit's decision.

The DOL eventually incorporated the originally proposed impartial conduct standards in Prohibited Transaction Exemption (PTE) 2020 02, which became effective on February 16, 2021. The PTE provides that investment advice fiduciaries relying on the exemption must render advice in the plan and participant's best interest to receive compensation that would otherwise be prohibited. However, to allow more time for transition to the new PTE, the DOL extended the temporary nonenforcement policy in FAB No. 2021 02 until January 31, 2022. Additionally, from December 21, 2021, through June 30, 2022, the DOL will not pursue prohibited transaction claims against investment advice fiduciaries who are otherwise in compliance with PTE 2020-02 based solely on their failure to comply with certain disclosure and documentation requirements set forth in the exemption.

HEALTH AND WELFARE UPDATES

EEOC Updates Guidance Regarding Nondiscrimination Laws and Vaccine Incentives

On October 25, 2021, the Equal Employment Opportunity Commission (EEOC) published an update to its previously issued question and answer (Q&A) guidance regarding the interaction of COVID 19 vaccination issues and the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA) and other federal nondiscrimination laws.

The updated language clarifies that neither the ADA nor GINA limits the incentives an employer may offer to encourage employees to either receive the COVID 19 vaccine or provide evidence of vaccination as long as employees receive the vaccine from a health care provider rather than from an employer or its agent. In contrast, if an employer offers an incentive for employees to voluntarily receive a vaccine administered by the employer or an agent of the employer, then the ADA's rules on disability related inquiries apply and the value of the incentive

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may not be "so substantial as to be coercive." The guidance does not offer any further clarity on when incentives become substantive enough to be considered coercive.

Finally, the updated guidance clarifies that an employer's request for an employee to provide evidence of vaccination is not an unlawful request for genetic information because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member, nor is it any other form of genetic information. As a result, GINA's restrictions on employers requesting genetic information do not apply.

OCR Publishes Guidance Addressing Application of HIPAA's Privacy Rule to COVID-19 Vaccine Inquiries

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) recently published guidance regarding whether the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) applies to requests for information about a person's COVID 19 vaccination status. The guidance confirms that HIPAA's Privacy Rule does not prohibit any person or entity from asking an individual whether they have received a COVID 19 vaccine. As the guidance details, the Privacy Rule only applies to covered entities (such as health plans, health care clearinghouses, health care providers, etc.) and their business associates, and only regulates how and when covered entities and business associates are permitted to use and disclose protected health information (PHI)—not whether a covered entity or business associate may request information from patients or visitors. However, the guidance cautions that other state or federal laws will determine whether an individual is required to disclose their vaccination status.

The guidance also provides examples of when a covered entity or business associate is permitted to disclose PHI relating to an individual's vaccination status, including the following:

- A covered pharmacy is permitted to disclose PHI relating to an individual's vaccination status to a public health authority when reasonably relying on a representation by the public health authority that the information constitutes the minimum necessary for the stated purposes of the disclosure *(e.g.*, tracking the effectiveness of different COVID 19 vaccines).
- A covered hospital is permitted to disclose PHI relating to an individual's vaccination status to an individual's employer so that the employer may conduct an evaluation relating to medical surveillance of the workplace if

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certain conditions are met.
- A physician is permitted to disclose PHI relating to an individual's vaccination status to the individual's health plan as necessary to obtain payment for the administration of a COVID 19 vaccine.

Although the guidance specifically addresses COVID 19, a footnote notes that the same rules apply to all vaccinations.

IRS Publishes Guidance on Interaction of Outbreak Period Relief With COBRA Payment Deadlines

On October 6, 2021, the IRS, in coordination with the DOL and HHS (collectively, the Departments), published Notice 2021 58 (the Notice), which addresses how the COVID 19 Outbreak Period relief interacts with a participant's deadline to elect COBRA coverage and pay the initial COBRA premium. Additionally, the guidance reiterates that the Outbreak Period extensions do not apply to the provision of notices under the American Rescue Plan Act of 2021 or to elections of the COBRA subsidy.

Background

As previously reported, a 2020 joint notice issued by the Departments explained that the period beginning March 1, 2020, and ending 60 days after the end of the COVID 19 national emergency, would be classified as the "Outbreak Period." The joint notice required employee benefit plans subject to ERISA or the Internal Revenue Code to disregard the Outbreak Period for purposes of calculating certain deadlines for participant action, including the deadline to elect COBRA coverage and the deadline to pay COBRA premiums. Subsequent guidance issued in 2021 clarified that the Outbreak Period applies to each participant individually, lasting until the earlier of (1) one year after the day the participant first became eligible for relief; or (2) 60 days after the end of the national COVID 19 emergency.

Deadlines to Elect COBRA Coverage and Pay Premiums

The Notice clarifies that the disregarded period for an individual to elect COBRA continuation coverage and the disregarded period for the individual to make initial and subsequent COBRA premium payments generally run concurrently. To help illustrate this point, the Notice provides some general rules:

- An individual's deadline to elect COBRA continuation coverage is the earlier of (1) one year and 60 days after the individual's receipt of the COBRA election

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notice; or (2) the end of the Outbreak Period.

- If an individual elects COBRA continuation coverage during the initial 60 day COBRA election timeframe, the individual will have until the earlier of the following to pay the initial COBRA premium payment: (1) one year and 45 days after *the date they elected COBRA continuation coverage*; or (2) the end of the Outbreak Period.
- If an individual elects COBRA continuation coverage outside of the initial 60 day COBRA election timeframe, the deadline to pay the initial COBRA premium payment is the earlier of (1) one year and 105 days *after the date the COBRA election notice was provided*; or (2) the end of the Outbreak Period.
- For COBRA premium payments made after the initial payment, the maximum time an individual has to make COBRA premium payments while the Outbreak Period continues is one year and 30 days from the date a payment would have been due, but for the Outbreak Period relief (subject to the transition relief described below). Based on examples included with the guidance it appears that under certain circumstances a participant's initial payment must cover more than the first month of coverage.

The stated goal of the rules is to ensure that individuals who delay electing COBRA do not receive more than one year total of disregarded time for the COBRA election and the initial COBRA premium payment. In practice, this means that the deadline for an individual to make their initial COBRA premium payment partially depends upon the date they elect COBRA continuation coverage.

Transition Relief for Premium Payments

The IRS acknowledges that prior to publication of the Notice, some individuals may have assumed the disregarded period for making the initial COBRA premium payment began on the date of the COBRA election. To address potential inequalities in deadlines, the Notice offers limited transition relief. Under the relief, an individual will not be required to make the initial COBRA premium payment before November 1, 2021, even if November 1, 2021, is more than one year and 105 days after the date the COBRA election notice was received, provided that the individual makes the initial COBRA premium payment within one year and 45 days after the date they elected COBRA continuation coverage.

Departments Publish FAQs Addressing COVID-19 Vaccine Coverage

On October 4, 2021, the Departments published five new FAQs addressing rapid coverage of preventive services for COVID 19 and HIPAA nondiscrimination and wellness programs.

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Preventive Services – Non-grandfathered Plans

As background, the CARES Act and its implementing regulations require non grandfathered group health plans to cover, without cost sharing requirements, any item, service or immunization that is intended to prevent or mitigate COVID 19 and that is, with respect to the individual involved, (1) an evidence based item or service that has an "A" or "B" rating in the current recommendations of the U.S. Preventive Services Task Force (USPSTF); or (2) an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC). Non-grandfathered plans must cover COVID 19 preventive services no later than 15 days after a recommendation from ACIP is adopted by the director of the CDC or after the USPSTF issues a recommendation.

The new FAQs clarify that the December 12, 2020, ACIP recommendation remains the applicable recommendation for purposes of the definition of qualifying COVID 19 preventive services that plans must cover. Accordingly, non-grandfathered plans must cover COVID-19 vaccines (1) immediately once the vaccine is authorized under an emergency use authorization (EUA) or approved under a biologics license application (BLA); and (2) consistent with the scope of a vaccine's EUA or BLA, including any EUA or BLA amendment. This will allow for immediate coverage of an additional dose to certain individuals, administration of booster doses and/or the expansion of the age demographic for whom the vaccine is authorized or approved.

The Departments will enforce the timing requirement to cover, without cost sharing, any COVID 19 vaccine authorized under an EUA or approved under a BLA immediately upon the vaccine becoming authorized or approved prospectively from the date of the FAQ.

HIPAA Nondiscrimination and Wellness Programs

A group health plan can offer participants a premium discount for receiving a COVID 19 vaccination if the premium discount otherwise complies with wellness program regulations. The FAQs note that receipt of a COVID-19 vaccination would be considered an activity-only wellness program and, as such, must comply with the five criteria set forth in the regulations. That is, the program must be reasonably designed to promote health or prevent disease, provide a reasonable alternative standard to qualify for the discount, and provide notice of the reasonable alternative standard. Additionally, the premium discount/surcharge

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cannot exceed 30 percent of the total cost of employee-only coverage and individuals must be able to qualify for the discount/surcharge at least once per year.

The FAQs also confirm that plans may not condition eligibility for benefits or coverage on vaccination status and that wellness incentives that relate to the receipt of COVID 19 vaccines are treated as not earned for purposes of determining whether employer sponsored health coverage is affordable.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

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, 2021, for calendar year plans).
2. 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 days, but not more than 90 days prior to the beginning of the plan year (between October 3, 2021, and December 1, 2021, for calendar year plans).

1. QDIA Notice. Plan sponsors of defined contribution plans, which invest participant contributions in a 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) Plan Notice. Plan sponsors of safe harbor 401(k) plans must provide participants with an annual safe harbor notice which

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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.

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