

Benefits Counselor October 2016

Retirement Plan Developments

Internal Revenue Service ("IRS") Extends Temporary Nondiscrimination Relief for Closed Defined Benefit Plans

The IRS extended temporary nondiscrimination relief for closed defined benefit plans through the end of 2017. The IRS will not publish final regulations with enough time for plan sponsors to comply before the temporary nondiscrimination relief would have expired.

IRS Issues Final Regulations for Bifurcated Defined Benefit Plan Distributions

The IRS finalized regulations that allow participants to receive optional forms of benefits that are paid partly as annuities and partly as single sums. The final regulations provide for two methods to bifurcate the accrued benefit. Under the first method, a plan may bifurcate the accrued benefit so that the plan provides that the minimum present value requirements in Treasury Regulation § 1.417(e)-1(d) apply to a specified part of the accrued benefit as though the part were the whole accrued benefit. Under the second, alternative method, a plan that distributes a specified single sum to a participant will satisfy the requirements in Treasury Regulation § 1.417(e)-1(d) if the remaining portion of the participant's benefit satisfies the minimum requirement set forth in the regulations.

The final regulations apply to distributions with annuity starting dates in plan years that begin on or after January 1, 2017.

Pension Benefit Guaranty Corporation ("PBGC") Issues Proposed Rule for Missing Participants Program for Terminating Plans

On September 20, 2016, the PBGC issued proposed regulations to redesign its existing missing participants program for terminating single-employer defined benefit plans and to adopt three new missing participants programs. The new programs would cover (1) multiemployer defined benefit plans covered by the PBGC's insurance program for plans covered by Title IV of ERISA, (2) professional service employer defined benefit plans that are not covered under the Title IV

POSTED:

Oct 18, 2016

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insurance program and (3) most defined contribution plans. The new programs would allow terminating plans to transfer accounts of missing participants to the PBGC or send the PBGC information about where the accounts were transferred after the plans conducted a diligent search. As with the existing defined benefit plan program, the PBGC will try to find all reported participants. Participants who cannot be located will be added to the PBGC's searchable database of missing participants.

There are some noteworthy changes in the proposed regulations. For example, the PBGC will charge a fee to participate in the program. In addition, plans would have to treat participants with *de minimis* benefits as missing if they are subject to mandatory cash-out and are non-responsive. The new program also has more robust requirements for searching for missing participants before the PBGC will accept a transfer from a terminating Plan. The PBGC also proposes reducing the number of benefit categories and actuarial assumptions for determining the amount of the transfer to the PBGC, and proposes changes to the rules for paying benefits to missing participants and their beneficiaries.

The new missing participants program is voluntary for terminating defined contribution plans and defined benefit plans that are not covered by PBGC insurance.

PBGC Lowers Penalties for Late Payments of Premiums

The PBGC lowered the penalty rates for late payments of premiums by all plans and provided a waiver of most of the penalty for plans that have demonstrated a commitment to premium compliance. Under the final regulation, the lower self-correction penalty rate will be 1/2 percent with a 25 percent cap, and the higher penalty rate will be 2.5 percent with a 50 percent cap. The PBGC also eliminated the minimum penalty assessment.

The PBGC will waive 80 percent of penalties assessed at the 2.5 percent rate if (1) the plan has a five-year record of timely payment of all premiums and (2) payment of the late premium no later than 30 days after the PBGC informs the plan in writing that there is or might be a problem.

This final regulation is applicable to late premium payments for plan years beginning after 2015.

Court Rejects Application of Dudenhoefter for Privately Held Stock

In *Allen v. GreatBanc Trust Co.*, No. 15-3569 (7th Cir. 2016), employees sued the trustee of their employer's employee stock ownership plan ("ESOP") in connection with a seller-financed transaction. In the transaction, the ESOP bought non-public stock from the employer's shareholders for \$60 million. Within a year of the sale, the stock price had dropped by almost 50 percent. The employees' lawsuit alleged that the trustee breached its fiduciary duty by failing to obtain an appropriate valuation and engaged in prohibited transactions. The district court dismissed the complaint after finding that the plaintiffs had not met the "special circumstances" pleading requirement of *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014).

In *Dudenhoeffer*, the United States Supreme Court stated that in certain cases involving the decline of the share price of publicly traded stock held by a retirement plan, the plaintiffs must plead special circumstances that show that the trustee knew the shares were overvalued. However, the Seventh Circuit rejected *Dudenhoeffer's* "special circumstances" pleading requirement in the context of private stock. The Seventh Circuit noted that the "special circumstances" pleading requirement is unnecessary because there is no market whose valuation must be explained away. Accordingly, the Seventh Circuit reversed the district court's decision and allowed the case to proceed past the pleading stage.

IRS Modifies Employee Plans Compliance Resolution System ("EPCRS") for Changes in the Determination Letter Program

On September 29, 2016, the IRS issued Rev. Proc. 2016-51, which modifies EPCRS in light of the changes to the determination letter program and supersedes Rev. Proc. 2013-12. Rev. Proc. 2016-51 also incorporates the provisions of several other revenue procedures.

Health and Welfare Plan Developments

Wisconsin Federal District Court Issues Ruling in Wellness Program Case

In *EEOC v. Orion Energy Sys., Inc.*, No. 14-CV-1019 (E.D. Wis. Sept. 19, 2016), the District Court for the Eastern District of Wisconsin determined that the employer's wellness program did not violate the Americans with Disabilities Act ("ADA") by requiring participants to pay 100% of their premiums for self-insured health coverage if they failed to complete a health risk assessment. The EEOC brought a lawsuit alleging that the employer's wellness program violated the ADA. The employer argued that the wellness program fell under the ADA's safe harbor for

bona fide benefit plans. The bona fide benefit plan exception allows insurers to establish a bona fide benefit plan that is "based on underwriting risks, classifying risks, or administering such risks." The district court concluded that the ADA's safe harbor did not apply because the wellness program was not used to underwrite, classify, or administer risks and was independent of the health plan. However, the court ruled in favor of the employer on the wellness program issue because the wellness program was voluntary.

It is important to note that this case originated before the EEOC issued its final wellness program regulations, and therefore, portions of the final regulations do not apply.

DOL Issues Final Paid Sick Leave Rule for Federal Contractors

The DOL issued a final rule requiring federal contractors to provide paid sick leave to employees who work in connection with federal contracts. The rule would cover employees who are sick, need to take care of a sick family member or must see a doctor or take a family member to a doctor. The final rule provides for up to 56 hours of paid sick leave per year.

Department of Health & Human Services ("HHS") Releases FAQs on 1557 Regulations

HHS has published guidance to help plans comply with the final regulations that implement the nondiscrimination rules under Section 1557 of the Affordable Care Act ("ACA"). HHS issued FAQs relating to the requirement that covered entities post taglines in at least the top 15 languages spoken by individuals with limited English Proficiency. In addition, HHS provided a table identifying the top 15 languages spoken by limited English proficiency individuals in each state. The published list is meant to help covered entities comply with the regulations, but covered entities may refer to sources other than the list.

Upcoming Compliance Deadlines and Reminders

1. **Reinsurance Fee for Group Health Plans.** Contributing entities (the third party administrator for self-funded plans or the insurer for fully insured plans) must report to HHS their annual enrollment counts by November 15, 2016 using the electronic "2016 ACA Transitional Reinsurance Program Annual Enrollment and Contributions Submission Form." The Form will then calculate the contribution amount owed. The contribution rate for 2016 is \$27 per reinsurance covered life. As in 2015,

self-insured, self-administered plans exempt from the reinsurance fee requirement may wish to send an e-mail to CMS indicating their self-insured, self-administered status. This is the last year that the reinsurance fee is payable.

2. **Health Plan Open Enrollment Requirements.**

1. Plan sponsors of group health plans must issue a new summary of benefits and coverage ("SBC") to participants and beneficiaries covered under the plan in conjunction with open enrollment. Group health plans without open enrollment must issue the SBC no later than 30 days in advance of the plan year (December 1, 2016 for calendar year plans).
2. Plan sponsors of health reimbursement arrangements ("HRA") must offer participants an annual opportunity to opt-out of and waive all future reimbursements from their HRA. This notice of opt-out can be provided with the open enrollment materials.

3. **Defined Contribution Plan Annual Notices.** Plan sponsors of defined contribution plans must provide the following notices, if applicable, at least 30 but not more than 90 days before the beginning of the Plan Year. Plan sponsors of calendar year plans must send the notices between October 3 and December 1, 2016.

1. Plan sponsors of defined contribution plans that invest participant contributions in a qualified default investment alternative ("QDIA") because the participant failed to make an investment election must provide an annual notice to all participants.
2. Plan sponsors of defined contribution plans with an eligible automatic contribution arrangement or a qualified automatic contribution arrangement must provide an annual notice to all participants on whose behalf contributions may be automatically contributed to the plan. Plan sponsors can combine the automatic enrollment notice with the QDIA notice.
3. Plan sponsors of safe harbor 401(k) plans must provide participants an annual safe harbor notice that describes the safe harbor contribution and other material plan features. Plan sponsors can combine the safe harbor notice with other required notices, such as the QDIA notice

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