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Benefits Counselor – October 2020

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RETIREMENT PLAN DEVELOPMENTS

PBGC Provides COVID-19 Relief for Variable-Rate Premium Filers by Extending Due Date for Prior Year Contributions

On September 23, 2020, the Pension Benefit Guaranty Corporation (PBGC) issued Technical Update 20 02 that provides additional flexibility for variable rate premium filers. The Coronavirus Aid, Relief and Economic Security (CARES) Act extended the due date for certain pension contributions otherwise due during 2020 until January 1, 2021, but did not provide any guidance with respect to PBGC premiums related to such contributions. Under the PBGC's new guidance, plans may include all contributions received by January 1, 2021, in their plan assets for purposes of calculating the plan's variable rate premium. Plans may not anticipate future contributions in their premium filing, and the new guidance does not impact premium due dates (*i.e.*, for calendar year plans, the 2020 premium is still due October 15, 2020). However, plans will be permitted to amend any previous filing to revise their originally reported asset value once all prior year contributions have been made, and may receive a refund of any premium overpayment.

HEALTH AND WELFARE PLAN DEVELOPMENTS

IRS Notice 2020 76 Extends Deadline for Health Coverage Reporting

The Internal Revenue Service (IRS) has issued Notice 2020 76, which extends the deadline to provide Form 1095-B, proof of minimum essential coverage and Form 1095-C, proof of employer offered coverage, from January 31, 2021 to March 2, 2021. The filing extension applies to insurers, self insuring employers, applicable large employers and other providers of minimum essential coverage who have an obligation to furnish Forms 1095 B and 1095 C to individuals. The IRS also confirmed that entities will need to comply with the obligation to provide Forms 1095 B to individuals (even though the individual shared responsibility payments in 2020 will be zero), but that the penalty non-enforcement policy the IRS issued last year will continue. Accordingly, the IRS will not assess any penalty against entities that fail to furnish Forms 1095-B to individuals if such entity (1) posts a prominent notice on its website stating that individuals may receive a copy of their Form 1095 B upon request, accompanied by relevant contact information and (2) the entity provides a Form 1095 B to any requesting individual within 30

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days after the request is received. The Notice also provides a final extension of relief from penalties until March 2, 2021, for entities that reported incorrect or incomplete information in 2020, but have since made a good faith effort to correct.

GENERAL DEVELOPMENTS

DOL Issues Proposed Regulations Regarding Classification of Workers as Independent Contractors

The U.S. Department of Labor's (DOL) Wage and Hour Division has proposed new regulations to determine whether a worker should be classified as an employee or an independent contractor under the Fair Labor Standards Act (FLSA). The DOL notes that the purpose of the proposed regulations is to streamline the test to identify independent contractors, as well as to bring clarity and consistency to the classification of workers.

The proposed regulations adopt an "economic reality" test to determine whether a worker is an employee or an independent contractor, which considers whether the worker is in business for him or herself (independent contractor) or economically dependent on the employer for work (employee). The proposed regulations identify two core factors to determine whether a worker is economically dependent on an employer: (1) the nature and degree to which the worker has control over the work (*i.e.*, whether the worker sets their own schedule, selects projects, or is able to work for others) and (2) the worker's opportunity for profit and loss based upon their own initiative or investment. The proposed regulations also set forth other factors that may comprise the analysis, such as the worker's required skill level for the work, the permanence of the relationship between the worker and the business, and whether the work is part of an integrated unit of production. Finally, the proposed regulations emphasize that the practical relationship between the worker and the business is more relevant than what may be contractually or theoretically possible in determining the worker's status.

Comments to the proposed rules are due by October 25, 2020.

DOL Issues Revised Temporary Rules on COVID-19-Related Paid Sick and Family Leave

Following a court order invalidating portions of previous temporary regulations, the DOL has issued revised temporary regulations regarding paid sick and family

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leave provisions of the Families First Coronavirus Response Act ("FFCRA"). In August 2020, a court in the Southern District of New York found that the DOL exceeded its authority when it limited eligibility of paid leave under FFCRA, and vacated several elements of the agency guidance, including:

- The broad definition of "health care provider" for purposes of exclusion from FFCRA leave;
- The provision stating employees are ineligible for FFCRA leave if the employer does not have sufficient work for them;
- The provision regarding employer approval before an employee is permitted to take intermittent leave; and
- The provision requiring that employees provide documentation prior to taking FFCRA leave.

In response to the court's order, the DOL issued revised temporary regulations and updated its related FAQ guidance. Highlights include:

- The definition of "health care provider" has been revised to specify further categories of individuals who may be denied FFCRA leave. The revised definition includes individuals who are employed to provide diagnostic, preventive or treatment service, or services integrated with or necessary to provide patient care (*g.*, bathing, dressing, hand feeding and transportation services). The revised definition excludes IT professionals, maintenance staff, HR personnel, cooks or food service workers, records managers, consultants and billing professionals.
- The revised regulations clarify that employees may only take FFCRA leave if the employer has sufficient work for the employee, but the employee cannot work due to a COVID 19-related reason. The preamble to the regulations notes that, if an individual has no work to perform due to circumstances other than a qualifying reason to take FFCRA leave, the employee would have no work from which to take leave (*g.*, if the employer has temporarily or permanently closed the employee's worksite).
- The revised regulations clarify that an employee must obtain employer approval for intermittent FFCRA leave to avoid disrupting the employer's operations. The revised regulations distinguish between "intermittent leave," which is taken in separate chunks due to a single qualifying reason, and separate consecutive requests for leave (*g.*, requesting leave to care for a child whose school is closed on alternate days would not be considered "intermittent leave," because each day of school closure constitutes a separate reason under FFCRA which expires when the school re opens the next day).

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- The revised regulations confirm that employees must give notice or provide required documentation as soon as practicable prior to taking FFCRA leave, but not necessarily before. However, the revised regulations note that if the need for leave is foreseeable, it will typically be practical for employees to provide advance notice, and, often, required documentation will be submitted when notice is provided.

The revised regulations are effective as of September 16, 2020, and are set to expire with the general FFCRA paid leave provisions on December 31, 2020.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Form 5500 Filing Deadline for Calendar Year Plans with Extensions. For plans that obtained an extension for filing their Form 5500, the Form 5500 must be filed by October 15, 2020.

SAR Deadline for Calendar Year Plans. Plan administrators must distribute Summary Annual Reports (SARs) within nine months of the plan's year end (*e.g.*, for plan years that ended December 31, 2019, the SAR was due September 30, 2020). However, if a plan has received an extension for filing its Form 5500 (*i.e.*, due by October 15, 2020), the nine month SAR deadline is extended to December 15, 2020. As explained in our May 2020 Benefits Counselor, the deadline for providing the SAR is tolled until 60 days after the announced end of the COVID-19 national emergency, provided the plan administrator acts in good faith and provides the SAR as soon as administratively feasible.

Retirement Plan Compliance Deadlines and Reminders

1. QDIA Notice. Plan sponsors of defined contribution plans that utilize a qualified default investment alternative (QDIA) must provide an annual notice to all participants at least 30 days, but not more than 90 days, prior to the beginning of the plan year. Plan sponsors of calendar year plans must provide this notice between October 3, 2020 and December 2, 2020.
2. Retirement Plan Automatic Enrollment Notice. 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 made to the plan, at least 30 days, but not more than 90 days, prior to the beginning of the plan year. Plan sponsors of calendar year plans must provide this notice between October 3, 2020 and December 2, 2020. Plan sponsors may combine the automatic enrollment

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notice 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 that describes the safe harbor contribution and other material plan features at least 30 days, but not more than 90 days, prior to the beginning of the plan year. Plan sponsors of calendar year plans must provide this notice between October 3, 2020 and December 2, 2020. Plan sponsors may combine the safe harbor notice with other required notices, such as the QDIA notice.

Health Plan Compliance Deadlines and Reminders

1. Medicare Part D Notice of Creditable Coverage. All group health plans that offer prescription drug coverage to Medicare eligible employees (under either an active plan or a retiree plan) must provide an annual creditable coverage disclosure notice to their Medicare eligible participants and dependents no later than October 15, 2020. The Centers for Medicare and Medicaid Services (CMS) provide a model notice that can be accessed through the CMS website. Plan sponsors should review the model notice to ensure it accurately reflects the provisions of their plan.
2. Health Plan Open Enrollment Requirements.

- 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 prior to the beginning of the plan year (December 2, 2020 for calendar year plans).
- 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 open enrollment materials.

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