



Benefits Counselor – October 2022

RETIREMENT PLAN DEVELOPMENTS

IRS Extends Additional Deadlines for Adopting Amendments Under CARES Act and CAA

The Internal Revenue Service (IRS) has extended the deadline for amending eligible retirement plans to reflect provisions relating to plan loans and coronavirus related distributions under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and qualified disaster related distributions under the Consolidated Appropriations Act of 2021 (CAA). The IRS announced the extension in Notice 2022 45.

The CARES Act allowed qualified individuals to receive favorable tax treatment with respect to coronavirus related distributions from an eligible retirement plan, while the CAA allowed qualified individuals to receive favorable tax treatment with respect to qualified disaster related distributions from an eligible retirement plan. Both coronavirus related distributions and qualified disaster related distributions are exempt from certain requirements that generally apply to hardship distributions.

Originally, qualified non governmental plans had until the last day of the first plan year beginning in 2022 to adopt amendments reflecting these provisions.

Notice 2022 45 extends the amendment deadline to December 31, 2025. Plans subject to this deadline include Internal Revenue Code (IRC) section 403(b) plans not maintained by a public school. For IRC section 403(b) plans which are maintained by a public school, the deadline remains 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023. For governmental plans, including IRC section 457(b) plans, the deadline to adopt amendments reflecting these provisions remains the last day of the first plan year beginning on or after January 1, 2024.

This is the same deadline the IRS previously announced in Notice 2022 33 for adopting amendments under other provisions of the CARES Act, the Bipartisan American Miners Act of 2019 and for all provisions under the Setting Every Community Up for Retirement Enhancement Act (SECURE Act). As a result, plan sponsors should be able to adopt amendments addressed in both Notices as of a single date. Because the new deadlines are fixed rather than relative to the plan

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year, like the original deadlines, plan sponsors should be aware that the adoption deadline may fall in the middle of the plan year for plans not using a calendar year plan year.

PBGC Releases Projections Report for 2021

The Pension Benefit Guaranty Corporation (PBGC) has released its 2021 projections analyzing the long term fiscal health of its single employer and multiemployer insurance programs for defined benefit pension plans. The PBGC issues the report each year to project whether each program will remain solvent over the next ten year period.

Once again, the Single Employer Pension Program is projected to have excellent financial health throughout the next decade. The PBGC stated its projections did not show any scenario in which the Single Employer Pension Program would become insolvent over the next ten years and noted that Program's net financial position is up slightly from last year's projections.

While not as strong, projections for the Multiemployer Program show that it is expected to remain solvent over the next decade, largely due to funding from the Special Financial Assistance Program (SFA) enacted as part of the American Result Plan Act of 2021. The majority of the PBGC's projections show that the infusion of SFA funds will delay insolvency of the Multiemployer Program to more than 40 years into the future.

Spate of Lawsuits Target 401(k) Plans Offering Low-Cost Target Date Funds

Beginning in late July, one law firm has filed at least ten lawsuits against large companies that sponsor 401(k) plans which offer certain BlackRock Inc. target date funds (TDFs) as investment options. Plan sponsors targeted by the lawsuits include numerous large corporations such as Microsoft Corp., Capital One Financial Corp., and Citigroup. All the suits have been filed as putative class actions and make the same complaint: that the plan sponsors have breached their fiduciary duties by selecting low cost TDFs, which the plaintiffs allege have underperformed.

Over the past decade, hundreds of lawsuits have been filed against plan sponsors by participants, alleging that the sponsors breached their fiduciary duties by selecting investment options and service providers that charged excessive fees. The BlackRock Inc. cases put a strange twist on this trend, with the plaintiffs alleging that the plan sponsors irresponsibly "chased low fees" as "is currently vogue" while failing to consider the ability of the low cost investment options to

generate returns.

No court has yet addressed the merits of the plaintiffs' claim. In the short term, plan sponsors should keep in mind that most courts take the position that prudence is not measured by how an investment performs but by the prudence of the procedures taken by fiduciaries in evaluating and selecting investment options. Accordingly, plan sponsors should ensure that they are adequately documenting these steps.

HEALTH AND WELFARE PLAN DEVELOPMENTS

District Court Rules PSTF Not Properly Appointed and That PrEP Preventive Care Mandate Violates Religious Freedom

On September 7, 2022, a judge in the Northern District Court of Texas ruled that a federal mandate under the Patient Protection and Affordable Care Act (ACA) to cover drugs used to treat HIV could not be upheld because members of the U.S. Preventive Services Task Force (USPSTF) were improperly appointed and therefore lacked the authority to recommend the coverage, and that the mandate violated the plaintiffs' religious freedom under the Religious Freedom Restoration Act (RFRA).

Background. The ACA requires most group health plans to cover certain "preventive care" services without imposing any cost sharing requirements when provided in-network. Some of the services classified as "preventive care" are determined based on the recommendations of the USPSTF, a body of volunteers with expertise in healthcare and related scientific research. The USPSTF is convened by the Director of the Agency for Healthcare Research and Quality, an agency within the Department of Health and Human Services (HHS).

In 2019, the USPSTF issued an "A" recommendation for pre exposure prophylaxis (PrEP) drugs for individuals who are at high risk for HIV infection. As a result, non-grandfathered group health plans must cover PrEP drugs as preventive care.

Plaintiffs' Argument. In *Braidwood Management Inc. et al. v. Xavier Becerra et al.*, six individuals and two businesses sued the Secretaries of HHS, the Treasury Department and the Labor Department. The lawsuit challenged the legality of the preventive care mandates of the ACA under two lines of argument. First, the plaintiffs claimed that the requirement to cover PrEP drugs violated their religious beliefs, which they argued were protected under the RFRA, by making them complicit in facilitating certain activities contrary to their religious beliefs. Second, they argued that recommendations of the USPSTF could not be enforced because



members of the USPSTF were unconstitutionally appointed. Specifically, the plaintiffs argued that members of the USPSTF are "principal officers" under the Constitution and must be appointed by the President.

Opinion. The Court found that the mandate to cover PrEP drugs did substantially burden the religious exercise of plaintiff Braidwood Management Inc. because it forced the Christian company to choose between being "complicit" in behaviors, such as intravenous drug use and sexual activity outside of the marriage between one man and one woman, that went against the owner's religious beliefs and facing a substantial monetary fine under the ACA. The Court then concluded that the government failed to show that the PrEP drugs mandate furthers a compelling governmental interest, noting that the government did not provide any evidence to show what effect allowing religious exemptions would have on the insurance market or PrEP drugs coverage. The Court granted summary judgment on the issue to Braidwood Management Inc. but reserved ruling in regards to the other plaintiffs and on an appropriate remedy.

Regarding the appointment claim, the Court ruled that USPSTF members satisfy both criteria of a "principal officer" under the Constitution because they (1) occupy a continuing position established by law, and (2) exercise significant authority pursuant to the laws of the United States. The Court found the government's arguments that USPSTF officers are not "principal officers" because they work in that capacity part time and do not receive compensation to be unpersuasive. The Court also found that the USPSTF's findings could no longer be categorized as "recommendations" because the ACA gave the recommendations the force of law. Although the Court granted summary judgment to plaintiffs on the issue, it reserved ruling on the appropriate remedy.

Court Allows GINA Claims Relating to Wellness Program to Proceed Against Plan Sponsor

A judge for the Northern District of Illinois has ruled that two City of Chicago (City) employees may proceed with their lawsuit alleging that the City's employee wellness program violates the Genetic Information Nondiscrimination Act (GINA).

The City administers a wellness program for employees and their spouses who are covered under the City's health plan. The wellness program requires employees to undergo a biometric screening, fill out a questionnaire about their personal medical history and submit a family medical history on behalf of their covered spouse. The City deducted \$50 from employee paychecks for each month they failed to participate in the wellness program and an additional

\$50 per month for each month the employee's covered spouse failed to participate.

One employee filed a complaint about the wellness program with the Equal Employment Opportunity Commission (EEOC) and obtained a right to sue letter, and six employees and two covered spouses filed suit against the City alleging claims under GINA, among other claims. Soon after, the City filed a motion to dismiss.

The Court noted that GINA prohibits an employer from obtaining genetic information from an employee unless the employee provides knowing, voluntary and written authorization. Under GINA, "genetic information" includes not only information about genetic testing but also the manifestation of a disease or disorder in an individual's family members. Bearing this definition in mind, the Court ruled that asking employees to undergo basic biometric screenings and fill out a questionnaire about their personal medical history, rather than the medical history of their family members, was not a request for genetic information and therefore could not violate GINA. However, asking employees to provide their spouses' medical history was a request for genetic information. As a result, the two employees with covered spouses were allowed to proceed with their GINA claims. The Court concluded by stating that whether the wellness program was involuntary is a question of fact that would be determined in further proceedings.

Whether a wellness program is "voluntary" is an issue that employers have regularly struggled with, so a decision on this issue could be insightful.

Court Holds Contracting With TPA to Provide COBRA Notices Does Not Discharge Employer's Liability

A recent ruling from the Middle District of Alabama addressed the respective liabilities of a self-funded health plan's third party administrator and the sponsoring employer for providing participant notices under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

In 2016, plaintiff Pamela Howard moved to a new permanent residence and filed a change of address with her employer, Ivy Creek, LLC, on two separate occasions. Despite the address change filings, Ivy Creek's system was never updated to reflect Ms. Howard's new address, and documents such as her Form W-2 continued to show the previous address. Ms. Howard never noticed the discrepancy. In 2019, Ms. Howard suffered a brain aneurysm. Soon after, Ivy Creek mailed Ms. Howard a letter stating that her employment was terminated



due to exhaustion of medical leave and that while she would lose her employer health coverage, a letter regarding her rights to elect COBRA coverage was forthcoming. The letter reached Ms. Howard because the employee who sent it was unable to access the payroll system and instead pulled recent medical records for Ms. Howard, which included up-to-date information, to find an address.

Ivy Creek then instructed its third party administrator, UMR, to mail a COBRA notice to Ms. Howard. Like Ivy Creek, UMR had Ms. Howard's old address on file and mailed the COBRA notice there. The COBRA notice was returned to UMR with a note that Ms. Howard no longer lived there, but UMR never notified Ivy Creek of this fact. Several months elapsed before Ms. Howard notified Ivy Creek that she had never received a COBRA notice, at which time the error was discovered.

Ms. Howard then filed suit for failure to provide a COBRA notice against both Ivy Creek and UMR and moved for summary judgment. In defense, Ivy Creek asserted that UMR alone should be liable for the failure because, under the service agreement between UMR and Ivy Creek, UMR was responsible for providing participant COBRA Notices. In contrast, UMR asserted that Ivy Creek alone should be liable because the same service agreement stated Ivy Creek was responsible for notifying UMR of participant address changes.

In its ruling, the Court dismissed Ms. Howard's claim against UMR and stated that her claim against Ivy Creek should proceed to trial. The Court noted that by mailing a COBRA notice, UMR had fulfilled its role under the service agreement, and the fact that the COBRA notice was sent to the incorrect address was solely the fault of Ivy Creek. It further stated that liability for a COBRA failure should be analyzed against Ivy Creek, as the plan sponsor, rather than against UMR, which owed no fiduciary duty to Ms. Howard.

The case serves as a reminder that plan sponsors should have robust procedures in place at all times for updating participant mailing addresses and that an agreement with a third party administrator to provide COBRA notices will not absolve a plan sponsor of liability under COBRA.

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, 2022.

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 on December 31, 2020, the SAR was due September 30, 2021). However, if a plan has received an extension for filing its Form 5500 (i.e., due by October 15, 2022), the nine month SAR deadline is extended to December 15, 2022.

Retirement Plan Compliance Deadlines and Reminders

1. QDIA Notice. Plan sponsors of defined contribution retirement 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, 2022, and December 2, 2022.
2. Retirement Plan Automatic Enrollment Notice. Plan sponsors of defined contribution retirement 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, 2022, and December 2, 2022. Plan sponsors may combine the automatic enrollment 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, 2022, and December 2, 2022. 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 offering 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, 2022. The Centers for Medicare and Medicaid Services (CMS) provides a model notice that can be accessed



through the CMS website. Plan sponsors should review the model notice to ensure that 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, 2022, 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.

1. Prescription Drug Data Reports for 2020 and 2021, which are required under the Consolidated Appropriations Act 2021, must be filed by December 27, 2022. Detailed reporting instructions are available on the Centers for Medicare and Medicaid Services website and may be downloaded [here](#).

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