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# Benefits Counselor September 2018

**POSTED:**

Sep 26, 2018

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## General Employee Benefits

### District Court of Southern Ohio Rules Arbitration Clause Does Not Apply to Former Participant

In Brown et al. v. Wilmington Trust NA et al., the District Court of Southern Ohio ruled that a former plan participant was not bound by a mandatory arbitration clause in an employee stock ownership plan. The Court found that, because the plan provision was added after the participant retired, the participant was not required to arbitrate her claim. The Court further asserted that even if the participant had agreed to be bound by the arbitration provision, such a provision would only be applicable to active participants.

## Retirement Plan Developments

### President Trump Issues Executive Order on Retirement Security

On August 31, 2018, President Trump issued an executive order directing the Department of Labor ("DOL") and Treasury Department to ease the barriers employers face in offering retirement plans to increase employee access to retirement benefit programs. In the order, President Trump directs the DOL and Treasury Department to:

- Consider changes to the existing rules regarding multiple employer plans;
- Reduce the administrative burden for administering retirement plans, which impacts a small employer's ability to offer retirement plans to employees; and
- Increase retirement preparedness by reviewing mortality tables used to calculate minimum distributions.

### IRS Releases Guidance on Changes to Code Section 162(m)

The Internal Revenue Service (IRS) recently published Notice 2018 68, which provides essential guidance on the changes to Internal Revenue Code (Code) section 162(m) and grandfathering rules. Internal Revenue Code (Code) section 162(m), the applicability of which was expanded under H.R. 1 (f/k/a the Tax Cuts and Jobs Act), imposes a $1 million deduction cap on compensation paid by publicly traded companies to certain executive officers. Notice 2018 68

clarifies the following:

- The employee is a covered employee for purposes of Code section 162(m) regardless of whether he or she is employed at the end of the taxable year.
- The employee may be a covered employee regardless of whether his or her compensation is required to be reported under Securities and Exchange Commission rules.
- Once an individual becomes a covered employee, he or she is always a covered employee and subject to the $1 million deduction limit.
- An agreement is not grandfathered if it is renewed after November 2, 2017. Notice 2018 68 further clarifies that if the employer can terminate the agreement without employee consent after November 2, 2017, the agreement is considered "renewed" on the date such termination, if made, would be effective.
- Compensation is not considered payable under a "written binding contract" if the employer is not obligated to pay it under applicable law. Accordingly, nonqualified deferred compensation plans that provide the employer with negative discretion to reduce or eliminate an employee's compensation will fail to satisfy the written binding contract standard if the employer is not obligated to pay the compensation under state law.
- A material modification occurs if an agreement is amended to increase the amount of compensation payable thereunder. The adoption of a supplemental contract for increased compensation or payment of additional compensation based on substantially the same elements or conditions as the grandfathered compensation is also treated as a material modification.

The guidance included in Notice 2018-68 is effective September 10, 2018, and any future guidance will apply only prospectively.

## IRS Publishes Private Letter Ruling Approving Student Loan Repayment Program Tied to 401(k) Plan

The IRS recently issued a private letter ruling (PLR) confirming that, under certain circumstances, employers may link employer contributions under a 401(k) plan to employee student loan repayments made outside the plan. The approved voluntary arrangement provides a nonelective employer contribution for all participants who make sufficient student loan repayments during every payroll period. Participants who elect not to participate are eligible for a matching contribution rather than the nonelective contribution. While the PLR does not provide binding authority, the PLR clarifies that there is an available option to

provide a tax  free student loan repayment option through a 401(k) plan contribution program.

## Frozen Pension Plans Receive Extension of Nondiscrimination Rule Exemption

The IRS extended temporary relief from nondiscrimination requirements under Code sections 401(a)(4) and 410(b) for pension plans with a “soft freeze.”  A soft freeze occurs when a plan is frozen to new participants but existing participants continue to accrue benefits.  The temporary relief applies to plans that were frozen prior to December 13, 2013, and extends through plan years beginning before 2020.

## Holy Redeemer Agrees to Settlement Terms Over Failure to Qualify for ERISA Church Plan Exemption

Holy Redeemer Health Systems becomes the latest church  affiliated health system to agree to settlement terms for erroneously relying on the church plan exemption under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").  In Snyder v. Holy Redeemer Health Sys., the plaintiff asserted that the hospital system claimed it was a church plan, without meeting the requirements, to keep its retirement plan underfunded and avoid ERISA required disclosures.  The settlement, if approved, requires Holy Redeemer to pay $1.6 million, adopt a financial policy to ensure the plan continues to meet actuarial funding standards, and guarantee that the plan will meet its payment obligations for the next 9 years.

## Participants in NYU Retirement Plans Ask Court to Remove Two Plan Fiduciaries

As reported in last month's Benefits Counselor, on July 31, 2018, a New York federal court issued an opinion in favor of New York University ("NYU") in Sacerdote v. New York University, the first excessive fee case against a university to be considered on its merits.  NYU employees have since filed a motion requesting that the federal court take the unusual step of affirmatively removing two plan fiduciaries, who were specifically named in the court’s opinion, whom the court concluded repeatedly failed to exercise the level of prudence necessary to manage NYU’s benefit plans.

### Second Lawsuit Filed Against Duke University Relating to Management of Retirement Plans

Participants in retirement plans sponsored by Duke University (Duke) filed a second lawsuit alleging mismanagement of retirement plan assets. Under this latest lawsuit, participants allege that Duke engaged four recordkeepers for the plans and allowed each recordkeeper to offer proprietary investment funds to participants. The plaintiffs claim the revenue sharing generated by these proprietary investment funds was more than $3.5 million annually in excess of the plans' recordkeeping services. Duke allegedly used these excess amounts to pay plan expenses and reimburse Duke for its own expenses, including the salaries and fringe benefits of employees in Duke's human resources department.

### Oasis Outsourcing Agrees to Settle 401(k) Plan Fee Claims

Oasis Outsourcing (Oasis) agreed to settle a proposed class action suit alleging imprudent investment options and payment by plan fiduciaries of excessive fees to the plan's former administrator. Participants accused Oasis of failing to replace the plan's administrator despite excessive fees because the fee sharing generated excess income, which ensured Oasis would not be responsible for any costs associated with the plan. The settlement agreement requires Oasis to pay $6 million into a fund for the benefit of the class and to hire an independent fiduciary.

## Health and Welfare Plan Developments

### Sixth Circuit Finds Retiree Health Benefits Not Vested for Life

The Sixth Circuit upheld a lower court decision that retiree health benefits are not vested for life without explicit language in a collective bargaining agreement (CBA) providing as such. In IUE CWA, et al. v. GE, plaintiffs allege that a reservation of rights clause in a CBA "strongly implie[d]" that the plans intended to vest health care benefits for life. The Court found that absent language to the contrary, such a conclusion could not be inferred. Additionally, the Court pointed to language in the CBA describing other benefits that were explicitly vested. The Court once again noted that following the United States Supreme Court in M&G Polymers USA LLC v. Tackett, the Supreme Court no longer looked to extrinsic documentation to interpret contract terms and instead used only "ordinary principles of contract law."

### USPSTF Updates Screening Recommendations

The United States Preventive Services Task Force (USPSTF) released a number of updated screening recommendations for a number of conditions, including cervical cancer, syphilis, electrocardiography, osteoporosis, and prostate cancer. Plan sponsors should work with legal counsel to review the latest recommendations to determine whether any plan amendments are required.

### Insurers Face Mental Health Parity Claims for ABA Exclusions

A lawsuit was recently filed against Blue Cross & Blue Shield of Illinois (BCBSIL) and Catholic Health Initiatives due to alleged exclusions of applied behavioral analysis (ABA) therapy to treat autism. While BCBS and Catholic Health provide coverage for alternative autism treatment options, both insurers have blanket exclusions for coverage of ABA therapy, which plaintiffs allege is a violation of the Mental Health Parity and Addiction Equity Act. BCBSIL and Catholic Health join a growing number of insurers and employers that have been sued in recent years over coverage exclusions for ABA therapy.

## Upcoming Compliance Deadlines and Reminders

### Summary Annual Report Deadline for Calendar-Year Defined Contribution Plans

Plan administrators must distribute summary annual reports (SAR) to participants and beneficiaries within 9 months of the plan's year end (e.g., for plan years that ended December 31, 2017, the SAR is due September 30, 2018). However, if a plan has received an extension for filing its Form 5500, the nine month SAR deadline is extended by two months.

### Form 5500 Filing Deadline for Calendar-Year Plans with Extensions

For plans that obtained an extension for filing the Form 5500, the Form 5500 must be filed by October 15, 2018.

### Medicare Part D Notice of Creditable Coverage

All group health plans that offer prescription drug coverage to Medicare eligible employees (under either an action plan or a retiree plan) must provide an annual creditable coverage disclosure notice to Medicare eligible participants and dependents no later than October 14, 2018. The Centers for Medicare and

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Medicaid Services ("CMS") provides a model notice that can be accessed through the CMS website at http://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/Model-Notice-Letters.html. Plan sponsors should review the model notice to ensure it accurately reflects the provisions of the plan.

## 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, 2018, 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 health plan's open enrollment materials.

## Retirement Plan QDIA Notice

Plan sponsors of defined contribution plans that invest participant contributions in a qualified default investment alternative (QDIA), as a result of the participant's failure to make an investment election, must provide an annual notice to all participants at least 30 days, but not more than 90 days, before the beginning of the plan year. Plan sponsors of calendar year plans must send this notice between October 3, 2018, and December 1, 2018.

## 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, before the beginning of the plan year. Plan sponsors of calendar year plans must send this notice between October 3, 2018, and December 1, 2018. Plan sponsors may combine the automatic enrollment notice with the QDIA notice.

## 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, before the beginning of the plan year. Plan sponsors of calendar year plans must send this notice between October 3, 2018, and December 1, 2018. Plan sponsors may combine the safe harbor notice with other required notices, such as the QDIA notice.