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Benefits Counselor – September 2020

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RETIREMENT PLAN DEVELOPMENTS

IRS and DOL Release Guidance Addressing Changes Under the SECURE Act

IRS Publishes Notice 2020-68 Addressing the Bipartisan American Miners Act and SECURE Act

The Internal Revenue Service (IRS) released Notice 2020 68 addressing a variety of provisions in the Bipartisan American Miners Act and the Setting Every Community Up for Retirement Effectiveness Act (the SECURE Act).

Offering a Cash or Deferred Arrangement to All Long Term, Part Time Employees. The SECURE Act requires all sponsors of defined contribution plans offering a cash or deferred arrangement to permit long term, part time employees to begin participating in the plan solely for the purpose of making elective deferrals. Employer contributions are not required for these groups. The SECURE Act defines long term, part time employees as individuals that have earned 500 or more hours of service in three consecutive plan years. The provision is effective January 1, 2021. The Notice clarifies that for purposes of determining a long term, part time employee's vesting service, all years of service with the employer must be taken into account.

In Service Withdrawals for Payment of Qualified Birth or Adoption Expenses. The SECURE Act permits defined contribution plan sponsors to permit participants to receive an in service distribution of up to $5,000 following the birth or adoption of a child. The in service distribution option is only available within one year following the date of birth or date the adoption was finalized. The distribution is exempt from the 10 percent federal early withdrawal penalty and may be repaid to the plan. The Notice provides that:

- Participants must provide the name of the child, age and the taxpayer identification number of the child to receive the in service distribution. Plan sponsors may rely on any participant representation unless the plan sponsor has actual knowledge to the contrary.

- An individual is eligible for the in service distribution following adoption of a child, provided the child has not attained age 18 or is physically or mentally incapable of self support. An individual is incapable of self support if the

individual is unable to engage in any substantial gainful activity due to a medically determined physical or mental impairment expected to result in death or be of indefinite duration.

- Each parent can receive $5,000 for each child. The distribution is aggregated across all plans sponsored within the same controlled group.

- The distribution is not an eligible rollover distribution and is not subject to mandatory withholding.

- Participants are permitted to reclassify any distribution as an eligible birth or adoption expense withdrawal for tax reporting and repayment purposes.

- Plans that offer the in service distribution option must allow qualifying individuals to repay the distribution to the plan, provided the plan also permits rollovers. Repayments are treated as a trustee to trustee transfer within 60 days of distribution.

Reduction in Age of In Service Distributions from Defined Benefit Plans. The Bipartisan American Miners Act reduced the minimum age for in service distributions under 457(b) and pension plans from age 62 to age 59 1/2. The Notice clarifies that:

- Plan sponsors are not required to offer in service distributions at age 59 1/2.

- If a plan sponsor elects to offer in service distributions at age 59 1/2, the reduction does not influence the plan's normal retirement age.

Deadlines to Adopt SECURE Act Amendments. The Notice clarifies that a qualified plan will not fail to satisfy the anti cutback requirements of the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA), provided SECURE Act *and* Bipartisan American Miners Act amendments are adopted by the last day of the plan year beginning on or after January 1, 2022 (last day of the plan year beginning on or after January 1, 2024 for governmental and collectively bargained plans).

IRS Updates Model Rollover Notices

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On August 6, 2020, the IRS issued Notice 2020 62, which amends the model eligible rollover notices required under Code section 402(f). Changes include:

- Excepting in service distributions for qualified birth and adoption expenses from the 10 percent early withdrawal penalty; and

- Increasing the age for the required beginning date for required minimum distributions (RMDs) from age 70 1/2 to age 72.

The Notice also reaffirms that coronavirus related distributions (as permitted under the CARES Act) and in service distributions for qualified birth and adoption expenses are not eligible for rollover and, as a result, an eligible rollover notice need not be provided.

The Notice includes revised model eligible rollover notices.

DOL Announces Interim Final Rule on Lifetime Income Illustrations

On August 18, 2020, the U.S. Department of Labor (DOL) released an interim final rule on the annual lifetime income illustrations required under the SECURE Act. The interim final rule requires defined contribution plan sponsors to include the following information in the annual notice:

- *Assumed Commencement Date*: Plan administrators must calculate the participant's benefit using an assumed commencement date of the last date of the benefit statement.

- *Assumed Age*: Plan administrators must assume that the participant is age 67 as of the assumed commencement date or the participant's actual age if older.

- *Assumed Spousal and Survivor Benefits*: Plan administrators must calculate the participant's single life annuity benefit and qualified joint and survivor annuity (QJSA) benefit offered under the plan. To calculate the QJSA, the plan administrator must assume that the participant's spouse is of equal age regardless of any known information to the contrary.

- *Assumed Interest Rate*: Plan administrators must use the 10 year constant maturity Treasury rate to calculate the participant's estimated benefit amounts.

- *Assumed Mortality Table*: Plan administrators must use the gender neutral mortality table under Code section 417(e)(3)(B) to calculate the participant's estimated benefit amounts.

The interim final rule also provides separate assumptions and notice requirements for in plan distribution annuities and deferred income annuities.

The interim final rule requires explanations regarding the estimated lifetime income payments that administrators must provide to participants as well as model language that could be used for these explanations. Additionally, the rule includes liability relief for information and calculations contained in the notice, provided the plan sponsor uses the required assumptions and either the model language or language substantially similar to the model language.

The DOL has requested comments on the interim final rule within 60 days. The interim final rule will become final on September 18, 2021, unless the DOL issues a replacement rule.

DOL Issues Proposed Registration Requirements for Pooled Employer Plan Providers

Under the SECURE Act, the commonality of interest requirement for establishing retirement plans was eliminated and "pooled employer plans" were explicitly permitted. One requirement of these pooled employer plans was that the plan provider be registered with the Treasury Department and DOL. On August 20, 2020, the DOL issued a notice of proposed rulemaking, outlining the registration requirements for these pooled employer plan providers.

Under the proposed rule, pooled employer plan providers will be required to file a Form PR electronically with the DOL (with no subsequent notice to the Treasury Department) no more than 90 days but no less than 30 days prior to the date the pooled employer plan provider begins publicly marketing its services or publicly offering the pooled employer plan. A Form PR will also be required upon the initiation of operations of the plan as a pooled employer plan, within 30 days of a reportable event and when the pooled employer plan provider is terminated and no longer operates any pooled employer plan.

Failure to properly file a Form PR would result in treatment as a series of individual plans rather than a pooled employer plan. The provider may also be liable for breaches of fiduciary duty and misrepresentation regarding status as a pooled employer plan provider, in addition to other federal and state law

violations.

The DOL is requesting comments on the proposed rule within 30 days of publication.

IRS Issues Guidance on Single-Employer Defined Benefit Plan Funding Relief Available Under CARES Act

On August 6, 2020, the IRS released Notice 2020 61, which provides additional clarity regarding the administration of the single employer defined benefit plan funding relief available under the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). The Notice confirms that all contribution deadlines are delayed until January 1, 2021, with interest accruing at the plan's effective rate of interest for the plan year in which the payment is made. Additionally, the Notice clarifies the following:

- Impact of Delayed Contribution on the Plan's Form 5500 Filing. If a plan sponsor makes a contribution after the applicable Form 5500 deadline, the filing will not reflect the additional contribution. As a result, plan sponsors must file an amended Form 5500 after the additional contribution(s) is made.

- Extension of Contribution Deadlines for Additional Contributions. The extended contribution deadlines available under the CARES Act apply to both minimum required contributions as well as contributions above the minimum funding requirement.

- AFTAP Guidance. Plan sponsors are permitted to elect to use the Adjusted Funding Target Attainment Percentage (AFTAP) from the last plan year ending before January 1, 2020, for any plan year that includes calendar year 2020. An election to use a prior year AFTAP must be made in writing to the plan's enrolled actuary. If the plan sponsor previously elected to use the plan's prior year AFTAP but did not notify the plan's actuary in writing, the sponsor must do so prior to September 30, 2020.

- Failure to Meet the Extended Deadline. If the plan sponsor fails to meet the January 1, 2021 deadline, penalties will apply as of January 1, 2021. Penalties include excise taxes for the unpaid minimum required contribution and an additional 5 percent interest added beginning January 1, 2021.

Additionally, the IRS released Announcement 2020 17 providing that the due

date for reporting and paying required excise taxes with respect to a minimum contribution to which the CARES Act applies is January 15, 2021.

IRS Releases Guidance Addressing Rollovers of Qualified Plan Loan Offsets

Participants with outstanding loans upon termination of employment are generally provided an opportunity to either repay the loan or offset the participant's account balance by the outstanding loan balance. The loan offset is treated as a distribution from the plan. Under the Tax Cuts and Jobs Act, the deadline to roll over an outstanding retirement plan loan was extended for participants who terminated employment prior to repayment of the outstanding loan balance. Prior to the change, the rollover deadline extended from the typical 60 day rollover period to the due date, including all applicable extensions, for filing the participant's federal income tax return for the year in which the offset occurs.

The IRS released Proposed Regulation section 1.402(c) 3 providing additional detail regarding this deadline extension. The Proposed Regulation distinguishes a qualified plan loan offset (QPLO) from a typical plan loan offset. A QPLO is a loan offset distributed from a qualified employer plan solely because:

- The employer terminates the qualified employer plan; or
- The employee terminates employment, provided the offset occurs within one year following termination of employment.

The Proposed Regulation also permits individuals to roll over the offset up until the extended tax filing deadline regardless of whether they applied for the filing extension, provided the individual amends his or her tax return to properly reflect the rollover.

Individuals may rely on the Proposed Regulation with respect to QPLOs distributed on or after August 20, 2020.

DOL Releases Guidance Clarifying Proxy Voting Obligations

On August 31, 2020, the DOL issued a proposed rule addressing proxy voting rules and responsibilities for plan fiduciaries. The proposal would amend the DOL's investment duty regulations issued in 1979 to clarify that plan fiduciaries are not obligated to vote proxies under all circumstances, but instead must consider factors affecting the plan's investments and act in the best interests of participants and beneficiaries.

The proposed rule outlines general fiduciary duties when voting any proxy where the fiduciary concludes that the matter being voted upon would have an economic impact on the plan. Additionally, the rule would generally prohibit fiduciaries from voting proxies under any circumstance that would not have an economic impact on the plan. The proposed rule also outlines fiduciary responsibilities to consider when voting any proxy including:

- Acting solely in accordance with the economic interest of the plan and its participants and beneficiaries, considering only factors that are prudently determined to affect the economic value of the plan's investment;

- Considering the likely impact on the investment performance of the plan based on factors such as the size of the plan's holdings in the particular investment against the total investment assets of the plan, the plan's percentage ownership of the investment and the costs involved;

- Avoiding any actions that would sacrifice investment return or take on additional investment risk to promote goals unrelated to the financial interests of the plan and its participants and beneficiaries;

- Investigating material facts forming the basis of the proxy vote or other exercise of shareholder rights;

- Maintaining records on proxy voting activities, including records that demonstrate the basis for proxy voting; and

- Exercising prudence and diligence in selecting and monitoring of persons chosen to advise or assist with the exercise of shareholder rights.

The proposal also establishes permitted practices that the plan fiduciaries could adopt related to proxy voting policies, including:

- Voting proxies in accordance with the voting recommendations of a corporation's management on proposals determined to be unlikely to have a significant impact on the value of the plan's investment;

- Focusing resources only on proposals determined likely to have a significant impact on the value of the plan's investment; and

- Refraining from voting on proposals when the plan's holding relative to the plan's total investments is below specific quantitative thresholds.

The DOL is requesting comments on the proposed rule within 30 days of publication.

IRS Increases Certain User Fees

The IRS issued Announcement 2020 14, which increases certain user fees. Changes include:

User Fee	Old Fee	New Fee
Form 5300: Application for Determination Letter	$2,500	$2,700
Form 5307: Application for Determination for Modified Volume Submitter Plan	$800	$1,000
Form 5310: Application for Determination for Terminating Plan	$3,000	$3,500

The increased user fees are effective January 4, 2021.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Oral Arguments Scheduled in Combined U.S. Supreme Court Case on Constitutionality of the ACA

The U.S. Supreme Court scheduled oral arguments in *Texas v. California* for Tuesday, November 10, 2020. This ongoing litigation challenges the constitutionality of the Affordable Care Act (ACA) following the elimination of the financial penalty tied to the individual mandate. A decision is not expected until June 2021.

Multiple Courts Address the HHS Rollback of 1557 Transgender Employee Protections

Earlier this year, the Department of Health and Human Services (HHS) amended the ACA section 1557 regulations to eliminate the anti discrimination protections based on gender identity claiming the prior rule exceeded the HHS's authority. However, between announcing the proposed rule and final rule, the U.S. Supreme Court released its decision in *Bostock v. Clayton County*, finding discrimination against an individual for their sexual orientation or gender identity is

discrimination on the basis of sex under Title VII.

Federal judges in New York and Washington, D.C., issued injunctions prohibiting HHS from enforcing the elimination of protections for individuals based on sexual orientation and gender identity as well as the religious exemption. Both courts determined that while *Bostock* interpreted Title VII of the Civil Rights Act, there is no reason that the Court's determination would not extend to Title IX and, as a result, section 1557 of the ACA. The district courts also reasoned that enforcement of the rule would increase discrimination against individuals on the basis of sex and would also decrease the availability of health coverage and care. Further, the courts found health care providers are likely to suffer irreparable financial and operational harm without an injunction.

While a district court in Washington dismissed a similar challenge for lack of standing, both the decisions out of New York and Washington, D.C., create a nationwide injunction against enforcement of the portions of the rule related to gender identify, sexual orientation and the religious exemption. The remainder of the revised regulations remains in effect.

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 (SAR) within nine months of the plan's year end (*e.g.*, for plan years that ended December 31, 2019, the SAR is due September 30, 2020). However, if a plan has received an extension for filing its Form 5500 (*i.e.*, due by October 15, 2019), 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 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) provides 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.