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Employee Benefits Update July 2016

POSTED:

Jul 20, 2016

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1. Payment of Patient-Centered Outcomes Research Fee Due by July 31. The Patient Protection and Affordable Care Act ("ACA") imposes fees on plan sponsors of applicable self-insured health plans to fund the Patient-Centered Outcome Research Institute. The fee, based on the average number of lives covered under the policy or plan, is required to be reported annually on the second quarter Form 720 and to be paid by July 31.

2. Form 5500 Due for Calendar Year Plans. Administrators or sponsors of employee benefit plans subject to Employee Retirement Income Securities Act ("ERISA") must generally submit the Form 5500 by the last day of the seventh month following the end of the plan year. For calendar year plans, the Form 5500 is generally due July 31. Extensions are available if certain steps are satisfied; employers should consult their advisors for specific compliance requirements. The Internal Revenue Service ("IRS") announced that employers do not have to complete certain questions on the 2015 Form 5500. A list of those questions can be found on the IRS website. Employers should also note that the IRS recently issued proposed changes to the Form 5500 that, if adopted, would be effective for plan years beginning on or after January 1, 2019.

3. Forms 1094 B/C and Forms 1095 B/C Can Still Be Filed. The IRS has confirmed that plan sponsors and employers may file the ACA reports, Forms 1094 B/C and Forms 1095 B/C, after the June 30, 2016 deadline, subject to late filing penalties. However, the IRS reiterates that penalties will not be imposed against plan sponsors or employers who made legitimate efforts to timely file, who continue to make such efforts and who complete the process as soon as possible. Plan sponsors and employers who have had a submission rejected have 60 days from the date of rejection to submit a replacement and have the rejected submission treated as timely filed. Finally, plan sponsors and employers who had their submission "Accepted with Errors" may continue to submit corrections.

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Retirement Plan and Nonqualified Plan Developments

PBGC Issues Proposed Regulations for Facilitating Mergers of Multiemployer Pension Plans

On June 6, 2016, the Pension Benefit Guaranty Corporation ("PBGC") released a proposed rule to provide guidance to multiemployer pension plans on the process for requesting a facilitated merger under ERISA section 4231(e), including a request for financial assistance. The proposed rule would also reorganize and update the existing regulation. More specifically, the proposed rule would provide guidance on:

1. The process for submitting a notice of merger or transfer and a request for a compliance determination or facilitated merger;
2. The information required in such notices and requests;
3. The notification process for PBGC decisions on requests for facilitated mergers; and
4. The scope of the PBGC's jurisdiction over a merged plan that received financial assistance.

The proposed regulations cannot be relied upon now. The new guidance will apply to mergers and transfers for which a notice or a request for a facilitated merger are filed with the PBGC on or after the date the final rules become effective.

IRS Issue Guidance on Code Section 409A Non-Qualified Deferred Compensation Plans

The IRS recently issued proposed regulations that would clarify or modify certain provisions of the final regulations under Internal Revenue Code (the "Code") section 409A. The guidance also withdraws a specific provision regarding the calculation of amounts includible in income under section 409A(a)(1) for unvested amounts and replaces that provision with revised proposed regulations. This new guidance can be relied upon immediately. While the guidance provides clarification on a number of provisions, the following are the highlights from the guidance:

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- Determining When a Payment Has Been Made. Current rules do not define when a payment has been made for all purposes under Code section 409A. The proposed regulations provide that a payment is made when a taxable benefit is actually or constructively received. The proposed regulations include a list of events that would be considered a payment under Code section 409A, including a transfer of cash, an amount includible in income under Code section 457(f)(1)(A) and a transfer of property includible in income under Code section 83. A payment is also considered made upon a transfer, cancellation or reduction in deferred compensation in exchange for benefits under a welfare plan, a non-taxable fringe benefit or any other non-taxable benefit.

- Limitations on Changing Time and Form of Payment of Unvested Amounts. The IRS added provisions to prohibit perceived abuses relating to changes involving unvested amounts. The IRS included limitations on changes to the time and form of payment for unvested amounts as follows:

  - An unvested amount is treated as vested, and thus includible in income, if a Code section 409A violation occurs for a year in which there is a change in a plan provision not otherwise permitted under Code section 409A(a) that affects the time, form or payment of the amount if there is not a good faith basis for determining that the original provision failed to meet the requirements of Code section 409A(a).

  - The proposed regulations include examples of the facts and circumstances that may indicate a pattern or practice of permitting impermissible changes in the time or form of payment of unvested deferred amounts.

  - If there is general guidance to correct a Code section 409A violation, that correction method must be used to correct that type of failure with respect to unvested amounts. The unvested amounts are only subject to the guidance for correcting violations, other general guidance, including income inclusion, additional taxes or notification requirements, do not apply.

- Payments after Death of Employee or Beneficiary. The IRS extended the period for payment after an employee's death to accommodate practical issues impacting payments made after death. An amount payable following the death of an employee is considered timely paid if the amount is paid between (1) the date of death; and (2) December 31 of the first calendar year following the calendar year during which the death occurs. A plan may still allow the beneficiary to determine a specific date.

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The proposed regulations also apply this rule to payments made upon a beneficiary's death. Further, the proposed rules allow a plan to be amended to provide for acceleration of payment upon the death, disability, or unforeseeable emergency of a beneficiary for a previously deferred amount without triggering a prohibited acceleration.

- Stock Rights. The proposed regulations reflect a number of changes related to stock options and stock rights, including the following:
  - Currently, an individual is required to be employed on the date the plan grants the stock right. The proposed regulations modify this rule to allow a plan to grant a stock right to an individual who is expected to and who actually does provide services within 12 months after the grant date.
  - Under the current rules, the exercise price for stock rights cannot be less than the fair market value on the grant date and mandatory repurchases of the underlying stock must be made at fair market value. The proposed regulations allow repurchases or exercise values based on a price that is less than fair market value if due to the employee's termination for cause or the occurrence of a condition within the employee's control (such as noncompliance with a non-compete or non-disclosure agreement).
- Short Term Deferrals. The short term deferral rules allow a payment made within 2½ months after the year in which the payment vests to be exempt from Code section 409A. The proposed regulations modify the short term deferral rules to permit a delay in payments if such delay is to avoid violating federal securities laws (or other applicable laws) as long as the payment is made as soon as reasonably practicable after the payment would no longer cause the violation.

IRS Issues Proposed Regulations for Governmental and Tax-Exempt Deferred Compensation Plans

Code section 457 governs nonqualified deferred compensation plans sponsored by state and local governments and tax exempt organizations. Code section 457 prescribes tax rules that apply to "eligible plans" under Code section 457(b) and "ineligible plans" under Code section 457(f). The new proposed regulations amend final regulations issued in 2003 to reflect subsequent legislative changes for eligible 457(b) plans. However, the primary impact of the new proposed regulations is to the taxation of ineligible 457(f) plans.

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Under Code section 457(f), taxes are imposed when a participant's right to deferred compensation vests, without regard to when benefits will be paid. The proposed regulations provide guidance on what arrangements will be considered deferred compensation, what constitutes a substantial risk of forfeiture (without which a participant's rights will be vested and subject to taxation), and what plans or arrangements will not be subject to Code section 457.

- Tax Rules for Ineligible 457(f) Plans. Pursuant to the proposed regulations, if an ineligible 457(f) plan provides for a "deferral of compensation," the compensation is includible as income on the date that is the later of: (1) the date the participant has a legally binding right to the compensation; or (2) if the compensation is subject to a "substantial risk of forfeiture," the date the substantial risk of forfeiture lapses. The definition of deferral of compensation under the proposed regulations is similar to the definition of deferred compensation under Code 409A.
    - Under the proposed regulations, amounts are subject to a "substantial risk of forfeiture" if entitlement to the payment is conditioned on:
        - Future performance of substantial services, based on the relevant facts and circumstances; or
        - The occurrence of a condition related to a purpose of the compensation as long as the possibility of forfeiture is substantial.
        - Additionally, a non compete agreement is a substantial risk of forfeiture only if certain conditions are met.
    - When a participant's rights are vested, the deferred compensation included in gross income is the present value of compensation deferred, including earnings on the deferred amount. The proposed regulations provide rules for determining the present value of deferred compensation.
- Plans Exempt from Code section 457.
    - *Death, Disability, Sick Leave and Vacation Plans.* The proposed regulations provide guidance on certain plans that are not subject to Code section 457, including bona fide death plans, disability pay plans and sick leave and vacation plans. The proposed regulations include factors for determining whether a plan meets the requirements to be considered one of these plans.
    - *Short Term Deferrals*. A short term deferral (payments made within

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2½ months of the year of vesting) is generally not subject to Code section 457.

- *Severance Pay Plans.* The proposed regulations provide guidance as to what constitutes a bona fide severance pay plan that is not subject to Code section 457. Those requirements include:
  - The benefits must be payable due to a participant's involuntary severance from employment (or voluntary severance for a good reason as described in the proposed regulations), a window program or a voluntary early retirement incentive program;
  - The amount payable cannot exceed two times the annualized compensation based on the annual rate of pay for the calendar year preceding the calendar year of severance; and
  - The benefits must be paid by the last day of the second calendar year following the calendar year of severance.

The proposed regulations will generally apply to compensation deferred for calendar years beginning after the date on which final regulations are published, but taxpayers can rely on the proposed regulations until the effective date of the final regulations.

IRS Modifies Determination Letter Program

As expected, the IRS issued Revenue Procedure 2016 37 to modify its determination letter program for qualified plans effective January 1, 2017. Under the new guidance, an individually designed plan's ("IDP") remedial amendment period for required amendments will be tied to a required amendment list (the "List") unless stated otherwise in legislation or other guidance. The List will be published by the IRS after October 1 of each year. Plan sponsors must adopt any amendments on the List by the end of the second calendar year following the year the List is published. For example, an amendment on the 2016 List must be adopted by December 31, 2018. Discretionary amendments must still be adopted by the end of the plan year in which the amendment is operationally effective.

Additionally, the IRS noted that Rev. Proc. 2016 37 does not change a plan's operational compliance requirements. A plan must still operate in compliance with any change from the effective date of the change, regardless of when the amendment is required to be adopted. The IRS intends to publish an Operational Compliance List annually to identify compliance requirements.

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As expected, an IDP may only request a determination letter under the following circumstances:

1. The plan has never received a letter before;
2. The plan is terminating; or
3. The IRS makes a special exception. The IRS stated that it anticipates making exceptions based on capacity and the need for rulings in certain areas. The IRS will measure need in a variety of ways but take into account annual comments from the employee plans community.

Seventh Circuit Assists Multiemployer Plans in Collecting Withdrawal Liability from Unaffiliated Company

On June 24, 2016, the Seventh Circuit Court of Appeals issued its decision in *Board of Trustees of the Automobile Mechanics' Local No. 701 Union and Industry Pension Fund v. Full Circle Group, Inc. et al.* The Court reversed the district court's grant of summary judgment in favor of the employer, indicating that the notice of a seller's contribution obligations to a pension fund may be sufficient to put the buyer on notice of potential withdrawal liability.

In this case, Donald Hannah owned Hannah Maritime Corporation ("HMC") and hired his son Mark to work for the company in 2007. A year later, Mark formed Full Circle and purchased the assets of HMC. HMC had a collective bargaining agreement with the mechanics union that required it to make contributions to the union's pension fund. No significant liabilities of HMC were explicitly transferred to the new company. Full Circle tried to negotiate its own collective bargaining agreement with the union, and after those attempts failed, Full Circle contributed to the union's pension fund until Full Circle's employees voted to decertify the union in 2009. As HMC ceased contributing to the pension fund, the fund assessed withdrawal liability against it. However, in the meantime HMC had become insolvent, which prompted the pension fund to file a lawsuit seeking to collect HMC's liability from Full Circle as HMC's successor.

The Court held that a successor company could be liable for the predecessor company's obligations if there is substantial continuity between the predecessor's and successor's businesses and the successor company has notice of the predecessor company's acts. The Court noted its decision in *Tsareff v. ManWeb Services, Inc.*, where the Court determined that an asset buyer is on notice of, and subject to, successor liability if the buyer has notice that the seller may be liable

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for withdrawal liability. The Court noted that while Full Circle may have never heard of withdrawal liability or not known that the pension fund was underfunded, it may be sufficient for Full Circle to have known that HMC had dealings with a union pension fund. The Court noted that most union pension funds are underfunded and the lack of familiarity with these issues is not an excuse as Full Circle had lawyers to advise it on the concept of withdrawal liability.

The Court remanded the case to the district court for a trial to establish the facts and determine if the requirements for imposing the liability of Full Circle are met.

Health and Welfare Plan Developments

The EEOC Issues Model Wellness Program Notice and Questions and Answers

As reported in the June 2016 EB Update *[insert link]*, the EEOC issued final regulations explaining how the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") apply to employer sponsored wellness programs. One aspect of the final regulations requires employers to send a notice to employees explaining what medical information will be obtained as part of the wellness program, how it will be used, who will receive it and what methods the employer will apply to prevent improper disclosure of the medical information. On June 16, 2016 the EEOC issued a model notice that employers may use to satisfy this requirement (the notice is available here [https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm]).

The EEOC also issued questions and answers about the notice. The informal guidance confirms that employers are not obligated to use the model notice, but employers must ensure that the notice provided meets the statutory requirements. The guidance also confirms that employers are not required to send a separate notice to satisfy the ADA requirements if other notices (such as a notice for Health Insurance Portability and Accountability Act ("HIPAA") purposes) include the required information. The EEOC clarified that employees must receive the notice prior to providing any medical information and with enough time to decide whether to participate in the program. Employers may provide the notice in any format that will be effective in reaching employees, including hard copy or as part of an email with a subject line that clearly identifies what information is being communicated.

Reinhart Comment: While the ERISA disclosure rules do not appear to apply to

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the EEOC notice, plan sponsors that intend on including the EEOC notice with other plan materials must ensure that the form of the other plan materials satisfies the disclosure rules. For example, if a plan does not satisfy the DOL safe harbor for electronic disclosure, the EEOC notice can be provided electronically but the other plan materials must be provided in hardcopy.

Departments Issue Proposed Regulations Implementing the Expatriate Health Coverage Clarification Act of 2014

On June 10, 2016, the Departments of Health and Human Services and Labor and the Internal Revenue Service (collectively, the "Departments") issued proposed regulations implementing the Expatriate Health Coverage Clarification Act of 2014 ("EHCCA"). The EHCCA established which provisions of the ACA apply to expatriate health plans. The proposed regulations are generally consistent with the EHCCA, will be effective plan or policy years beginning on or after January 1, 2017, and can be relied upon pending the final regulations. Specifically, the proposed regulations confirm that, while an expatriate health plan is minimum essential coverage and employers offering expatriate health plans are subject to the employer shared responsibility rules of the ACA, the expatriate health plan is not subject to the market reform provisions of the ACA. Additionally, employers offering expatriate health plans must file the ACA reports required under Code sections 6055 and 6056, as applicable. Finally, the regulations confirm that the excise tax on high cost plans applies to expatriates assigned to work in the United States but expatriate health plans are exempt from the health insurer fee, transitional reinsurance fee, the Patient Centered Outcomes Research Institute Fee and the medical loss rebate requirements.

Departments Issue 32nd ACA FAQ Addressing COBRA Notices

On June 21, 2016, the Departments issued another set of ACA frequently asked questions (FAQ). In this 32nd set of FAQs, the Departments confirm that plan sponsors may include additional information about Marketplace coverage with COBRA election notices. The revised model COBRA notice issued May 2, 2014 includes information about enrollment in Marketplace coverage. The Departments now clarify that plan sponsors may include information such as how to obtain assistance with enrolling in the Marketplace, the availability of financial assistance, information on particular products offered in the Marketplace and any other information that may help a qualified beneficiary choose between COBRA and other coverage options.

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DOL Identifies Common Plan Provisions that May Violate Mental Health Parity and Addiction Equity Act (MHPAEA)

The DOL issued a notice providing examples of non quantitative treatment limits on mental health or substance use disorder benefits that could be violations of the MHPAEA if similar limits are not applicable to medical or surgical benefits. A non quantitative treatment limit is a non numerical limit on the scope or duration of benefits. Some examples of the provisions the DOL identified include:

- Blanket preauthorization requirements for mental health or substance use disorder benefits or admissions;
- Progress or treatment attempt requirements (for example, requiring a participant to attempt outpatient treatment before inpatient treatment would be covered);
- Failure to comply provisions;
- Medical necessity review authority;
- Limits on residential treatment;
- Imposition of geographical limits on where treatment may be provided; and
- Specific licensure of facilities providing mental health or substance use disorder treatment.

Reinhart Comment: Plan sponsors should review their plans to determine whether they contain any of the above, or similar, limits. The mere existence of such a limit does not necessarily mean that the plan violates the MHPAEA. Rather, the limit must be reviewed to determine whether it satisfies the parity requirements.

Other Employee Benefit Plan Developments

The DOL Increases Various Plan Penalties

The 2015 Inflation Adjustment Act addressed the fact that civil monetary penalties had not been increased for inflation in decades. The DOL subsequently issued regulations on July 1, 2016 implementing the penalty increases. Going forward, the DOL will increase the civil monetary penalties no later than January 15 of each year to adjust for inflation. The increased civil monetary penalties will apply

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effective for penalties assessed after August 1, 2016 for violations occurring after November 2, 2015. Some highlights of the penalty increases include:

ERISA Violation	Current Penalty Amount	New Penalty Amount
Failure to furnish reports to former participants and beneficiaries (*e.g.*, pension benefit statements) or maintain records	Up to $11 per employee	Up to $28 per employee
Failure to file Form 5500 Failure of a multiemployer plan to certify endangered or critical status, which is treated as failure to file an annual report	Up to $1,100 per day	Up to $2,063 per day
Failure to furnish information requested by the DOL	Up to $110 per day	Up to $147 per day
Failure to provide summary of benefits and coverage	$1,000 per failure	$1,087 per failure
Failure of a group health plan to meet GINA requirements	$100 per day during noncompliance period	$110 per day during noncompliance period
Failure of employer to notify employees of CHIP coverage opportunities	Up to $100 per day	Up to $110 per day
Failure of multiemployer plan to adopt a funding improvement plan or rehabilitation plan	Up to $1,100 per day	Up to $1,296 per day

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