Reinhart

Employee Benefits Update May 2016

POSTED:

May 3, 2016

RELATED PRACTICES:

Employee Benefits

https://www.reinhartlaw.com/practices/employee-benefits

Select Compliance Deadlines and Reminders

1. **Forms 1095 B and 1095 C.** Forms 1095-B and 1095-C must be distributed to participants and filed with the Internal Revenue Service ("IRS"). Self-funded health plan sponsors and Applicable Large Employers ("ALEs") must file Forms 1095 B and 1095 C with the IRS by May 31, 2016 (or June 30, 2016, if filing electronically, which is required for entities filing at least 250 information returns).
2. **Forms 1094 B and 1094 C.** Plan sponsors and ALEs must file the first Forms 1094-B and 1094-C with the IRS no later than May 31, 2016 (or June 30, 2016, if filing electronically). These forms serve as transmittal forms for the Forms 1095-B and 1095-C.
3. **Summary of Description of Material Modifications for Calendar-Year Plans.** Plan administrators of employee pension and welfare benefit plans must provide to each participant covered under the plan and each beneficiary receiving benefits under the plan a summary description of any material modifications ("SMM") to the plan and changes to the summary plan description. Administrators must generally provide this summary no later than 210 days after the close of the plan year in which the modification or change was adopted, unless otherwise described in a timely summary plan description. For calendar year plans that made design changes in 2015, the deadline for providing an SMM is July 28, 2016. Please note that this SMM rule is separate from the rules imposed by the Affordable Care Act (the "ACA") for updating a group health plan's summery of benefits and coverage ("SBC").

   If a group health plan is modified during the year in a way that is not reflected in the most recently provided SBC, an updated SBC must be provided 60 days **in advance of** the effective date of the change. No advance notice is required for changes to the SBC that are effective in conjunction with benefit renewal. Plan sponsors that timely comply with the SBC 60-day advance notice requirement do not have to also send an SMM summarizing the changes disclosed in the 60-day advance notice.
4. **FBAR Filing for Certain Foreign Investments.** U.S. persons who have a financial interest in, or signature or other authority over, foreign financial accounts are generally required to report on the Treasury Department

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

Form TD F 90 22.1 (the "FBAR") by June 30 of each year. While foreign hedge funds and private equity funds are not required to be reported on the FBAR, many other accounts in foreign jurisdictions might be. Plan sponsors should consult with tax and legal counsel to determine if any FBAR filing is required.

Retirement Plan Developments

DOL Issues Final Fiduciary Rule

On April 6, 2016, the Department of Labor (the "DOL") released the final rule (the "Final Rule") regarding the definition of investment "fiduciaries" for employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA") and for individual retirement accounts ("IRAs") under the Internal Revenue Code of 1986 (the "Code"). The Final Rule expands the definition of "fiduciary" to encompass a wider range of individuals who provide investment advice or recommendations to plans or IRAs for a fee.

The Final Rule applies beginning on April 10, 2017. The DOL provided a transition period, which runs from April 10, 2017 through January 1, 2018, for certain prohibited transaction exemptions issued with the Final Rule. The prohibited transaction exemptions will fully apply on January 1, 2018.

Summary of Final Rule

The Final Rule states that a person is a fiduciary if the person receives a fee or compensation for providing certain recommendations regarding investments and investment-related activities and policies. Investment professionals who provide such recommendations are fiduciaries if they (1) acknowledge their fiduciary status, (2) provide advice pursuant to an agreement or understanding that the advice is customized for the recipient, or (3) provide advice to a specific recipient regarding particular investments.

The Final Rule clarifies what types of "recommendations" fall under the purview of the rule. For example, a "recommendation" includes communications that suggest the recipient either act or refrain from acting in a certain way based on a reasonable, objective view of the content, context and presentation of the recommendation. A "recommendation" may also include a series of actions that may be considered a recommendation when considered together.

Under the proposed rule, appraisals also created fiduciary obligations (with

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

exceptions for appraisals for employee stock ownership plans ("ESOPs") and certain other investment funds), but the Final Rule removed appraisals from the list of activities that trigger fiduciary status. The DOL indicated that it has reserved all appraisal issues for future rulemaking. The Final Rule also changed the proposed rule to clarify that a financial adviser's recommendation for a customer to hire the adviser will not constitute a fiduciary recommendation.

The DOL is publishing prohibited transaction exemptions that allow investment professionals to receive traditional forms of compensation as long as certain criteria are met. The Best Interest Contract Exemption (the "BICE") allows advisers and financial institutions to receive otherwise prohibited compensation for providing investment advice. There are a number of specific requirements to meet this exemption, but in general, it is designed to require that the financial adviser and its firm acknowledge in writing their fiduciary status and agree to give advice in the best interest of the advice recipient.

In addition to the BICE, the DOL has issued the Principal Transactions Exemption, which allows investment professionals to purchase or sell certain investments from their own inventories to plans or IRAs. Similar to the BICE, this exemption requires that the financial professional comply with certain impartial conduct standards and meet other requirements.

Please see our e-alert dated April 14, 2016 for more discussion on the Final Rule.

IRS Finalizes Rules on Multiemployer Plan Benefit Suspensions

On April 26, 2016, the IRS issued final regulations addressing suspensions of benefits for multiemployer defined benefit plans in critical and declining status. The final regulations generally adopt the proposed regulations published in June 2015 and September 2015, but do not finalize the proposed regulations published in February 2016.

Notable clarifications and changes included in the final regulations are as follows:

- A retiree representative must be selected for a plan with 10,000 or more participants. (Plans with fewer than 10,000 participants may select a retiree representative but are not required to do so.) The retiree representative is to advocate for the interests of retired and deferred vested participants throughout the suspension approval process. The plan must provide the representative with relevant information necessary for the retiree representative to perform his or her role.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

- Any suspension will remain in effect until the plan provides benefit improvements or the suspension expires on its own terms.
- The final regulations also include limitations on suspensions, requirements for benefit improvements and notice requirements.
- The final regulations include additional steps required for a participant vote on benefit reductions.

Private Equity Fund Liable for Pension Withdrawal Liability

In its recent decision in *Sun Capital Partners v. New England Teamsters*, a Massachusetts Federal District Court ruled that a private equity firm is liable for the multiemployer pension withdrawal liability of one of their portfolio companies.

Background

In 2007, two private equity funds managed by Sun Capital (Sun Capital Partners III and Sun Capital Partners IV) invested in a metal producer that contributed to a multiemployer pension plan. As the metal producer's financial condition deteriorated, it ceased making contributions to the multiemployer plan, and the plan demanded payment of withdrawal liability from both the metal producer and the private equity funds.

The private equity funds brought an action seeking a declaration that they were not liable for withdrawal liability because they were not "trades or businesses," and because they were not under "common control" with the metal producer. The Massachusetts District Court agreed with the private equity funds, but the decision was overturned on appeal to the U.S. Court of Appeals for the First Circuit. The First Circuit found that Sun Capital Partners IV was a "trade or business" for the purposes of withdrawal liability because of its active role in management of the portfolio company and the management fee structure of the fund. The case was remanded to the lower court for further findings of fact on the trade or business issue, and to determine whether the metal producer was under "common control" with the private equity funds.

District Court Decision

On remand, the Massachusetts District Court found that both Sun Capital Partners III and Sun Capital Partners IV were engaged in a trade or business. The question of "common control" raised a more challenging question. Generally, a finding of "common control" requires an entity to hold more than an 80%

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

ownership interest. In this case, the two funds' interests were specifically structured to be less than 80%. (One fund held a 70% interest and the other held a 30% interest.) The district court disregarded the formal corporate structure of the funds' investments and found that the two funds created a "partnership-in-fact," which was engaged in a trade or business and, thus, was liable for withdrawal liability.

IRS Withdraws Proposed Nondiscrimination Rules

In Announcement 2016-16, the IRS announced it would withdraw certain provisions contained in proposed regulations that would have changed the nondiscrimination requirements applicable to qualified retirement plans.

In January 2016, the IRS issued proposed regulations modifying nondiscrimination requirements for certain retirement plans. The IRS indicates it will withdraw its proposed changes intended to address certain retirement plan designs that take advantage of flexibility in the existing nondiscrimination rules to provide a special benefit formula for selected employees without extending the formula to a classification of employees that is reasonable and established under objective business criteria.

Health and Welfare Plan Developments

Departments Issue 31st Set of ACA FAQs

The DOL, Department of Health and Human Services and IRS (collectively, the "Departments") have issued additional informal guidance implementing the ACA. This 31st set of frequently asked questions ("FAQs") provides guidance on, among other things, preventative health service requirements and compliance issues under the Women's Health and Cancer Rights Act and the Mental Health Parity and Addiction Equity Act.

- **Colonoscopies**. The FAQs clarify that bowel preparation medications should be covered by plans without cost sharing.
- **Contraceptives**. If a plan uses medical management techniques for a contraception method, it may use a standard exception form with instructions to provide an exception process that is not unduly burdensome on the individual, the individual's personal representative or doctor.
- **Clinical Trials**. The FAQs clarify that a plan cannot deny (or limit or impose additional conditions on) routine patient costs associated with participation in an approved clinical trial.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

- **Mental Health Parity.** The FAQs clarify that plan-specific data, if available, should be used in calculating the tests for financial requirements (such as copays and coinsurance) and quantitative treatment limitations. The FAQs also provided additional clarification regarding disclosure and medication assisted treatment for opioid use disorder.
- **Mastectomies**. The FAQs clarify that coverage of breast reconstruction following a mastectomy must include providing coverage for nipple and areola reconstruction.

New York State and San Francisco Adopt Paid Family Leave

The number of states and cities requiring paid family leave continues to grow, with New York State and the City of San Francisco each adopting paid family leave requirements.

Beginning January 1, 2018, employers in New York State will be required to provide eligible employees with up to 12 weeks of paid, job-protected leave per year to care for a new child or a family member with a serious medical condition. Paid family leave will be administered and paid for by the state's disability benefits fund, so employers are not responsible for paying employees on family leave. Rather, the program is funded through employee payroll deductions of approximately $1 per week.

San Francisco also adopted a paid parental leave ordinance, which begins taking effect on January 1, 2017 and is fully phased in by January 1, 2018. Under the new ordinance, most employers will have to offer supplemental pay to employees who have a newborn child, newly adopted child or new foster child. The program is intended to supplement the amount already available through California's paid family leave program and is paid for by the employer.

Briggs & Stratton Settles Retiree Suit

Briggs & Stratton Corp. agreed to settle a class action suit brought by union retirees who alleged the company reduced their health benefits in violation of collective bargaining agreements. The retirees argued that the company cut their health benefits after promising to provide health coverage for retirees with 30 more years of service until age 65. According to the settlement, Briggs & Stratton agreed to continue retirees' medical, vision and dental benefits according to a 2010 agreement.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

All materials copyright © 2023 Reinhart Boerner Van Deuren S.C. All rights reserved.