Reinhart

February 2016 Employee Benefits Update

POSTED:

Feb 9, 2016

RELATED PRACTICES:

Employee Benefits

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

Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. **Medicare Part D Creditable Coverage Disclosure.** Calendar-year plans providing prescription drug coverage must provide the annual creditable coverage disclosure to the Centers for Medicare and Medicaid Services ("CMS") by March 1, 2016 (or 60 days after the beginning of the plan year for noncalendar-year plans).

2. **Form M-1.** Multiple employer welfare plans providing health coverage must electronically file the annual Form M-1 by March 1, 2016. Employers may request a 60-day automatic extension in the filing.

3. **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"). Plan sponsors of self-funded health plans and Applicable Large Employers ("ALE") must provide Forms 1095 B and 1095 C to employees by March 31, 2016. Plan sponsors and ALEs should also file these forms with the IRS by May 31, 2016 (or June 30, 2016, if filing electronically).

4. **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.

Upcoming Retirement Plan Compliance Deadlines and Reminders

Quarterly Fee Disclosure and Benefit Statements for Participant Directed Defined Contribution Plans. Plan sponsors of plans permitting participants to direct the investment of their accounts must provide participants with a fourth quarter benefit statement as well as a disclosure of fees and administrative expenses deducted from the accounts of participants during the fourth quarter of the plan year by February 14, 2016 (or within 45 days after the fourth quarter).

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

Reinhart

Retirement Plan Developments

Third Circuit Rules ERISA Church Plan Exemption Not Available to Retirement Plan Maintained by Religious Hospital

In *Kaplan v. St. Peter's Healthcare System*, No. 15-1172 (3d Cir. Dec. 29, 2015), the Third Circuit affirmed a trial court's determination that a plan established and maintained by a church-affiliated hospital was not a church plan under ERISA because it was not established by a church. The court held that a plain reading of ERISA's church plan definition limits the type of entity that can establish an exempt church plan. Although a religious institution that is not a church may maintain a church plan under ERISA § 3(33)(C) and related guidance, the Third Circuit's opinion limits the type of entity that can establish a church plan to a church. Although some district courts have reached the opposite conclusion (*e.g.*, *Medina v. Catholic Health Initiatives*, 2015 WL 8144956 (D. Colo. 2015)), the Third Circuit is the first appellate court to address the issue.

Supreme Court Remands Amgen Case for Inadequate Pleading

The Supreme Court has remanded *Amgen Inc. v. Harris* to the Ninth Circuit for a second time. The case involves claims by participants in two related 401(k) plans that plan fiduciaries continued to offer employer stock funds after they knew or should have known that the stock was being sold at an artificially inflated price. The Court previously remanded the case for reconsideration in light of *Fifth Third Bancorp v. Dudenhoeffer*. On remand, the Ninth Circuit concluded that the complaint sufficiently alleged fiduciary violations, rejecting the fiduciaries' argument that *Dudenhoeffer* established a new, higher pleading standard.

In reviewing the *Amgen* complaint, the Court concluded that the complaint did not present sufficient facts and allegations to meet the *Dudenhoeffer* standard. The Court noted that even though fiduciaries are not entitled to a presumption of prudence when investing in employer stock, participants alleging a fiduciary breach based on inside information are held nevertheless to a high standard. Specifically, participants must allege (1) an alternative investment scheme, consistent with securities laws, and (2) that the fiduciary could not have concluded that halting employer stock purchases would do more harm than good to the fund.

IRS Letter Ruling Allows LLCs to Adopt ESOPs in Limited Circumstances

A recent IRS letter ruling authorized a limited liability company ("LLC") to adopt an

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

employee stock ownership plan ("ESOP") under certain circumstances. Generally, the Internal Revenue Code (the "Code") limits the use of ESOPs to C or S corporations. However, in Private Letter Ruling 201538021, the IRS ruled that the membership units of an LLC would be considered as qualified employer securities under the Code, conditioned on the following:

- the LLC must elect to be treated as a corporation for tax purposes;
- the LLC issues membership units which it calls "unit shares;"
- all of the unit shares must have equal voting rights and liquidation rights;
- the unit shares to be sold or held by the ESOP must have the greatest voting and dividend rights of any unit shares issued by the LLC;
- if the LLC issues dividends, they must be distributed to the unit shareholders in proportion to the unit shares owned by the shareholders;
- if the LLC allocates profits or losses, they must be allocated to the unit shareholders in proportion to the unit shares owned by the shareholders.

The ruling is a welcome clarification of the ESOP rules and opens up the possibility of an LLC using an ESOP. However, the ruling is a private letter ruling and applies only to the taxpayer who requested it. LLCs interested in pursuing an ESOP might consider requesting their own private letter ruling.

IRS, Treasury Release Proposed Regulations Relating to Government Plan Normal Retirement Age

On January 27, 2016, the IRS issued proposed regulations addressing the extent to which government pension plans must comply with rules governing normal retirement ages. The proposed regulations clarify and amend previous rules pertaining the normal retirement age under government plans in the following ways:

- **Normal Retirement Age.** Government plan documents are not required to define "normal retirement age." Normal retirement age is the lowest age specified in the plan that the employee may retire without the employer's consent and receive full retirement benefits based on the employee's service. Current regulations provide that a normal retirement age under a pension plan must be an age not earlier than the earliest age that is "reasonably representative" of the typical retirement age in the industry which the plan

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

serves.

- **Safe Harbors for Any Government Employee.** The proposed regulations provide safe harbors that will consider a normal retirement age below age 62 to satisfy the reasonably representative requirement. These safe harbors are intended to cover all state plans and most or all local government plans. The safe harbors are:
  - attainment of age 62 with or without a service requirement;
  - attainment of age 60 with a 5 year service requirement;
  - attainment of age 55 with a 10 year service requirement;
  - combined age and years of service of 80 or more; or
  - attainment of 25 years of service, regardless of age.
- **Safe Harbors for Public Safety Employees.** The proposed regulations also provide safe harbors that will consider a normal retirement age below age 62 to satisfy the reasonably representative requirement for public safety employees. The safe harbors are:
  - attainment of age 50;
  - attainment of 20 years of service, regardless of age; or
  - combined age and years of service of 70 or more.
- **Employee Classes.** The proposed regulations state that plans may have different normal retirement ages for different classes of employees, as long as each satisfies the requirements.
- **Nonsafe Harbors.** For a normal retirement age outside the safe harbors outlined above, the reasonably representative requirement will apply.

The regulations are proposed to be effective for employees hired during plan years beginning on or after the later of January 1, 2017, or the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is three months after the final regulations are published. Plans may rely on the proposed regulations before the effective date. Comments to the proposed rules must be received by April 26, 2016.

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

PBGC Announces Online Electronic Premium Filings Now Available

The Pension Benefit Guaranty Corporation ("PBGC") has announced that online premium filing is now available. Plans may file online for plan years beginning in 2016. The PBGC has released more information and frequently asked questions on its website.

Anthem Excessive 401(k) Fee Litigation Suit Filed Over Vanguard Fees

In *Bell et al. v. Anthem Inc. et al.*, Case No. 15-cv-2062 (S. D. Indiana, Dec. 29, 2015), plan participants allege plan fiduciaries of the Anthem Inc. 401(k) Plan breached their fiduciary duty by failing to secure lower rates on high-fee mutual funds, and paying excessive investment management and administrative fees. Plaintiffs claim Anthem should have used the plan's large size—allegedly over $5 billion in assets—to secure lower fees and lower cost share classes of mutual funds. Plaintiffs also claim fiduciaries "failed to adequately investigate and [. . .] offer non-mutual fund alternatives." Notably, the passively managed index mutual funds offered by Vanguard, which are the subject of the suit, are generally recognized as low-cost funds.

Eighth Circuit Rules 401(k) Service Provider Not ERISA Fiduciary

The U.S. Court of Appeals for the Eighth Circuit has ruled that Principal Life Insurance Co. was not an ERISA fiduciary for claims that it charged excessive fees to its 401(k) plan clients. To hold a service provider liable for fiduciary breach, the Eighth Circuit held that the activities giving rise to fiduciary status must bear some connection to the activities giving rise to the breach. The Eighth Circuit's decision follows the recent judicial trend of dismissing excessive fee claims against 401(k) service providers after finding that the providers do not qualify as ERISA fiduciaries. The case is *McCaffree Financial Corporation v. Principal Life Insurance Co.*, Case No. 15-1007 (8th Cir. Jan. 8, 2016).

Supreme Court Declines to Review Validity of Forum Selection Clauses in ERISA Plans

The U.S. Supreme Court has denied a petition to review a case regarding the validity of forum selection clauses in retirement plan documents. In *Smith v. Aegon Companies Pension Plan*, a panel of judges in the U.S. Court of Appeals for the Sixth Circuit ruled that a forum selection clause in the Aegon Companies Pension Plan did not conflict with ERISA. The Court declined to review the decision, noting that no conflict among appellate courts has yet arisen on the

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

issue.

IRS Releases Guidance Reducing VCP Filing Fees

On January 4, 2016, the IRS issued Revenue Procedure 2016-08, which sets for the fees for submitting plan corrections under the Voluntary Correction Program ("VCP"). Going forward, VCP fees will be set forth in the annual revenue procedure addressing other employee plan fees. The IRS has reduced most fees for VCP submissions made on or after February 1, 2016, but will not apply the reduced fees to, or make refunds for, VCP submissions made before February 1, 2016.

IRS Updates Procedures for Determination Letters, Letter Rulings

On January 4, 2016, the IRS also issued Notice 2016-03 to address several issues raised by upcoming changes to the determination letter program and letter rulings. The notice addressed three items:

- The notice announced that expiration dates included in determination letters issued to individually designed plans before January 4, 2016, will no longer apply. The IRS will issue future guidance explaining the extent to which employers may rely on determination letters after law changes or plan amendments.
- The notice confirms that certain sponsors of Cycle A plans may submit applications during the period beginning February 1, 2016, and ending January 31, 2017. The notice also confirms that plans maintained by a controlled group or affiliated service group may also make submissions, so long as a Cycle A election was made by January 31, 2012, for all plans in the group.
- The notice extends the deadline for the adoption of a current defined contribution preapproved plan adopted on or after January 1, 2016, to April 30, 2017. The extended deadline does not apply to any plan that is a modification or restatement of a preapproved plan maintained by the employer before January 1, 2016.

The IRS notes that each of the above three items will be reflected in a planned update to Revenue Procedure 2007-44 (the guidance that established the five-year determination cycles).

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

Reinhart

Health and Welfare Plan Developments

Supreme Court Limits Equitable Relief Claims against ERISA Health and Welfare Plans

The Supreme Court has ruled that an ERISA health and welfare plan has no equitable right to reimbursement for settlement funds paid to a participant by a third party once the participant has spent the funds on nontraceable items. In *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, a group health plan sued to recover significant medical expenses paid relating to a participant's injuries. The plan's terms provided for reimbursement and required participants to notify the plan before entering any settlement agreement. However, the participant's attorneys asserted that the plan was not entitled to reimbursement and informed the plan's board of trustees that the settlement funds would be disbursed to the participant unless the plan acted by a specific deadline. The board failed to act by the deadline and later sued to enforce the plan's reimbursement rights. The participant asserted that he had already spent most of the settlement funds.

The Court held that the plan's right to recover reimbursement was not "appropriate equitable relief" under ERISA § 502(a)(3). The court noted that whether a remedy is equitable depends on (1) the basis for the claim, and (2) the nature of the remedy sought. The Court noted that the plan's claim would have been equitable had the plan sought recovery directly from the settlement or items traceable to the settlement. However, once the funds are no longer in the participant's possession or control and are not traceable, the remedy is legal, not equitable, because the plan cannot look to the participant's general assets for recovery. The Court also noted that wrongful disposal of the funds does not change its analysis.

HHS Issues Guidance Regarding Individual's Right to Access PHI

On January 14, 2016, the Department of Health and Human Services ("HHS") issued guidance regarding the obligation of HIPAA covered entities to provide individuals with access to their protected health information ("PHI"). In particular, the guidance addresses the following:

- **PHI Covered.** Individual rights extend only to PHI maintained in a designated record set. The guidance includes examples of PHI considered to be included in a designated record set and PHI not considered to be included. The guidance

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

also describes limited circumstances allowing covered entities to deny access requests.

- **Requests for Access.** Covered entities may require individuals to request access to their PHI in writing and may offer electronic means for submitting requests. However, covered entities may not require individuals requesting PHI to come to a physical office, use a web portal or mail requests. Covered entities may require use of a specified form, so long as the requirement creates no barrier or unreasonable delay. The guidance also describes permissible means of verifying the identity of requesting individuals.

- **Providing Access.** Covered entities must provide access to PHI in the manner requested by the individual, including picking up PHI at a specified location or having a copy of the PHI mailed or e mailed. Covered entities must inform individuals requesting PHI sent in an unencrypted e mail of the associated risks. Covered entities must provide electronic copies of PHI maintained only on paper if electronic copies are readily producible (*i.e.*, by scanning the documents). Electronic PHI must be provided in the form requested by the individual, if readily producible. Paper is permitted if an individual rejects any of the electronic formats readily producible by the covered entity.

- **Third Parties.** Covered entities must honor a written request to release PHI to a third party if (1) the request is signed by the individual, (2) the request identifies the designated recipient, and (3) the request directs where to send the PHI.

- **Business Associates.** Covered entities are responsible for providing individuals access to PHI held by business associates. The business associate's agreement with the covered entity determines whether the business associate will provide the individual with direct access or provide the PHI to the covered entity, which will then forward the PHI to the individual.

- **Timeliness.** Covered entities must provide access to requested PHI within 30 calendar days of receiving a request. The guidance describes 30 calendar days as an outer limit.

- **Fees.** Covered entities may not recover costs associated with verification, documentation, searching for and retrieving PHI, systems maintenance, data access, storage or infrastructure from requesting individuals.

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.