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January 2016 Employee Benefits Update

POSTED:

Jan 11, 2016

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Compliance Deadlines and Reminders

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Determination Letter Filing.** The Cycle E Remedial Amendment Period for individually designed plans must be submitted for a favorable IRS determination letter by January 31, 2016. Cycle E plans include those sponsored by employers with tax identification numbers ending in 5 or 0, as well as government plans. Additionally, the Cycle A Remedial Amendment Period opens on February 1, 2016. Cycle A plans are those sponsored by employers with tax identification numbers ending in 1 or 6, as well as plans sponsored by a controlled group or affiliated service group. Following the completion of the Cycle A Remedial Amendment Period, the IRS will no longer accept determination letter applications under the current determination letter program. The IRS issued Notice 2016-03, summarized below, revising the determination letter program for Cycle A applications.

Upcoming Health Plan 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"). Plan sponsors of self-funded health plans and Applicable Large Employers ("ALEs") must provide Forms 1095 B and 1095 C to employees by March 31, 2016. IRS Notice 2016 4, issued on December 28, 2015, extended this deadline from February 1, 2016. Due to the extension, employers should not rely on the IRS to grant any additional extension of this deadline. IRS Notice 2016-4 did not explicitly extend the deadline for filing Forms 1095-B and 1095-C with the IRS. Plan sponsors and ALEs should continue preparing these reports to ensure they meet the applicable deadlines.
2. **Forms 1094 B and 1094 C.** Plan sponsors and ALEs must also file the first

reports required under the Affordable Care Act ("ACA") with the IRS no later than May 31, 2016 (or June 30, 2016 if filing electronically). IRS Notice 2016 4 extended this deadline from February 29, 2016 (or March 31, 2016 if filing electronically). Plan sponsors and ALEs should continue preparing these reports to ensure they meet the applicable deadlines.

Retirement Plan Developments

The PBGC Finalizes Rule on Partitions of Eligible Multiemployer Plans

On December 23, 2015, the Pension Benefit Guaranty Corporation ("PBGC") finalized its rule regarding partitions of eligible multiemployer plans, which was released in June 2015. The finalized rule details the information a multiemployer plan must provide as part of its application for partition. Under the finalized rule, the PBGC may not authorize the partition of a multiemployer plan until the following requirements are satisfied:

- the plan is in "critical and declining" status, as defined in ERISA section 305(b)(6);
- the PBGC determines the plan sponsor has taken all reasonable measures to avoid insolvency;
- the PBGC expects the partition will reduce the PBGC's long term loss with respect to the plan and the partition is necessary for the plan to remain solvent;
- the PBGC certifies to Congress that its ability to meet existing financial assistance to other plans will not be impaired by the partition; and
- the cost to the PBGC arising from the partition is paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans.

Upon approval of an application for partition, the PBGC will provide an order transferring to the successor plan the minimum amount of the original plan's liabilities necessary for the original plan to remain solvent. Additionally, if an employer withdraws from the original plan within ten years of the partition order, withdrawal liability will be computed for both the original and successor plans. The original plan must also pay premiums for participants whose benefits were transferred to the successor plan for ten years following the partition. The finalized rule will apply to all partition applications submitted on or after January 22, 2016.

Court Finds ESOP Fiduciary's Investment Decision Requires Only Prudent Process

In a recent case, *Pfeil v. State Street Bank & Trust Co.* (6th Cir. 2015), the Sixth Circuit Court of Appeals found a third party fiduciary did not breach its fiduciary duty despite continuing to invest in company stock prior to the company declaring bankruptcy. The General Motors ("GM") Employee Stock Ownership Plan ("ESOP") began incurring losses in early 2008. However, State Street Bank & Trust continued to invest in GM stock until November 2008 and did not completely divest the ESOP of GM stock until November 2009. The court found that, absent special circumstances, a fiduciary's reliance on market price for any publicly traded securities has a presumption of prudence. The dissenting opinion criticized the majority opinion as essentially immunizing publicly traded stock plans from imprudence claims.

The IRS Releases Revisions to the Determination Letter Program for Cycle A Plans

The IRS issued Notice 2016 03 providing the following modifications to the determination letter program for Cycle A plans:

- controlled groups and affiliated service groups that maintain more than one plan may submit a determination letter application during the Cycle A submission period only if they made a Cycle A election prior to January 31, 2012;
- expiration dates included in determination letters issued prior to January 4, 2016 are no longer operative; and
- the deadline for an employer to adopt a defined contribution preapproved plan and to apply for a determination letter is extended from April 30, 2016 to April 30, 2017, if the plan was adopted on or after January 1, 2016. This will allow employers who currently maintain individually designed plans a longer period to move to a preapproved plan document.

The PBGC Releases Guidance Regarding Filing and Premium Requirements for 2016

On December 10, 2015, the PBGC released the premium filing instructions for 2016. The filing instructions remain unchanged, but the flat-rate premium rates

increased to $64 per participant for single employer plans and $27 per participant for multiemployer plans. Additionally, the variable rate premium increased to $30 per $1,000 of unfunded benefits.

Health and Welfare Plan Developments

Congress Delays Implementation of the Cadillac Tax

The effective date of the Cadillac Tax has been delayed until 2020. Additionally, when the tax takes effect, it will be tax deductible.

Court Finds Employers May Condition Enrollment in a Sponsored Health Plan on Participation in a Wellness Program

In a recent case, EEOC v. Flambeau, Inc. (W.D. Wis. 2015), the Western District of Wisconsin found that a plan requiring an employee to participate in a wellness program did not violate the Americans with Disabilities Act ("ADA"). In this case, Flambeau, Inc. had initially provided a $600 credit to all employees enrolled in its health plan who participated in its health risk assessment and biometric screening process. Flambeau later eliminated the credit, and instead, conditioned health plan enrollment on participation in the risk assessment and biometric screening. The EEOC claimed this requirement violated the ADA as it conditioned enrollment in the Plan on a completion of medical examinations. The District Court found that Flambeau's wellness program fell within the ADA's safe harbor for insurance benefit plans. In its decision, the court also recommended that plan sponsors and employers include any wellness program or biometric screening requirement in the Plan's Summary Plan Description, particularly when enrollment in such programs affects an individual's eligibility to participate in the plan.

IRS Issues Guidance Regarding Tax Treatment of Reimbursement of Group Health Coverage From a Spouse's Employer

The IRS released a Chief Counsel Advice ("CCA") memorandum regarding when an

employer may use a Health Reimbursement Arrangement ("HRA") to reimburse employees for medical premiums paid under a health plan maintained by a spouse's employer. The CCA provides seven scenarios that establish the following rules:

- An employee's HRA may be used to reimburse the employee on a tax free basis for premiums paid by the employee's spouse under a health plan maintained by the spouse's employer.
- The tax free nature of the reimbursement applies only if the premiums are paid on an after tax basis.
- The above rules apply to other forms of "employer payment plans" even if they are not a qualified HRA.

HHS Releases Proposed Notice of Benefit and Payment Parameters for 2017

On December 2, 2015, the Department of Health and Human Services ("HHS") issued proposed rules regarding payment parameters and various topics related to the provision of welfare benefits. Notable provisions include:

- **Premium Adjustment Percentage.** The premium adjustment percentage for 2017 is proposed to be 13.2%. As a result, for 2017:
  - The maximum in-network, out-of-pocket limit for a nongrandfathered plan would increase to $7,150 per person and $14,300 per family. The increased out-of-pocket limits do not apply until the first day of the plan year beginning on or after January 1, 2017.
  - The annual employer shared responsibility penalties would increase to $2,260 for a 4980H(a) penalty and $3,390 for a 4980H(b) penalty.
- **Plan Year.** HHS interprets "plan year" to be a period that does not exceed 12 months. A plan year in excess of 12 months is inconsistent with the ACA.
- **Notice of Premium Tax Credit Eligibility.** Under the current regulations, an Exchange must provide an employer notice if an employee is determined eligible for advanced payment of premium tax credits. Under the proposed regulations, an Exchange would be required to notify an employer only when an employee actually enrolls in subsidized coverage. This change more accurately reflects the shared responsibility penalty as the penalty is not triggered unless a full-time employee receives a premium tax credit and enrolls in a qualified health plan. Under the proposed rule, if an employer receives a notice, the employer is considered to have knowledge that the shared responsibility

penalty has been triggered.

- **Risk Stabilization Programs.** HHS would be authorized to audit TPAs, ASOs and other third parties that assisted contributing entities with calculating or submitting reinsurance contributions from 2014–2016. The contributing entity would remain liable for payment but the proposed regulations would require cooperation from the third party service provider.
- **SHOP.** Employers using the federally facilitated Small Business Health Options Programs ("SHOP") could offer employees a "vertical" choice among all plans available from a single insurer across all coverage levels.

IRS Issues Guidance Regarding the Effect of Certain Health Care Reform Provisions on Employer-Sponsored Health Plans

On December 16, 2015, the IRS issued Notice 2015 87 to provide guidance on how certain health care reform provisions affect employer-sponsored health plans. Some highlights in IRS Notice 2015 87 include:

- **Health Reimbursement Arrangements.**
  - An HRA that covers two or more participants who are current employees and that permits participants to use the HRA to purchase individual market coverage at any time is deemed not integrated with another group health plan. As a result, the HRA will fail to satisfy the ACA rules prohibiting annual dollar limits and mandatory coverage of preventive care services without in-network cost sharing. An HRA that covers fewer than two current employees may continue to reimburse individual insurance premiums.
  - An HRA is permitted to reimburse medical expenses of a participant's spouse or dependents only if those individuals are enrolled in both the HRA and the employer's integrated group health plan. The IRS will not begin enforcing this limitation until 2017.
  - An HRA may reimburse premiums for individual market coverage providing only excepted benefits (e.g., vision or dental coverage).
- **Definition of "Hour of Service" for Employer Shared Responsibility Full-Time Employee Determination.**
  - Short-term or long term disability results in credited hours of service for periods in which the recipient retains employee status and receives disability benefits funded by the employer. Disability paid for by the employee with an after-tax

arrangement would not constitute benefits funded by the employer and, therefore, would not constitute hours of service.
    - An hour of service does not include hours after termination of employment or hours paid solely to comply with worker's compensation, unemployment or disability insurance laws.
    - The 501-hour limit on hours of service required to be credited due to a continuous period during which the employee performs no service if the hours would otherwise qualify as hours of service (e.g., due to a leave of absence) provided in the "hour of service" definition does not apply to the full-time employee determination.
- **Affordability**. IRS Notice 2015 87 provides detailed rules to determine whether and how employer contributions to an HRA and employer flex credits impact the affordability of coverage offered to employees. Additionally, IRS Notice 2015 87 clarifies that employer contributions cannot reduce an employee's required contributions if they can be received as taxable benefits or used to purchase non-health benefits. Finally, IRS Notice 2015 87 provides that unconditional opt out payments should be treated as increasing an employee's required contribution for employer sponsored coverage. The IRS anticipates issuing proposed regulations reflecting this rule, and this rule would apply only to unconditional opt out arrangements adopted after December 16, 2015.
- **Adjustments to the 9.5% Affordability Standard.** In 2015, the IRS began indexing the percentage of household income that employees may be required to pay for employer sponsored plans. This guidance clarifies that the indexing applies to all provisions under Code sections 4980H and 6056. As a result, the affordability standards are:
    - 56% for 2015; and
    - 66% for 2016.
- **Penalty Relief**. Penalties for incorrect or incomplete Forms 1094/1095-B and C furnished to employees relating to 2015 coverage will not be imposed on an ALE that can demonstrate a good faith effort to comply with the reporting requirements.
- **Health FSA Carryovers.** IRS Notice 2015 87 confirms that any Flexible Spending Account ("FSA") carryover amount is included in the maximum FSA benefit available under COBRA. IRS Notice 2015 87 also clarifies that employers may limit FSA carryovers to employees who participant in the FSA in a subsequent year and may limit FSA carryovers to a maximum period.

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IRS Issues Final Rules Regarding Affordability and Minimum Value of Employer-Sponsored Plans

The IRS released final regulations on December 18, 2015 regarding an individual's eligibility for premium tax credits. Under the final regulation, an ALE may be liable for a shared responsibility penalty if coverage is not affordable or does not provided minimum value and a full-time employee receives the tax credit. Employer sponsored coverage is considered affordable if it does not exceed 9.5% (as indexed) of the employee's household income for the taxable year and the minimum value requirement is met if the employer sponsored plan covers at least 60% of the total allowed cost of benefits expected to be incurred.

The final regulation also provide the following:

- **Wellness Program Incentives.** Wellness incentives are taken into account for affordability and minimum value only if they are related to tobacco use.
- **Employer Contributions to HRAs.** Amounts newly made available for a current plan year in an integrated HRA are taken into account in determining a plan's affordability if they are used only for paying premiums. Amounts used only for cost-sharing but not for paying premiums are taken into account in determining the minimum value percentage.
- **Employer Contributions to Cafeteria Plans.** In determining affordability, an employee's required contribution is reduced by employer contributions under a cafeteria plan that:
  - may not be taken as a taxable benefit;
  - may be used to pay for minimum essential coverage; and
  - may be used only to pay for medical care within the meaning of Code section 213.
- **Post Employment Coverage**. An individual eligible for COBRA coverage is considered eligible for minimum essential coverage only for months the individual is enrolled in COBRA. This applies only to former employees and retirees, and does not apply to current employees with reduced hours.

General Developments

Form 5500 for 2015 Plan Year Released

The Department of Labor has released the 2015 Form 5500 and the IRS has released a draft of the 2015 Form 5500 EZ. The IRS added a series of compliance

questions to the Form 5500 series. These questions are optional for 2015 plan filings but will be required for 2016 reporting and beyond. The changes include:

- **Schedule H (Financial Information)**: Part IV includes two IRS specific questions about Unrelated Business Taxable Income ("UBTI") and in service distributions.
- **Schedule R (Retirement Plan Information)**: Part VII contains ten new IRS compliance questions covering: (1) 401(k) plan ADP and ACP requirements, (2) coverage requirements and plan aggregation, (3) recent plan amendments and type of plan; and (4) plans maintained in U.S. territories.
- **Form 5500 SF (Short Form Annual Return/Report of Small Employee Benefit Plan):** The above changes are incorporated into the form. There is also an additional question regarding whether required minimum distributions were made to 5% owners who were age 70 1/2 or older.

The IRS issued guidance on December 4, 2015 regarding how plan sponsors should analyze and answer the new compliance questions. The guidance also strongly encourages plan administrators to answer the questions despite being optional for 2015 filings.

Congress Repeals Form 5500 Filing Extension

Legislation enacted in July 2015 provided for a maximum extension for filing of Form 5500 of 3 1/2 months. However, Congress recently passed Public Law No. 114 94 repealing the extension increase. As a result, the Form 5500 filing extension will remain at 2 1/2 months. This new legislation did not alter any other provisions of the July law changing the filing due dates for other tax forms.

IRS Issues Guidance Regarding Implications of Obergefell Decision

On December 9, 2015, the IRS issued guidance regarding the impact of the Supreme Court's decision in Obergefell v. Hodges, requiring state civil marriage laws to apply to same sex couples, on employee benefit plans. Notable clarifications include:

- **Qualified Retirement Plans.**
  - The IRS does not require any amendments to comply with *Obergefell* as changes under *Windsor* were required to be adopted by December 31, 2014.
  - If a plan sponsor wishes to provide new rights or benefits for participants

with same sex spouses, the plan sponsor must adopt such amendments by the last day of the plan year in which the amendment was operationally effective.

- **Health and Welfare Plans.**
  - The IRS does not require health and welfare plans to provide specific rights or benefits to a participant's spouse regardless of gender.
  - If a plan's terms provide for coverage of a participant's spouse, the plan administrator may need to alter the plan's operation as of the date of change in state law. Any alterations to plan operations must be reflected in formal plan amendments.
  - If the terms or operations of a cafeteria plan's benefits change midyear due to the change in coverage of same sex spouses, affected participants may make an election change due to a "significant improvement" in coverage.