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June 2014 Employee Benefits Update

POSTED:

Jun 15, 2014

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On May 9, 2014 the IRS issued two new pieces of guidance (Revenue Procedure 2014-32 and Notice 2014-35) providing penalty relief for certain late filers of Form 5500. Generally, plan administrators who fail to timely file Form 5500 series annual reports can be subject to penalties under both Title I of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code). The plan sponsor or administrator can face late filing penalties for delinquent Forms 5500 and Forms 5500-EZ as high as $15,000 for each late return, plus interest.

Non-Title I Retirement Plans (One-Participant Plans and Certain Foreign Plans)

In Revenue Procedure 2014-32, the IRS has established a temporary one-year pilot program providing relief from Form 5500 series annual reports late filing penalties to plan administrators and plan sponsors of retirement plans that are: (1) small business (owner-spouse) plans and plans of business partnerships (together, "one-participant plans") that do not provide benefits for anyone except the owner and/or the owner's spouse or one or more partners; and (2) certain foreign plans not subject to Title of 1 of ERISA. To qualify for the relief, certain procedural requirements must be met, including the filing of the late return, including all required schedules and attachments, for each plan year that the applicant is seeking penalty relief. No penalty or other payment is required to be paid under this pilot program. The temporary pilot relief program is effective June 2, 2014 and will remain in effect until June 2, 2015.

Later Filers Participating in the DOL's Delinquent Filer Voluntary Compliance Program

Since 2002, the Internal Revenue Service (IRS) has not imposed penalties relating to the filing of a Form 5500 series report on a plan administrator or sponsor who satisfies the requirements of the Department of Labor's (DOL) Delinquent Filer Voluntary Compliance (DFVC Program) with respect to the filing of a Form 5500. The DFVC Program allows plan administrators who fail to file a timely annual report to pay reduced civil penalties otherwise applicable under Title I of ERISA.

In Notice 2014-35, the IRS has modified the requirements for retirement plans to qualify for IRS late filing penalty relief to reflect that the Annual Registration Statement for Deferred Vested Participants (Schedule SSA) was replaced by Form

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8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits, a stand-alone form that must be filed with the IRS, but not the DOL. The IRS will now waive the late filing penalties only for filers who: (1) are eligible for and satisfy the requirements of the DFVC Program with respect to a delinquent Form 5500 series return for such year; and (2) file separately with the IRS a Form 8955-SSA with any information required to be filed for the year to which the DFVC filing relates (to the extent that the information has not previously been provided to the IRS). The Form 8955-SSA must be filed on paper with the IRS and must be filed by the later of 30 calendar days after the filer completes the DFVC filing or December 1, 2014. This requirement applies with respect to any DFVC filing submitted through EFAST2 (generally, all DFVC filings after December 31, 2009), regardless of whether the filing was submitted before the issuance of Notice 2014-35.

Select Compliance Deadlines and Reminders

2013 Form 5500 Deadline Approaching

Plan administrators generally have seven months after the end of a plan year to file Form 5500. For plan years ending December 31, 2013, the deadline for filing Form 5500 is July 31, 2014. Plan sponsors who extended their corporate federal income tax return deadline can receive an automatic extension until September 15, 2014, if certain criteria are satisfied. Otherwise, plan administrators can apply for a deadline extension until October 15, 2014 by filing Form 5558 on or before July 31, 2014 (the plan's regular filing deadline).

2013 Form 8955-SSA and Individual Statement Deadline for Retirement Plans

Like Form 5500, Form 8955-SSA (*Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits*) is due seven months after the end of a plan year (July 31, 2014 for calendar year plans). A plan administrator can receive the same extension for Form 8955-SSA as is available for the filing of Form 5500 by filing Form 5558 on or before July 31, 2014. Plan administrators must also provide the individual statements to those separated participants identified on Form 8955-SSA prior to the deadline for filing Form 8955-SSA.

Annual Benefit Statement for Defined Contribution Plans with Plan-Directed Investments

Administrators of defined contribution plans that do not allow participant investment direction must provide an annual benefit statement to participants

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and beneficiaries by the date the Form 5500 is filed. Thus, the annual benefit statement must be sent by July 31, 2014 unless a Form 5500 extension applies.

Retirement Plan Developments

IRS Permits Mid-Year Amendments to Safe Harbor 401(k) Plans Adopted to Comply with Windsor Decision

The IRS has issued Notice 2014-37 expressly permitting plan sponsors to adopt mid-year amendments to safe harbor 401(k) plans to reflect the outcome of *United States v. Windsor* (invalidating Section 3 of the 1996 Defense of Marriage Act). As discussed in our April 2014 Employees Benefit update, the IRS issued guidance requiring that any qualified retirement plan requiring an amendment to reflect the outcome in Windsor to adopt such plan amendment by the later of: (1) the end of the plan year that the change is first effective; (2) the due date of the employer's tax return for the tax year that includes the date of the change; or (3) December 31, 2014. However, a safe harbor 401(k) plan must generally be maintained throughout a full 12-month plan year, which means that the plan typically can only be amended before the beginning of the plan year. In Notice 2014-37, the IRS has provided an exception to this general rule, providing that a safe harbor 401(k) plan will not fail to satisfy the requirements to be a 401(k) safe harbor plan merely because the plan sponsor adopts a mid-year amendment pursuant to Notice 2014-19.

PBGC Issues Final Regulations on Determining Guaranteed Amount of Unpredictable Contingent Event Benefits

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations on how to determine the amount of unpredictable contingent event benefits (UCEB) guaranteed under Title IV of ERISA for single-employer defined benefit plans. UCEBs are benefits or benefit increases that become payable solely by reason of the occurrence of an unpredictable contingent event (UCE), such as a plant shutdown or other reductions in force. Historically, when underfunded single-employer defined benefit plans were terminated, the PBGC generally guaranteed the payment of new pension benefits and benefit increases over a five-year phase-in period, beginning on the date the new benefit or benefit increase was adopted or effective.

The Pension Protection Act of 2006 (PPA) section 403 and these final regulations (which are substantially the same as the proposed regulations issued in March

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2011) change the start of the phase-in period for UCEBs. The phase-in rules are now applied as if a plan amendment creating a UCEB was adopted on the date the UCE occurred rather than as of the actual adoption date of the amendment, resulting in a lower guarantee of UCEBs. The change applies to UCEBs that become payable as a result of a UCE that occurs after July 26, 2005.

IRS Releases Final Regulations on Tax Treatment of Qualified Retirement Plan Payment of Accident or Health Insurance Premiums

The IRS issued final regulations on May 12, 2014 finalizing its 2007 proposed regulations clarifying the tax treatment of payments from a qualified retirement plan for accident or health insurance premiums. Consistent with the proposed regulations, the final regulations provide that payments from a qualified retirement plan for accident or health insurance premiums will generally constitute a taxable distribution to the participant for the year in which the premium was paid, unless another statutory provision provides for a different result. Thus, amounts distributed from a qualified retirement plan that an employee elects to have applied to pay health insurance premiums under a cafeteria plan would be considered taxable income to the employee.

The final regulations provide an exception for the payment of disability insurance premiums from a qualified plan if (1) the disability insurance replaces retirement plan contributions if the employee is unable to continue employment due to disability, and (2) the payment of benefits to an employee's account does not exceed the amount of annual contributions that could have been reasonably expected to be made to the plan on the employee's behalf during the disability period, reduced by any other contributions.

The final regulations address only the situation in which disability premiums are paid from the plan. If the disability insurance premiums are not paid by the plan, the insurance benefits paid to the plan on account of an employee's disability would be considered contributions to the plan governed by qualified plan contribution rules (such as the Code's dollar limits on employer contributions to a defined contribution plan). Similarly, if an employer self-insures (as opposed to having a disability insurance contract), the payments to the plan on account of an employee's disability would be considered a contribution to the plan subject to the general rules that apply to qualified plan contributions.

These regulations generally apply for taxable years that begin on or after January 1, 2015. However, taxpayers may elect to apply the regulations to earlier taxable

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years.

PBGC Issues Final Rule Reducing Reporting Obligations for Certain Multiemployer Plans

The PBGC finalized its proposed rule amending its multiemployer regulations to make providing information to the PBGC and plan participants more efficient and effective, and reduce the burden on plan sponsors without substantive changes. The amendments reduce the number of actuarial valuations required for certain small terminated (but not insolvent) plans and remove certain notice requirements for insolvent multiemployer plans. In addition, the final rule shortens the advance notice filing requirement for merger transactions. Under the PBGC's final rule, plan sponsors of all plans involved in a merger or transfer of assets and liabilities between multiemployer plans must jointly file a notice with the PBGC no less than 45 days before the transaction (reduced from 120 days), provided that no compliance determination has been requested.

Health and Welfare Plan Developments

IRS Issues New FAQs Relating to the Affordable Care Act's Employer Shared Responsibility Rules, Small Business Health Care Tax and Employer Health Care Arrangements

The IRS has issued several new FAQs relating to the Affordable Care Act (ACA), including updating series of questions and answers on its website relating to the employer shared responsibility rules. The new employer shared responsibility Q&As (Questions 48-56) address, among other things, the consequences for an employer covered by the employer shared responsibility rules if the employer offers health insurance coverage to all full-time employees but does not offer dependent coverage, and who certifies when an employer meets the minimum value requirements. In addition, the IRS released 16 Q&As (available at FTEs & Average Annual Wage) about the small business health care tax credit and determining full-time employees and average annual wages.

Finally, the IRS also issued a new FAQ (Employer Health Care Arrangements) clarifying that reimbursing premiums paid by employees for health insurance (either through a qualified health plan in the Marketplace or outside the Marketplace) qualifies as an "employer payment plan" and is considered to be a group health plan subject to the market reforms, including the prohibition on annual limits for essential health benefits and the requirement to provide certain

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preventive care without cost sharing. The IRS previously noted in Notice 2013-54 that such arrangements cannot be integrated with individual policies to satisfy the market reforms. Consequently, such an arrangement may be subject to a $100/day excise tax per applicable employee (which is $36,500 per year, per employee) under section 4980D of the Code for failing to satisfy the market reform requirements.

Federal Court Holds Self-Funded Health Plan is not Prohibited under ERISA from Excluding Same-Sex Spouses from Plan Coverage

On May 1, 2014, a U.S. District Court in the Southern District of *New York held in Roe v. Empire Blue Cross Blue Shield and St. Joseph Medical Center*, 2014 WL 1760343, (S.D.N.Y May 1, 2014) that an employee had no claim under ERISA against the sponsor of a private self-funded health plan that included an exclusion for same-sex spouses. The plaintiff, an employee of the plan sponsor who was legally married under New York law to a same-sex spouse, argued that the sponsor of the self-funded health plan violated ERISA section 510, which prohibits an employer from interfering with or discriminating against a participant or beneficiary for exercising any benefit rights under an employee benefit plan. The court rejected the employee's claim, finding that claims under ERISA section 510 are limited to instances involving adverse employer-employee actions, and is not an outright anti-discrimination provision. Notwithstanding the Supreme Court holding in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) striking down section 3 of DOMA, the court noted that ERISA gives employers broad discretion in writing terms of welfare benefit plans. Therefore, the court held that the same-sex spouse exclusion was not unlawful under ERISA, and because the plaintiff-employee suffered no adverse employment action (she was still employed by the plan sponsor), the employee had no claim under ERISA section 510.

Reinhart Comment: *Roe v. Empire Blue Cross Blue Shield* supports the conclusion that ERISA does not prohibit self-funded health and welfare plans from excluding same-sex spouses from plan coverage. However, until additional district courts and appeals courts have had an opportunity to further consider the implications of *U.S. v. Windsor* on health and welfare plans, sponsors of health and welfare plans that exclude same-sex spouses from coverage may still risk legal actions from employees. Additionally, the court specifically noted the exclusion of same-sex spouses in the plan. Accordingly, plans that do not cover same-sex spouses should consider including a specific exclusion in the plan document.

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