

West Michigan CEBS Employee Benefits Legal Update



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DOL Electronic Disclosure Regs

Proposed voluntary safe harbor for website disclosures.

Plan participants would be notified that information is available online, including instructions on how to access and right to paper copies, and have the right to opt out.

Sets standards for the website and invalid email addresses

Proposed RMD Regs

Updated life expectancy and distribution tables

Would apply to RMDs made on or after January 1, 2021

Calculate RMDs as usual for 2020

Hardship Withdrawals

2018 Bipartison Budget Act

- No 6-month suspension of deferrals
- Allowed from more sources and earnings
- Loans not required before hardship

Final Regulations Issued

Plan amendment required

EPCRS

Revenue Procedure 2019-19

Expanded self-correction

- Plan document failures
- Expanded correction by amendment

Electronic filing required

Fee schedule:

- \$500,000 or less: \$1,500
- Over \$500,000 to \$10,000,000: \$3,000
- Over \$10,000,000: \$3,500

Plan Documents

Pre-approved DB plans – April 30, 2020

403(b) – March 31, 2020

Individually designed plans – when established and terminated; otherwise amend annually as required by IRS;

Pre-approved DC plans - TBD

Student Loan Assistance

PLR 201833012

- Allocate profit-sharing contribution taking into account student loan repayments
- No reliance on PLRs
- Administrative complications
- Other alternatives

Congress likely to address

DOL Guidance

DOL information letter (12/18) confirmed ERISA preempts state law requiring consent before withholding deferrals from wages (e.g. auto enrollment)

DOL information letter explains the right of a participant to designate a representative and the need for SPDs to describe any requirements

DOL Guidance cont'd

Socially conscious investing

- Fiduciary may not sacrifice return or take on additional risk to promote social policy goals
- May, but are not required, to include such options but only if the investment option is prudent
- Default investment of particular concern

Proxy voting or shareholder engagement using plan expenses – reasonable expectation of enhancing value?

DOL (& IRS) Guidance cont'd

MEPs - the goal is to support small employers offering joint plans for economies of scale.

Proposed amendment to Treas. Reg. Section 1.413-2 addresses the Unified Plan Rule (“one bad apple rule”) for tax-qualification

Final DOL Reg. 2510.3 allows association retirement plans (based on geography or industry) and professional employer organization safe-harbor plans

DOL Guidance cont'd

PTE 2019-02 and Advisory Opinion 2018-1A address a Retirement Clearinghouse (RCH) program to automatically rollover default rollovers to a new employer plan.

Enrolling is a fiduciary act requiring due diligence and monitoring.

Accepting the rollover is a fiduciary act.

The PTE allows RCH, a fiduciary, to receive a fee for the rollover to the new plan, but cannot sell data.

Missing Participants

DOL letters alleging potential breach of fiduciary duty related to missing participants

2014 DOL guidance on terminating plans; not ongoing plans

Where to send the money?

Missing for RMDs?

IRS on Uncashed Checks

Rev. Rul. 2019-19—Uncashed checks received by a participant are taxable and subject to required withholding in the year distributed.

The IRS continues to review the separate issue of lost participants.

Pension Lump Sum Windows

IRS announced withdrawal of intent to issue regulations stating that lump sum windows for retirees violate 401(a)(9) and will not assert violation

Fiduciary Rule

Vacated by Fifth Circuit

Back to the 5-part test:

- (1) makes recommendations as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
- (2) on a regular basis;
- (3) pursuant to a mutual understanding;
- (4) that such advice will be a primary basis for investment decisions; and
- (5) that the advice will be individualized to the plan

SEC

SEC Regulation Best Interest on IRA rollover advice

- Applies to all rollover advice
- Requires:
 - Comparison of investments, risks, services
 - Info about the investor's individual financial circumstances, needs, and preferences
 - A recommendation in line with the profile

Retirement Reform

Retirement Enhancement and Savings Act (RESA)

Retirement Security and Savings Act

Receiving Electronic Statements to Improve Retiree Earnings (RETIRE) Act

Retirement Plan Simplification and Enhancement Act

Retirement, Savings, and Other Tax Relief Act

Setting Every Community Up for Retirement Enhancement Act (SECURE) of 2019

Litigation Review

Tussey v. ABB

Sound familiar?

Case finally closed with \$55M settlement.

Sacerdote v. NYU

Investment committee best practices

Periodic fiduciary education for the committee

Training new committee members

Review, question, and document decision making and monitoring of providers

Negotiating for lower fee even without an RFP can be prudent

BB&T Corporation 401(k) Settlement

\$24M, plus

Required actions:

- Fiduciary training by experienced ERISA counsel
- Use of independent consultant to search for an independent investment advisor, with a minimum of three candidates
- Use lowest cost shares and understand revenue sharing and rebate it, consider index funds

Karg v. Transamerica Corp.

Transamerica retained its own poorly performing funds and use “Portfolio Xpress” to push accounts into those funds

Court denied dismissal of the claim where there was a prior settlement (but with respect to management through affiliates who then hired outside advisors)

Flawed process can be reasonably inferred, so claim is plausible (Braden v. Walmart Stores, 8th)

PBGC v. Findlay Industries

Single-employer DB plan termination liability

Controlled group liability

Trade or business when owner leases property to the business

Pearce v. Chrysler

Reformation of plan based on conflict
between Plan and SPD

Reasonable reliance

Critical decision

Importance of accuracy and disclaimers in
SPD and other communications

Fessenden v. Reliance Standard Life

- Failure to comply with timing on claim denial (on LTD claim) entitled the participant to *de novo* standard of review rather than deference to the plan administrator.
- The court rejected the “substantial compliance” standard applied by the 3rd, 9th, and 10th circuits.

Lerbakken v. Sieloff

Retirement assets acquired in divorce held subject to the alternate payee's creditors

Sikora v. UPMC

Top hat plan exemption for NQDC plans

- Limited to a select group of employees
- Quantitative
- Qualitative
- Requirement to find bargaining power?

Circuit split

Legal Update: Health and Welfare Plans



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Affordable Care Act

1094-C/1095-C Forms

- Draft 2019 form instructions out (but not forms)
- No apparent changes from 2018!

States with individual mandates may also require reporting

Affordable Care Act

Summary of Benefits and Coverage (SBC)

- SBC Template being updated
 - Reflects elimination of individual mandate.
 - Rules on coverage example calculations
- Required for policy years that begin on and after January 1, 2021.
 - Start using with fall 2020 open enrollments

ACA Penalty Enforcement

IRS continues to enforce employer responsibility requirements.

- Working on 2017 preliminary assessments
 - Failure to cover 95% of full-time employees.
 - Failure to offer affordable coverage
 - Failure to file forms

Most preliminary assessments result from reporting errors



ACA Inflation Adjustments



	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>
4980H(a)	\$2160	\$2260	\$2320	\$2500	\$2570
4980H(b)	\$3240	\$3390	\$3480	\$3750	\$3860
Affordability	9.66%	9.69%	9.56%	9.86%	9.78%
FPL SH	\$94.74	\$95.93	\$96.07	\$99.75	\$101.79

Other Inflation Adjustments

PCORI Fees

- Plan years ending 10/1/18 - 12/31/18: Done!
- Plan years ending 1/1/19 - 9/30/19: \$2.45

Health FSA contribution limits: \$2750

Dependent Care contribution limits: \$5000/\$2500

Other Inflation Adjustments

HSA/High-deductible health plan limits

Deductible thresholds:	\$1,400/\$2,800
Out-of-pocket limits:	\$6,900/\$13,800
HSA contribution limits:	\$3,550/\$7,100
HSA catch-up contributions:	\$1,000

Michigan Auto Insurance Reform

Beginning July 1:

- No more mandate to purchase unlimited PIP benefits
- Coverage choices:
 - \$250,000
 - \$500,000
 - Unlimited
 - For some: \$0 or \$50,000

Michigan Auto Insurance Reform

Decisions for Employers with self-insured plans:

- Exclude coverage?
- Pay secondary?
- Exclude coverage below specific threshold/pay secondary after that?

Communication challenge

Health Reimbursement Arrangements

Two new types of HRAs

- insurance coverage HRA
- Excepted benefit HRA



Can make available beginning January 1, 2020

Health Reimbursement Arrangements

Insurance Coverage HRAs (ICHRAs)

- Premium only/other medical expenses
- Individuals must have individual health plan coverage (must verify)
- Cannot be eligible for traditional health plan
- Class requirements
- Must allow opt out (notice requirement)

- Large employers: affordability issue

Health Reimbursement Arrangements

Excepted Benefit HRAs (EBHRAs)

- Up to \$1800 for medical expenses
 - Can't pay medical insurance premiums
 - Can pay for dental insurance, vision insurance, and other excepted coverage.
- Individuals must also be eligible for employer's medical coverage.
- Same terms for all similarly situated employees

Mental Health Parity

DOL enforcement activity:

- Concluded 285 investigations in 2018
- 21 plans cited with MHPAEA violations

Example cases:

- Stricter preauthorization requirements
- Specialist copay amounts
- Requiring measurable goals and continued progress

Mental Health Parity

Telemedicine arrangements covering mental health services:

- Charging full-cost for mental health services?
- Different copay/out-of-pocket amounts?

High Deductible Health Plans

IRS Notice 2019-45: preventive drugs

- 14 Specific maintenance drugs that will be treated as “preventive” care.
- Examples:
 - Beta-blockers
 - Statins
 - ACE inhibitors
 - Insulin and other glucose lowering agents

California FSA Notice Requirements

Requires notice of deadline to withdraw funds from FSAs before end of year.

- Two forms of notice required
- Only one may be electronic

How do you communicate to employees losing eligibility mid-year?

Is there ERISA preemption for health FSA?

California Consumer Privacy Act

Goes into effect January 1, 2019

Requirements:

- Notices to CA residents (including employees)
- Individual rights
 - Right to know
 - Right of access
 - Right to be forgotten
 - Right to opt out of “sale” of information
 - Right to equal treatment (antidiscrimination)
 - Right to sue for statutory damages for data breach

Temporary, partial exception during 2020 for employment information

California Consumer Privacy Act

ERISA preemption?

- Uncertain, until courts rule
- Not all benefits subject to ERISA
- Other employment data

Contracts with vendors

- Need contractual provisions to prevent “sale” of data

HIPAA Privacy and Security

- Health Plan ID number
 - Abolished!
- HIPAA penalty structure reworked
 - No knowledge: \$25,000
 - Reasonable cause: \$100,000
 - Corrected willful neglect: \$250,000
 - Uncorrected willful neglect: \$1,500,000
- But penalties will also be adjusted upward for inflation. New maximum: \$1,754,698

2019 HIPAA enforcement

- Elite Dental Assoc. Dallas P.C.: \$10,000
- Jackson Health System: \$2.15 million
- Cottage Health System: \$3 million
- Touchstone Medical Imaging: \$3 million

2019 HIPAA Enforcement

- Bayfront Health St. Petersburg: \$85,000
- Medical Informatics Engineering: \$100,000
- Univ. of Rochester Medical Center: \$3 million
- TX Health & Human Svcs. Comm: \$1.6 million

Thank you!



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