

Legal Update: Retirement Plans

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Trends

- In 2016, 84.9% of participants made contributions
- Roth availability increased again – now offered at 71% of companies
- Company contributions increased to an average of 4.8% of participants' pay
- Target-date funds are now offered in nearly 75% of plans



Trends

- 70% of plans retain an independent investment advisor to assist with fiduciary responsibility
- 71% of plans use automatic enrollment, and 75% of those plans auto increase the default deferral rate
- Steady decline in the use of revenue sharing – to 27.4% of plans from 66.6% in 2012



Hardship Withdrawals

- The February 2018 Bipartisan Budget Act, effective in 2019:
 - Removes the mandatory six-month prohibition on contributions after a hardship withdrawal
 - Expands assets available in a hardship withdrawal to include not only 401(k) deferrals, but also certain “qualified” matching and non-elective contributions, and earnings on those monies
 - Clarifies that participants need not first elect a plan loan before taking a hardship withdrawal



Hardship Withdrawals

- IRS “Substantiation Guidelines” provide framework for documenting hardships
 - Sufficient if participants retain their own documentation

But, you should still monitor to determine if:

- Participants are getting multiple distributions; and
- What is happening with deemed substantiation is OK



Plan Claim Procedures

- Effective for disability determinations filed after April 1, 2018
- The new rules apply to claims under STD and LTD plans subject to ERISA, as well as other ERISA plans that condition a benefit upon the determination of a disability
 - This includes top hat plans, 403(b) plans, 457 plans, 401(k) and profit sharing plans, defined benefit plans, and ERISA severance plans
 - In other words, any ERISA plan that references a participant becoming disabled as a condition of payment

The Fiduciary Rule

What's happening?

- SEC action and enforcement
- States also beginning to act and enforce
- Service providers reversing changes!



DOL Enforcement

- Common scenarios:
 - Delinquent employee contributions – still a BIGGIE!
 - Excessive service provider fees
 - Imprudent investments for all sorts of reasons
 - Plan sponsor bankruptcies
 - Abandoned pension plans
 - Hard to value assets
 - Fiduciaries who didn't know/fulfill their duties – and many who didn't know they are fiduciaries!



Plan Audits

Plans Audited	Number of Firms	Deficient Audits
1-2	3,684	75.80%
3-5	1,519	68.40%
6-24	1,603	67.40%
25-99	433	41.50%
100-749	77	12.00%
750 +	14	12.00%
Firms Total	7,330	

Plan Audits

DOL & PBGC still working to review auditors that audit less than 5 plans

- Finding high rates of non-compliance or failure to satisfy basic auditing standards
 - Documentation failures
 - Overreliance on ER reps
 - Recognize the risks you may be taking when you go for the lowest fee amount
 - Selection of auditor is a fiduciary decision
 - Not all auditors are qualified to audit plans



Plan Audits

- An overall error rate of nearly 40% doesn't tell the whole story
 - Largest firm practices – 12% error rate
 - Smallest firm practices – 76% error rate
- Large firms have their own risks and challenges
 - Consistency throughout firm
 - Firm growth through acquisition
 - Dabbling
 - Relationship partners without plan experience



Missing Participants

IRS permits plans to forfeit benefits of missing participants subject to restoration in the event of a future claim

The PBGC recognizes the validity of the forfeiture and restoration procedure

DOL doesn't like forfeiture of missing participant benefits with right of restoration in a DC plan

- Views it as a possible prohibited transaction, triggering an excise tax
- And as a possible breach of fiduciary duty

However, it's in many plans and is commonly done



Missing Participants

It's pretty clear that the DOL expects employers to contact participants prior to a distribution event, e.g., when normal retirement age (NRA) is approaching under an ongoing plan, to advise them that distributions are available!

- Basically, this requires that you maintain records on the whereabouts of former employees in order to be able to pay benefits in a timely manner – a daunting task

IRS also wants to see focus on missing participants before point of distribution or plan termination

- For example, at each corporate or plan transaction

Missing Participants

The IRS points to three steps that would constitute “reasonable” search steps:

- Search all plan, sponsor and public records for contact information
- Contact a commercial locator service or use a proprietary internet tool for locating people
- Send a USPS certified mail to the last known address or by email address or telephone number



Missing Participants

Per DOL Field Assistance Bulletin No. 2014-01, DOL expects you to:

- Use certified mail
- Check related plan and employer records
- Check with designated plan beneficiary
- Use free electronic search tools

Additional search steps if warranted due to account size

- Commercial locator services or credit reporting agencies

May assess reasonable fees to missing participant accounts for search efforts

Missing Participants

If a participant truly can't be found -

- Roll the balance into an IRA or Inherited IRA for non-spouse beneficiaries (but *not* RMDs)
- Other options for accounts less than \$1,000 -
 - Roll into an interest-bearing federally insured bank or savings account
 - Place into the unclaimed property fund of the State of the participant's last known address
- Accounts must preserve principal, provide a reasonable ROR and liquidity, and assess only reasonable fees

Missing Participants

Also, with the DOL program still in full force, the PBGC expanded its missing participant program for terminated defined contribution plans

For plans that terminate on or after January 1, 2018:

- The PBGC will permit the transfer of missing participant accounts to the PBGC and PBGC will pay benefits out when the participant is located; or
- The PBGC can be given information about the entity responsible for payment when the participant is found

Missing Participants



The PBGC has created a centralized online searchable database of missing participants

More info:

<https://www.pbgc.gov/prac/terminations/missing-participants>

Uncashed Checks

Job-hopping

- Average job tenure is two years!

DOL considers amount to be a plan asset

- Leads to issues with float because financial institution removes the amount from the plan's account once the check is issued
 - Even if it's never cashed

Uncashed Checks

So, try to find a participant

- If unsuccessful, rollover to an IRA
 - Under \$5,000
 - Any amount in connection with a plan termination
 - Unless it's an RMD
- More complicated if amount was already taxed
 - Re-deposit to plan or transfer to IRA may be problematic outside 60-day rollover window

Student Loan Repayments

Recent PLR authorized an employer matching contribution based on employees' student loan repayments

- IRS said it would not violate the “contingent benefit rule” (i.e., no benefit other than a qualified plan match may be based on an employee contributing to, or refraining from contributing to, a 401(k) plan)

Student Loan Repayments

Note –

- It's only a PLR
 - But IRS has been asked to issue a Rev. Ruling
- It's technically not a matching contribution subject to the ACP test
 - It's an employer profit-sharing contribution subject to 401(a)(4) nondiscrimination testing
 - May have to be limited to NHCEs
 - May cause a failure of the ACP test if a lot of employees forego elective deferrals
- What documentation of student loan repayment is required

Student Loan Repayments

- In a matching safe harbor plan, the employer will probably have to make both the safe harbor match and the student loan contribution
 - The contingent benefit rule will not allow the student loan contribution to be made only to employees who don't make elective deferrals

The plan document has to be drafted to allow employer “profit sharing”–type contributions to be allocated to subgroups of employees eligible to get the contribution

It is too soon to do this without sophisticated help

Revised Model Rollover Notice

See IRS Notice 2018-74

Replaces model notice issued in 2014

Covers –

- Extended rollover deadline for qualified plan loan offset amounts (i.e., rollovers of loan offsets resulting from employment or plan termination)
 - Up to extended due date of employee's tax return
- Self-certification of eligibility for waiver of 60-day deadline for making rollover
 - Rev. Proc. 2016-47

President Trump's Executive Order

Expand MEPs

- How will testing work?
- Will we eliminate the “one bad apple” rule?
- Will we have some sort of mandatory contribution?
- Where will the fiduciary responsibilities land?

Review RMDs

Reduce number and complexity of notices and disclosures

- Increase options for electronic delivery

Michigan Earned Sick Time Act

Note: this law may not stick at all, or at least in its present form

- The legislature may repeal or modify it after the election

At present, though, beginning in April, employees must provide paid sick time

- One hour of paid sick time for every 30 hours worked
 - Maximum of 72 hours per calendar year
 - All employers, except the federal government

Controlled Group and Pension Liability

We have always had statutory controlled group joint and several liability for multiemployer plan withdrawal liability

Sixth Circuit recently made it clear that is true as well for single-employer DB plan finding liabilities

- E.g., in connection with a distress or involuntary plan termination
- Liability to the PBGC for the plan's underfunding

Controlled Group and Pension Liability

Even worse, liability can extend to a bona fide purchaser of assets

- Where buyer had notice of the liability prior to the sale
- And there is sufficient continuity of operations by the buyer
- Even worse, CA 6 also said that leasing of property to a commonly-controlled entity is categorically a “trade or business” for purposes of this liability

Legal Update: Health and Welfare Plans

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November 7, 2018



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Affordable Care Act



Texas v. United States of America

- Challenge to the ACA
- Years away from ruling

City of Columbus v. Trump

- Challenge to Executive Orders and other administration decisions re ACA

ACA Penalty Enforcement

IRS sending out preliminary assessment notices.

- Started with 2015 1094-C/1095-C forms
- Now starting on 2016 assessments

Most assessments result of errors



ACA Inflation Adjustments



	2016	2017	2018	2019
4980H(a)	\$2160	\$2260	\$2320	\$2500?
4980H(b)	\$3240	\$3390	\$3480	\$3750?
Affordability	9.66%	9.69%	9.56%	9.86%
FPL SH	\$94.74	\$95.93	\$96.07	\$99.75

Other Inflation Adjustments

PCORI Fees

- Plan years ending before 10/1/18: \$2.39
- Plan years ending on or after 10/1/18: \$2.45

Health FSA contribution limits: TBD

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

Other Inflation Adjustments

HSA/High-deductible health plan limits

Deductible thresholds:	\$1,350/\$2,700
Out-of-pocket limits:	\$6,750/\$13,500
HSA contribution limits:	\$3,500/\$7,000
HSA catch-up contributions:	\$1,000

ACA Reporting

No significant changes to forms



Distribution deadlines:

- 1095-C: January 31 to employees
- 1094-C: February 28 (paper)
April 1 (electronic)

Massachusetts: Health Insurance Responsibility
Disclosure forms

Health Care Exchange Notices

Two new model forms available

Consider whether former employees need confirmation of loss of coverage.

Association Health Plans



New regulations liberalizing rules.

- Small groups in large group market
- Self-insured?
- challenges

Health Reimbursement Arrangements

Two new types of HRAs

- insurance coverage HRA
- Excepted benefit HRA



Only proposed regulations—must wait for them to be finalized.

Pending Legislation

Expanded use of HSAs?

- definition of HDHP
- meaning of preventive care



Another delay of Cadillac tax and medical device tax?

Further suspension of health insurance tax?

Mental Health Parity Enforcement

DOL enforcement priority

- Part of all current audits
- Erroneous claims must be reprocessed

Most problems are operational

- Inconsistent treatment medical/surgical vs mental/substance abuse

Employer Tax Credit for Paid Leave

New guidance—and proposed regulations coming.

Will it be extended beyond 2019?



LGBT Coverage Issue

EEOC Title VII enforcement.

- Offering transgender benefits
- Gender-neutral domestic partner benefits

2019 Human Rights Campaign Corporate Entity Index criteria

- No transgender exclusions
- Gender-neutral domestic partner benefits

LGBT Coverage Issue

Boyden v. Conlin (W.D. Wisc. 2018)

- exclusion of gender-conforming surgery violated Title VII and ACA.

Courts split on issue—will it reach the Supreme Court?



Contraceptive Coverage

2017 interim rules

- Expanded religious objection
- New moral objection

Rules on hold pending outcome of litigation

HIPAA Privacy/Security Enforcement

- *21st Century Oncology*: \$2.3 million
- *Fresenius Medical*: \$3.5 million
- *FileFax*: \$100,000
- *Univ. of Texas*: \$4.3 million
- *Boston Hospitals*: \$999,000
- *Anthem, Inc.*: \$16 million



Non-HIPAA Privacy/Security

ERISA fiduciary obligations

State and federal laws expanding



Questions?

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