BENEFITS INSIDER
A Member Exclusive Publication

Volume 168, September 1, 2016 (covering news from August 16-31, 2016)

WEB's ***Benefits Insider*** is a bi-monthly member exclusive publication providing the latest developments from Washington, DC, on matters of interest to employee benefits professionals. The content of this newsletter is being provided through a partnership with the American Benefits Council, a premier benefits advocacy organization. To inquire about membership with the Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Nothing to report this issue

RECENT REGULATORY ACTIVITY

DOL Finalizes Rules for State-Run Retirement Plans for Private Workers, Proposes New Rules for Other Municipalities

The U.S. Department of Labor (DOL) **finalized regulations** on August 25 clearing the way for states to establish mandatory automatic enrollment retirement plans (using IRAs as the savings vehicle) for private-sector employees without workplace coverage. Under the new DOL safe harbor, the programs would be mandatory for employers but employees could opt out. The DOL concurrently issued **proposed regulations** that would facilitate similar efforts by large cities and counties. The speed of the project's final approval reflects its status as a major element of President Obama's retirement policy agenda.

A number of states have passed (or are considering) legislation to require private-sector employers that do not sponsor retirement plans to provide payroll deduction contributions into a state-sponsored retirement plan.

Although these state initiatives are generally intended to apply to small employers that do not sponsor a retirement plan, there is also the potential that there could be related responsibilities imposed on larger employers regarding employees who are not eligible for the retirement plan. These state initiatives could potentially erode ERISA's preemption standard, disrupting multi-state employer plans that rely upon a strong federal framework.

The final regulations essentially provide a safe harbor under which a state-run retirement arrangement meeting certain requirements would not be considered an employee benefit plan under ERISA and, therefore, the state law mandate would not be not subject to ERISA preemption. Whether or not preemption applies, as DOL acknowledged in the proposed regulations, would ultimately be determined by a court.

Some states have considered or adopted arrangements that embrace ERISA-governed plans. Interpretative Bulletin 2015-02, issued in November 2015 with the initial proposal, allows states to create or facilitate three types of ERISA-covered plans.

In crafting the final regulations, the DOL largely ignored the issue of most concern to plan sponsors – that states may impose the mandate on employees of an employer that offers a plan, but for which some employees are not eligible (because, for example, the employee is a temporary worker or has not yet met the age or service requirements). The DOL also declined to provide any guardrails on which individuals are subject to the state-run mandate, which could result in overlapping and inconsistent requirements. For example, an employee living in one state but working in another could be subject to both states' retirement plan mandate. Finally, DOL declined to extend the safe harbor to employers not mandated to participate but who would like to offer the payroll deduction. DOL concludes that an employer that *voluntarily* joins the program has effectively sponsored a plan.

Among the other changes included in the final proposal:

- The final rule removes a provision prohibiting the state from imposing any restrictions or penalties on withdrawals.

- DOL modified the provision prohibiting an employer from receiving any direct or indirect consideration for participating in the program (other than reimbursement of actual costs of the program); the final rule provides that a state need not determine with precision an employer's actual cost and clarified that this can be done through tax incentives and credits.

- The final rule clarifies that the new rule is just a safe harbor (and that other arrangements might also not be subject to ERISA).

The proposed rule, issued concurrently with the final rule addressing states, effectively expands the availability of the rules to "qualified political subdivisions" without being subject to ERISA. A QPS is any governmental unit of a state, including a city, county, or similar governmental body, that:

- Has authority, implicit or explicit, under state law to require employers' participation in an IRA program,

- Has a population equal to or greater than the population of the least populated state (excluding the District of Columbia and listed territories), and

- Is not located in a state that, pursuant to state law, establishes a state-wide retirement savings program for private-sector employees.

The comment period on the proposal is only 30 days, which suggests that the DOL will seek to finalize these rules quickly after the close of the comment period.

The White House has released a fact sheet on the final and proposed regulations.

DOL to Host Webinar on ACA, Mental Health Parity Compliance

The U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) will host a webcast on September 14 to assist employer health plan sponsors in complying with the Affordable Care Act (ACA) and related mental health and substance use disorder parity requirements.

Go to the DOL/EBSA registration page for more information.

According to the announcement, the webcast will "highlight the most common problems in complying with the Mental Health and Substance Use Disorder Parity provisions from EBSA's enforcement efforts and offer some best practices," including a discussion of the Summary of Benefits and Coverage templates.

EBSA officials will also describe the activities of the Mental Health and Substance Use Disorder Parity Task Force, which was established by a presidential memorandum earlier this year to secure parity protections and expand coverage to further realize the intended benefits of the Mental Health Parity and Addition Equity Act of 2009 (MHPAEA).

A synopsis of the listening session has been provided by EBSA.

IRS Introduces Safe Harbor for Retirement Account Rollover Requirements

On August 24, the Internal Revenue Service (IRS) introduced **Revenue Procedure 2016-47** which allows eligible recipients of plan distributions to qualify for a waiver of the 60-day time limit through a self-certification procedure.

Recipients of retirement plan distributions who inadvertently missed the 60-day time limit for rolling these amounts into another retirement plan or individual retirement arrangement (IRA) can claim eligibility for a waiver through a written certification that meets one or more of the 11 criteria detailed in the procedure (which includes a sample letter). Prior to the self-certification procedure, taxpayers who failed to meet the 60-day rollover requirement requested private letter rulings from the IRS to obtain a waiver.

The new self-certification procedure provides that a "plan administrator, or an IRA trustee, custodian, or issuer ('IRA trustee'), may rely on the certification in accepting and reporting receipt of a rollover contribution." According to IRS statement, "the IRS now has the authority to grant a waiver during a subsequent examination" even is a taxpayer does not self-certify.

IRS Releases Draft 2016 Instructions for Forms 1094-B and 1095-B

The Internal Revenue Service (IRS) has released draft instructions for completing Forms 1094-B and 1095-B for calendar year 2016.The draft forms themselves were released on June 22. Form 1095-B is used to report certain minimum essential coverage (MEC) information to the IRS and to covered individuals to help the IRS administer the individual shared responsibility payment. The "B" forms are generally filed by insurers for insured MEC. Employers that are not considered "applicable large employers" (ALE – generally, an employer that, together with other employers in its controlled group, employed on average at least 50 full-time employees or equivalents) also file the "B" Forms to report coverage under their self-insured plans. ALEs that are "applicable large employers" report this coverage information on Part III of the Form 1095-C instead of the Form 1095-B.

- [Form 1095-B: Health Coverage] is used to fulfill the requirement under Internal Revenue Code Section 6055 that every health insurance issuer, sponsor of a self-insured health plan (except applicable large employers), government agency that administers government-sponsored health insurance programs and other entities that provide MEC, file annual returns reporting certain information for each individual for whom MEC is provided and to transmit a copy of the return to the individual.

- [Form 1094-B: Transmittal of Health Coverage Information Returns] is to be used to transmit the Forms 1095-B.

A comparison of the 2016 draft instructions with the 2015 final instructions reveals a number of notable changes:

- Under the 2016 draft instructions, MEC does not include coverage consisting solely of excepted benefits, such as vision and dental coverage not part of a comprehensive health insurance plan, workers' compensation coverage, and coverage limited to a specified disease or illness.

- The 2016 draft instruction revises the wording in the section on supplemental coverage reporting ("more than one type of minimum essential coverage" has been changed to "more than one minimum essential coverage plan or program"), but *the basic rules or examples have not been changed*, nor do the instructions clarify how reporting applies to Health Reimbursement Arrangements (HRAs) that are only available to retirees enrolled in Medicare. The instructions refer to the proposed regulations under Code Section 6055 for more information on reporting for supplemental coverage (which also do not clarify this issue).

- With respect to the electronic filing requirement, the 2016 draft instructions clarify that the "250 or more" return threshold applies to each type of return filed separately *for original and corrected forms*. An example has also been added: In an instance where you have 150 Forms 1095-B to correct, you may file the corrected returns on paper because they fall under the 250 threshold, even if you originally filed 250 or more Forms 1095-B electronically. But if you had 300 Forms 1095-B to correct, they must be filed electronically.

- Under the 2016 draft instructions, when issuing a corrected Form 1095-B to a recipient, the filer can write, print or type "CORRECTED" on the form. (The 2015 instructions did not include print or type.)

- The 2016 draft instructions reflect the increased penalties for the failure to file or furnish correct forms ($250 is increased to $260 and the $3 million maximum is increased to $3,139,000).

IRS Updates Priority Guidance Plan

The U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) released its initial **2016-2017 Priority Guidance Plan** on August 15, which describes the 281 regulatory projects that the agency "intends to work on actively" during the twelve-month period from July 2016 through June 2017. The guidance plan does not place any deadline on completion of projects and is typically updated throughout the year.

While the IRS is not bound by its priority guidance plan, its publication does provide insight regarding the administration's goals and the amount of activity expected. While the plan does not make any assumptions about the overall regulatory philosophy that will govern the IRS over the next year, it is important to note that the new presidential administration that will assume control in 2017 may dictate different priorities for the agency.

The plan includes 35 items addressing retirement benefits (Pages 4-6 of the document) and 20 items addressing executive compensation, health care and other benefits, including items related to implementation of the ACA (Pages 7-8). A number of these items have already been completed, as indicated in the priority plan, and many items from the Treasury Department's most recent semiannual agenda are included in the list alongside sub-regulatory guidance (such as notices, revenue rulings and frequently asked questions).

The following items are particularly noteworthy:

- Regulations under Internal Revenue Section 4980I regarding the 40 percent "Cadillac" excise tax on high-cost employer-provided health coverage: There has been some question as to whether the IRS will issue proposed regulations on the "Cadillac Tax" in the wake of the two-year delay that postpones its implementation until 2020. The IRS has already issued numerous requests for comments.

- Guidance on issues under Code Section 4980H, which governs the employer "shared responsibility" mandate under the ACA: This is a new addition to the Priority Guidance Plan, though no specifics are provided.

- Additional guidance regarding qualifying longevity annuity contracts (QLACs): This new addition to the Priority Guidance Plan clarifies the final rules on longevity annuity contracts.

- Additional guidance on the determination letter program, including changes to the pre-approved plan program: IRS Revenue Procedure 2016-37 recently confirmed that the IRS will eliminate determination letters for individually designed plans (those that are *not* operating under a pre-approved vendor-sponsored master and prototype or volume submitter plan document), *except* upon plan creation and plan termination.

- Guidance regarding substantiation of hardship distributions: Informal guidance has suggested that plan sponsors need to keep the substantiation for hardship withdrawals, which would be a duplication of efforts since that function is typically performed by recordkeepers.

- The following additional measures are also new additions to the Priority Guidance Plan:

  - Regulations on procedures for determination of employment status.

  - Guidance on certain transactions involving welfare benefit funds.

  - Guidance on the treatment of future interest credits under a hybrid defined benefit plan for purposes of satisfying various qualification requirements.

  - Guidance on the remedial amendment period under Code Section 403(b)

  - Update of the regulations governing top-heavy rules under Code Section 416.

  - Regulations on qualified excess benefit arrangements under Code Section 415(m)

  - A revenue procedure modifying the Employee Plans Compliance Resolution System (EPCRS) to provide guidance with regard to certain corrections.

  - A revenue ruling relating to the recovery of basis under phased retirement programs.

Other tax issues addressed elsewhere in the priority guidance plan include consolidated returns; corporations and their shareholders; excise taxes; exempt organizations; financial institutions and products; gifts, estates and trusts; insurance companies and products; international issues; partnerships; subchapter S corporations; tax accounting; tax administration; tax-exempt bonds and other general tax issues. An appendix also lists additional routine guidance that is published each year.

GAO Releases Report on Approval Process for State Innovation Waivers

On August 5, the U.S. Government Accountability Office (GAO) publicly released a **report** on the approval process for state innovation waivers established under Section 1332 of the ACA. The report was prepared in response to a request from Senate Finance Committee Chairman Orrin Hatch (R-UT).

Beginning in 2017, states are permitted to seek state innovation waivers where the U.S. departments of Treasury and Health and Human Services (HHS) may waive certain aspects of the health care law – including qualified health plan standards and employer and individual responsibility standards – if certain criteria are met. State innovation waivers are an important issue for major employers because of the potential for federal agencies to grant states the authority to take actions that could have an impact on plan sponsors that, typically, enjoy federal preemption of state legislative or regulatory efforts.

The agencies have published final regulations and guidance setting out the process for states to submit applications. However, more specific procedures for agency coordination of review and approval of waivers are still in development.

GAO was asked by Hatch to examine the status of the implementation of the review and approval process for state innovation waivers. In doing so, GAO collected information on how the agencies were "applying the statutory approval criteria" and "coordinating the review and approval of Section 1332 waiver proposals" across relevant parties.

The new report states that the agencies have approved no waivers and were reviewing only one state's submitted application as of May 2016. (The state was not identified in the report, but it has been widely reported that Vermont filed a waiver in March 2016). Consequently, the GAO was not able to elaborate on the "types of approvable proposals or how the Departments applied controls."

Regarding the regulatory review and approval of Section 1332 waiver proposals, the GAO reports that officials from both Treasury and HHS stated they are "coordinating between and within their departments to help states as they develop the concepts for their waiver proposals."

In related news, it has been reported that Hawaii has submitted a revised Section 1332 waiver request to the federal government, after HHS determined in July that the state's initial application was incomplete. (Hawaii is seeking to waive its Small Business Health Options Program (SHOP) exchange and other ACA requirements because they conflict with the state's existing employer mandate law.)

The 2016 Democratic platform favored state innovation waivers and promoted their usage "to develop unique locally tailored approaches to health coverage." Although the initial interest in innovation waivers appears to be coming from states such as Vermont and Hawaii that, broadly speaking, embrace the goals and structure of the ACA, it seems increasingly probable that states that have been reluctant to implement features of the ACA will find the waivers attractive as a potential means to shape health system reforms more to their liking.

ERISA Advisory Council Hears Testimony on Lifetime Retirement Plan Participation, Cybersecurity

On August 23, 24 and 25, the ERISA Advisory Council (EAC) heard testimony on a number of significant benefits matters: (1) participant plan transfers and account consolidation for the advancement of lifetime participation and (2) cybersecurity for retirement and health plans. The panel also received a regulatory update from Judy Mares, deputy assistant secretary of the U.S. Department of Labor's (DOL) Employee Benefit Security Administration (EBSA).

The EAC is a group of benefits experts established by Congress and appointed by the U.S. DOL to identify emerging benefits issues and advise the Secretary of Labor on health and retirement issues.

Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation

Many of the witnesses shared common themes in their testimony, including the challenges of finding lost participants, possible defaults in plan-to-plan rollovers when investments do not match, and communication between participants, plan sponsors and providers, citing a general lack of automation and standardization.

A number of speakers expressed concerns about the rise of publicly-sponsored retirement plans for private employees and whether employees will be able to transfer in and out of those systems. (The DOL released **final regulations** clearing the way for states to establish mandatory automatic enrollment retirement plans (using IRAs as the savings vehicle) for private-sector employees without workplace coverage. The DOL concurrently issued **proposed regulations** that would facilitate similar efforts by large cities and counties.)

There was general agreement among plan sponsors and financial service providers that a regulatory safe harbor would help facilitate the plan-to-plan transfer process.

Rennie Worsfold – vice president for Financial Engines, who chaired the EAC's inquiry on this topic – summarized the discussion by informally suggesting that the DOL encourage more automated processes and standardize certain forms and data elements to permit interoperability. Worsfold specifically suggested that the agency make available helpful guidance for plan sponsors and a "roadmap" for participants, and encourage states to collaborate to forge common state-sponsored plan elements and principles and address potential rollover issues. He indicated the EAC plans to provide drafts of this potential guidance to the DOL as part of their report.

Cybersecurity Considerations for Benefit Plans

Witnesses discussed appropriate sharing of data and introduction of automated features that would ensure encryption and uniformity. The importance of encryption and automation was raised since social security numbers were not designed to be identifiers and automating encryption systems can prevent errors incurred when employees are offered a choice. Additional features such as automated network scanning would permit email communication only if encryption standards were met for both sender and recipient.

Deborah Tully, partner at Pine Cliff, chaired the EAC's inquiry on this topic. Testimony addressed the National Institute of Standards and Technology (NIST) framework when discussing implementation of cybersecurity systems and that other protection may be available under the SAFETY Act or through cyber insurance. The EAC's issue group indicated it intends to highlight the existing framework and recommend that a navigation document be developed, released, and shared (the EAC plans to provide a draft of the navigation document to the DOL).

Update from EBSA Deputy Assistant Secretary Judy Mares

On August 25, the EAC received a brief update from Judy Mares, deputy assistant secretary of DOL's Employee Benefits Security Administration (EBSA). Mares reported that DOL has proposed changes to Form 5500, including additional questions that request more specific information. She mentioned that the DOL has received requests to extend the comment period without indicating whether the extension would be granted. She encouraged comments be submitted early in the process rather than near the deadline, and noted that the DOL is taking into consideration substantive comments as they are submitted.

Shortly after Mares' comments on the DOL's intentions to finalize the rules on state-run retirement plans for private workers, the **regulations** were released. The final rules essentially provide a safe harbor under which a state-run retirement arrangement meeting certain requirements would not be considered an employee benefit plan under ERISA and, therefore, according to the DOL the state law mandate would not be not subject to ERISA preemption. When asked about the possibility of DOL sharing best practices with the states, Mares discussed the DOL's role in providing technical assistance when requested.

Mares addressed how the DOL is working diligently with individuals who have asked for interpretive guidance on the fiduciary rule, and that those discussions will be helpful when developing the FAQs. She also mentioned the court cases filed to challenge the fiduciary rule and indicated that the DOL stands behind the work they have done on the rule.

RECENT JUDICIAL ACTIVITY

Fourth Circuit to Review 'Reverse' Stock Drop Case for Second Time

The U.S. Court of Appeals for the Fourth Circuit will review *Tatum v. R.J. Reynolds*, a case regarding alleged breach of fiduciary duty pursuant to the elimination of a company stock investment option from the company's 401(k) plans. This is the second time the Fourth Circuit will weigh-in on this case.

In a traditional "stock drop" case, plaintiffs contend the plan sponsor breached its fiduciary duty by allowing the plan to offer a particular stock that has lost significant value. In *Tatum v. R.J. Reynolds*, the plaintiffs asserted a breach of fiduciary duty because of the elimination of the Nabisco single-stock investment option from the R.J. Reynolds (RJR) 401(k) plans shortly after RJR was spun off from Nabisco in 1999. After the fund's removal, Nabisco received an unsolicited takeover bid and the resulting bidding war drove the price of Nabisco stock significantly higher. This is commonly referred to as a "*reverse* stock drop."

The Fourth Circuit last ruled on *Tatum v. R.J. Reynolds* in August 2014, when a divided three-judge panel ruled that there was a breach of fiduciary duty which caused loss to the plan participants. The case was remanded to the U.S. District Court for the Middle District of North Carolina for reconsideration.

On remand, the district court once again ruled in favor of the plan fiduciaries, concluding that a reasonable and prudent fiduciary "would" have divested the plan as the defendant did.