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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 in this issue.

RECENT REGULATORY ACTIVITY

PBGC Participant and Plan Sponsor Advocate Urges More Cooperation, Outreach from Agency on Premiums, Penalties, Reportable Events

The Pension Benefit Guaranty Corporation's (PBGC) Participant and Plan Sponsor Advocate, Constance Donovan, issued her annual report on December 31, 2015, noting that the agency has made numerous improvements since her inaugural report in 2014 but citing numerous matters on which PBGC should work more productively with employer plan sponsors and participants.

The advocate position was established by the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012 to assist participants and sponsors in resolving issues related to the agency. Since the beginning of her tenure in 2013, Donovan has actively committed to reaching out to both the plan sponsor and participant community. She has been very helpful in bringing to light employer concerns about such issues as ERISA Section 4062(e) enforcement (regarding cessation of certain business operations). Donovan has regularly raised the visibility of the negative impact of increased PBGC premiums on the defined benefit plan system by eroding PBGC's premium base; and she does so in the annual report as well.

The 2015 report suggested PBGC "must noticeably improve its relations with plan sponsors," noting that the agency's communications often lack transparency or a complete explanation as to why the sponsor is considered to have violated ERISA. In particular, Donovan cited "aggressive second-guessing of private business operations" as an example of the overly adversarial relationship that serves neither the defined benefit system nor PBGC itself.

The report identified three specific areas of interaction that have suffered from this adversarial relationship between PBGC and plan sponsors:

Premiums and premium penalties: While the report includes several examples in which PBGC demonstrated a lack of flexibility or courtesy with regard to premiums, Donovan expressed optimism with regard to a new internal working group instituted by PBGC to address premium penalty issues and penalty waiver authority.

PBGC's Early Warning program: Plan sponsors have suggested that the agency is using its Early Warning program – designed to identify possible risk of loss to the PBGC – as a pretext to intervene in routine business transactions or demand changes in business operations, particularly after Congress clarified the definition of "substantial cessation of operations" of a defined benefit pension plan sponsor under ERISA Section 4062(e). The report recommends PBGC "provide the maximum possible transparency

about its use of risk-mitigation tools" as a means of facilitating dialogue with plan sponsors.

Reportable Events regulations: In September 2015, the PBGC issued final rules addressing defined benefit plan reportable events under ERISA Section 4043 – events that indicate potential problems and may signal the possible future underfunded termination of a pension plan. Donovan recommended that PBGC "actively seek and obtain input from the regulated community as to any problems that may arise in connection with the implementation of the new rules" and consider using its waiver and extension authority.

The report also discusses a number of concerns on behalf of defined benefit plan participants, including implementation of the Multiemployer Pension Reform Act of 2014 (MPRA), which sought to help multiemployer plans struggling with underfunding.
The PBGC released its 2015 Annual Report on November 16, including its deficit calculations for the single-employer and multiemployer plan programs. The agency reports that its single-employer program deficit grew to $24.1 billion, up from $19.3 billion reported in 2014, while the multiemployer insurance program deficit increased to $52.3 billion, compared with $42.4 billion in 2014.

PBGC Releases Updated Forms and Instructions for Defined Benefit Plan Reportable Events

In a related story, the Pension Benefit Guaranty Corporation (PBGC) has released **new forms and instructions** allowing defined benefit plan sponsors to comply with final rules addressing defined benefit plan "reportable events."

Under ERISA Section 4043, pension plan sponsors must inform the PBGC of events that indicate potential problems and may signal the possible future underfunded termination of a pension plan. Such reportable events, under certain circumstances could justify closer scrutiny of the plan by the PBGC.

The final rules, published in September 2015, are applicable to post-event reports for reportable events occurring on or after January 1, 2016, and to advance-reports due on or after that date. The reports must now be filed electronically with the PBGC using these new forms or the agency's e-filing portal.

According to the PBGC's Reportable Events Frequently Asked Questions (Question 4), the specific timing for these new forms is as follows:

- For plans subject to post-event reporting, the new Form 10 must be used for *events* that occur on or after January 1, 2016.

- For plans subject to advance reporting, the new Form 10-Advance must be used for *reports* due on or after January 1, 2016 (i.e., for events expected to take effect on or after January 31, 2016).

- For reporting large unpaid contributions, the new Form 200 must be used if the date the aggregate value of missed contributions first exceeds $1 million is on or after January 1, 2016.

In some respects, reporting is reduced under the new rules, but in other respects, reporting is increased. Particularly given the importance of reportable events in the context of loan and other corporate agreements, it is critical that defined benefit plan sponsors have an understanding of the new rules and evaluate how best to achieve compliance.

IRS Bulletin Provides Ongoing Guidance on Benefit Plan Administration, Including Revised Determination Letter Process

On January 4, the Internal Revenue Service (IRS) issued guidance which includes significant changes to the determination letter program first announced in June 2015. Internal Revenue Bulletin 2016-1 encompasses additional revenue procedures effective for the new calendar year.

Most notably, IRB 2016-1 includes IRS Revenue Procedure 2016-6, which – along with IRS Notice 2016-3 – establishes the new process for obtaining determination letters on the qualified status of employee plans under certain sections of the Internal Revenue Code. The existing five-year remedial amendment cycle system for individually designed plans under the Employee Plans determination letter program is being eliminated effective January 1, 2017.

IRS Rev. Proc. 2015-36 set forth changes to the determination letter program for pre-approved retirement plans in the pre-approved plan process for the first time. These changes, along with a reduction in the number of employers necessary to adopt a pre-approved plan in order to obtain a pre-approved plan determination letter, could make pre-approved plans available to more employers.
Specifically, Rev. Proc. 2016-6 provides that determination letters issued to individually designed plans on or after January 4, 2016, will no longer contain an expiration date. Notice 2016-6 states further that expiration dates included in determination letters issued prior to January 4, 2016, are no longer operative. Later guidance is expected which will detail when such letters can be relied upon after a subsequent change in law or plan amendment.

Additionally, under Notice 2016-3, controlled groups and affiliated service groups that have previously made a Cycle A election are permitted to submit determination letter applications during the Cycle A submission period beginning February 1, 2016, and ending January 31, 2017. Also, the period during which certain employers may, on or after January 1, 2016, establish or adopt a defined contribution pre-approved plan and, if permissible, apply for a determination letter, is extended from April 30, 2016, to April 30, 2017 (essentially allowing more individually designed plans to switch to pre-approved plans).

Also included in IRB 2016-1, relating to employer plans:

- Rev. Proc. 2016-4, providing revised procedures for furnishing guidance to taxpayers on issues under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division.

- Rev. Proc. 2016-8, providing current guidance for complying with the user fee program of the IRS as it pertains to requests for employee plans letter rulings, determination letters, advisory letters and Voluntary Correction Program (VCP) submissions and for determination letters submitted by or on behalf of exempt organizations.

IRB 2016-1 also contains a number of revenue procedures addressing tax-exempt organizations and IRS administrative matters, reflecting the shift in technical responsibility from the agency's Tax Exempt and Government Entities (TE/GE) Division to the Office of Associate Chief Counsel.

It is important to note that, in Rev. Proc. 2016-1, the IRS states that "oral guidance is advisory only, and the Service is not bound by it."

IRS Issues Information for Individual Taxpayers Regarding New ACA Reporting Forms

In a **questions-and-answers (Q&A) document** updated on January 11, the Internal Revenue Service (IRS) is providing information to individual taxpayers regarding the new forms they might receive regarding health coverage they had or were offered in 2015. The information is intended to help individuals understand new Forms 1095-A, 1095-B and 1095-C, including who should expect them and how to use them.

Taxpayers may need to refer to this information when filing their individual tax returns. Employers and service providers may find the Q&A information helpful in preparing any employee communications related to the new forms and information reporting. The Q&A document reflects the recent IRS guidance extending the due dates for ACA information reporting by insurers, self-insured employers and other reporting entities.

The IRS recently issued new guidancesignificantly extending the due dates for 2015 ACA information reporting. Notice 2016-4 automatically extended the due date for furnishing Forms 1095-C and 1095-B to insureds and/or employees from February 1, 2016 to March 31, 2016. The due date for filing forms with the IRS was extended from February 29, 2016 to May 31, 2016 if not filing electronically. For employers and insurers filing electronically, the due dates were extended from March 31, 2016 to June 30, 2016. "Automatic" means that requests do not have to be sent to the IRS.

The Q&A document explains that, "Some taxpayers may not receive a Form 1095-B or Form 1095-C by the time they are ready to file their 2015 tax return. While the information on these forms may assist in preparing a return, they are not required.

Individual taxpayers will generally not be affected by this extension and should file their returns as they normally would. Like last year, taxpayers can prepare and file their returns using other information about their health insurance. You should not attach any of these forms to your tax return."

IRS Issues Correction Procedures for 2015 Transit Benefit Overpayments

The Internal Revenue Service (IRS) issued Notice 2016-06 on January 12, providing correction procedures for employers who paid transit benefits in excess of $130 per month in 2015 and wish to make corrections on their fourth quarter Form 941.

The Consolidated Appropriations Act, 2016 made permanent the mass transit benefit parity originally enacted as part of the American Taxpayer Relief Act of 2012 (H.R. 8), which provided for an increase in the pre-tax allowance for mass transit expenses to $250 per month, making it equal to the benefit provided for parking.

RECENT JUDICIAL ACTIVITY

District Court Rules for Employer in EEOC Challenge to Wellness Program

The U.S. District Court for the Western District of Wisconsin has rejected a challenge by the Equal Employment Opportunity Commission (EEOC) alleging that a company's wellness program violated the Americans with Disabilities Act (ADA). The court's decision in *EEOC v. Flambeau*, issued December 30, held that the employer's wellness program fell within the ADA's safe harbor provision for insurance benefit plans, favorably citing a 2012 Eleventh Circuit decision in *Seff v. Broward County*. Although the EEOC is likely to appeal the *Flambeau* decision, it provides employers with helpful insight into how courts may apply the safe harbor and the conditions that would satisfy it.

The EEOC sued Flambeau, Inc. in October 2014, arguing that the biometric testing and health risk assessment required under the employer's wellness program constituted "disability-related inquiries and medical examinations" that were not both job-related and consistent with business necessity as defined by Title I the ADA, which prohibits disability discrimination in employment, including making disability-related inquiries. Participation in the wellness program was not a condition of employment, but enrollment in the employer-sponsored health plan was only available to participants in the wellness program.

Flambeau argued that its practice of conditioning enrollment in its health benefit plan with meeting certain requirements of its wellness program was protected by the ADA's safe harbor for insurance benefit plans. The statutory safe harbor provision generally exempts from the ADA activities related to "establishing or administering the terms of a *bona fide* benefit plan that are based on underwriting risks, classifying risks, or administering such risks." Flambeau asserted that the wellness program requirement

constituted a “term” of its health insurance plan and that this term was included in the plan for purposes of underwriting, classifying and administering health risks.

The federal district court judge concluded that the protections set forth in the ADA’s safe harbor provision for the terms of a *bona fide* benefits plan “enable employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment without violating the ADA. The judge further held that Flambeau’s wellness program fit within the safe harbor since it was a term of the benefit plan (as evidenced by information provided to employees, including the plan’s summary plan description), it was intended to assist Flambeau with assessing, classifying and administering risks under the plan (including decisions related to plan premiums and stop-loss coverage) and the wellness program requirement was not a subterfuge for avoiding the purposes of the ADA.

The federal district court also rejected the EEOC’s argument that the *Seff* decision was wrongly decided, specifically noting that it was not persuaded by EEOC’s reference to *Seff* in its proposed regulations amending ADA regulations related to employer wellness programs.

The proposed rules provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. In the proposed rules, the EEOC indicated that it “did not believe” that the ADA’s safe harbor provision applicable to insurance plans as interpreted by *Seff* was the “proper basis for finding wellness plans permissible.”