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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 this issue

RECENT REGULATORY ACTIVITY

Proposed IRS Regulations Address MEC Reporting

Proposed regulations released by the Internal Revenue Service on July 29 address a number of outstanding issues related to information reporting of minimum essential coverage (MEC) under Section 6055 of the Internal Revenue Code, as added by the Affordable Care Act (ACA).

Tax code Section 6055 requires issuers and employers that sponsor self-funded plans and other entities that provide MEC to file an annual report with the IRS and issue annual statements to covered individuals indicating the calendar months in a given year in which individuals were enrolled in MEC.

The proposed regulations address the following issues:

Exception to MEC Reporting for Supplemental Coverage

Existing regulations provide that MEC reporting is not required for certain supplemental coverage; however, there has been significant confusion regarding the circumstances under which this exception applies. The proposed regulations generally reflect the adjustments to this rule set forth by the IRS last year in IRS Notice 2015-68.

Under the proposed regulations, (1) if an individual is covered by more than one MEC plan or program provided by the same reporting entity, reporting is required for only one of the plans or programs; and (2) reporting is not required for an individual's MEC to the extent that the individual is eligible for that coverage only if the individual is also covered by other MEC for which Section 6055 reporting is required. The preamble to the proposed regulations confirm that MEC reporting is not required for a month if that coverage is offered only to individuals who are also covered by other minimum essential coverage – including Medicare, TRICARE, Medicaid, or certain employer-sponsored coverage – for which reporting is required.

TIN Solicitation

Reporting entities are required to provide the IRS with the taxpayer identification number (TIN) (generally, the individual's Social Security number) for each person with coverage. Failure to include a TIN could expose the entity to penalties for not properly completing the Form 1095-B or 1095-C. However, existing IRS regulations describe a three-step TIN solicitation process that an entity should undertake in order to establish it has acted in a "responsible manner" when attempting to collect TINs. Acting in a

"responsible manner" helps provide a basis for arguing that penalties should not apply, in the event the form is filed or furnished without the TIN.

This three-step TIN solicitation process was originally designed for financial institutions and did not necessarily apply well to health coverage providers. Therefore, the IRS has adjusted the missing TIN solicitation process for the purposes of Code section 6055 reporting as follows:

- *Initial Solicitation*: Must be made when an "account is opened" or a relationship is established. For purposes of Section 6055 reporting, an account is considered "opened" on the date the filer receives a substantially complete application for new coverage, or to add an individual to existing coverage. Accordingly, health coverage providers may generally satisfy the requirement for the initial solicitation by requesting enrollees' TINs as part of the application for coverage.

- *First Annual Solicitation:* Must be made no later than seventy-five days after the date on which the account was "opened" (i.e., the day the filer received the substantially complete application for coverage), or, if the coverage is retroactive, no later than the seventy-fifth day after the determination of retroactive coverage is made.

- *Second Annual Solicitation:* Must be made by December 31 of the year following the year the account is "opened."

Notably, different solicitation rules apply for *incorrect* TINs (as opposed to missing TINs). The solicitation rules for incorrect TINs were generally not changed by the proposed regulations, although the IRS did clarify that for purposes of those rules, an account is considered "opened" on the date the filer receives a substantially complete application for new coverage or to add an individual to existing coverage. Accordingly, filers may generally satisfy the requirement for the initial solicitation if they requested enrollees' TINs as part of the application process (including during open enrollment). If an individual was enrolled in coverage on any day before July 29, 2016, the account is considered opened on July 29, 2016. Accordingly, reporting entities have satisfied the requirement for the initial solicitation of a missing TIN with respect to already enrolled individuals so long as they requested enrollee TINs either as part of the application for coverage or at any other point before July 29, 2016.

TIN solicitations (both initial and annual) made to the responsible individual for a policy or plan are treated as TIN solicitations of every covered individual on the policy or plan. However, filers must solicit TINs for each individual added to a policy under these rules. The provision of a renewal application that requests TINs for all covered individuals satisfies the annual solicitation provisions.
The proposed regulations also confirm that TIN solicitations may be made electronically and there is no requirement to provide a Form W-9 with the solicitation. However, solicitations made by mail must include a return envelope.

Reporting of Catastrophic Plans and Basic Health Programs

Health insurance issuers will be required to report MEC provided through catastrophic health insurance plans (as described in ACA Section 1302(e)) when enrolled through an exchange, effective for 2017 (with the relevant reporting occurring in 2018). This is consistent with prior IRS guidance on this issue.

States are allowed to establish Basic Health Programs (which also constitute MEC) under Section 1331 of the Affordable Care Act ("ACA"). The proposed regulations provide that the State agency administering coverage under the Basic Health Program is required to report that coverage.

Truncated TINs

Reporting entities are allowed to truncate the EIN of the employer sponsoring the plan on the Form 1095-B.

IRS Releases Draft Forms, Instructions for Calendar Year 2016 ACA Employer Reporting

On August 2, the Internal Revenue Service (IRS) released draft instructions for completing forms 1094-C and 1095-C. The IRS previously released revised draft Forms 1094-C and 1095-C on July 7.

These forms will be used to fulfill the requirements specified in final regulations under Code sections 6055 and 6056 implementing the reporting of offers and coverage information of employer-provided minimum essential coverage (MEC). Under Code Section 6055, providers of MEC, including employers with self-insured plans, must file a return with the IRS and furnish a statement to covered individuals that reports the months of coverage. Under Code Section 6056, every applicable large employer member (ALEM – generally, an employer that, together with other employers in its controlled group, employed on average at least 50 full-time employees or equivalents) must file a return with the IRS and furnish a statement to full-time employees that reports the terms and conditions of the health care coverage offered to the employer's full-time employees during the year. ALEMs that sponsor self-insured plans report information under both Code Sections 6055 and 6056 on the Forms 1094-C and 1095-C.

Compared to the current forms for 2015 calendar year reporting, the draft 2016 forms include a number of noteworthy elements and changes, summarized in a Benefits Blueprint prepared by Groom Law Group.
Draft instructions have not yet been issued for the related forms 1094-B and 1095-B, which are used by providers of MEC that are not ALEMs to fulfill the requirement under Code Section 6055. The IRS did, however, release revised draft Forms 1094-B and 1095-B on June 22, 2016.

FASB Proposes Updates to Accounting Standards for Retirement, Health Plans

The Financial Accounting Standards Board (FASB) – the independent organization tasked with establishing generally accepted accounting principles (GAAP) within the United States –proposed three updated employee benefit plan accounting standards on July 28 related to the reporting of interest in a master trust. FASB is accepting comments on the proposal through September 26.

The proposal, developed by FASB's Emerging Issues Task Force, addresses defined benefit pension plans, defined contribution retirement savings plans and health and welfare plans. Its purpose is to improve the utility of employee benefit plan financial statements by revising the standards for reporting a plan's interest in a master trust. A master trust is a trust for which a regulated financial institution (bank, trust company, or similar financial institution that is regulated, supervised, and subject to periodic examination by a state or federal agency) serves as a trustee or custodian and in which assets of more than one plan sponsored by a single employer or by a group of employers under common control are held.

Under current standards, plans are currently required to disclose:

- the fair value of investments held by the master trust by general type of investment;
- the net change in the fair value of each significant type of investment of the master trust;
- the total investment income of the master trust by type;
- a description of the basis used to allocate net assets, net investment income or loss, and gains or losses to participating plans; and
- the plan's percentage interest in the master trust.

Because many employee benefit plans hold investments in master trusts and some stakeholders have raised concerns that these requirements are limited, FASB is proposing to require more detailed disclosures by the plan. The proposal would require all plans with a divided interest in the master trust "to disclose both a list of the general types of investments held by the master trust and the dollar amount of their interest in each of those general types of investments."

The proposal solicits feedback on a number of issues, including potential additional disclosures and the timing and formatting of reporting.

NTIS Releases Final Certification Program for Access to Death Master File

The U.S. Commerce Department's National Technical Information Service (NTIS) released the final rule on the certification program to provide access to the Death Master File (DMF) on June 1. The rule becomes effective November 28, 2016. The DMF is a list of deceased individuals maintained by the Social Security Administration and distributed through the Commerce Department. These records, updated weekly, contain the full name, Social Security number, date of birth and date of

death for listed decedents. Defined benefit and defined contribution plans commonly use these files for administrative purposes, such as determining when benefits to a deceased participant should be terminated or when a payment should be made to a surviving beneficiary.

Under the Bipartisan Budget Act enacted in December 2013, however (and effective as of March 26, 2014), the Secretary of Commerce must restrict access to the information in each individual's DMF for a three-year period beginning on the date of the individual's death, except to persons who are certified under a program to be established by the Secretary of Commerce. Only parties that have "a fraud prevention interest or other legitimate need for the information and agree to maintain the information under safeguards similar to those required of federal agencies that receive return information" may apply for certification.

On March 25, 2014, the NTIS issued an Interim Final Rule (IFR) establishing a temporary certification program for continued access to the DMF. In December 2014, NTIS published a proposed rule and request for comments on a proposed permanent certification program to provide access to the DMF.

The NTIS final rule did not establish a safe harbor that allows Certified Persons under certain circumstances to disclose a participant's date of death to other parties involved in the administration of a plan without regard to whether those other parties meet the requirements for certification, stating that the "NTIS is without discretion to categorically exclude 'date of death' [as an exception to requirement for certification] through rulemaking." However, the NTIS also pointed out that the "fact of death" (unlike the "date of death") "is not an element of the statutory definition of the term 'Death Master file,'" apparently allowing a certified person to confirm that a participant has died (but not the date of death) to a non-certified plan representative.

EEOC Survey Requiring Employee Pay Disclosure Now Active, Deadline in September

The Equal Employment Opportunity Commission (EEOC) announced on August 1 that the notification letters for the 2016 Employer Information Report (EEO-1) have been mailed to employers.

Currently, certain private industry employers with 100 or more employees and federal contractors with 50 or more employees are required to report annually on the EEO-1 the number of employees they have in ten job categories by seven categories of race and ethnicity and by sex.

The annual filing deadline is September 30. As noted in the announcement, employers who meet the current criteria, or who filed the EEO-1 in 2015 and have not received the 2016 EEO-1 notification letter by August 15, are advised to immediately contact the EEO-1 Joint Reporting Committee at (877) 392-4647 or e1.techassistance@eeoc.gov.

New revisions to the EEO-1 were recently finalized by the EEOC, requiring employers to also report employees' W-2 earnings and hours worked within 12 specified pay bands for each job category, race, ethnicity and sex. These changes will first apply to 2017 reports.

The revision also extended the due date for the future EEO-1 filings to March 31 following the reporting year (March 31, 2018, for 2017 reports), and revised the "snapshot" period during which an employer must count its employees to be reported on the EEO-1 from the third quarter (a period between July 1 and September 30) to the fourth quarter (a period between October 1 and December 31).

IRS Clarifies New Proposed Rules Governing Nonqualified Deferred Compensation

On August 4, the Internal Revenue Service (IRS) issued corrections to the June 22 proposed rules addressing the taxation of nonqualified deferred compensation plans under Internal Revenue Code Section 409A.

As mentioned in the correction notice, the June 22 issuance "contains errors that may prove to be misleading and are in need of clarification corrections." The modifications correct minor typographical errors to clarify certain sections of the text:

- Four incorrect references to Treasury Department regulations have been corrected.
- The language "substantial risk of forfeiture—(1) Risk of forfeiture disregarded." has been corrected to read "substantial risk of forfeiture."

RECENT JUDICIAL ACTIVITY

Full Ninth Circuit Court to Re-hear Fiduciary Suit

The full U.S. Court of Appeals for the Ninth Circuit has announced that it will once again entertain the case of *Tibble vs. Edison*, after a three-judge panel of the court effectively dismissed the suit earlier this year on grounds that plaintiffs forfeited the ongoing-duty-to-monitor argument by failing to raise it in the district court or their initial appeal. Therefore, the allegation of breach of fiduciary duty in the case exceeded ERISA's statute of limitations.

The Ninth Circuit has ruled on *Tibble v. Edison* numerous times. The initial lawsuit involved the plaintiffs' claim that the retirement plan fiduciary breached its fiduciary duty by choosing retail-class funds for the plan's investment menu.

While the U.S. District Court for the Central District of California initially ruled for the plaintiff on the fiduciary duty question, the district court held that ERISA's statute of limitations barred the plaintiffs' claim because the retirement plan fiduciaries had selected the funds more than six years before the filing of the complaint. The plaintiffs appealed the Ninth Circuit decision to the U.S. Supreme Court, arguing that the decision

to offer the fund could have been reconsidered during the six-year window, making it a "continuing violation."

In a unanimous opinion in May 2015, the U.S. Supreme Court ruled in favor of the plaintiffs, establishing a "continuing duty" for plan sponsors to "properly monitor investments and remove imprudent ones," but remanded the case back to the Ninth Circuit. A three-judge panel **held on April 13 of this year** that the plan fiduciaries failed to meet the U.S. Supreme Court's standard for overcoming ERISA's statute of limitations, noting that the plaintiffs failed to raise the monitoring issue prior to its Supreme Court appeal.

The plaintiffs appealed and have been granted an "en banc" hearing by the full Ninth Circuit. A date for the new hearing has not been announced.