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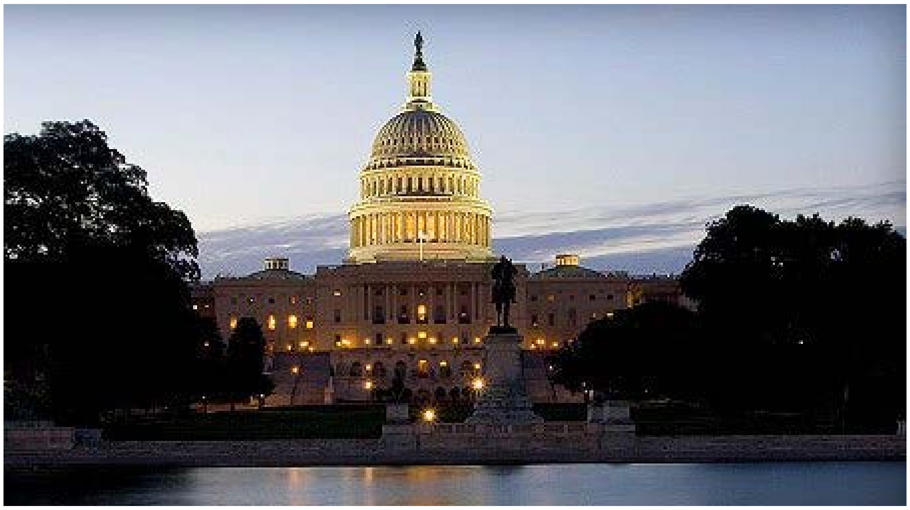

Employee Benefits Update

January 2016

HIGHLIGHTS

Affordable Care Act Delays, Changes

IRS Notice 2016-4 has extended the deadline for health care reporting under the Affordable Care Act (ACA) for the 2015 plan year. Employers and insurers providing Forms 1095-B and Forms 1095-C now must provide the forms no later than March 31, 2016. A copy must be submitted to the IRS (with the appropriate transmittal form) by June 30, 2016 for e-filers. The extensions are automatic and any prior extension requests will be disregarded. The IRS has released a new set of Q&As specifically addressing ACA forms.

Also, the so-called "Cadillac tax" has been delayed by two years, to January 1, 2020. Congress pushed back the 40% excise tax on high-cost employer health coverage as part of the Consolidated Appropriations Act of 2016 (H.R. 2029). The thresholds for triggering the excise tax will continue to be indexed, however. Significantly, the legislation also makes Cadillac tax payments deductible for employers.

In This Issue

PBGC Premiums, IRS Mortality Tables Spur Additional De-Risking Activity by Plan Sponsors

Sharp increases in PBGC premiums have spurred more pension plan sponsors to engage in de-risking activity, and the trend is likely to continue. In October 2015, Congress approved a flat-rate premium hike to $64 per participant for 2016, rising to $80 in 2019. Variable rate premiums have risen considerably, to $30 per $1,000 of unfunded vested benefits (capped at $500 per person). De-risking strategies that reduce headcount can be a viable option for employers seeking to reduce PBGC premium liability.

Two economic factors may increase the appetite for de-risking in 2016. First, interest rates are trending upwards (although possibly at a slower pace due to recent market volatility), which would produce smaller lump sum payments to participants.

Second, plan sponsors had worried in 2015 that lump sum payments would increase if the IRS adopted a new base mortality table based on improved longevity. The IRS put these fears to rest with Notice 2015-53, which retained the current base mortality table for 2016 calculations. (Additional changes are expected for 2017, however.)

Lessons from ERISA Fee Litigation: 2015 Year in Review

Headline-grabbing settlements and recently initiated lawsuits have raised the stakes of ERISA fee litigation and placed greater scrutiny on plan fiduciaries than ever before. Just in 2015, several high-profile multimillion dollar settlements were filed across the country, including:

- Ameriprise (filed Mar. 26, $27.5 million) settled claims that its own subsidiary service providers had received excessive fees for their investment management and recordkeeping services.
- Boeing (filed Nov. 5, $57 million) settled claims that it overpaid its service providers and offered imprudent investments such as a technology sector fund.
- Lockheed Martin (filed Feb. 20, $62 million) settled claims based on similar allegations of excessive fees in its 401(k) plans and imprudent management of plan investments.
- Novant Health (filed Nov. 9, $32 million) settled claims that it had overpaid its recordkeeper and investment manager, in part by maintaining high-cost retail shares where institutional class shares of identical funds were available.

But while the dollar amounts of these settlements have captured all the attention, the real lessons for plan fiduciaries are in the nonmonetary terms. These terms generally formalize defendants' future compliance with ERISA duties and provide insight into how a plan fiduciary may mitigate litigation exposure by following a similar process of periodic review.

1. **Periodically assess the costs, performance, and risks associated with each investment option offered to plan participants.**

Recent settlements have required defendants to implement review processes to ensure that plan investments are cost-effective. A similar process may include comparing the fees and performance of comparable funds, evaluating existing offerings based on performance net of fees, and carefully analyzing the fee structure of less transparent investment vehicles pitched by investment managers. Fiduciaries also should investigate the availability of institutional class shares as an alternative to high-cost retail class shares and consider obtaining independent review of the overall investment portfolio or of specific offerings, such as sector funds, that may be seen as less traditional.

2. **Monitor reasonableness of service providers' fees.**

Plan fiduciaries should periodically monitor the overall compensation of recordkeepers and other service providers. This monitoring process, like that for investments, should be carefully documented to indicate thorough consideration of the amount of fees in light of the quality of services provided. Some recent settlements have mandated a formal process such as a competitive request for proposal with a minimum number of bids. There also has been additional scrutiny on fees based on a percentage of assets rather than a flat or per-participant basis, on the grounds that percentage-based fees have sometimes resulted in greater overall compensation.

3. **Monitor service providers' compliance with DOL disclosure obligations.**

Additionally, plan fiduciaries should carefully monitor their service providers' compliance with rules regarding both participant-level disclosures and fiduciary-level disclosures.

Disclosures to participants. Newly clarified Department of Labor (DOL) regulations require that participants be provided certain plan information every 14 months to enable them to meaningfully compare the plan's investment options. A good practice to ensure compliance with the regulations is to contract with service providers in the course of fee negotiations to supply timely participant disclosures of fees and investment benchmarks.

Disclosures to plan fiduciaries. The plan should not overlook the disclosures provided to plan fiduciaries. These disclosures should be carefully reviewed for compliance with the DOL regulations as well as for the substantive information they contain.

In assessing whether fees paid to a service provider are reasonable, plan fiduciaries might also evaluate whether the provider has fully complied with its disclosure obligations both to participants and to plan fiduciaries.

Court Takes Issue with EEOC Position on Wellness Programs

The EEOC's aggressive position on wellness plans has been rejected by a district court judge in Wisconsin, in *EEOC v. Flambeau, Inc.* (W.D. Wis. Dec. 31, 2015). Despite employer enthusiasm for wellness programs (and endorsement by the Affordable Care Act), the EEOC has been reluctant to allow employers to reward employees for their participation in health exams. In its proposed regulations, the EEOC attempted to draw lines in the sand prohibiting certain arrangements it viewed as "involuntary." At least one of those lines was potentially washed away in *Flambeau*.

Flambeau (a manufacturer of hunting decoys, the original yo-yo, and art supplies, among other things) had implemented a somewhat less common wellness plan design – Flambeau decided to *require* an annual biometric screening as a condition of signing up for its self-insured medical plan starting in 2012. Following participant and union grievances, the EEOC intervened and objected to the arrangement in a lawsuit in 2014, charging that the medical exam requirement was not permitted under the Americans with Disabilities Act (ADA).

In the meantime, in 2015 – spurred in part by Congressional pressure – the EEOC finally released its proposed regulations for wellness programs under both the ADA and the Genetic Information Nondiscrimination Act (GINA). In these proposals, the EEOC set forth various requirements for a wellness program to be considered "voluntary" and therefore compliant with the ADA and GINA. Among the ADA requirements, *the EEOC proposed that no wellness program would be voluntary if participation in an exam was a condition of eligibility for health benefits*.

In a December 31 opinion, the court squarely rejected the EEOC position and said Flambeau's arrangement was permissible. The court's opinion in Flambeau was interesting for several reasons:

- The court relied on the so-called "underwriting" safe harbor in the ADA for "bona fide benefit plans." This safe harbor states that the ADA shall not interfere with a bona fide benefit plan's terms that are based on underwriting, classifying, or administering risks. This safe harbor is potentially much broader than the "voluntary" exception the EEOC would like to apply to wellness programs.
- Only one other court (in *Seff v. Broward County*) had opined on the scope of the underwriting exemption in a similar context. 778 F.Supp.2d 1370 (S.D. Fla. 2011), *aff'd* (11th Cir. 2012). In that case, the district court had reached a similar result. The EEOC previously said it believes *Seff* was wrongly decided. But now the EEOC is potentially facing two "wrongly decided" cases.
- The EEOC's litigation position was that the underwriting safe harbor is not available and that the wellness program must meet a different ADA standard – being a "voluntary" wellness program. This was also the EEOC's position in its proposed regulations. But the court refused to defer to this position, since proposed regulations are not owed deference by a court.

It will be especially interesting to see how the EEOC approaches wellness plan enforcement following this case. It is possible that the EEOC will step back from its aggressive position, although many skeptics doubt that the EEOC will make any progress on its proposed regulations at all. Despite the uncertainty, we expect to see continued growth in creative wellness program design in 2016.

Supreme Court Allows Plan's Forum Selection Clause to Stand

The Supreme Court has denied a petition for certiorari in *Smith v. Aegon Companies Pension Plan*, a Sixth Circuit case which held that forum-selection clauses in ERISA plans are presumptively valid and enforceable even when they aren't the product of an arm's length transaction. 769 F.3d 922 (6th Cir. 2014). By allowing the *Smith* decision to stand, the Court has authorized plan sponsors to select an employer-favorable venue for ERISA claims. This decision has been echoed by a number of district courts as well. *See, e.g., Keever v. NCR Pension Plan*, 2015 WL 9255342 (S.D. Ohio); *Almont Ambulatory Surgery Center, LLC v. Unitedhealth Group, Inc.*, 215 WL 1608991 (C.D.Cal.); *Turner v. Sedgwick Claims Mgmt Servs, Inc.*, 2015 WL 225495 (N.D. Ala).

If your plan documents do not already include a forum selection clause, consider adding a provision that requires all ERISA claims to be litigated in the jurisdiction of your choice.

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Relevant IP&B Expertise

IP&B's Rosina Barker has been quoted and spoken extensively on the future of pension de-risking:

Rosina Barker Quoted in BNA on the Future of De-Risking

Rosina Barker Speaks on Pension De-Risking at ALI CLE Conference

Rosina Barker Speaks to ABA Tax Section on Politics of Pension De-Risking

Rosina Barker Speaks to ABA on Developments in Pension Plan De-Risking

Rosina Barker Speaks to ALI-CLE on Pension De-Risking

Rosina Barker Speaks to ABA on Pension De-Risking