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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

EMPLOYEE BENEFITS YEAR-END CHECKLIST

2017 EMPLOYEE BENEFITS YEAR IN REVIEW—PLANNING AHEAD FOR 2018

With the end of the calendar year drawing near, this is a good time for employers to conduct a year-end review to make sure their benefit plans are up-to-date and operating in compliance with the law. In addition, the end of the year brings a number of important deadlines. To assist you with your year-end projects, this newsletter provides a summary of some important dates and new developments.

Important Reminders for 2017

- Some (but not all) of the benefit limits will increase for 2018, so your payroll and recordkeeping systems will need to be updated. A table setting forth the 2017 and 2018 IRS limits appears at the end of this newsletter.
- If you have participant-directed investments and utilize a "Qualified Default Investment Alternative" ("QDIA") for "default" investments, you should provide your default investment informational notice by December 1, 2017 if you have a calendar year plan year. Your plan recordkeeper generally will assist you in preparing the notice and coordinating its distribution.
- If you have a "safe harbor" 401(k) or 403(b) plan or want to adopt a safe harbor structure for 2018, you must provide your annual notice by December 1, 2017 if you have a calendar year plan year. This applies regardless of whether you are using a traditional safe harbor or an automatic enrollment safe harbor. Make sure the notice includes a warning that the employer retains the right to reduce or eliminate safe harbor contributions, in order to preserve this ability for you if you need it.
- If you have an automatic enrollment 401(k) or 403(b) plan, regardless of whether it is a "safe harbor" plan, you must provide your automatic enrollment annual notice by December 1, 2017 if you have a calendar year plan year.
- Participant-directed defined contribution plans must provide annual notices regarding plan expenses and investments. Plans should be sure they have met that obligation; the deadline will vary depending on the timing the plan has established. Disclosures must be provided no more than 14 months after the previous year's fee disclosure.
- If you want to make any amendments to your qualified retirement plan, you may need to adopt them before the end of the current plan year. Generally, an amendment to a qualified retirement plan that takes effect during a plan year must be adopted before the end of the plan year, unless Congress or the IRS has granted an extension.
  - Certain amendments necessary to reflect the IRS's regulations on bifurcated distributions (i.e., distributions paid partly in the form of a lump sum or other form of payment subject to Section 417(e) of the Code and partly in the form of an annuity) are due by December 31, 2017.
  - Some amendments must be in place before the desired effective date (for example, if you are changing your contribution structure, an advance amendment may be required).
  - Changing a 401(k) or 403(b) plan to or from a "safe harbor" structure usually requires an amendment in advance of the start of the plan year, and certain changes to those plans cannot be made after the start of the year. If you have one of these plans, it is important to plan ahead.

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- Adding an automatic enrollment feature to a 401(k) or 403(b) plan may also require an amendment before the start of the plan year.

- Benefit statements
  - Remember that you must provide benefit statements for your participant-directed plans within 45 days of the end of the quarter, and for non-participant-directed defined contribution plans by the filing date for Form 5500 for the plan year.
  - If you sponsor a defined benefit plan, you must either provide employed participants with an annual notice of the availability of a benefit statement on request, or with an actual benefit statement once every three years. (Bear in mind that the statute does *not* exempt frozen plans from these requirements.) Defined benefit plans sponsored by employers with intranet sites may also be required to make certain information available on the intranet site within 90 days of filing Form 5500.
- Make sure that you or your insurer have provided all notices required under your group health plan this year, which may include the Women's Health and Cancer Rights Act notice, notice of availability of the HIPAA privacy notice, and/or the Medicare Part D notice, and that you or your insurer provide required Summary of Benefits and Coverage documents during your open enrollment period. Congress failed to renew the Children's Health Insurance Program ("CHIP") in September 2017, and it is uncertain whether lawmakers will be able to reestablish the program by the end of 2017. We continue to track developments on the reestablishment of CHIP, including whether the Department of Labor will enforce the CHIP notice requirement for 2017.
- Most retirement plan participants are required to receive annual "required minimum distributions" after turning age 70½ and terminating employment with the plan sponsor (or after turning age 70½, in the case of a more-than-5% owner). Time limits also apply to payment to beneficiaries of deceased participants. Each year's payment must be made by December 31st, with the exception of a participant's first required minimum distribution (due April 1st of the following year). Make sure that your plan has arranged to make all required payments, and has up-to-date addresses for affected participants and beneficiaries.
  - As the population ages, more and more plan participants are affected by these deadlines. The IRS and the Department of Labor have increased the resources dedicated to enforcing these rules, and now require plans to indicate on Form 5500 whether they failed to make required payments (see "Increased Regulatory Focus on Retirement Plan Payment Deadlines" below).
- If you expect to have assets remaining in your defined contribution plan's forfeiture account at the end of the year, you should review your options and obligations under the plan document to determine whether you can (and whether you must) make arrangements to use up your forfeiture account this year. The IRS has emphasized that plans generally should not be carrying forfeiture balances over from year to year. As a corollary of this analysis, make sure that your recordkeeper is processing forfeitures in a timely fashion when former employees take distributions or complete five breaks in service, so that the forfeited money can be put to proper use.
  - In this regard, it is worth noting that the IRS now allows forfeitures to be used to fund safe harbor contributions to 401(k) and 403(b) plans as well as certain other types of contributions for which forfeiture funding previously was disallowed. Employers that want to take advantage of this new rule should adopt any requisite amendments by the applicable deadline.

A Look Ahead at 2018

There are some important action items to bear in mind as 2018 gets underway:

- A new pension mortality table will take effect January 1, 2018 for purposes of calculating defined benefit plan lump sum distributions. The new mortality guidelines also will take effect for purposes of calculating funding obligations for plan years beginning on or after January 1, 2018, unless an extension or exception applies.

- With respect to funding calculations, businesses which can demonstrate hardship in implementing the new tables for the 2018 plan year can seek an extension until 2019. The IRS has indicated an intention to be liberal in granting these requests, with a showing of increased funding obligations and/or increased PBGC premiums expected to be treated as a sufficient basis for an extension.
- Plan sponsors may also request IRS permission to use alternative tables more in keeping with their plans' demographics for their funding calculations. Applications are due by February 28, 2018.
- More information on the mortality tables and associated guidance is available in the October 2017 issue of the IRS's Employee Plans News (https://www.irs.gov/retirement-plans/employee-plans-news).

■ Some aspects of the Department of Labor's regulations re-defining "fiduciary" under ERISA took effect in June 2017, with the Department of Labor requiring plans and vendors to demonstrate good-faith compliance through the end of 2017. The Department of Labor has delayed other aspects of the regulations and their accompanying exemption until July 1, 2019, and further delays or changes are possible. In the meantime, however, plan fiduciaries should make sure that they and their vendors meet all requirements currently in effect, and monitor ongoing developments to be sure that they can remain in compliance as additional requirements become applicable. See "New Fiduciary Regulations" below for more details.

■ Under the Patient Protection and Affordable Care Act, larger employers can face a "shared responsibility" (a.k.a. "pay or play") penalty if they fail to offer full-time employees affordable medical coverage. Larger employers are also subject to an information reporting requirement that requires them to track employees' hours of service as well as information about their offers of coverage to their full-time employees during the year. The IRS has finalized the instructions and forms for the 2017 filing, which are available here: https://www.irs.gov/pub/irs-pdf/i109495c.pdf, https://www.irs.gov/pub/irs-pdf/f1094c.pdf, https://www.irs.gov/pub/irs-pdf/f1095c.pdf. For the 2017 filing, copies of the 1095-Cs are due to individuals by January 31, 2018, and copies of the 1094-Cs and 1095-C forms are due to the IRS by February 28, 2018, or April 2, 2018, if filing electronically.

■ If required, an employer with a self-insured medical plan may need to make a second request for a taxpayer identification number ("TIN") (i.e., a Social Security Number) for employees who have not provided a requested TIN. As noted above, under the Affordable Care Act, larger employers are subject to information reporting requirements regarding employee full-time status and offers of coverage. The IRS Forms used for this purpose require that TINs be included on the Form. Employers with self-insured medical plans are responsible for collecting (or attempting to collect) TINs for employees and their family members who enroll in the employer's medical coverage. The IRS proposed regulations that provide a waiver from penalties if the employer is unable to obtain necessary TINs but has taken "responsible steps" to collect such TINs, which consists of making a solicitation within the following timeframes:

  - upon enrollment,
  - within 75 days after the date of the initial solicitation, and
  - by December 31 of the year following the year in which the individual applied for coverage or added an individual to existing coverage.

  If an employee does not provide a TIN for a covered spouse or dependent, the employer may use that individual's date of birth on Form 1095-C in lieu of a TIN.

■ The Health Information Technology for Economic and Clinical Health Act (the "HITECH Act") requires group health plans to notify the Department of Health and Human Services ("HHS") of all breaches of unsecured protected health information. You must notify HHS within 60 days of discovering a breach affecting 500 or more individuals. For breaches involving fewer than 500 individuals, HITECH requires a group health plan to keep a log or other documentation of such breaches that occur within a calendar year and to notify HHS of such breaches within 60 days of the close of the calendar year. This means that you must notify HHS of all breaches affecting fewer than 500 individuals that occurred in 2017 by no later than March 1, 2018. Notifications must be submitted online at http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/brinstruction.html.

- Medicare Part D online disclosure to the Centers for Medicare & Medicaid Services ("CMS") for group health plans offering prescription drug coverage to individuals eligible for Medicare Part D is due by March 1, 2018.
- As discussed at more length below, New York's paid family leave requirements take effect in 2018.
- For plans that take advantage of special IRS rules relating to hardship withdrawals or loans associated with economic losses caused by Hurricanes Harvey and Irma, plan amendments may be required in 2018. Amendments relating to the special distribution and loan rules in the Disaster Tax Relief and Airport and Airway Extension Act of 2017 are due by the end of the 2019 plan year.

Important Developments in 2017

A number of developments occurred in 2017 that affect employee benefit plans, including efforts to repeal or administratively restrict the Affordable Care Act, legislative and administrative efforts to assist businesses and individuals affected by hurricane damage, updated guidance from the IRS, Department of Labor and the PBGC, and significant decisions from the courts on a number of employee benefits issues. This segment of the newsletter summarizes the items we have found to be most relevant to our clients.

Possible Tax Reform

Speculation continues to swirl regarding the possibility of comprehensive federal tax law changes, and the potential impact on employee benefit programs. For example, some proposals would sharply reduce the availability of pre-tax 401(k) contributions in favor of Roth contributions. That particular proposal was *not* included in the initial proposal released by House Republicans. The House proposal did include significant revisions to executive compensation tax rules, however. We continue to monitor potential developments in this area, but at this point, it is too soon to say what benefits-related changes (if any) will be enacted.

Affordable Care Act Developments

Despite several attempts to repeal and replace the Affordable Care Act during 2017, efforts to roll back the Affordable Care Act failed. In a court filing released on October 13, 2017, the Trump Administration announced the cessation of federal cost-sharing reduction payments to insurers issuing coverage in the individual health insurance marketplaces, effective October 18, 2017. The termination of federal cost-sharing subsidies will impact the individual market, but will not directly impact the employer group market. Lawmakers are currently considering a bipartisan solution to restore subsidies to insurers, with the aim of stabilizing the individual insurance market.

We continue to track further developments in this area, including an October 12, 2017 executive order directing federal agencies to consider implementing new rules for health reimbursement accounts ("HRAs"), association health plans, and short-term disability insurance.

Hurricane Relief

Both the IRS and Congress took action to assist individuals with financial needs arising from Hurricanes Harvey, Irma and Maria.

Disaster Tax Relief and Airport and Airway Extension Act of 2017 ("DTR Act")

The DTR Act contains several different provisions intended to facilitate individuals' access to urgently needed funds.

A participant can request a "qualified hurricane distribution" from a qualifying plan or IRA.

- "Qualified hurricane distributions" are distributions (up to $100,000 in total) from qualified retirement plans, 403(b) plans, eligible governmental 457(b) plans or IRAs to an individual:
  - Whose principal place of abode on August 23, 2017 was located in the Hurricane Harvey disaster area and who has sustained an economic loss on account of Hurricane Harvey (the distribution must have occurred on or after August 23, 2017 and before January 1, 2019),
  - Whose principal place of abode on September 4, 2017 was located in the Hurricane Irma disaster area and who has sustained an economic loss on account of Hurricane Irma (the distribution must have occurred on or after September 4, 2017 and before January 1, 2019), or
  - Whose principal place of abode on September 16, 2017 was located in the Hurricane Maria disaster area and who has sustained an economic loss on account of Hurricane Maria (the distribution must have occurred on or after September 16, 2017 and before January 1, 2019).
- Qualified hurricane distributions are exempt from the Section 72(t) 10% additional early-distribution tax.
- Qualified hurricane distributions can be repaid to any plan permitted to receive a rollover contribution (and willing to accept the payment) for three years from the date of distribution (but are not treated as eligible rollover distributions when made and hence are not subject to 20% income tax withholding).
- A plan can treat an otherwise-qualifying distribution as a qualified hurricane distribution so long as the total payments from the controlled group plans do not exceed the $100,000 cap. The employer does not need to monitor what the individual might be withdrawing from other plans or IRAs.
- A qualified hurricane distribution can be made notwithstanding the restrictions that otherwise apply under the Internal Revenue Code to in-service distributions from 401(k), 403(b) and 457(b) distributions.
- The recipient of a qualified hurricane distribution has the ability to spread the tax impact of the distribution across three years.

The DTR Act also loosens restrictions on loans for individuals who meet the residency requirements outlined above under the "qualified hurricane distributions" definition and whose loans are issued after the identified snapshot date for the relevant hurricane (August 23, 2017 for Harvey, September 4, 2017 for Irma and September 16, 2017 for Maria).

- Loan limits are increased to the lesser of $100,000 (instead of $50,000) and 100 percent (instead of 50 percent) of the participant's vested account balance.
- The start of loan repayments can be delayed one year (with future payments being adjusted to reflect the delay and resulting interest accruals). The statute also indicates that a participant may be able to suspend repayments with post-hurricane due dates for loans issued prior to the relevant snapshot date.
- The one-year-delay period is disregarded when calculating the maximum five-year loan term and when determining whether the loan repayment schedule meets the requirement that loan payments be amortized levelly over the loan term.

In addition, the DTR Act allows participants to recontribute to an eligible rollover plan any prior hardship or first-time homebuyer withdrawals that were withdrawn after February 28, 2017 and before September 21, 2017 to fund or construct a principal residence in the Harvey, Irma or Maria disaster area but which were not so used because of Harvey, Irma or Maria. The deadline for recontribution is February 28, 2018. This allows participants to prevent the detriment to their retirement savings and the adverse tax consequences of the withdrawal that otherwise would have been unavoidable despite the participant's inability to buy or build the intended residence.

IRS Administrative Guidance

In addition to extending various deadlines, the IRS has authorized plans to allow individuals living or working (or with spouses or certain close family members living or working) in areas affected by Hurricanes Harvey, Irma and Maria, as well as those affected by the California wildfires, to obtain more liberal access to at least some of their retirement savings. The IRS has also issued guidance allowing tax-favored treatment for employees' donation of amounts they would otherwise have been paid for vacation or other absence from work to charities assisting Harvey, Irma and Maria victims. The IRS guidance works in tandem with the hurricane relief provisions of the DTR Act, and depending on an individual's situation and the employer's plan rules, one or the other or both sets of special rules may be relevant for a given individual.

Department of Labor and Pension Benefit Guaranty Corporation

Both of these agencies have approved various waivers and extensions for individuals and businesses affected by the storms. For example, the Department of Labor has indicated it will not take enforcement action regarding delays in remitting contributions or failure to provide blackout notices for companies and vendors in affected areas that are not able to meet these obligations, and the PBGC has issued penalty waivers and deadline extensions in connection with premium filings, contributions and certain other requirements. Affected employers and vendors should review the agency guidance to determine what special exemptions are available for their circumstances.

Puerto Rico

Employers with dual-qualified plans and/or Puerto Rico qualified plans should remember that the DTR Act and the IRS administrative guidance only apply to U.S. participants. Accordingly, these special rules cannot be extended to individuals whose benefits are required to comply with Puerto Rico law. Employers with Puerto Rico plans should consult Puerto Rico counsel about special hurricane relief rules that may be available under Puerto Rico law.

Supreme Court Advocate Health Care Decision

In contrast to the flurry of Supreme Court employee benefits rulings in recent years, 2017 was a quiet year. However, the Court did issue a decision in *Advocate Health Care Network v. Stapleton* that shed some additional light on the parameters that a "church plan" must meet in order to be exempt from ERISA and its associated funding and fiduciary requirements. Rejecting the results of a handful of lower court cases that had denied "church plan" status to pension plans maintained by a number of religiously affiliated hospitals, the Court held that a plan could qualify as a "church plan" even if it was established by a religiously affiliated organization rather than by a church or similar institution of worship, if the plan meets the other "church plan" requirements.

The case arrived at the Supreme Court in the wake of a series of lawsuits against a variety of church-affiliated plan sponsors with underfunded pension plans and the well-publicized collapse of a Lutheran publishing organization's pension plan that left it unable to pay promised benefits. The lawsuits' targets were primarily hospitals. The plaintiffs sought to have the plans reclassified as non-church plans, subject to ERISA. A plaintiff victory would require the sponsoring organizations to fund the plans as required by ERISA and maintain federal pension insurance. The plaintiffs persuaded several appellate courts to rule in their favor, with those courts concluding that the religiously affiliated plan sponsors had to comply with ERISA.

The Supreme Court sent the case back to the lower court to determine whether the Advocate Health plan met the rest of the requirements to be a church plan. The lower court will need to make that determination based on the particular facts of the case.

In the wake of *Advocate*, several of the lawsuits challenging "church plan" status have settled, with the plan sponsors agreeing to fund the pension plans in specified amounts. At this point, it remains to be seen how readily religiously affiliated organizations will be able to qualify their plans as "church plans." In the meantime, religiously affiliated pension plan sponsors and any organization considering acquiring or partnering with an organization with an underfunded pension plan should understand the potential liabilities associated with the underfunding. Even if the caselaw develops in favor of a broad grant of "church plan" status, underfunded pension plans can create significant drains on an organization's resources, and could result in adverse publicity for the organization and challenges to employee morale. Furthermore, "church plan" sponsors remain subject to state law, and must bear in mind any contractual obligations they may have as well.

Defined Contribution Litigation Continues

Investment and Fee Litigation

New lawsuits continue to allege use of investments that charge excessive fees, overly expensive recordkeeping compensation, and other inefficiencies or overpayments. Financial institutions that include their own proprietary funds in their plans have increasingly found themselves favored targets for these types of accusations, with plaintiffs in these cases alleging that the plan fiduciaries not only acted imprudently but also provided a prohibited benefit to the plan sponsor. Violation of ERISA's prohibitions on self-dealing subjects the fiduciaries and plan sponsor to heightened liability due to the potential application of penalties, disgorgement requirements and excise taxes.

In the past, much of this "401(k) fee" litigation has centered on large private companies with multi-billion dollar plans. However, some smaller plans have also found themselves in the cross-hairs, and several recent cases involve much smaller plans (for example, one lawsuit involves a plan with roughly $1.1 million in assets). Accordingly, employers should not assume that a smaller plan size means that they will not be attractive litigation targets.

In addition, a recent wave of lawsuits targets the defined contribution plans (401(k) and 403(b) plans) offered by a number of well-known colleges and universities.[1] Traditionally, organizations in the non-profit sector have emphasized choice and flexibility, and have minimized employer oversight of defined contribution retirement programs. Many schools, hospitals and other charities allow employees to contribute to retirement vehicles offered by a variety of vendors, and impose few if any limits on the choice of investment products. Plaintiffs allege (among other claims) that the schools allowed their plans to run up excessive costs by utilizing multiple recordkeepers and numerous investment options rather than seeking efficiencies of scale that would have reduced administrative and investment fees.

Although courts have largely rejected plaintiffs' assertion that the sheer number of choices available under these programs was so paralyzing that it constituted a per se breach of fiduciary duty, courts have been receptive to other aspects of the plaintiffs' accusations. So far, only one of the schools (the University of Pennsylvania) has been successful in seeking early dismissal of the lawsuit against it.

In contrast, by way of positive news for employers, the courts have rejected lawsuits against various defendants attempting to challenge certain investment decisions as automatically imprudent. For example, the court in *Jacobs v. Verizon Communications, Inc.* dismissed claims that the plan fiduciaries had designed "white label" investment offerings that "were overly complex, overly risky and inappropriate for the average Verizon employee." The court commented

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[1] The discussion in this segment of the newsletter focuses on ERISA-based claims. Some non-profit organizations maintain retirement plans that are exempt from ERISA. In some cases, these plans are (or claim to be) "church plans," in which case the sponsor should monitor the developments on "church plan" status discussed earlier in this newsletter, and should comply with any obligations it may have under state law. Beyond the "church plan" exemption, some 403(b) programs that only permit employee contributions and allow only very minimal employer involvement can qualify for exemption from ERISA. Meeting the requirements for exemption is increasingly difficult now that Internal Revenue Code compliance obligations for 403(b) programs have increased, so an organization should consult experienced employee benefits counsel as to whether its program is exempt. If the program is exempt from ERISA, then, like a "church plan" sponsor, the organization needs to be familiar with any fiduciary or other obligations that it may have under state law.

that plan sponsors could permit "participants to make their own choices" and observed that "a plan is not per se imprudent merely because it incorporates risky investments." Instead, the court held, the appropriateness of an investment option must be assessed in light of the portfolio as a whole.

Likewise, in *White v. Chevron Corp.*, the plaintiffs challenged the decision to offer a money market fund instead of a stable value fund. Stable value funds frequently offer higher returns than money market funds, but often come with the potential for liquidity constraints and may make somewhat riskier investments. The plaintiffs also asserted that the defendant fiduciaries selected overly pricy investment vehicles rather than using less expensive investment arrangements such as separate accounts. In addition, the plaintiffs alleged that the plan paid too much in recordkeeping fees as a result of the plan's asset-based pricing, since fees increased when plan assets increased. After initially dismissing the case in August 2016, the court in May 2017 also dismissed the plaintiffs' amended complaint. The court commented that the fiduciaries had in fact demonstrated active engagement with the selection of investments and the amount of the plan's administrative fees, said that it was appropriate for the fiduciaries to consider factors other than price when making decisions, and refused to find their particular investment decisions to be *per se* imprudent.

As the *Chevron* case re-affirms, the key to protecting plan fiduciaries against a successful assertion of breach of fiduciary duty is the use of a prudent, well-documented process for selecting and overseeing plan vendors. The recent litigation against smaller plans and against colleges and universities is a good reminder that small companies and non-profit employers are subject to these same expectations. Plan fiduciaries should meet regularly, actively engage with the performance and cost of the plan's investments, and review available alternatives. For example, in the *Verizon* case discussed above, the court allowed plaintiffs to pursue a claim for imprudence with respect to a fund that had underperformed its benchmark drastically for 10 years while maintaining a high expense ratio, meaning that the fiduciaries will need to defend their decision not to take action. With this in mind, plan fiduciaries must take care to document their decisions and the associated rationale with sufficient detail to persuade a court that they discharged their duties properly, and should make appropriate use of professional advisors. Even if the fiduciaries have hired an investment professional to assume responsibility for investment decisions under Section 3(38) of ERISA, they remain responsible for overseeing that professional's performance, and should meet with the professional and review the plan's portfolio regularly.

Caselaw Continues to Favor Employers with Respect to Employer Stock Claims

Caselaw in the wake of 2014's *Fifth Third Bancorp v. Dudenhoeffer* Supreme Court decision continues to favor defendant employers, with courts dismissing numerous cases over the last year based on a post-*Dudenhoeffer* equation (absent "special circumstances") between the payment of market price for publicly traded stock and a conclusion that such an investment was prudent and permissible. Some (though not all) decisions have even extended this deferential approach to privately held stock, despite the lack of an efficient market to set the price.

Furthermore, even when plaintiffs can allege that in fact the stock was not bought at a fair "market price" (due to alleged misleading information, concealment of information or other violations of public market disclosure requirements), and that the fiduciaries overseeing the plan knew that in fact the plan was overpaying for the stock it purchased on the market, courts have rejected efforts to hold the fiduciaries liable. In order to succeed on these claims, plaintiffs must demonstrate not only that the fiduciaries could permissibly have taken some form of corrective action without violating securities laws, but that a prudent fiduciary "could not have concluded" that the proposed corrective action would "do more harm than good." For example, freezing future stock purchases would prevent additional purchases at inflated prices, but might also cause a market panic that would deflate the value of the stock already held by the plan.

Despite this favorable trend for plan fiduciaries, the presence of company stock in a plan remains a risk. Significant stock price drops continue to attract lawsuits, despite the high bar that plaintiffs must clear to proceed. Conversely, an event resulting in an unexpected stock price increase can attract lawsuits from participants who sold their stock prior to the event and who allege that fiduciaries concealed information that would have changed their decision to sell. Even leaving legal liabilities aside, if a company encounters difficulties, reaction by employees and the public to the loss of a potentially large part of employees' retirement savings in addition to the loss of employment, reductions in salaries and other consequences of employer difficulties can exacerbate an already bad situation. Overall, plan fiduciaries need to be sure they understand the *Dudenhoeffer* standard as it applies to their company's situation, and plan sponsors need to be thoughtful about whether continuing to allow plan fiduciaries to offer company stock as either an active or frozen investment makes sense from the perspective of potential litigation risk and expenses.

Claims Procedures

Recent cases, especially in the Second Circuit, emphasize the importance of processing claims in a timely fashion. In that regard, the *Salisbury v. Prudential Insurance Co. of America* decision issued earlier this year indicates that plan fiduciaries should be cautious about exercising a plan's right to extend a claims processing deadline except in unusual circumstances beyond the plan's control. While not all courts have adhered to the plaintiff-friendly approach taken in the Second Circuit and it remains to be seen whether any will endorse *Salisbury's* stringent view of the claim deadline extension rules, prompt and courteous claims processing is a plan fiduciary's first line of defense, and adherence to the regulatory processing deadlines is required by law. Plan fiduciaries and their vendors should design their procedures accordingly.

More information and suggestions for best practices are available in our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/1174-federal-court-decisions-highlight-importance-of-timely-claims-processing-for-benefit-plans-2.

Standing

Under Article III of the U.S. Constitution, in order for a person to be entitled to sue in federal court, the person must have suffered an injury. In 2016, the Supreme Court decided *Spokeo v. Robins*. The *Spokeo* decision confirmed existing precedent that the mere violation of statutory rights is not sufficient to create standing automatically, and went on to explain that a plaintiff must have suffered a "concrete" injury, although the injury does not necessarily need to be "tangible." While the decision does not establish a clear standard for "concrete" injuries, it has since been read as supporting defendant-friendly dismissals for lack of standing in a number of previous ERISA cases (beginning with *Harley v. Minnesota Mining and Manufacturing*). Those cases held that plaintiffs could not sue defined benefit fiduciaries with respect to investment losses that did not appear to present a credible risk to participants' receipt of their benefits. In general, post-*Spokeo* lower court decisions addressing whether a plaintiff has standing to sue for violations of his or her rights under ERISA have interpreted the *Spokeo* standard to reach decisions *denying* standing.

However, the Second Circuit departed from this trend in *Fletcher v. Convergex Group, LLC*, determining that a nominal damages claim was sufficient for standing. In addition, a person's standing to sue always depends on the particular facts of the case, so defendants facing an allegation that they violated ERISA should not assume that a given plaintiff cannot pursue the claim without a specific financial loss. Finally, the Department of Labor also has enforcement authority to address ERISA fiduciary breaches, and agency standing is subject to a different analysis. Accordingly, fiduciaries should bear in mind that they are potentially liable for any breaches they commit, and conduct themselves accordingly.

In a separate twist on this issue, the Eighth Circuit recently revisited and altered the rationale for its holding in the seminal *Harley v. Minnesota Mining and Manufacturing* case. In *Thole v. U.S. Bank, N.A.*, the plaintiffs challenged the defendants' decision to invest in proprietary U.S. Bank investment funds, alleging that the funds were overpriced, too risky given the plan's funded status, left the plan insufficiently diversified and resulted in significant investment losses that caused the previously overfunded plan to become underfunded. The plaintiffs also alleged that the investment decisions were designed to benefit the company and the individual fiduciaries rather than the plan, in violation of ERISA. The company subsequently contributed enough money to restore the plan to overfunded status. The Eighth Circuit affirmed the district court's decision to dismiss the case. In doing so, the Eighth Circuit explained that *Harley* was not intended to decide these types of cases based on the presence or lack of constitutional standing to sue, the issue addressed in *Spokeo*. Instead, the analysis of a plaintiff's right to sue should depend on whether, in the circumstances, the plaintiff fell "within the class of plaintiffs whom Congress has authorized to bring suit" under ERISA. In the *Thole* case, the court held that the plan's now-overfunded status meant that the plan and the plaintiffs as plan participants no longer had an "actual or imminent injury" that a lawsuit could remedy and accordingly the plaintiffs were no longer entitled to sue under ERISA.

Department of Labor News

New Fiduciary Regulations

The Department of Labor's new standard for determining when a person providing "investment advice for a fee" is a fiduciary of an ERISA-governed plan or an IRA or HSA took effect June 9, 2017. Under the new regulations, a wider range of activities will come under ERISA's fiduciary standards and the "prohibited transaction" conflict of interest rules imposed by the Internal Revenue Code on qualified retirement plans, IRAs and HSAs.

Compliance with some of the associated requirements for vendors has been delayed until July 1, 2019, with further delays or alterations possible. In addition, the Department of Labor has announced a non-enforcement policy with respect to the ban on arbitration clauses applicable to vendors seeking to rely on the "best interest contract exemption" or "principal transactions exemption" from ERISA's prohibitions on transactions between plans/IRAs, on the one hand, and fiduciaries and other service providers and affiliates on the other. The Department cited a conflict between the arbitration ban in the exemptions and the U.S. Solicitor General's position on arbitration clauses in an unrelated case.

For the requirements that are already applicable, the Department has said that through the end of the year, it "will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions."

While the financial industry bears the bulk of the responsibility for complying with the new regulations, the sponsors and fiduciaries of ERISA-governed plans should consider the impact of the new definition on their existing vendor relationships and make any necessary changes to bring new and existing fiduciary relationships in line with ERISA. In particular, plan fiduciaries should confirm that their recordkeepers have updated their participant outreach and communication protocols to make sure that either (i) the recordkeeper is not crossing the line into provision of fiduciary advice or (ii) the recordkeeper will be providing fiduciary investment advice and has made the necessary updates to its marketing practices, contracts and disclosures to enable it to operate in compliance with its ERISA fiduciary obligations and to ensure that the plan sponsor and other plan fiduciaries have appropriate contractual protections against any fiduciary breaches committed by the recordkeeper. Sponsors and fiduciaries should also review their own communication materials to make sure that they themselves are not providing individualized investment advice to plan participants and beneficiaries.

Ultimately, under the new regulations, employees should be at less risk of receiving conflicted advice, and investment professionals serving the plan and/or individual participants will generally need to provide clear disclosure about their fiduciary status, compensation, and potential conflicts of interest. However, plan sponsors and employee-fiduciaries still need to bear in mind that not all plan vendors will owe a fiduciary duty to the plan, and must be sure to exercise appropriate oversight even with respect to vendors who have accepted fiduciary status.

More information is available in our newsletters at https://www.hselaw.com/news-and-information/legalcurrents/1167-implementation-of-dol-benefit-plan-fiduciary-rules-to-proceed and https://www.hselaw.com/news-and-information/legalcurrents/962-new-fiduciary-standards-for-erisa-plans.

Increased Regulatory Focus on Retirement Plan Payment Deadlines

Tax-qualified retirement plans, 403(b) plans and 457(b) plans must begin paying participants no later than the April 1st after the year in which the participant turns 70½ or the year in which the participant's employment terminates, whichever is later. In the case of individuals owning more than five percent of the plan sponsor, and all IRA owners, the deadline is always April 1st after the year in which the individual attains age 70½. Some plans (particularly defined benefit pension plans) require payment to commence earlier, when the participant reaches normal retirement age. Beneficiaries of deceased participants are also subject to payment deadlines, with the actual deadline varying depending on a number of factors.

As explained in last year's newsletter, the Department of Labor and IRS are devoting increasing enforcement attention to whether plans are being proactive about meeting these payment deadlines. Department of Labor auditors are seeking information about the payment outreach and missing participant search process for plans under their review, and Form 5500 requires disclosure of payments that were not made on time (excluding payments not made because the plan could not locate the individual despite diligent effort). IRS auditors are examining plans to determine whether the plans have met the legal deadlines for commencement of required minimum distributions.

The IRS issued a memorandum on October 19, 2017 to instruct auditors not to assert that a plan has violated the required minimum distribution rules if a plan has searched its records, the plan sponsor's records and publicly available records or directories, used a commercial locator service, credit reporting agency or a proprietary internet search tool, and attempted contact via certified mail to the last known mailing address and through "appropriate means" for other contact information (such as e-mail and telephone). A plan that has not taken these steps and fails to make a required minimum distribution may be cited for violation of the required minimum distribution rules.

The IRS's approach is consistent with the position of the Department of Labor, which has said that plan fiduciaries should maintain written procedures for enforcing payment deadlines and locating missing participants. Plan fiduciaries should make sure that they maintain and follow appropriate payment outreach procedures, and are proactive about keeping in touch with participants. Even if a participant has years to go before a payment deadline, fiduciaries should follow up promptly on returned mail or other information indicating a bad address, a deceased participant or other potential issues that may impact the plan's payment deadline and/or the plan's ability to make payment on time. Fiduciaries without clear written procedures should cooperate with their recordkeeper to document their plan's actual practice, and make sure that practice is legally adequate.

If you are creating or updating your plan's procedures, consider addressing the following points:

- Identification of the party responsible for tracking and initiating required distributions. If you expect the recordkeeper to perform this function, the recordkeeping contract should expressly impose this obligation.
- A process for searching for participants and beneficiaries as soon as the plan learns of a bad address. For example, if a routine benefit statement comes back as undeliverable, an address search should be conducted at that time. Waiting until the payment deadline approaches increases the odds that you will not be able to find the person, or that you will not have timely notice of a death and associated payment requirements. In addition, the plan has an

ongoing obligation to provide required communications to the participant or beneficiary; it cannot simply ignore a bad address.

- Revisit the "bad address" list periodically, to conduct updated searches for individuals who could not be located through your original efforts.

- A process for conducting death searches. A participant's death may accelerate the time at which payments must begin, or mean that payments need to stop, be reduced, or be redirected. Beneficiaries may not know of a participant's retirement benefits, particularly if the participant had not yet commenced payment, so the plan should not assume it will receive timely notification from the next of kin. Note that enhanced requirements now apply to qualify for access to the Social Security death master file.
- The timing for initial and follow-up outreach to initiate payment, and rules for how to handle non-responsive participants and beneficiaries.

In addition, be sure to communicate payment deadlines in your summary plan description, exit packages and other appropriate plan communications.

Disability Claims Regulations

The Department of Labor had previously issued regulations requiring enhanced disclosures in connection with denial of claims for disability benefits. Those regulations were scheduled to take effect January 1, 2018, but the Trump Administration has proposed delaying the effective date by an additional 90 days (i.e., until April 1, 2018). While the regulations largely affect insurance companies and disability claims administrators, large companies that administer ERISA-governed disability programs in-house also need to update their systems to reflect any new rules that take effect. In addition, retirement plans that offer enhanced vesting, early or enhanced payment, service credit or other special benefits to disabled participants may also need to comply with the new rules, unless the plan relies entirely on a Social Security Administration or long-term disability plan administrator to determine a participant's disabled status.

IRS News

Use of Forfeitures to Fund QNECs, QMACs and Safe Harbor Contributions

The IRS has issued proposed regulations reversing its previous position that plan forfeitures could not be used to fund Qualified Nonelective Contributions ("QNECs"), Qualified Matching Contributions ("QMACs") or safe harbor 401(k) or 403(b) contributions (other than matching contributions under a Qualified Automatic Contribution Arrangement). Employers can begin operating in accordance with the proposed regulations right away, without waiting for the regulations to be finalized, so long as their plan documents accommodate that course of action. Employers with safe harbor plans or a need to make QNECs or QMACs should discuss any required amendments with their plan document vendor.

Substantiation Guidelines for Hardship Withdrawals

On February 23, 2017, the IRS issued a memorandum (https://www.irs.gov/pub/foia/ig/spder/tege-04-0217-0008.pdf) providing new guidelines for IRS auditors reviewing the propriety of hardship withdrawals from 401(k) plans. The IRS then provided similar rules for 403(b) plans in a March 7, 2017 memorandum (https://www.irs.gov/pub/foia/ig/spder/tege-04-0317-0010.pdf). The memoranda revised the expectations established in an earlier IRS newsletter, which stated that plan administrators should make arrangements to retain documentation substantiating the legitimacy of the claimed hardship expense. Under the revised guidelines, plans can use a system that requires participants to retain this documentation and provide it on request, if certain disclosures are provided and if the participant provides specified information about the expense to the plan. More information is available in our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/1130-new-irs-guidance-for-hardship-withdrawals.

403(b) Remedial Amendment Period

The IRS has established March 31, 2020 as the deadline for 403(b) plans to have adopted plan documents that comply fully with the legal requirements applicable under Section 403(b) of the Internal Revenue Code. 403(b) sponsors should work with their vendors to make sure they will have a compliant document in place by this deadline. 403(b) vendors should have a pre-approved form of plan document available shortly, if they do not already have one available. 403(b) sponsors should consider a pre-approved 403(b) plan document because the IRS does not offer a determination letter program for 403(b) plan sponsors.

Guidance on Missed Loan Repayment Corrections

A participant who borrows from a qualified retirement plan or 403(b) plan and then defaults on a loan repayment becomes taxable on the outstanding loan unless the missed repayment is made up by the end of the plan's cure period. The cure period cannot extend beyond the end of the calendar quarter after the quarter in which the default occurred.

The IRS recently issued a Chief Counsel Advice ("CCA") Memorandum (https://www.irs.gov/pub/irs-wd/201736022.pdf) addressing two scenarios for correction of missed repayments on participant plan loans. While the CCA is informal guidance, it is encouraging that the IRS has indicated that it is receptive to at least some common approaches to resolving missed loan repayments. Most notably, the CCA allows a participant who has missed some repayment installments to count subsequent installments towards the missed payments, delaying the point at which the missed payment can no longer be cured. For example, a participant who misses a payment in March and one in April, and then makes the payments due in May and June, can correct both missed payments in July, even though July is in the third calendar quarter and the first missed payment was in the first quarter. The IRS has agreed that the May payment corrects the March missed payment. As an alternative, a participant may be able to refinance the loan, if the plan permits loan refinancing and the participant can satisfy the refinancing loan limits.

However, the CCA leaves some important issues unaddressed. Most notably, it is not clear whether a participant can apply the "lookback" rule for correcting repayments indefinitely, if doing so will extend the loan past the five-year maximum term. Furthermore, the practice of "reamortizing" a loan to absorb missed payments into subsequent payments is not addressed, and in a number of circumstances seems likely to remain problematic. Accordingly, arranging for prompt make-up payments if a payment is missed is still the preferable course of action.

In this regard, it is worth noting that the issue of missed payments often arises in the context of business acquisitions, if an acquired company's plan terminates or temporarily stops accepting loan payments during the process of merging with the buyer's plan. Loan payments should not be skipped or suspended in these circumstances. Instead, arrangements should be made to allow loan repayments to continue to the loan-issuing plan. If that is not possible, any delay in collecting payments should be kept brief enough to allow timely remittance of make-up payments before the loan defaults, and participants should plan for the necessary cashflow to bring the loan current as soon as the plan is again accepting repayments.

Pension Plan Funding Methods

The IRS has updated the Revenue Procedures governing employers' requests to change plan funding methods and automatic approval of certain funding method changes. More information is available in the October 2017 issue of the IRS's Employee Plans News (https://www.irs.gov/retirement-plans/employee-plans-news). As discussed above, that newsletter also includes information on new mortality tables for plan funding.

IRS Extends Nondiscrimination Relief for Frozen Defined Benefit Plans

Through the last plan year beginning before 2019, the IRS will continue to allow additional nondiscrimination testing flexibility for defined benefit plans that permit existing participants to continue earning benefits but are closed to new hires, if the plans satisfy specified requirements.

Other News

Cybersecurity

2017 once again saw large-scale data breaches that should remind plan fiduciaries to take care of the sensitive information under their control. While ERISA does not impose any special requirements for data security, all plan fiduciaries need to be aware of the issue when working with their internal IT resources and when hiring or monitoring vendors who have access to employees' personal information, as part of their general obligation to operate the plan prudently. Plan fiduciaries need to make sure that they are in compliance with generally applicable federal, state and local laws, as well as organizational data security policies, and should be sure appropriate clauses are included in their vendor contracts. With respect to vendor policies, the SPARK Institute recently announced reporting standards for auditing 401(k) recordkeeper data security procedures. Other organizations, including the Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans, have issued reports and suggested guidelines on cybersecurity as well (see https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2016-cybersecurity-considerations-for-benefit-plans.pdf).

Plan fiduciaries of group health plans also have to comply with HIPAA (although in the case of an insured group health plan, the bulk of HIPAA privacy and security compliance falls upon the insurance carrier). More information about the ramifications of HIPAA data breaches and reporting obligations is available in our newsletter at https://www.hselaw.com/news-and-information/legalcurrents/1124-hipaa-data-breach-reporting-deadline-swiftly-approaching.

State IRA Programs

State efforts to facilitate or mandate the availability of retirement savings programs continue to gain steam, despite Congress' reversal of Obama-era Department of Labor guidance intended to assist these programs. A number of states have now approved these programs and are moving forward with implementation. While states generally have exempted employers that already offer retirement plans, even employers that offer plans already should bear in mind that state programs may affect affiliated companies that are not participating in a plan.

In addition, Oregon requires employers to file a certificate to obtain an exemption from the OregonSaves program, and to renew the exemption every three years. The deadlines to register for the program or file for exemption are:

- One hundred (100) or more Oregon employees: November 15, 2017
- At least fifty (50) but no more than ninety-nine (99) Oregon employees: May 15, 2018
- At least twenty (20) but no more than forty-nine (49) Oregon employees: December 15, 2018
- At least ten (10) but no more than nineteen (19) Oregon employees: May 15, 2019
- At least five (5) but no more than nine (9) Oregon employees: November 15, 2019
- Four (4) or fewer Oregon employees: May 15, 2020

Although, Oregon's program is now the subject of a lawsuit alleging that the program's reporting requirements are barred by ERISA, employers likely should plan to comply until and unless a court enjoins enforcement.

Paid Family Leave

Various states and municipalities have adopted paid family leave programs.

In addition to making sure that they are in compliance with applicable state and local requirements, employers should make sure they understand how paid family leave interacts with their benefit programs. For example, whether or not amounts paid for family leave are "compensation" under a retirement, disability or life insurance program will depend on the terms of the program and how the program is paid and taxed.

New York's paid leave program takes effect in 2018. New York's paid family leave law requires employers to maintain health insurance for employees who go out on paid family leave in the same manner as if the leave were an FMLA leave. This means that employers must continue to make its normal contribution towards the cost of coverage during the leave. Coverage may be cancelled only if the employee fails to timely pay his or her share of the premium (although a notice requirement and 30 day grace period applies). Employers—particularly those with self-insured plans and stop loss coverage—should ensure that employees on a paid family leave remain eligible under the terms of their plans for the duration of the leave. More information on the law can be found at https://www.hselaw.com/nys-paid-family-leave.

New EEOC Wellness Program Regulations

In May 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") issued final regulations addressing employer-sponsored wellness programs pursuant to two different federal laws: the Americans with Disabilities Act ("ADA") and Title II of the Genetic Information Nondiscrimination Act ("GINA"). The final regulations clarified and amended earlier-released proposed regulations on the ADA and GINA issued by the EEOC in April 2015 and October 2015. See our 2016 year-end newsletter for an overview of the final EEOC wellness program regulations.

In August 2017, a federal court directed the EEOC to reconsider its rules regarding financial incentives for participation in wellness programs. The current regulations remain in effect, pending the EEOC's review which will take place through August 2018. The EEOC has indicated that any revisions to the final regulations would likely not take effect until January 2021 in order to minimize employer and wellness plan disruption.

Puerto Rico

Employers that maintain retirement plans for employees in Puerto Rico must satisfy the requirements of Puerto Rico's tax laws, even if the plan also satisfies U.S. Internal Revenue Code requirements. Puerto Rico passed legislation in early 2017 that alters some of those requirements, although aspects of that legislation were subsequently amended by further legislation, and additional clarification is expected. It is also expected that the original 2017 amendment deadline will be extended in light of the damage caused by Hurricane Maria. If you have a retirement plan covering employees in Puerto Rico, regardless of whether it is a Puerto Rico only plan or a "dual qualified" plan that also covers U.S. employees, consult Puerto Rico counsel about your obligations.

For More Information

As always, please feel free to contact a member of the Employee Benefits & Executive Compensation group for more information about the items discussed in this newsletter, or for assistance in other matters.

UPDATED INTERNAL REVENUE CODE LIMITS

	2018	2017
IRAs		
IRA Contribution Limit	5,500	5,500
IRA Catch-Up Contributions	1,000	1,000
IRA AGI Deduction Phase-out Starting at		
Joint Return	101,000	99,000
Single or Head of Household	63,000	62,000
SEP		
SEP Minimum Compensation	600	600
SEP Maximum Contribution	55,000	54,000
SEP Maximum Compensation	275,000	270,000
SIMPLE Plans		
SIMPLE Maximum Contributions	12,500	12,500
Catch-up Contributions	3,000	3,000
401(k), 403(b), Profit-Sharing Plans, etc.		
Annual Compensation	275,000	270,000
Elective Deferrals	18,500	18,000
Catch-up Contributions	6,000	6,000
Defined Contribution Limits	55,000	54,000
ESOP Limits	1,105,000 220,000	1,080,000 215,000
Other		
HCE Threshold	120,000	120,000
Defined Benefit Limits	220,000	215,000
Key Employee	175,000	175,000
457 Elective Deferrals	18,500	18,000
Control Employee (board member or officer)	110,000	105,000
Control Employee (compensation-based)	220,000	215,000
Taxable Wage Base	128,700	127,200