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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

COVID-19 DEADLINE EXTENSIONS AND FIDUCIARY RELIEF FOR EMPLOYEE BENEFIT PLANS UNDER DOL DISASTER RELIEF NOTICE 2020-01

As a result of the national emergency that was declared due to the COVID-19 outbreak, the Department of Labor (“DOL”) released guidance extending deadlines and softening enforcement protocols for a variety of Employee Retirement Income Security Act (“ERISA”) functions. The guidance consists of a “notification of relief” issued jointly with the Internal Revenue Service that extends a number of deadlines (see our newsletter at <https://hselaw.com/news-and-information/legalcurrents/1942-dol-and-treasury-announce-extensions-of-benefit-plan-deadlines>), and additional deadline extensions and modified enforcement policies set forth by the DOL in EBSA Disaster Relief Notice 2020-01.¹ Notice 2020-01 extends deadlines for plan communications required under Title I of ERISA, and also announces modified enforcement policies relating to contribution remittance, plan loan administration and overall fiduciary activity that offer a level of protection to employers and fiduciaries acting diligently and in good faith under the circumstances.

Employers and plan fiduciaries should bear in mind that they are still required to operate their plans prudently and in the best interests of participants and beneficiaries. To the extent an employer or fiduciary feels unable to meet its responsibilities, prompt consultation with counsel and/or retention of a competent, reasonably priced third-party vendor to fulfill those functions remains essential. In fact, the current crisis may increase the need for fiduciary engagement with claims, communications, investments and other aspects of plan operations, as well as for employer review of plan provisions to be sure the plan is fulfilling its desired function without requiring employer expenditures in excess of what the employer is able to bear. For example, the recent DOL guidance requires employers and fiduciaries to coordinate with their vendors to ensure that deadline extensions for participant and beneficiary actions are properly implemented, and recent market volatility may call for special attention to plan investments and participant education efforts.

GENERAL FIDUCIARY RELIEF

In addition to complying with ERISA’s general requirement that plans be operated prudently, in accordance with plan documents, and in the best interests of participants, ERISA plan fiduciaries must meet a number of specific obligations within particular timeframes. In the Notice, the DOL acknowledges that the pandemic may make compliance more difficult, and also grants some specific relief for communication deadlines and particular functions as discussed at more length in later sections of this newsletter. However, the Notice does not provide a free pass for the duration of the pandemic. Instead, the DOL explains that

¹ the Internal Revenue Service has confirmed that it agrees with the provisions of Notice 2020-01. Likewise, the Department of Health and Human Services (“HHS”) has indicated that it will be taking a similar approach to deadlines under its jurisdiction.

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“the guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing.”

In keeping with this guiding principle, the DOL says that it will focus on reasonableness of plan fiduciaries’ efforts under the circumstances if claims processing is slowed, emphasizing “compliance assistance,” and will “include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider’s principal place of business makes compliance with pre-established timeframes for certain claims’ decisions or disclosures impossible.” However, the Notice also warns that “Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.”

EXTENDED DISCLOSURE DEADLINE

As discussed in our previous newsletter (<https://hse.com/news-and-information/legalcurrents/1942-dol-and-treasury-announce-extensions-of-benefit-plan-deadlines>), the “notification of relief” issued by the DOL and IRS offers additional time to participants, beneficiaries and claimants on a number of plan-related deadlines, and also extends the deadline for a plan to send a COBRA election notice. In Notice 2020-01, the DOL granted a general extension of deadlines applicable to fiduciaries obligated to provide disclosures required under Title I of ERISA. The extension is available for disclosures due between March 1, 2020 and 60 days after the announced end of the COVID-19 emergency, with guidance to be forthcoming as needed regarding specific dates and regional variations (a one-year statutory maximum applies). However, the extension does not simply allow all plans to delay furnishing all disclosures until the expiration of the extension period. Instead, the extension is only available “if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances.” The Notice goes on to add that “Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.” This loosening of the DOL’s normal rules for electronic disclosure may simplify communications for employers whose workforces are not physically on-site due to the pandemic, or who need to communicate with a number of former employees entitled to plan benefits.²

Blackout notices that would be due during the period from March 1, 2020, until 60 days after the COVID-19 emergency period are Title I disclosures and hence covered by the extension. The Notice also observes that the existing regulations grant forgiveness for a late notice if the administrator determines in writing that it was unable to provide a timely notice due to circumstances beyond the administrator’s reasonable control,

² Information on the usual electronic disclosure rules, as currently in effect, is available at <https://hse.com/news-and-information/legalcurrents/1419-electronic-delivery-rules-for-benefit-plan-communications>. The DOL recently submitted updated electronic disclosure rules for final approval by the Office of Management and Budget, and those rules are expected to offer some additional flexibility for electronic communication on a permanent basis.

and says that the written determination requirement is excused for blackout notices eligible for the deadline relief under Notice 2020-01.

PARTICIPANT CONTRIBUTION REMITTANCE DELAYS

The Notice says that the DOL will not take enforcement action with respect to temporary delays in remitting participant contributions and loan payments, to the extent the delay is solely due to the pandemic. However, the employer/service provider “must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.” It is essential that employers remember that payroll deduction contribution and loan payment amounts are plan assets, and cannot be used for other purposes. A delay in remitting contributions because someone crucial to payroll processing was absent due to COVID-19 illness or quarantine typically should be acceptable so long as steps are taken to remit the contribution as promptly as reasonably possible. In contrast, a delay in remitting contributions because the employer wanted to use the money to cover other bills until an account receivable came in would not be permissible and will result in exposure to excise taxes, liability to make the plan whole for any losses, and potential additional financial penalties.

PLAN LOAN CARES ACT RELIEF AND PROCESS SIMPLIFICATION

Normally, plan loans must be limited to the lesser of 50% of a participant’s vested account balance or \$50,000 (with the available dollar limit reduced if the participant has had a loan outstanding within the last twelve months). Loans also must be paid in level installments, and cannot extend beyond five years except in the case of a loan for the purchase of a principal residence. The Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) temporarily allowed loans up to the lesser of 100% of the participant’s vested account balance or \$100,000 (subject to reduction for prior loan balances), allowed plans to permit the extension of loan repayments otherwise due between March 27, 2020 and December 31, 2020, and allowed the loan’s term to be extended by a year to accommodate these 2020 loan repayment delays.

Although the CARES Act only amended the Internal Revenue Code’s plan loan rules and did not address similar restrictions imposed by the DOL’s regulations, Notice 2020-01 confirms that the DOL will not treat a plan as having violated ERISA because it makes an increased loan permitted by the CARES Act or allows suspension of repayments as permitted by the CARES Act. CARES Act plan amendments are due by the end of the 2022 plan year.

Notice 2020-01 also states that the DOL will not take enforcement action in connection with deficiencies in procedural verification requirements with respect to plan loans if those deficiencies arise from the pandemic. This relief only applies to requirements under DOL jurisdiction; rules under IRS jurisdiction (including, in particular, spousal consent requirements) are not affected. In order to claim the relief, the plan administrator must act diligently and in good faith under the circumstances, and make a reasonable effort to correct the deficiencies and assemble missing documentation as soon as practicable.

FORM 5500

Form 5500 deadlines are under the jurisdiction of the IRS. At present, the IRS has granted an extension for filings due on or after April 1, 2020 until July 15, 2020. Since calendar year plans’ filings are due on July 31,

2020, with an extension available until October 15, 2020, calendar year Form 5500s currently remain due at the usual time.

Plans which offer employer stock and are required to file a Form 11-K within 180 days of the plan year end should consult their securities counsel regarding the rules for an extension on that filing if they have concerns about their ability to meet the Form 11-K deadline.

If you have any questions regarding the benefit plan extensions, please contact any member of the [Employee Benefits and Executive Compensation](#) group at 585.232.6500, 716.853.1616, or visit www.hselaw.com

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