buckconsultants

xerox

FYI® Roundup
For Your Information®

Volume 38 | Issue 109 | July 29, 2015

Retirement Plans – 2015 Summer Recap

This *FYI Roundup* recaps recent defined benefit and defined contribution retirement plan developments. Highlights include DOL's controversial fiduciary rule, changes to IRS determination letter and correction programs, an abrupt change to retiree cashout rules, an extension of nondiscrimination testing relief for closed defined benefit plans, guidance for multiemployer plans under the new Multiemployer Pension Reform Act, and legal challenges for church and public plans. We also include some overtime and independent contractor guidance that may indirectly affect retirement programs.

General Interest

Our roundup of general interest items includes updates on DOL's controversial fiduciary rule, changes to IRS determination letter and error correction programs, DOL employment guidance that can generate questions for retirement plans, audit concerns, and an advisory council outsourcing report.

DOL Re-Proposes Controversial Fiduciary Rule

The DOL released its re-proposal of the regulation defining who is a fiduciary as a result of giving investment advice — also known as the "conflict of interest" rule. In the works since the DOL withdrew its initial proposal on this topic in September 2011, the re-proposed rule broadens the fiduciary definition to include a wider scope of investment advice relationships. However, it also includes a number of key carve-outs. Directed at the financial services industry with a particular focus on rollover-related advice, the re-proposal also addresses plan sponsors' efforts to provide participants with investment-related information. Our April 21, 2015 *For Your Information* provides an overview of the proposal. **Update**: DOL's comment period for the proposed guidance closed on July 21. Over 1,000 letters flooded the DOL with suggestions for clarifying and improving the proposed rule and its companion conflict of interest exemption.

Volume 38 | Issue 109 | July 29, 2015

IRS Announces Changes for Pre-Approved and Individually Designed Plan Letter Programs

In an effort to increase the availability of pre-approved retirement plans to small and mid-size employers, the IRS recently extended this program to hybrid ("cash balance") plans and ESOPs. It also reduced from 30 to 15 the minimum number of employer-clients required for a pre-approved plan sponsor wishing to submit a plan to the IRS for pre-approval. These changes, as described in our July 2, 2015 *For Your Information*, do not affect individually designed retirement plans.

For individually designed plans, the IRS announced that its determination letter program for reviewing these plans will close effective January 1, 2017, except for initial qualification, qualification upon termination, and in other limited circumstances. Effective immediately through December 31, 2016, requests for off-cycle letters will not be accepted. IRS seeks comments on what other modifications should be made to accommodate this change. Our July 21, 2015 *For Your Information* gives the details.

DOL Guidance on Independent Contractors and Proposed Overtime Change Can Affect Retirement Plans

Our July 16, 2015 *FYI Alert* discusses the DOL's Wage and Hour Division guidance on classifying workers as employees or independent contractors under the Fair Labor Standards Act. Applying an economic realities test, the Administrator's Interpretation takes an expansive view of who is an employee. Our June 30, 2015 *FYI Alert* provides information on new proposed rules from the DOL that would significantly expand overtime eligibility by more than doubling the salary threshold for the so-called "white-collar" exemptions. Under these rules, full-time salaried workers making less than an estimated $970 per week, or $50,440 annually, in 2016 would be entitled to overtime — altering long-standing pay practices with significant financial implications for most employers.

> **Comment.** In assessing the impact of the overtime proposal on compensation, retirement plan sponsors will want to understand the additional costs stemming from higher benefits reflecting higher pay, and if overtime is excluded from plan pay, the possible negative impact on nondiscrimination test results. Similarly, the independent contractor rule can impact plan participation or nondiscrimination test results.

Reporting and Disclosure

Our June 11, 2015 *For Your Information* reports on DOL's dissatisfaction with plan audit quality. DOL's review of 400 Form 5500 plan audits found 39% had major deficiencies in one or more generally accepted auditing standards. As a result, DOL has a list of recommendations — including the repeal of the limited scope audit exemption, additional qualifications for auditors, and the ability to levy penalties on auditors rather than plans. Administrators may wish to consider the DOL's findings in selecting and working with their auditors to ensure required plan audits bring value to their plans.

Our June 3, 2015 *For Your Information* reports that the IRS now offers a permanent program of filing penalty relief for retirement plans that are not eligible for reduced penalties under the DOL's Delinquent Filer Voluntary Compliance program. Non-ERISA owner-only, partner-only and certain foreign plans for which US tax deductions are taken are eligible for the program.

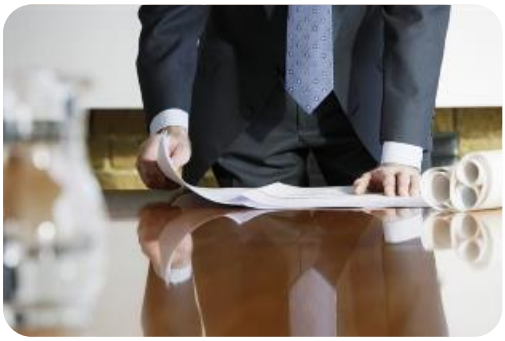
Correcting Errors

The IRS issued two directives modifying its correction program ("EPCRS"). Our April 2, 2015 *For Your Information* covers modifications responding to the practical needs of employers trying to keep their pension plans in operational compliance without excessive cost for the plan sponsor or imposing undue hardship on plan participants. Changes announced in Revenue Procedure 2015-27 allow fiduciaries to use judgment in seeking repayment of overpayments to participants. The IRS also reduced compliance fees for minimum distribution and loan-related failures.

Our April 8, 2015 *For Your Information* covers expanded options provided in Revenue Procedure 2015-28 to help sponsors correct elective deferral errors while keeping their plans in compliance at a reasonable cost. Three new options for savings plans reduce the corrective contribution required to compensate employees for their missed deferral opportunity when deferral elections or automatic contribution triggers are not properly implemented.

ERISA Advisory Council Issues Outsourcing Report

The ERISA Advisory Council issued a report in January on the outsourcing of retirement and welfare plan administration to service providers. The report identifies areas of confusion for plan sponsors and fiduciaries — particularly whether fiduciary responsibility has been shifted as a result of outsourcing and how to properly select and monitor a service provider. The Council's report includes recommended guidance that the DOL should issue that would be helpful for plan sponsors and fiduciaries. In addition, the Council looked at the role of multiple employer plans and their potential for expanding retirement plan coverage for small employers. Read more about the report in our March 16, 2015 *For Your Information.*



Defined Benefit Plans

Our roundup of defined benefit items includes updates on nondiscrimination testing relief for closed plans, limits on cashouts of retiree payments, final annual funding notice regulations, and guidance for multiemployer plans under the Multiemployer Pension Reform Act (MPRA).

IRS Puts Brakes on Pre-Plan Termination Retiree Cashout Windows

Notice 2015-49 announces that IRS will soon propose amendments to the minimum distribution regulations to bar "risk-transferring" transactions that offer cashouts to retirees who are already receiving annuities. The notice does not affect cashout windows for vested terminees who have not yet begun annuity payments and does not appear to affect the ability to offer distribution option changes because of the limited circumstances specified in the regulation, such as upon plan termination. Certain pre-notice accelerations already underway on July 9, 2015 can be completed. Find the details in our July 10, 2015 *FYI Alert.*

IRS Extends Temporary Nondiscrimination Testing Relief for Closed Defined Benefit Plans

In Notice 2015-28, IRS adds a year to the temporary nondiscrimination relief previously provided to certain soft frozen defined benefit plans. The relief will be available through plan years beginning before 2017 instead of through plan years beginning before 2016. IRS anticipates finalizing amendments to the nondiscrimination regulations by the time this relief expires. Our March 20, 2015 *FYI Alert* discusses the notice.

Final Regulations for Annual Funding Notice

Final regulations from the DOL on the annual funding notice required of PBGC-covered single-employer and multiemployer plans replace previous guidance in field assistance bulletins and proposed regulations. The final rules are effective for plan years beginning in 2015; plan administrators can choose to implement new model language for 2014 years or retain their previous compliance approach. In either case, addendum language for MAP-21 and HATFA is handled independently. See our February 3, 2015 *For Your Information.*

Multiemployer Plan Guidance

In June, both the PBGC and IRS issued guidance in the form of a revenue procedure and proposed, final, and temporary regulations on the suspension and partition rules enacted in December, 2014 under MPRA. Our June 29, 2015 *For Your Information* covers the PBGC interim final rule allowing more multiemployer plans to request a partition to fend off plan insolvency. The PBGC will coordinate these requests with those made to the Treasury Department for approval of benefit suspensions. Those benefit suspension rules are outlined in our second June 29, 2015 *For Your Information.* The IRS' proposed and temporary regulations and revenue procedure focus on benefit suspensions newly available to multiemployer plans in critical and declining status. Treasury will now accept applications for suspensions, but will not approve any until the regulations are finalized — after consideration of public comments and a public hearing in September 2015.

Also for multiemployer plans, PBGC has proposed that certain multiemployer notices for plans facing termination or insolvency be required to be submitted to the agency electronically. PBGC's proposed regulation does not consider MPRA changes or change how notices are provided to other interested parties. See our April 10, 2015 *For Your Information.*

Defined Contribution Plans

Our roundup of defined contribution items includes good news for fee disclosure timing and some updates on fiduciary monitoring duties.

DOL Provides Flexibility in Fee Disclosure Timing

Plan administrators of individual account plans that permit participants to direct investments have additional time to provide annual participant fee disclosure documents. They no longer need to target distribution timing to a precise 12-month deadline to avoid "deadline creep." Disclosures will be timely if provided within 14 months of the prior year's disclosure. Find the details in our March 19, 2015 *For Your Information.*

DOL Seeks to Clarify Fiduciary's Annuity Monitoring Obligation

In an effort to increase the availability of lifetime income options in defined contribution plans, the DOL provided guidance to fiduciaries about limitations on their responsibility for annuity products. The DOL explained that a fiduciary's obligation to periodically review an annuity provider ends when the plan stops offering annuities from that provider. The duty to monitor does not continue after discontinuing purchases merely because more benefits are still due under the annuity contracts. The DOL's guidance also clarifies the statute of

limitations for participants and beneficiaries to sue for alleged fiduciary breaches. The guidance was released in conjunction with the 2015 White House Conference on Aging. Read more about this guidance in our July 16, 2015 *For Your Information.*

High Court Affirms Duty to Monitor Plan Investments; Says Little on Scope of Duty

In a unanimous decision, the Supreme Court underscored ERISA's duty to monitor existing plan investments and ruled that a claim is not barred solely based on the date of the initial investment. The decision relied heavily on the trust-law principle that a fiduciary must regularly review the suitability of investments and remove those that are no longer prudent. The Court did not define the scope of the monitoring duty, however; it sent the case back to the appellate level to decide whether and what type of a review of the investments in question was appropriate. In light of this decision, plan fiduciaries should ensure systematic procedures for monitoring plan investments. See our May 22, 2015 *For Your Information* for more on the Court's decision.

Special Interest Areas

Public plans, church plans and special tax opportunities under Puerto Rico law complete our review of developments since our last report.

Public Pension Plan Update — Legal Challenges; Pension Obligation Bonds

Public pension liability remains a hot, fast-moving and fluid topic. Recent state and local legislation altering public pension rights has attracted a slew of legal challenges, the results of which have varied. In our February 3, 2015 *For Your Information*, we discuss several recent, major developments in the public pension sphere. Specifically, we examine legal challenges to pension reform passed by the state of New Hampshire, state of Illinois, and city of Atlanta; how Detroit's art collection enabled the bankrupt city to drastically reduce pension cuts; and the treatment of pension debt in two California municipal bankruptcy proceedings.

In our July 22, 2015 *For Your Information* we discuss how a number of state and local governments have turned to pension obligation bonds — issued by the state or local government entity itself — to shore up the funding status of their retirement plans. Critics see this concept as an investment gamble and complain that the approach saddles future taxpayers with bond repayment obligations to cover past liabilities. Whether through bond repayments or future contributions, however, state and local governments must find funds to pay promised benefits. Actuarial analyses of likely outcomes can help plan fiduciaries understand the risks of different funding approaches.

Also of interest for public sector plans is the Supreme Court ruling on same-sex marriage. As noted in our *FYI Alert* from June 26, 2015, ERISA plans were required to recognize same-sex marriages to comply with the various spousal protection rules after the earlier *Windsor* decision in 2013. For public sector employers, the Court's new ruling will also require that plans extend to same-sex spouses the same spousal protection under their retirement plans as they extend to opposite-sex spouses.

Church Plan Litigation Developments

In recent years, participants and beneficiaries in retirement plans maintained by certain church-related tax-exempt entities (such as hospitals) have sued to enforce their rights under ERISA. They assert that ERISA's church plan exemption does not apply. The federal district courts that have considered ERISA's church plan exemption in these

cases have been evenly split, with courts in three circuits ignoring long-standing IRS private letter rulings and DOL Advisory Opinions and finding that the pension plans do not qualify as valid church plans and courts in three other circuits finding that they do.

In contrast to retirement plan cases where participants have argued against the church plan exemption to obtain ERISA protections, participants in welfare benefit plans have argued for the applicability of the church plan exemption so they could litigate their state-law based claims in state court. Our May 4, 2015 *For Your Information* provides an overview of developments in this area.

Our May 15, 2015 *FYI Alert* follows up with a report on the proposed settlement of the Ascension Health case. There, the plan participants in *Overall v. Ascension Health* have agreed to drop their claim that Ascension's plans are ineligible for ERISA's church plan exemption in exchange for an $8 million contribution to the Ascension plans and up to $2 million for attorney's fees. The sponsor also agreed to amend its plan documents and administrative procedures to include certain ERISA-like protections, and to "guarantee" that plan benefits will be paid through June 2022.

New Deadline for Puerto Rico Reduced Taxation on Retirement Funds

Puerto Rico Law 44 of 2015 extended the end of the window for taking advantage of special tax rates on retirement plan distributions and prepayments from January 31, 2015 to April 30, 2015. See the update in our April 21, 2015 *FYI Alert.*

Current Hot Topics

Some of the other ongoing hot topics plan sponsors are discussing include:

Financial Literacy

Study after study looks at how well individual employees understand financial principles and how well they put those into an action plan for retirement readiness. Generally, these studies conclude that a surprisingly high number have trouble grasping even basic financial planning concepts such as the time value of money or asset diversification. Whether aimed at Millennials, Gen X or Baby Boomers, plan sponsors are looking for more impactful ways to educate employees on how their decisions today will affect their ability to enjoy retirement later.

Leakage of Plan Assets

While many plan sponsors accept rollovers from former employer plans, few are inclined to promote the retention of plan assets when participants retire, resulting in a troubling "leakage" of plan assets. Although perhaps discouraged by the proposed DOL fiduciary regulation's characterization of fiduciary investment advice, plan sponsors should bear in mind the potential benefits to the plan (reduced costs that would otherwise be passed onto participants) and consider design options to allow assets to remain in the plan.

Social Security Claiming Strategies

Experts are not always of a single mind about the best strategy for claiming Social Security benefits. And variations in individual circumstances make for a complicated analysis. Plan sponsors are looking at integrating modeling tools into their retirement benefit platforms to assist employees with this key decision.

Volume 38 | Issue 109 | July 29, 2015

Administrative Issues

Two key administrative concerns plan sponsors with defined contribution plans are currently mulling over are rearranging how to pay for recordkeeping services and how to adjust to upcoming money market reforms. The vast majority of recordkeepers had been operating with a bundled fee arrangement and are now moving to, or looking at, direct fee arrangements for core services. While there are multiple causes behind this trend, one factor is undoubtedly the continued litigation impacting large plans with revenue sharing arrangements.

Plans using money market funds as their capital preservation option need to be mindful of the new SEC rules that will come into play October 2016. Prime funds used by retail investors (which include defined contribution plan participants) can maintain a $1 net asset value — but must be prepared to impose restrictions (either a redemption fee or waiting period before honoring redemption requests) if liquidity (assets that can be converted to cash within 7 days) drops below prescribed levels. Plan sponsors are evaluating whether an alternative such as stable value, US government funds or prime funds would be a better option for their plan.

Authors
Marjorie Martin, FSPA, EA, MAAA
Joanne Jacobson, JD, LLM

Produced by the Knowledge Resource Center of Buck Consultants at Xerox
The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@xerox.com.