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Retirement Plans – 2017 Summer Recap

This *FYI Roundup* recaps recent defined benefit and defined contribution retirement plan developments since our review in February. Highlights include updates on DOL's fiduciary rule, state-run retirement programs, the Supreme Court decision for church plans, and funding recommendations.

General Interest

Our roundup of general interest items covers DOL's fiduciary rule, state-run retirement programs, and developments for plan filing and audit responsibilities.

DOL's Fiduciary Guidance

After a series of steps in response to President Trump's directive to re-examine the fiduciary rule (see our February 6, 2017 *For Your Information*), DOL delayed initial implementation of the final rule for 60 days (to June 9) and pushed the need for certain written disclosures and representations by fiduciaries under the new exemptions through the end of the year. That is, fiduciaries must adhere to the Impartial Conduct Standards beginning June 9, but are not required to make specific disclosures and representations of fiduciary compliance in written communications with investors until January 1, 2018. (See our April 5, 2017 *FYI Alert.*)

Despite appeals for relief, DOL said it would not at this point further delay the rule's June 9 applicability date. As pointed out in our May 24, 2017 *FYI Alert*, while DOL will focus on compliance assistance rather than enforcement through January 1, 2018, as of June 9, 2017, participants can bring class action lawsuits against fiduciaries under the final rule.

Meanwhile, DOL will be evaluating many more comments submitted for its consideration, and Congress continues to mull over the possibility of legislation to stop the fiduciary rule in its tracks. (See our July 24, 2017 *Legislate.*) Stay tuned!

State-Run Savings Plans

Congress turned back DOL's Obama-era regulatory safe harbor for state- and locality-run retirement savings plans. While this action does not bar states, cities and counties from operating these programs, it may bolster legal challenges from employers now that states and localities will not have the benefit of DOL support, as reported in our May 5, 2017 *For Your Information*.

Not to be deterred, Oregon moved ahead with their state-run automatic IRA retirement program for private-sector

employees of employers of 100 or more workers in Oregon, slated to take effect beginning in 2018. These employers must register with the OregonSaves program unless they sponsor a "qualified retirement plan," in which case they must certify exempt status every three years. Federal courts may ultimately consider whether ERISA preempts OregonSaves and other state-based retirement programs. In the meantime, employers that have workers in Oregon should look for information from OregonSaves on how to register for the program or file a certificate of exemption. Read all about it in our June 16, 2017 *For Your Information*.

Oregon is the first state-based retirement program scheduled to become effective in 2018, but several other states and localities have them in the works.

As of June 2017, eight other states – California, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Vermont and Washington – have enacted a program designed to expand retirement savings options for workers in the private sector. These programs come in various forms and are in different stages of implementation. (See our August 29, 2016 *For Your Information*.) Several other states have introduced (but not enacted) legislation aimed at improving retirement savings options for private-sector workers.

New York City, Philadelphia and Seattle have also considered possibilities for city-run retirement plans.

Form 5500 Developments

Changes are afoot for ERISA-mandated Form 5500 filing requirements, though it's unclear at this time when and which changes will actually be implemented. In response to DOL's 2015 review of plan audits, the American Institute of CPAs (AICPA) has proposed changes to audit standards that would significantly increase reporting obligations for employee benefit plans. Additionally, in conjunction with bidding a new contract for processing Form 5500 and its schedules, DOL, IRS and PBGC have proposed vastly expanded filing requirements designed to modernize and improve the Form 5500, Annual Return/Report for Employee Benefit Plans, effective for plan year 2019 filings. However, the new administration's efforts to push back regulatory burdens may significantly curtail that effort. IRS has once again allowed a pass on their compliance questions by omitting them from the 2017 draft forms. See our June 2, 2017 *For Your Information.*

Earlier in the year, we learned of changes in accounting disclosures adopted by FASB for master trusts. Under the changes, plans investing in master trusts need to report more information in their statement of net assets available for plan benefits and in their statement of changes in net assets available for plan benefits. Our March 9, 2017 *For Your Information* reported on this development.

And our April 4, 2017 *For Your Information* confirmed extra time for extended tax returns – which in some cases will provide a corresponding extension for Form 5500 filings. In Form 7004, IRS provided an automatic six-month extension for calendar year C corporation returns rather than the five-month period specified in the 2015 Transportation Act. For sponsors of plans required to file Form 5500 and 8955-SSA that have plan years coinciding with the sponsor's tax year, this additional time may skirt the need to file Form 5558.

Amendments to Plan Documents

The IRS has issued its first Operational Compliance List, designed to help plans comply with changes in qualification requirements beginning on the effective date of each change. The timing for amendments, set forth late last year in the first Required Amendments List, is separate from the operational compliance requirement. The OC list can be a helpful compliance tool that plan sponsors should review carefully. Read up on the details in our March 15, 2017 *For Your Information.*

DOL, PBGC and HHS Increase Penalties for Violations

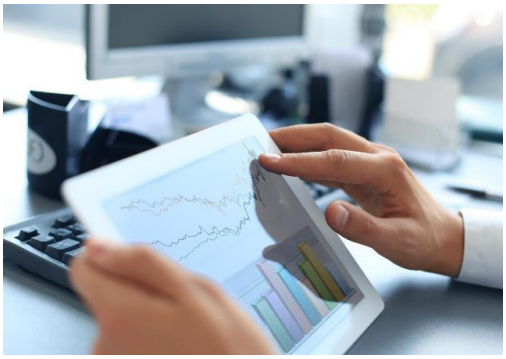
The DOL, PBGC and HHS have announced annual inflation penalty adjustments. Employers should pay careful attention to compliance deadlines to minimize any potential liability for violations. See our February 10, 2017 *For Your Information* for details.

Defined Benefit Developments

While waiting for word on whether IRS will finalize mortality table regulations for 2018 (still waiting, and waiting), we covered funding recommendations, accounting and multiemployer plan issues.

Funding Recommendations

For the last five years, corporate pension plan sponsors have enjoyed the flexibility of lower defined benefit plan funding requirements made available by several iterations of congressional funding relief. While some sponsors have chosen to contribute based on the requirements had the funding relief not been made available, others have not, which puts many sponsors at real risk of falling behind on prudent funding goals. Rising PBGC premiums combined with the possibility of tax reform relief that could reduce the value of deductions may make accelerating contributions beyond minimum requirements a smart move. Our June 20, 2017 *For Your Information* asks "Corporate Pension Funding – Is Sooner Better than Later?"



Accounting – Presentation of Benefit Cost and Disclosures in Financial Statements

The Financial Accounting Standards Board has issued a final Accounting Standards Update (ASU) that affects pension and postretirement benefit accounting. The update changes the presentation of the benefit cost and allows only the service cost component to be eligible for capitalization. The final provisions are consistent with last year's proposed ASU except, to help entities apply the new rules retrospectively, a practical expedient has been added to accommodate restating prior period income statements based on the prior year's disclosure notes. Need to know more? See our March 21, 2017 *For Your Information*.

Multiemployer Plans

The Treasury Department revised its application procedures for multiemployer defined benefit pension plans in critical and declining status seeking to suspend benefits. The revised procedures are effective for applications submitted on or after September 1, 2017, and are intended to facilitate the department's review in light of its experience processing benefit suspension applications so far. Our July 14, 2017 *For Your Information* lists the changes for you.

In the courts, multiemployer plans encountered resistance to imposing liability on foreign controlled group members of contributing U.S. employers. Specifically, a Canadian court rejected an underfunded multiemployer pension plan's bid to impose ERISA withdrawal liability. The case involved collection of a withdrawal liability payment from a Canadian company in the same controlled group as a financially distressed U.S. employer that had left the plan and was unable to make the withdrawal liability payment. This decision could stymie efforts of multiemployer plans that look abroad to collect withdrawal liability when U.S. controlled group members lack the requisite capital. Nevertheless, the ruling leaves many other questions unanswered on the extraterritorial application of ERISA's multiemployer withdrawal liability rules. See our June 12, 2017 *For Your Information.*

Defined Contribution Plans – Hardship Distribution Substantiation

After an extended period of uncertainty about what constitutes acceptable substantiation of a hardship withdrawal request, new guidelines for IRS examiners provide clarity. While traditional means of gathering source documents continue to be acceptable, the new guidelines set forth requirements that allow plans to use a summary of those documents instead. The guidelines describe specific information that the summaries must contain and require that participants agree to preserve source documents and make them available on request. This change will reassure plans that already allow for streamlined substantiation and could reduce the administrative burden for plans that currently require source documents. The guidelines were effective February 23, 2017 and apply to IRS examinations open on that and future dates, as we noted in our March 7, 2017 *For Your Information*.

We later learned from IRS that the new guidelines also apply to 403(b) plans.

Special Interest

For this recap, we have news for church plan sponsors and plan sponsors in Puerto Rico.

Church Plans

Our June 13, 2017 *For Your Information* reported on the U.S. Supreme Court's unanimous decision that a plan maintained by a church-related "principal purpose organization" qualifies as an ERISA-exempt church plan, regardless of who established it. The Supreme Court's decision provides relief to tax-exempt organizations associated with churches that established plans otherwise subject to ERISA – most notably with respect to PBGC premiums and ERISA's minimum funding requirements for defined benefit plans. Had the Court ruled against them, the affected organizations would have had to spend millions of additional dollars on premiums and contributions. On the flip side, participants in severely underfunded defined benefit plans maintained by these entities will be left

unprotected if the plans become insolvent. Plan sponsors aiming to avert further lawsuits and retain their plans as key attraction and retention tools need to think through how best to avoid that result.

Puerto Rico

Puerto Rico requires that sponsors of all retirement plans intended to be qualified in Puerto Rico (including "dual-qualified plans" that are qualified both in the U.S. and Puerto Rico) must apply for a "qualification letter" from the Puerto Rico Department of the Treasury (known locally as "Hacienda"), the Puerto Rico equivalent of the U.S. Internal Revenue Service, to confirm the plan's tax qualified status. As noted in our February 16, 2017 *For Your Information*, on December 23, 2016, the Secretary of Hacienda issued Circular Letter of Tax Policy No. 16-08 (CL 16-08) to update its rules and procedures for requesting qualification letters for Puerto Rico qualified retirement plans. The new rules and procedures were effective immediately.

This was soon followed by changes to Puerto Rico qualified plan rules that were effective immediately. Our March 10, 2017 *For Your Information* reviewed the changes in Act No. 9-2017. The changes may trigger the need for plan amendments.

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