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Retirement Plans – 2018 Winter Recap

This *FYI Roundup* recaps recent defined benefit and defined contribution retirement plan developments since our July review. Highlights include updates on DOL's fiduciary rule, state-run retirement programs, a new missing participant program, mortality table developments and a reminder of our annual planning tools.

General Interest

Our roundup of general interest items highlights IRS required plan amendments and changes to user fees for IRS correction applications, DOL's fiduciary rule, state-run retirement programs, and the new PBGC missing participant program.

Required Amendments and IRS Fees for Correction Applications

Issuing its annual Required Amendments list, the IRS reminded plan sponsors to monitor operational compliance for changes required to be made in 2017 and to identify any corresponding plan amendment that may be needed before 2020 to memorialize those changes. Amendments were required by the end of the 2017 plan year for discretionary changes implemented in 2017. (See our December 12, 2017 *For Your Information*.)

If timely operational changes or amendments are not made, correction using the IRS Voluntary Correction Program just became more expensive for certain failures (required minimum distributions, plan loans and nonamender submissions) and for smaller plans. (See our January 9, 2018 *For Your Information*.)

DOL's Fiduciary Guidance

DOL extended until July 1, 2019 the requirement for the written disclosures and fiduciary representations under the new exemptions to the expanded fiduciary rule. During this time, the department will consider possible changes and alternatives to the exemptions, as well as potential input from the SEC. The DOL similarly extended its “enforcement lite” policy for fiduciaries working diligently and in good faith to comply with the updated rule, which went into effect on June 9, 2017. (See our November 28, 2017 *For Your Information*) Meanwhile, the DOL is providing ongoing updates about compliance with the revised definition of investment advice fiduciary — issuing another set of FAQs that affirms that participant communications specifically encouraging larger plan contributions — at specific individualized levels — are not fiduciary in nature as long as investment recommendations are not specified. (See our August 7, 2017 *For Your Information*.)

State-Run Savings Plans

The new state-run savings plan is in full swing in Oregon. Employers with 100 or more employees in Oregon were supposed to register with OregonSaves by November 15, 2017, or file a certificate of exemption (and then again in three years’ time) if they already sponsor a retirement plan. Smaller employers have deadlines in mid- to late 2018. Under OregonSaves, Oregon employers that do not offer a retirement savings program must facilitate employee payroll deductions, which are then contributed to personal Roth IRAs. Four other states — California, Connecticut, Illinois and Maryland — have adopted similar programs. (See our September 27, 2017 *For Your Information*.)

The ERISA Industry Committee (ERIC) filed a lawsuit in October, arguing that ERISA pre-empts the reporting requirements in OregonSaves. The provision of retirement plans is generally looked upon favorably, but the registration requirements in multiple states — and perhaps cities and counties — by large employers are considered by most to be an administrative nightmare.

New Missing Participants Program and Other Helpful Items for Terminating Plans

PBGC has opened their missing participants program to terminating defined contribution plans, PBGC-insured multiemployer plans, and small professional service defined benefit plans. The PBGC also made it easier to classify certain distributees as missing — participants or beneficiaries who fail to make a distribution election or fail to cash a check may be considered missing. Furthermore, the PBGC clarified the requirements for a diligent search for lost distributees. The program aims to help plan administrators efficiently close out plans and plan participants to gain access to funds they had forgotten about when moving on to new jobs. The guidance would give sponsors considering plan terminations in the coming years new options for dealing with missing participants — but does not address the missing participant problem in the case of distributions from ongoing plans. (See our January 2, 2018 *For Your Information.*)

Disaster Relief

For extraordinary events, announcements of relief from the agencies provide more than the plain vanilla extensions for filing forms and meeting reporting obligations. The additional relief generally mimics the extra relief announced in 2016 for victims of Hurricane Matthew and the Louisiana flooding to include relaxed standards for processing hardship withdrawals and plan loans and allows more time to adopt plan amendments, if appropriate. It does not open the door to loans or withdrawals from amounts that are inaccessible for hardship withdrawal, such as QNEC and QMAC accounts and income accumulated on elective deferrals.

Since our July *FYI Roundup*, the agencies have provided this extra help for victims of **Hurricane Harvey** on or after August 23, 2017 as described in our September 6, 2017 *For Your Information*. Our September 19, 2017 *For Your Information* explains what is available for victims of **Hurricane Irma** on or after September 4, 2017 (for Florida) and September 5, 2017 (for other locations). The Harvey and Irma relief extends through January 31, 2018. Extra help through March 15, 2018 came for victims of **Hurricane Maria** on or after September 16, 2017 for the U.S. Virgin Islands and September 17, 2017 for Puerto Rico, and for victims of the October 8 to 31, 2017 **California wildfires** as we report in our November 15, 2017 *For Your Information.* This "extra help" has not been announced for the subsequent fires or landslides that hit more recently. DOL news releases made allowances for delays in providing blackout notices as well as processing participant contributions, loan repayments, health plan benefit claims and COBRA elections. See our September 19, 2017 and December 11, 2017 *For Your Information* for more information on the agency guidance and for a list of additional actions employers can consider to help employees when disaster strikes.

Following on the heels of the agency disaster relief, Congress, in the Disaster Tax Relief and Airport and Airway Extension Act of 2017, included relief from the ten percent penalty on distributions prior to age 59½ and provided the ability to stretch taxation over multiple years. It also allowed for larger loans and offered extra time for repayments (see our October 6, 2017 *For Your Information*). However, this relief was not extended to victims of the California wildfires.

In addition to the relief described above that is aimed at helping individual participants recover from these disasters, for Hurricanes Harvey and Irma, IRS announced an extension until January 31, 2018 to make required contributions to single and multiemployer pension plans, to obtain AFTAP certifications to forestall funding-based limits on distributions and plan accruals, and for other similar funding certifications and obligations. The relief applies to select areas affected by the twin hurricanes and is described more fully in our September 13, 2017 *For Your Information.*

Defined Benefit Developments

Our roundup of defined benefit items highlights updates to mortality tables, temporary nondiscrimination relief, PBGC 2018 premium rates, plan amendments for bifurcated benefits and disability claims procedures modifications.

Updated Mortality Tables

Most of the regulatory activity in the latter half of 2017 involved defined benefit plans, notably the release in October of the long awaited mortality tables used to determine minimum funding requirements, maximum benefits and minimum lump sums for single-employer ERISA defined benefit plans for 2018. These tables generally use the Society of Actuaries' RP-2014 study as the basis (see our October 10, 2017 *For Your Information*). Shortly after the October release, the Society of Actuaries released their MP-2017 report, and the IRS released updated mortality tables effective in 2019, adopting the SOA factors in that update. (See our December 15, 2017 *For Your Information.*) Updated rules for

substitute, plan-specific mortality tables were also released and permit the use of tables reflecting partially credible experience for plans that are too small to have fully credible experience.

Temporary Nondiscrimination Relief

Meanwhile, the IRS was unable to address an issue that frequently spurs plan sponsors with “soft-frozen” plans (plans that are frozen to new entrants) to hard freeze their defined benefit plans (no additional accrued benefits) — the failure to meet nondiscrimination testing. As a stop-gap measure, they extended through 2018 the temporary relief from select nondiscrimination requirements that had been announced in 2013 and extended through 2017. (See our September 5, 2017 *For Your Information.*) IRS anticipates changes to the nondiscrimination regulations will be finalized by 2019.

PBGC 2018 Premium Rates

But the nondiscrimination relief might not overcome the plan sponsor reaction to the PBGC’s announced 2018 increase in premium rates for single and multiemployer plans (see our October 19, 2017 *For Your Information*). The rates for single-employer plans reflect the premium hikes in the Bipartisan Budget Act of 2015 (see our November 2, 2015 *FYI Alert*); the rates for multiemployer plans reflect the increase under the Multiemployer Pension Reform Act of 2014 to $26 for 2015 with inflation increases thereafter (see our *For Your Information* from January 12, 2015).

Bifurcated Benefit Options

IRS issued model amendments to assist defined benefit plan sponsors in amending their plans to allow participants to split their pension among forms of distribution options, typically, paying part of the benefit in annuity form and part in a lump sum. (See our August 25, 2017 *For Your Information*.)

Disability Claims

After fits and starts, DOL announced that regulations setting out new requirements for claims procedures of ERISA plans that provide disability benefits — including disability retirement benefits — will apply to claims filed on or after April 1, 2018. (See our January 9, 2018 *For Your Information*.) The new rules do not apply if the finding of disability was made by a third party for a purpose unrelated to making a benefit determination under the plan. For example, if a pension plan conditions eligibility for disability retirement benefits on a prior determination of disability by the SSA or by the employer’s long-term disability plan, the claim would be subject to ERISA’s rules for pension rather than disability claims.

Closing Out the Year

Here are some important changes for 2018 and proactive steps for ensuring plan compliance going forward.

Key Benefit Limits for 2018

Continued minimal upward inflation pressure during 2017 resulted in minimal increases in various benefit plan limits. This is true for various Social Security indices as well. Our *For Your Information* and *FYI Alert* publications on the 2018 limits include:

October 19, 2017: IRS Announces Key Retirement Plan Limits for 2018

November 29, 2017: Social Security Administration Revises Some 2018 Amounts (revising amounts posted in our October 13, 2017 *For Your Information*) Social Security Benefits and Taxable Wage Base to Increase for 2018

Time for a Checkup?

As a year-end or a new year fresh start, it's an excellent time to perform a review or "checkup" (i.e., an audit of operational practices and fiduciary responsibilities) of qualified retirement plans. A plan checkup should address plan expenses, plan design considerations, participant fees, and plan investments. The checkup should also verify the plan's compliance with the terms of the plan document and investment policy statement, if any. You'll find planning tools and a calendar to address some critical events to ensure that qualified plans remain compliant in our year-end planning guides:

2018 Planning for ERISA Single-Employer Defined Benefit Plan Operations

2018 Planning for ERISA Single-Employer Defined Contribution Plan Operations

2018 Planning for ERISA Multiemployer Defined Benefit Plan Operations

2018 Planning for Governmental Retirement Plan Operations

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