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FYI® Roundup
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Retirement Plans – 2018 Summer Recap

This *FYI Roundup* recaps recent defined benefit and defined contribution retirement plan developments since our January review. Highlights include a student loan contribution design, updates on DOL and SEC fiduciary rules, tax and budget law changes, possible determination letter changes, a new rollover notice, an extension of relief for closed defined benefit plans, and worker issues.

General Interest

Our roundup of general interest items highlights developments for handling contingent workers, making plans LGBTQ friendly, disaster relief reporting requirements and progress with selectively opening the IRS determination letter program in 2019. We also have stories on fixing participant communications due to revised DOL links and the new IRS Special Tax Notices.

Tax and Budget Law changes. These two laws present some direct, and indirect, changes for retirement plans. Changes specific to defined contribution plans will be covered below. For all plans, changes to the taxation of moving expenses and bicycle transportation fringe benefits can have an impact on compensation that is considered for plan purposes. For example, a plan that references the Form W-2 safe harbor definition in the IRC 415 regulation would have included the moving expenses as a default but could have omitted the expenses to the extent it was reasonable to believe they were deductible. Under the change in tax law, they are not deductible, so they are not excluded from the 415 definition. Employers can still exclude them for plan pay, but the document needs to say so.

Special Tax Notice. Our September 19, 2018 *FYI Alert* leads you to the new Special Tax Notice models from IRS, revised in part to reflect tax law changes due to extended time to roll over loan offsets in the legislation described above. There's more than just that, however. Plan administrators — particularly those who had not independently updated notices to reflect recent law changes — will want to implement the new model as soon as possible.

DOL weblinks. Last year, DOL overhauled its website. If your electronic or printed participant communications link to DOL materials, you may need to revise those communications so your participants will be directed to the

appropriate pages on the revamped DOL site. Some examples are provided in our September 18, 2018 *For Your Information.*

Determination letters. Our July 10, 2018 *For Your Information* dug in to comments provided to IRS by trade organizations, law firms, and other stakeholders on what special circumstances beyond initial plan qualification and plan termination should merit a review of plan documents. Unsurprisingly, these constituents had many good arguments for why letters should be available to plans involved with significant design changes, mergers and acquisitions, and in situations that cannot use the prototype programs such as multiemployer plans, governmental plans and 403(b) programs. It remains to be seen whether the IRS will allow determination letter applications in 2019 for any of these situations.

Contingent workers and benefit plans. On April 30, the California Supreme Court issued a decision with significant implications for California employers and the gig economy generally. The new, worker-friendly standard the court articulated presumes that all workers are employees for purposes of California wage orders unless the entity hiring them can establish otherwise and now requires more than just proof of the exercise of control. Although the California wage order ruling is not necessarily controlling for other purposes, employers should re-evaluate their worker classifications considering this decision, especially where the business model relies on a contractor workforce or where they have been using a single definition of employee across all areas. As suggested in our May 23, 2018 *For Your Information,* they should also consider any practical effects of the decision on their employee benefit plans.

Our March 27, 2018 *For Your Information* provided reminders of how determining accurate employee status is critical for retirement plans. Mistakes in this area can trigger dire consequences for qualified retirement plans, like plan disqualification and participant lawsuits under ERISA. Plans should periodically review worker classifications for compliance purposes, paying attention to eligibility terms and definitions, as well as proper inclusions and exclusions of classifications for testing purposes. Waiting for an audit or a lawsuit to discover classification problems can prove costly and burdensome.

LGBTQ benefits. Large companies seeking to demonstrate workplace equality to employees and consumers can consider seeking a high rating from the annual Corporate Equality Index from the Human Rights Campaign (HRC). For 2019 certification, HRC looks to 2018 survey responses that include expanded standards for benefit plans, including, among others, offering benefits to both same-sex and opposite-sex domestic partners. Our June 20, 2018 *For Your Information* reported on how HRC had expanded the applicable criteria for LGBTQ benefits that would be evaluated for the upcoming benefit year.

Disaster relief. Our March 22, 2018 *For Your Information* explained new individual reporting requirements for disaster relief. Forms 8915A and 8915B are used by participants adversely affected by a 2016 or 2017 disaster to report a retirement plan distribution that qualifies for favorable tax treatment for the 2017 tax year. While participants are responsible for filing these forms, plan sponsors and administrators should be aware of them in case they wish to point participants in the right direction where they know individuals have taken disaster-related distributions.

Defined Benefit Developments

Our roundup of defined benefit issues includes changes in disclosure requirements, an extension of nondiscrimination relief for closed plans, proposed PBGC reporting requirements for multiemployer plans, and final PBGC regulations for multiemployer facilitated mergers.

Revised disclosure requirements. The Financial Accounting Standards Board has issued a final Accounting Standards Update that affects pension and postretirement benefit accounting. The update adds, removes, and clarifies some current footnote disclosures. The final provisions vary somewhat from the proposed ASU issued in 2016 and take into account comments received on the utility of the information to financial statement users relative to the burden imposed on reporting entities. While some disclosure items were removed, some have been added, and the net effect could be an increase in the time required to complete disclosure information. Get the details in our September 11, 2018 *For Your Information.*

Closed plans. IRS has again extended the temporary relief from select nondiscrimination requirements that had been announced in Notice 2014-5. If the conditions in that notice are satisfied, defined benefit plan sponsors may continue to rely on its relief for plan years beginning before 2020 — at which point IRS anticipates the changes to the nondiscrimination regulations will be finalized. See our August 30, 2018 *For Your Information* for this update.

PBGC proposed multiemployer reporting changes. PBGC proposed regulations for multiemployer plans aimed at streamlining reporting and disclosure of information to PBGC and interested parties. Insolvent plans receiving financial assistance (whether terminated or not) and plans terminated by plan amendment that are expected to become insolvent could generally perform actuarial valuations less frequently than currently required. Additionally, the proposal would eliminate some notice requirements for insolvent plans. Additional details are in our July 31, 2018 *For Your Information.*

PBGC final facilitated merger regulation. Final regulations on multiemployer plan mergers allow PBGC to approve facilitated mergers under the Multiemployer Pension Reform Act of 2014. Through this process, PBGC can offer training, technical assistance, mediation, communication with stakeholders, support with requests to other government agencies, and financial assistance. Check out our September 21, 2018 *For Your Information.*

Defined Contribution Developments

Our roundup of issues primarily of interest to sponsors of defined contribution plans includes the latest on DOL and SEC fiduciary requirements, a new idea for student loans, the final rule on using forfeitures for QNECs, QMACs, and safe harbor contributions, and tax law changes affecting hardship withdrawals.

Student loans. In a Private Letter Ruling, the IRS blessed an employer's proposed student loan program through which an employee's student loan debt repayment would be matched by the employer in its 401(k) plan. However, the structure of the program is very specific and may be difficult, if not impossible, for certain plans and employers to implement. Our August 30, 2018 *For Your Information* describes the arrangement and challenges, such as nondiscrimination requirements, that would need attention.

Forfeitures. The IRS has finalized regulations that allow employers to use forfeitures as qualified nonelective and qualified matching contributions to help pass nondiscrimination tests and as safe harbor contributions. The change

is effective for plan years beginning on or after July 20, but, as previously offered in IRS' proposed regulation, can be relied on for earlier periods. We cover the final regulation in our July 20, 2018 *For Your Information.*

Tax and Budget Law changes. In addition to the compensation changes noted above, these two laws present some direct, and indirect, changes for defined contribution plans.

The Tax Cuts and Jobs Act indirectly changed one of the safe harbor bases for hardship distributions. For tax years 2018-2025, the new law limits casualty loss deductions to those occurring in a federally declared disaster area. Plans that use hardship distribution safe harbors that reference this deduction, or otherwise refer to deductible casualty damage to a principal residence as a reason for a hardship distribution, should consider how they will address requests for losses that occur outside of a federally declared disaster area, as we discuss in our February 15, 2018 *For Your Information.* As noted above, the IRS has issued updated Special Tax Notices for eligible rollover distributions that reflect the change in this tax law for rolling over loan offsets.

This year's Budget Act created the Joint Select Committee on Solvency of Multiemployer Pension Plans, provided qualified plan distribution relief for the late 2017 California wildfires, and made some changes for hardship withdrawals and loans as we reported in our February 9, 2018 *Legislate.* For example, plans would no longer be required to suspend participant deferrals for 6 months when a participant takes a hardship withdrawal. These changes are not effective until 2019 and IRS has not provided guidance on these changes — but we will report to you when they do.

Fiduciary updates. In the face of the 5th Circuit Court of Appeals decision to vacate as arbitrary, capricious, contrary to the law, and in excess of its authority DOL's expanded definition of investment advice fiduciary and newly created prohibited transaction exemptions, DOL issued a temporary nonenforcement policy. The agency is evaluating the need for possible prospective and retroactive prohibited transaction relief. We reported on the appeals court decision in our March 19, 2018 *For Your Information* and on the nonenforcement policy in our May 9, 2018 *For Your Information.* Meanwhile, as we said in our April 20, 2018 *For Your Information,* attention now turns to what fiduciary rule might come from SEC. The SEC proposed new standards for registered investment advisers and broker-dealers that would cast a wider net than the controversial DOL fiduciary guidance. It remains to be seen what will happen with the DOL or SEC guidance, and how vendors and fiduciaries will react as judicial and regulatory processes move forward.

Economically targeted investments and shareholder activities. Backing away from its expanded fiduciary net doesn't mean the DOL isn't thinking about other fiduciary issues. In updated field advice, DOL recently cautioned fiduciaries against "too readily" characterizing environmental, social and governance factors as economically relevant considerations in selecting funds for the plan's investment lineup. The agency also emphasized that proxy voting and other shareholder activities do not typically involve plan expenditures — and that fiduciaries contemplating routine or substantial spending of plan funds to actively engage with management on environmental or social factors should document the analysis of the cost of this activity compared to the anticipated economic benefit. This guidance serves as a reminder for fiduciaries to examine ETI-related investments and document a cost/benefit analysis of any routine or substantial expenses connected with shareholder activism. Read more in our April 27, 2018 *For Your Information.*

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