

ReedSmith

Employee Benefits Developments

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Driving progress
through partnership

What We'll Address

- 1. Retirement Plans – Recent Developments**
- 2. Welfare Plans – Recent Developments**
- 3. Other Recent Developments**

Retirement Plan Developments

Lump sum payouts for retirees in pay status

Hardship withdrawals

Disability claims procedures

EPCRS self-correction and VCP procedures

Lump Sum Payout Background

Required Minimum Distribution Rules

- **Required beginning date is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 ½ or, if later, retires**
 - If entire interest is not distributed by the required beginning date, it must be distributed over the life of the employee or lives of the employee and the designated beneficiary
 - Absent an exception, interest must be paid in the form of periodic annuity payments for the employee's or beneficiary's life or over a period certain no longer than the period specified in the regulations
 - Period and form cannot be changed after distribution has commenced with certain exceptions

Lump Sum Payout Exceptions

Exceptions allowing changes to period and form of distribution (Section 1.401(a)(9)-6)

- To pay increased benefits that result from a plan amendment
- To allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a lump sum upon the employee's death
 - No similar rule is provided for a conversion of an employee's annuity benefit during an employee's life or conversion of a beneficiary's annuity other than upon the employee's death
- If a participant has the ability to accelerate distributions at any time, Section 401(a)(9) rules are violated

Retiree Lump Sum Windows

- **Beginning around 2012, many defined benefit plans were amended to provide a limited period during which certain retirees receiving annuity payments could convert to an immediate lump sum**
 - Not specifically addressed in regulations
 - Plan sponsors treated as an increase in benefits as a result of a plan amendment
 - IRS issued several PLRs (beginning with GM and Ford) permitting this practice
- **Shifts risk from the Plan Sponsor to the retiree**
- **This practice was halted in 2015 by IRS action**

Lump Sum Payouts Update

IRS Reverses Course on Retiree Lump Sum Windows

- **Notice 2019-18 retracts Notice 2015-49**
 - Notice 2015-49: IRS intended to propose regulations to prohibit retiree lump sum windows by clarifying that only increases are permitted by plan amendment, not accelerations
 - Notice 2019-18: IRS no longer plans to issue proposed regulations, but will continue to study the issue
 - Will no longer carve out retiree lump sum window provisions from determination letters
 - Will not assert that a retiree lump sum window amendment violates Section 401(a)(9)
 - Does not explicitly permit such windows so the decision should be carefully considered

Hardship Withdrawals Background

Optional provision in 401(k), 403(b) and 457(b) plans

- **If provided, the plan must provide the specific criteria used to make the determination of hardship**
 - Must specify and apply nondiscriminatory and objective standards
 - Must be on account of an immediate and heavy financial need of the employee
 - Safe harbor expenses deemed to be immediate and heavy
 - The amount must be necessary to satisfy the financial need
 - Includible in gross income unless Roth contributions and are not repaid to the plan

Hardship Withdrawals Background

- **Necessary to satisfy the financial need**
 - Not necessary if the employee has other resources available to meet the need, including assets of the employee's spouse and minor children
 - Previously deemed necessary if all other currently available distributions have been obtained and 6 month suspension of elective deferrals imposed
 - May include amounts necessary to pay any taxes or penalties that may result from the distribution
 - Employee representation may be relied upon

Hardship Withdrawals Update

IRS Proposed Regulations for Hardship Withdrawals

- May allow distributions of qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), and earnings on elective deferral contributions, QNECs and QMACs from 401(k) plan, but not 403(b) plan
- Necessary to satisfy immediate and heavy financial need
 - Removes requirement to take all plan loans (optional)
 - Modifies safe harbor list of expenses
 - Suspension of employee contributions is optional until January 1, 2020, then prohibited
- Employee representation that distribution is necessary to satisfy financial need required beginning January 1, 2020

Hardship Withdrawals Update

Modifications to Safe Harbor List

- Added “primary beneficiary under the plan” as an individual for whom qualifying medical, educational, and funeral expenses may be incurred
- Clarified damage to a principal residence that would qualify for a casualty deduction under Section 165 does not have to be in a federally declared disaster area
- Added a new type of expense to the list, relating to expenses incurred as a result of certain disasters

Disability Claim Procedures

Applies to both welfare and retirement plans

- Administrative discretion in disability determinations – does not apply if 3rd party such as SSA or LTD carrier relied on
- Plans should be amended as soon as possible and SPDs updated by July 29, 2019

Requirements

- Claims adjudicator cannot be hired, promoted, terminated or compensated based on the likelihood of denying claims
- Right to review and respond to new information before final decision
- Culturally and linguistically appropriate notices
- Additional information required to be disclosed as part of denial

Disability Claim Procedures

Additional Information Required to be Disclosed

- Explanation for disagreeing with the claimant's treating physician or a Social Security Administration determination
- If based on a medical necessity or experimental treatment, either an explanation of the scientific or clinical judgment or a statement that such explanation will be provided free of charge upon request
- Specific internal rules, guidelines, protocols, standards or other similar criteria that the plan relied upon in denying the claim (or a statement that these do not exist)
- Statement that the claimant is entitled to receive, upon request, documents relevant to the claim

EPCRS Self-Correction

- **Loan failures**
 - Loan does not comply with Code § 72(p)(2) or is in default that is not corrected under EPCRS
 - Defaulted loans within loan repayment period
- **Retroactive plan amendments via SCP**
 - Results in a uniform increase of a participant's benefit, right or feature
 - Number of plan loans to a participant exceeds the number of loans permitted by written plan terms
- **Failure to obtain spousal consent**

VCP Procedures

- **All VCP submissions must be made using Pay.gov**
 - Establish an account
 - Upload single pdf file that doesn't exceed 15 MB
 - Electronic payment
 - Fax any documents that don't fit in submission
- **Plan sponsor can authorize a legal representative to sign and submit**
 - Penalty of perjury statement signed by the plan sponsor
 - Form 2848

Welfare Plan Developments

Status of Affordable Care Act

Association Health Plan Rules

State Leave and Retirement Policies

Status of Affordable Care Act

- **DOJ agreed with Texas federal judge that entire Affordable Care Act is unconstitutional**
 - 2017 tax cut bill reduced the individual mandate penalty to zero
 - *Texas v. Azar* struck down the entire ACA on the grounds that the individual mandate is unconstitutional and rest of law cannot stand without mandate
 - Appealed to the Fifth Circuit Court of Appeals; oral arguments to be held during the week of July 8, 2019
 - The ACA remains in place while the decision makes its way through the courts, even after the DOJ's most recent announcement

Association Health Plan Rules

- Association Health Plan rules seek to allow small businesses and individuals to band together by geography or industry to offer health insurance plans
 - Provides pricing power and more flexible regulations that apply to large employers
- Federal district court struck down Association Health Plan rules as “end-run around” ACA and violation of ERISA
 - *State of New York v. U.S. Department of Labor*
 - Unreasonable expansion of the definition of employer to include associations of disparate employers connected only by common geography
 - Violated consumer protections of the ACA; designed to let employers “avoid the most stringent requirements of the ACA”

State Leave Policies

Massachusetts paid family medical leave (PFML)

- Employers localized in Massachusetts
- 12-26 weeks of paid family leave depending on circumstances
- Job protection, continuation of health insurance and anti-retaliation
- Payroll tax effective July 1, 2019 unless application for exemption is approved
 - Exemptions for private paid leave benefits greater than or equal to PFML beginning January 1, 2021 (deadline is September 20, 2019)
- Quarterly contributions to the Department of Family and Medical Leave beginning October 2019
- Benefits beginning in 2021, with all benefits available July 1, 2021

State Leave Policies

Michigan paid medical leave

- Michigan employers with 50 or more employees
- Employees must accrue one hour for every 35 hours worked, up to 40 hours per year
 - May frontload the 40 hours to reduce carryover
- Employees must be able to carryover unused sick days, but can limit use to 40 hours per year
- Approved uses:
 - Employee's or family member's mental or physical care
 - Issues related to domestic violence or sexual assault
 - Closure of workplace or school for public health emergency
- Documentation may be required after 3 consecutive days

State Leave Policies

New Jersey paid family leave

- Current law provides two thirds of weekly wage, up to \$637 for up to six weeks
 - To bond with newborn child or care for sick child, parent, spouse or civil union partner
- Proposed bill would double the benefits period to 12 weeks and increase the maximum weekly payment to \$842
 - Also to care for additional family members
- Potentially beginning July 2020

State Retirement Policies

CalSavers Retirement Savings Program

- **Employers may enroll beginning effective July 1, 2019**
 - Employer with at least 5 employees that doesn't offer a retirement savings vehicle
 - Required to either offer one or provide access to CalSavers
 - Rolling deadline based on number of employees beginning June 30, 2020
 - No fee for employers, just facilitate the program and submit participating employees' contributions via payroll deduction
 - Account is a Roth IRA

State Retirement Policies

New Jersey Secure Choice Savings Program

- Expected by March 28, 2021
- Employer with 25 or more employees that has not offered a qualified retirement plan in the past two year
- Employers must enroll employees who have not opted out and administer contributions through payroll deductions
 - Open enrollment period for employees to opt-in after initial designation

Other Developments

Excise tax for tax-exempt employers providing more than \$1 million in compensation

Expansion of Determination Letter Program

Secure Act intended to increase participation in and contributions to 401(k) plans

Compensation Limit for Tax-Exempt Employers

Code Section 4960 Added Effective in 2018

- **Notice 2019-09 provides interim guidance**
- **Applies to “applicable tax-exempt organizations” (ATEOs)**
- **Excise tax equal to the corporate tax rate (21% currently) on certain payments by ATEOs and related organizations to “covered employees”:**
 - Payments over \$1 million; and
 - “excess parachute payments”

Compensation Limit for Tax-Exempt Employers

- **Covered employees: top 5 highest-paid employees of ATEO in current or any prior year**
 - Once a covered employee, always one
- **Payments over \$1 million generally judged on § 3401 remuneration in a calendar year**
 - Payments subject to a risk of forfeiture treated as paid when vested
 - Remuneration excludes compensation for bona fide medical services (such compensation also excluded when determining covered employees)
 - Complex rules for allocating payments among ATEO and related organizations

Compensation Limit for Tax-Exempt Employers

- **Parachute Payment Rules are based on 280G principles for corporations**
 - Parachute payments are payments to a covered employee that exceed 3X average annual compensation and contingent on an involuntary separation
 - No “cleansing” process like 280G
 - If 3X is exceeded, 21% excise tax applies to all above 1X base
 - Similar exception for compensation for medical services

Expansion of Determination Letter Program

- **IRS expanded determination letter program for statutory hybrid plans and plan mergers**
 - Individually designed statutory hybrid plans
 - Statutory hybrid plan is a defined benefit plan that uses a hypothetical account balance or an accumulated percentage of final average compensation to determine accrued benefit
 - May submit applications for the 12-month period beginning September 1, 2019 and ending August 31, 2020
 - Plan mergers occurring by end of first plan year after the plan year of a corporate merger, acquisition or similar transaction
 - Applications may be submitted on an ongoing basis
- **Initial qualification and termination determination letter applications still accepted**

Secure Act

- House Ways & Means Committee passed the Secure Act, a bill intended to increase the flexibility of 401(k) plans and improve access to the accounts, particularly for small businesses
 - Allows unrelated employers to join Pooled Employer Plans, treated as single employer plans
 - Increases 10% limit on elective deferral automatic enrollment safe harbor plans to 15%
 - Creates a new tax credit of up to \$500 for small companies that set up plans with automatic enrollment
 - Long-term, part-time workers must be allowed to become eligible for retirement benefits
 - Raises the age for required mandatory distributions from 70½ to 72
 - Increases flexibility of safe harbor plans

Questions?

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