

ReedSmith

Employee Benefits Developments

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through partnership

Allison Sizemore



Allison is a Partner in the Employee Benefits and Executive Compensation Group who assists clients with matters involving employee benefits and executive compensation. Among Allison's areas of specialty expertise are the Department of Labor's fiduciary rule, legal compliance for qualified retirement plans, complex controlled group and similar determinations, documentation and disclosure for qualified and nonqualified plans, executive compensation (including Code Sections 409A, 280G and 457), counseling regarding day-to-day benefits administration and compliance, health and welfare plan matters, and withdrawal liability and other multiemployer plan issues.

Allison also regularly advises employers on ERISA fiduciary matters, including governance, potential liability, and best practices, and assists financial institutions with complex prohibited transaction, trust and custody, required disclosures, and "plan asset" matters. Allison is also experienced with benefits advice in connection with mergers, acquisitions, and lending transactions, including private equity and private fund transactions, as well as analyzing ERISA implications of fund structure and certain operations.

Allison is a graduate of Duquesne University School of Law, J.D. summa cum laude and St. Bonaventure University with a B.A. in Political Science, summa cum laude.

What We'll Address

- 1. Retirement Plans – Recent Developments**
- 2. Welfare Plans – Recent Developments**
- 3. ERISA Litigation Update**
- 4. Other Recent Developments**

Retirement Plan Developments

Lump sum payouts for retirees in pay status

Hardship withdrawals

Restating preapproved 403(b) plans

Uncashed pension distribution checks

Lump Sum Background

RMD – Distribution must commence by April 1 after 70.5 and cannot decrease once commenced.

Exceptions:

- 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 exception 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
- Such lump sums help “de-risk” by removing participants from the plan, shifting investment risk, and saving costs (e.g. PBGC premiums)
- This practice was halted in 2015 by IRS action

Lump Sum Payouts Update

IRS Reverses Course on Retiree Lump Sum Windows

- 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

- **In-service distribution on account of hardship**
- **If offered, the plan must provide the specific criteria used to make the determination of hardship**
 - Must use nondiscriminatory and objective standards
 - Must be on account of an immediate and heavy financial need of the employee
 - “Safe harbor” list of expenses deemed to be immediate and heavy
 - The amount must be necessary to satisfy the financial need

Hardship Withdrawals Update

IRS Proposed Regulations for Hardship Withdrawals

- **Reg. § 1.401(k)-1(d)(3)**
 - May allow withdrawal of additional types of contributions
 - Removes requirement to take all plan loans before a hardship distribution (optional)
 - Modifies safe harbor list of expenses
 - Suspension of employee contributions is optional until January 1, 2020, then prohibited (6 month wait previously required)
 - Employee representation that distribution is necessary to satisfy financial need required beginning January 1, 2020
- May require plan amendment

Restating Preapproved 403(b) Plans

Section 403(b) Plans Finally Entitled to True “Preapproved” status

- Previously, 403(b) plans did not have reliance on an IRS approval letter, even if they used a vendor’s “fill in the blank” document
- IRS finally finished its first cycle of preapproved 403(b) documents in 2017
- In order to rely on such a letter, a restated document must be adopted by March 31, 2020.
 - Caution: vendors are setting earlier administrative deadlines!
 - These restatements may retroactively correct document defects back as far as 2010.

Uncashed Pension Distribution Checks

Helpful (but not surprising) guidance

- Issue: administrator sends a check to a participant, withholds income tax and remits it to the IRS, and issues a 1099. Participant fails to cash check.
- Guidance:
 - No obligation to recoup withheld taxes
 - No required changes to 1099
 - No change to the taxability to the participant in the year the check was issued
- IRS still reviewing bad address situations.

Welfare Plan Developments

Status of Affordable Care Act

Association Health Plan Rules

New HRA Rules

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 AHP rules as “end-run around” ACA and violation of ERISA
 - *State of New York v. U.S. Department of Labor – D.C. Circuit*
 - Unreasonable expansion of ERISA 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”
 - Trump administration appealing & being fast tracked

New HRA Rules

Expanded potential to use HRAs to reimburse individual coverage premiums

- Starting 1/1/2020, individual coverage HRA (ICHRA) available if:
 - Each person covered by individual market coverage
 - Employer doesn't offer that class of individuals a traditional group health plan
 - Same terms offered to each class
 - Employees can opt-out of ICHRA
 - Notice

Broad potential “classes”: FT, PT, seasonal, union, geographic area, salaried/hourly, waiting period, <25, employees working abroad, temporary workers

ERISA Litigation Update

- *Renco v. Steelworkers Pension* – “evade or avoid” decision leads to \$96 million to pension trust
- *Honeywell* – 2nd Circuit upholds ruling requiring Honeywell to provide lifetime retiree medical benefits, even after expiration of CBA
- SCOTUS to consider *Thole v. US Bank* – issue of whether participants can sue for breach of fiduciary duty for management of a fully-funded DB plan
- SCOTUS to review *Jander v. IBM* – stock drop litigation tackles the *Dudenhoeffer* “more harm than good” pleading standard
- *Shore v. Charlotte-Mecklenburg Hospital Authority* – suit alleging false classification as government plan

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 (also excluded when identifying 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
 - Payments do not have to exceed \$1M to constitute parachute payments

Expansion of Determination Letter Program

- **Individually designed cash balance plans and plan mergers (Rev. Proc. 2019-20)**
 - 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 beginning September 1, 2019
- **Initial qualification and termination determination letter applications still accepted**

Secure Act

- House passed the **Secure Act** on May 23 (417-3), 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
 - Encourages automatic increase programs by increasing safe harbor limit from 10% to 15%
 - Creates 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
- Now in the Senate – strong support but now bogged down

Questions?

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