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BENEFITS & BREAKFAST

Benefits Planning for 2018: What You Need to Know

Chicago – Tuesday, January 23, 2018

Philadelphia – Wednesday, February 7, 2018

Welcome and Logistics

- Introduction
- Event Schedule
- 8 – 8:30 a.m.: Registration/Networking
- 8:30 – 9:30 a.m.: Presentation
- 9:30 – 10 a.m.: Post Discussion/Networking
- CLE and Continuing Education Credit

Today's Topics

- Tax Reform
  - Qualified Retirement Plan Provisions
  - Fringe Benefit Provisions
  - Executive Compensation Provisions
- DOL Proposed Rule on Association Health Plans
- Cybersecurity
- Agency Guidance on Missing Participants
- Voluntary Compliance Program Changes
- ACA Reporting Extension and Employer Assessments
- AARP v. EEOC – Update on the Wellness Program Litigation
- 2018 Planning Items

Tax Reform

Tax Reform – Qualified Retirement Plan Provisions

- Extended deadline for participants to roll over plan loan offset amounts in certain situations
- Plan loan offset
  - When a participant defaults on a loan from a 401(k) or 403(b) plan and is eligible to receive a distribution, the unpaid loan balance is "offset" against the amount available for distribution
  - Likely to occur when a participant terminates employment with an outstanding plan loan and the loan balance becomes immediately payable in full
- New Rule: Deadline for rolling over a plan loan offset amount to an eligible retirement plan is the due date (with extensions) for filing the participant's federal income tax return
  - This rule applies only when the plan loan offset amount results solely from the participant's termination of employment or the employer's termination of the plan
  - Applies to plan loan offsets that occur in tax years beginning after December 31, 2017

Tax Reform – Qualified Retirement Plan Provisions

Addition of "Qualified 2016 Disaster Distributions"

- Qualified 2016 Disaster Distribution = A distribution made:
  - From an eligible retirement plan (401(k), 403(b), governmental 457(b), IRA)
  - On or after January 1, 2016 and before January 1, 2018
  - To an individual whose principal place of abode during 2016 was in an area for which a major disaster was declared by the president, and who sustained an economic loss due to the disaster
- Dollar limit for a Qualified 2016 Disaster Distribution
  - $100,000, reduced by all amounts treated as Qualified 2016 Disaster Distributions received by the individual for prior tax years
  - The $100,000 limit applies to all qualified plans in the plan sponsor's controlled group

Tax Reform – Qualified Retirement Plan Provisions

Addition of "Qualified 2016 Disaster Distributions"

- Favorable Tax Treatment for Qualified 2016 Disaster Distributions
  - The amount includible in the taxpayer's gross income with respect to the distribution is included ratably over 3 years beginning with the tax year in which the distribution is made (unless the taxpayer elects otherwise)
  - The 10% additional tax on early distributions does not apply
  - During the 3-year period beginning on the date of the distribution, taxpayer can repay all or a portion of the distribution to an eligible retirement plan to which the taxpayer could make a rollover contribution; repayments are treated as direct rollovers
- Special tax notice does not need to be provided in connection with a Qualified 2016 Disaster Distribution
- Automatic 20% withholding does not apply

Tax Reform – Qualified Retirement Plan Provisions

Hardship Withdrawals for Damage to a Principal Residence

- One of the "safe harbor" reasons for which a hardship withdrawal can be approved is to repair damage to a principal residence, if the damage was caused by a casualty loss that is deductible under Code Section 165
- Code Section 165 has been amended so that personal casualty losses are deductible only to the extent such losses are attributable to a federally declared disaster
- As a result, plans that use the "safe harbor" standard for approving hardship withdrawals can approve a casualty loss hardship withdrawal only if the damage being repaired results from a federally declared disaster
- Applies to losses incurred in tax years beginning after December 31, 2017 and before January 1, 2026

Tax Reform – Fringe Benefit Provisions

- Changes to Employer Deductions
  - No deduction for qualified transportation fringe benefits
  - Deduction for meals provided to employees for the convenience of the employer is limited to 50% of the expense (after January 1, 2026, such expenses are completely non-deductible)
- Changes to Employee Deductions and Exclusions
  - No exclusion for reimbursements of qualified bicycle commuting expenses (other qualified transportation fringe benefits remain excludable)
  - No deduction for qualified moving expenses and no exclusion for reimbursements of moving expenses, except for a member of the U.S. Armed Forces on active duty who move pursuant to a military order and incident to a permanent change of station
- Changes are effective for tax years beginning after December 31, 2017 and before January 1, 2026

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Tax Reform – Executive Compensation Provisions

- Changes for Public For-Profit Employers: Code Section 162(m)
- Changes for Private For-Profit Employers: Deferral of Equity Compensation Awards
- Changes for Tax-Exempt Employers: Excise Tax on Excessive Compensation

Executive Compensation for Public Companies: Section 162(m)

- Section 162(m) prohibits a public company from deducting compensation paid to a “covered employee” in excess of $1 million per year
- Prior to the Act, the $1 million deduction limit did not apply to performance-based compensation or remuneration payable on a commission basis

Tax Reform Act – Changes to 162(m)

- The Act eliminates the exceptions for performance-based compensation and compensation payable on a commission basis
- The Act applies the $1 million deduction limit to a company's principal financial officer and to any employee who was a covered employee in any preceding tax year beginning after December 31, 2016
  - 162(m) now applicable to compensation paid after termination of employment (*e.g.*, severance, deferred compensation, etc.)
- The Act expands the application of the $1 million deduction limit to include companies that are required to file reports with the SEC under Section 15(d) of the Exchange Act, such as a company that issues debt securities to the public

Effective Date of 162(m) Changes

- The 162(m) changes generally apply to taxable years beginning after December 31, 2017
- Transition Rule: Changes do not apply to "remuneration provided pursuant to a written binding contract which was in effect on November 2, 2017, and which was not modified in any material respect on or after such date"

162(m) Changes – Practice Pointers

- Review equity plans and annual bonus plans to determine what changes, if any, are appropriate in light of the 162(m) changes
  - Certification of performance goals by compensation committee
  - Pre-establishment of performance goals
  - Performance goals set by compensation committee
  - Annual limits on individual awards
- Shareholder approval requirements relaxed
- Exercise caution before modifying existing contracts if want to preserve grandfathered status under the transition rule
- Anticipate IRS to provide guidance on definition of “material” and other aspects of transition rule

Executive Compensation for Private For-Profit Employers: Deferral of Equity Awards

- Certain employees who are granted stock options or restricted stock units (RSUs) and who later receive stock upon exercise of the option or upon settlement of the RSU ("qualified stock") may elect to defer the recognition of income for up to five years if:
  - The corporation's stock is not publicly traded;
  - The corporation has a written plan under which not less than 80% of all U.S. employees are granted options or RSUs with the same rights and privileges to receive qualified stock; and
  - Certain other requirements are met
- The Section 83(i) changes apply to RSUs settled and to stock attributable to options exercised after December 31, 2017

Executive Compensation for Tax-Exempt Employers: Excise Tax on Excessive Compensation

- The Act provides for a 21% excise tax on certain executive compensation paid by tax-exempt entities
- The excise tax equals 21% of the sum of:
  - The compensation paid by the entity to any covered employee in excess of $1 million (other than the “excess parachute payment” described below); and
  - The amount of any “excess parachute payment” paid by the entity to any covered employee
- The excise tax is imposed on the employer
- The excise tax applies to taxable years beginning after December 31, 2017

Excise Tax on Excessive Compensation: Covered Employees

- A “covered employee” includes an employee who was among the organization’s five highest compensated employees in the current taxable year or who was a covered employee for any preceding taxable year beginning after December 31, 2016
- Once a covered employee, always a covered employee
- Appears to apply on an entity-by-entity basis (as opposed to a controlled group basis)

Excise Tax on Excessive Compensation: Excess Parachute Payment

- An “excess parachute payment” is an amount equal to the excess of any parachute payment over the employee’s base amount
  - An employee’s “base amount” is the employee’s average annualized compensation from the employer over the five calendar years preceding his or her separation from service
  - An amount would be a “parachute payment” if it is contingent on the employee’s separation from employment and the present value of the compensation equals or exceeds three times the employee’s base amount

Excise Tax on Excessive Compensation: Definition of Compensation

- "Compensation" means an employee's wages for federal income tax purposes under Code Section 3401(a) of the Code
  - Includes amounts required to be included in gross income under Section 457(f) of the Code (even if such amounts have not actually been paid)
  - Excludes designated Roth contributions as well as pre-tax contributions to cafeteria plans, retirement plans, and transportation benefit plans
  - Excludes payments made to non-highly compensated employees
  - Excludes the portion of any remuneration paid to a licensed medical professional (including a veterinarian) for the performance of medical or veterinary services by such professional

Executive Compensation Changes Proposed, But Not Adopted

- **New 409B**: The initial House version of the tax bill had proposed a new 409B that would have taxed all compensation when no longer subject to a substantial risk of forfeiture (applied to employees of public, private, and tax-exempt entities)
- **Changes to Intermediate Sanction Rules**: The Senate version of the tax bill had proposed a number of changes to the intermediate sanction rules, including imposing a 10% excise tax on organizations in the event of an excess benefit transaction (unless certain requirements are met), eliminating the rebuttable presumption of reasonableness, and making various other changes
- **Governmental 457(b) Plans**: The Senate version of the tax bill would have changed the deferral limits for governmental plans by imposing one limit on an employee's deferrals to a governmental 457(b) plan, a 403(b) plan, and a 401(k) plan

DOL Proposed Rule on Association Health Plans

DOL Proposed Rule on Association Health Plans

- Amends the definition of “employer” to expand the types of groups and associations that would qualify as single employers for purposes of sponsoring an ERISA group health plan
- Under the Proposed AHP Rule, the association must exist for the purpose (in whole or in part) of sponsoring a group health plan to offer its employer members
    - Significant change from prior DOL guidance which required that an association must be established for a purpose unrelated to the provision of benefits
    - Cannot be a “health insurance issuer” or owned or controlled by one

DOL Proposed Rule on Association Health Plans

- Under the Proposed AHP Rule, each employer member of the association must employ at least one employee who is a participant covered under the AHP
  - Employer members may be any size and can operate in any form (*e.g.,* sole proprietor, or an incorporated or unincorporated business)
  - "**Working Owner**" will have dual status as both a member employer and a covered employee
    - Must have an ownership right in a trade or business
    - Must be earning wages or self-employment income by providing personal services to that trade or business
    - Must not be eligible to participate in any other subsidized group health plan
    - Must either work for that trade or business at least 30 hours per week (120 hours per month) **<u>or</u>** have income from that trade or business at least equal to the cost of coverage for the individual (and any of his or her covered beneficiaries)

DOL Proposed Rule on Association Health Plans

- Like current rules, under the Proposed AHP Rule, the members of the association must have, "**Commonality of Interest**," but the proposal greatly expands what is sufficient commonality
  - Must be in the same trade, industry, line of business, or profession; **or**
  - Have a principal place of business within the same state or metropolitan area (even if the metropolitan area includes more than one state)
- The DOL's proposal provides that this determination will be made based on relevant facts and circumstances

DOL Proposed Rule on Association Health Plans

- The association must have a formal organizational structure (*e.g.*, bylaws or similar governance structure) and be controlled by its employer members (*e.g.*, the employer members elect the organization's directors, officers or similar representatives)
- Access to health coverage under the AHP must be limited to employees, former employees, and their family members and beneficiaries
- Both the association and the AHP coverage itself must comply with the HIPAA nondiscrimination rules
  - Association is prohibited from restricting membership based on any health factor (*e.g.*, health status, medical condition, etc.)
  - AHP coverage eligibility terms and premium or contribution requirements cannot discriminate against an individual based on any health factor
  - An association cannot treat different employer members as distinct groups of similarly situated individuals

DOL Proposed AHP Rule & ERISA

- The association, through its governing body, would be the plan sponsor responsible for administering the health plan, rather than the individual member employers
- Under the Proposed AHP Rule, it will be possible for small employers to offer insured coverage under the “large group” coverage rules (if the AHP covers at least 51 employees)
- Does not change ERISA definition of MEWA
  - **Multiple Employer Welfare Arrangement** (MEWA) = any arrangement where two or more unrelated employers join together to offer health coverage to their employees

Questions about and Limits of the DOL Proposed Rule on Association Health Plans

- State insurance laws apply to MEWAs
  - Some DOL authority to issue exemptions for self-funded MEWAs (*i*.*e*., preempt state laws that apply to self-funded MEWAs)
  - National Association of Insurance Commissioners (NAIC) and some states oppose AHPs on the grounds of consumer protection—for example, the potential to destabilize the small group insurance market

Comments on Proposed AHP Rule Due March 6, 2018

Cybersecurity

Increased Focus on Cybersecurity

- Plan fiduciaries have a duty to prudently select and monitor service providers
  - Numerous federal and state laws that regulate privacy and security of information (health, SSNs, financial, etc.)
  - Fiduciary obligation to ensure that service providers protect participant information
- Plan fiduciaries should review contractual protections and insurance requirements related to cybersecurity:
  - Before engaging a new service provider, as part of the overall review of the service provider agreement
  - Periodically for all current service providers

Increased Focus on Cybersecurity

- Plan fiduciaries should evaluate service provider policies and determine appropriate allocation of liability in contractual provisions (*e.g*., indemnification, etc.)
- Does the service provider have a cybersecurity policy in place outlining:
  - Steps the service provider will take to safeguard participant information?
  - How and how often the effectiveness of the safeguards will be reviewed/evaluated?
  - Steps the service provider will take in the event a breach occurs?

Increased Focus on Cybersecurity

- Appropriate preventive measures may include:
  - Employee awareness/training programs
  - Email and other system scanning (*e.g.*, spam filters, review of activity logs, etc.)
  - Firewalls and other defenses (*e.g.*, software patches current, anti-virus software)
  - Frequent system backups, security of data
  - Vulnerability assessments
  - Incident response and business continuity plans
  - Third party contracts
- Additional protections may include:
  - Cybersecurity insurance
  - Encryption

Agency Guidance on Missing Participants

Agency Guidance on Missing Participants – IRS Memorandum for Employee Plans (EP) Examinations Employees

- EP examiners are instructed not to assert a violation of the Code Section 401(a)(9) rules due to a failure to pay RMDs to participants and beneficiaries who cannot be located, as long as a qualified plan has taken the following steps to locate the individual:
  - Searched plan and related plan sponsor, and publicly-available records or directories for alternative contact information
  - Used (1) a commercial locator service, (2) a credit reporting agency, and/or (3) a proprietary internet search tool for locating individuals
  - Sent notice to the individual using USPS certified mail to the individual's last known mailing address
  - Attempted contact to the individual through appropriate means at any alternative addresses or alternative contact information (*e.g.*, e-mail, telephone)
- The memorandum is not official guidance and should not be relied upon by plan sponsors as a safe harbor for locating missing participants

Agency Guidance on Missing Participants – PBGC Final Rule on Missing Participants Program

- PBGC Missing Participants Program
  - Program previously applied only to single-employer defined benefit plans insured by the PBGC
  - Requires the plan administrator of a terminating plan to either purchase annuities for missing participants and beneficiaries, or make a payment to the PBGC to cover the benefits of missing participants and beneficiaries
  - If a missing participant or beneficiary later contacts the PBGC, benefits are paid to the individual
- PBGC final rule on the Missing Participants Program, effective for plan terminations and multiemployer plan close-outs after 2017:
  - Expands the Program for voluntary use by terminating defined contribution plans and terminating defined benefit plans sponsored by small professional service corporations (that are not insured by the PBGC)
  - Modifies certain aspects of the Program for terminating single-employer defined benefit plans that are already subject to the Program
  - Expands the Program to apply to multiemployer defined benefit plans that are insured by the PBGC

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Agency Guidance on Missing Participants – PBGC Final Rule on Missing Participants Program

- Under the final rule, when a defined contribution plan or a non-PBGC insured defined benefit plan terminates and there are **missing distributees** who cannot be located after a **diligent search**, the plan sponsor may choose to:
  - Transfer funds to the PBGC to cover the cost of providing the missing distributees' benefits (the plan is referred to as a "transferring plan"), or
  - Provide the PBGC with information about the financial institution to which the missing distributees' benefits were transferred, so that the PBGC can inform the missing distributee if contacted in the future (the plan is referred to as a "notifying plan")
- A **missing distributee** is a participant or beneficiary who is entitled to a plan distribution and upon plan termination one or more of the following applies:
  - The plan does not know the distributee's location with reasonable certainty
  - The distributee has not elected a form of distribution in response to a distribution notice
  - A lump sum payment was made to the distributee, and the distribution check is not cashed by the check's stale date or an earlier cash-by date that is indicated on the check (which must be at least 45 days after the check is issued)

Agency Guidance on Missing Participants – PBGC Final Rule on Missing Participants Program

- A **diligent search** means:
  - For defined contribution plans, following the required search steps specified in Department of Labor Field Assistance Bulletin 2014-01
  - For defined benefit plans, using either (1) a commercial locator service, or (2) the records search method if the value of the missing distributee's normal monthly retirement benefit is $50 or less
    - The records search method means taking all of the following steps to locate the missingdistributee, to the extent reasonably feasible and affordable: (a) searching records of the plan, the plan sponsor, welfare benefit plans, and other retirement plans for contact information, (b) contacting named beneficiaries of the missing distributee, and (c) using free internet search methods (*e.g.*, search engines, public records databases, social media)
- The diligent search must be done within 9 months before the plan sponsor files information about the missing distributee with the PBGC
- The **administrative fee** charged for transferring plans is $35 for each missing distributee with a payment obligation of more than $250; no fee applies to notifying plans

Agency Guidance on Missing Participants – PBGC Final Rule on Missing Participants Program

- For single-employer defined benefit plans already required to participate in the Program, the final rule:
  - Modifies the standards for what constitutes a diligent search and when participants and beneficiaries are considered missing distributees
  - Makes changes to the rules for determining the payment amount to transfer to the PBGC for missing distributees if the plan sponsor does not purchase annuities to cover benefit payments
  - Revises the Program's fee structure
- Multiemployer defined benefit plans are now required to participate in the Program, subject to rules similar to the rules that apply to single-employer defined benefit plans

Voluntary Compliance Program

Changes to User Fees and Form 8950

VCP Changes

- **Significant Change in VCP Fees**
  - The new VCP user fee is based on plan assets
    - $1,500 for plans with assets of $500,000 or less
    - $3,000 for plans with assets of over $500,000 to $10,000,000
    - $3,500 for plans with assets of over $10,000,000
  - No reductions are available for nonamender submissions or for corrections of plan loan or required minimum distribution failures
- **Revised Form 8950 (application for VCP Submissions)**
  - Questions and information items about determination letter submissions deleted

ACA Reporting Extension and Employer Assessments

ACA Reporting – 2018 Extension

- **Due Date Extended for ACA Information Reporting to Individuals**
  - **2017 Forms 1095-B and 1095-C** - The due date for furnishing 2017 Forms 1095-B and 1095-C to individuals is extended to March 2, 2018 (from January 31, 2018)
  - **<u>No</u>** extension of the time required to file 2017 Forms 1094-B and 1094-C with the IRS (February 28, 2018 for paper filings; April 2, 2018 for electronic filings)
- **Relief from Penalties for Good Faith Efforts to Comply with ACA Reporting Requirements (IRS Notice 2018-06)**
  - Applies to reporting entities that can show a good faith effort to comply with the ACA information reporting requirements (Forms 1094-B, 1095-B, 1094-C, 1095-C)
    - Applies even though there may be incorrect or incomplete information (*e.g.*, missing or inaccurate taxpayer identification numbers and dates of birth).
  - Does not apply to reporting entities that do not make good faith efforts to comply and/or that file information returns with the IRS or furnish individuals with the required statements after the applicable due dates

ACA Reporting – Employer Assessments

- IRS is beginning to issue 226-J Letters (*proposed* assessments for 2015 employer shared responsibility payments)
- Employers have 30 days from the date of the letter to respond
    - Agree or disagree (in whole or in part)? Request extension?
- Review Forms submitted; verify enrollment status, offer of coverage, and full-time status; determine what needs to be corrected and submit corrections
- What are your procedures for processing 226-J letter?

AARP v. EEOC – Update on Wellness Program Litigation

AARP v. EEOC – D.C. Circuit Amends Prior Order

- **Fall 2016**: American Association of Retired Persons (AARP) brought a lawsuit challenging the final regulations issued by the Equal Employment Opportunity Commission (EEOC), which apply certain requirements of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) to employer sponsored wellness programs (EEOC Rules)
  - AARP's main argument was that the EEOC failed to justify setting the limit on incentives in voluntary wellness programs at 30% of the cost of health plan coverage
- **August 2017**: D.C. Circuit held that the EEOC's decision to set a 30% limit on incentives in voluntary wellness programs was "neither reasonable nor supported by the administrative record" and remanded the EEOC Rules back to the EEOC for further consideration – but did not vacate the EEOC Rules

AARP v. EEOC – D.C. Circuit Amends Prior Order

- **September 28, 2017**: AARP moved for the D.C. Circuit to amend its August 2017 order, to either vacate the EEOC Rules or issue an injunction against enforcement of the EEOC Rules effective January 1, 2018
- **December 2017**: D.C. Circuit amended its prior order to vacate the incentive portions of the EEOC Rules, effective January 1, 2019
- **January 2018**: EEOC argues judge cannot dictate timing of regulatory process; judge modifies order (still requires status report by March 30, 2018 and vacates rules effective January 1, 2019, but removes other mandates on timing of regulatory process)
- EEOC currently anticipates proposed rules in August 2018, final rules in October 2019, with an effective date of January 2021

2018 Planning Items

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2018 Planning Items

- **2018 IRS Limits**

- §401(k)/403(b) elective deferral maximum	$18,500
- §415 defined benefit dollar maximum	$220,000
- §415 defined contribution annual addition maximum	$55,000
- §457(b) nonqualified deferred compensation limit	$18,500
- §401(a)(17) annual compensation limit	$275,000
- §414(q) highly compensated employee limit	$120,000
- §414(v) catch-up contribution limit	$6,000
- §416(i) top-heavy officer limit	$175,000

2018 Planning Items

- **DOL's Revised Disability Claims and Appeals Procedures**
  - Effective for disability claims filed under an ERISA benefit plan on or after April 1, 2018
  - Apply to all ERISA plans that provide for a disability benefit, if the disability determination is made under the plan
  - Do not apply if the disability determination is made by a third party such as the Social Security Administration or the employer's long-term disability plan
  - Among other things, require additional disclosures to be made for disability claims

2018 Planning Items

- **New Mortality Tables Apply to Defined Benefit Plans**
  - Effective for calculating lump-sum and other accelerated distributions with annuity starting dates in a stability period beginning on or after January 1, 2018
  - For the purposes of IRC §430 minimum funding calculations, generally required for plan years beginning in 2018, unless
    - the plan sponsor uses a one-time option to delay use of the tables for one year, or
    - the plan uses a substitute plan-specific mortality table
  - In order to delay use of the new tables for one year, a plan sponsor must:
    - conclude that for the 2018 plan year, use of the new tables would be administratively impracticable or would result in an adverse business impact that is greater than de minimis (not defined in the regulations); and
    - notify the plan actuary of the plan's intent to use the mortality table under the prior basis

2018 Planning Items

- **Revised Form 5300**
  - Changes reflect the elimination of the 5-year remedial amendment cycles, and generally limit determination letter requests to new and terminating plans
- **Form 5310 (a determination letter application for a terminating plan) User Fee** - increased to $3,000
- **Relief following Hurricane Maria Available under Puerto Rico Law (announced in Administrative Determination No. 17-29)**
  - For distributions and loans to participants in retirement plans qualified under Puerto Rico law or dual-qualified under U.S. law
  - To the extent plan sponsors implement the relief, plans will need to be amended by December 31, 2018

Closing and Discussion

- What are your priorities for 2018?
- What would you like to see an upcoming Benefits & Breakfast event address?
- Reminders:
  - Retirement Plan and H&W Plan Compliance Calendars
  - CLE and Continuing Education Credit Available
  - Feedback Survey

Contact Information

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