

BENEFITS 
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Update on Top Benefits Issues on the Horizon in Early 2019

Philadelphia – Tuesday, February 12, 2019

Chicago – Thursday, February 14, 2019

Today's Agenda

- Qualified Retirement Plans
 - Changes to Hardship Withdrawal Rules
 - Student Loan Contributions
 - Fee Litigation Trends
 - Fiduciary Investment Advice
- Excise Tax on Executive Compensation for Tax-Exempt Employers
- Health and Welfare Plans
 - ACA Update
 - Administrative Agency Developments
 - Case Law Developments and Cases to Watch
 - Fiduciary Considerations Related to Opioid Crisis

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Changes to Hardship Withdrawal Rules

Changes to Hardship Withdrawal Rules

- No longer required to exhaust the opportunity to take loans under the plan (or other plans of the same employer) before receiving a hardship withdrawal
- Permitted to take hardship withdrawals from not only elective deferral contributions, but also QNECs, QMACs and earnings (including post-1988 earnings on elective deferrals)

Changes to Hardship Withdrawal Rules (cont'd)

- Removal of the safe harbor rule requirement that the participant's deferral contributions to all plans maintained by the employer be suspended for 6 months following the withdrawal
- Effective for plan years beginning after December 31, 2018, but immediate amendments (apparently) not required

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Student Loan Contributions

Student Loan Contributions

- PLR 201833012 is widely misunderstood – it states only that employer contributions conditioned upon student loan payments would not violate the Code’s “contingent benefit” prohibition...

Student Loan Contributions (cont'd)

“A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.”

Student Loan Contributions (cont'd)

*“The SLR nonelective contribution will be subject to all applicable plan qualification requirements, including, but not limited to, eligibility, vesting, and distribution rules, contribution limits, and coverage and nondiscrimination testing. The SLR nonelective contribution **will not be treated as a matching contribution** for purposes of any testing under or requirement of section 401(m).”*

Student Loan Contributions (cont'd)

- Likely “self-administration” by plan sponsors – recordkeeper systems, etc. will need to be updated
- Amendment of plan may create some challenges
- How to document payment of student loans?
 - No specific IRS guidance, but consider guidance in other contexts (e.g., hardship eligibility)
- Consider effect on ADP and ACP non-discrimination testing

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Fee Litigation Trends

Fee Litigation Trends

- Failure to manage recordkeeping costs – still #1
 - RFPs required?
 - Frequency of RFP/benchmarking checks?
 - Long-term service agreements – too locked in?
 - Discounts for recordkeeper-affiliated investments can create challenges
 - “Per participant” costs
 - Revenue sharing (confusion over lowest “net cost” share classes vs. lowest “total cost” share classes)

Fee Litigation Trends (cont'd)

- Increased targeting of 403(b) plan sponsors
- Use of platform-level account managers (and fee levels) being challenged
- Appropriate number of investment options?

Fee Litigation Trends (cont'd)

- Failure to consider non-mutual fund options for so-called “mega plans”
- Use of in-house products being challenged
 - Fiduciary dimensions
 - PT dimensions (for example, PTCE 77-3)

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Fiduciary Investment Advice

Fiduciary Investment Advice

- DOL's Fiduciary Rule was struck down (vacated *in toto*) by the Fifth Circuit in 2018
 - Broader definition of fiduciary advice no longer applies, along with certain carve-outs
 - New and amended PT exemptions also gone
- Return to 1975 "5-Part Test" for fiduciary advice
- DOL and IRS transition relief for advice PTs
- No effect on discretionary advisors (investment managers)

Fiduciary Investment Advice (cont'd)

- DOL has announced plans to re-propose new set of rulemaking
 - Likely in Summer or Fall of 2019
 - Differences may affect IRA advice more than plan advice – specifics are unclear at this point
 - Advice on rollovers will be a focal point
 - Will include a replacement exemption for BIC Exemption
 - Coordination with SEC “best interest” proposals

Fiduciary Investment Advice (cont'd)

- In the meantime:
 - What relationships are affected? Are there any conflicts?
 - Recognize limiting effect of “regular basis” requirement in 5-Part Test
 - Application of PT rules for advice to large plan fiduciaries (>\$50 million) is somewhat unclear
 - Advice on IRA rollovers is another grey area – unclear whether (and how) previous DOL guidance applies

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Excise Tax on Executive Compensation for Tax- Exempt Employers

Excise Tax On Executive Compensation for Tax-Exempt Employers

- New Code Section 4960 imposes a 21% excise tax on payment to a “Covered Employee” of any:
 - “Excess Remuneration”
 - “Excess Parachute Payments”
- Tax is generally effective for years commencing after December 31, 2017
- “Applicable Tax-Exempt Organizations” include tax-exempts under Code Section 501(a), and some other categories

Excise Tax On Executive Compensation for Tax-Exempt Employers (cont'd)

- For calendar year taxpayers, May 15, 2019 is the first deadline to calculate and pay tax (Form 4720 is used)
- IRS Notice 2019-09:
 - “Covered Employee” – generally, five highest paid in (i) current year, or (ii) preceding year beginning after December 31, 2016
 - Aggregation rules for certain “related” organizations
 - “Remuneration” is broadly defined and includes certain deferred compensation benefits upon vesting, but there are a number of important exclusions too

Excise Tax On Executive Compensation for Tax-Exempt Employers (cont'd)

- Excess Remuneration – in excess of \$1 million
 - Special rules apply for apportioning liability among multiple (related) organizations
- Excess Parachute Payments – over “base amount”
 - Parachute payments are payments “in the nature of compensation” that are contingent upon involuntary termination of employment, and equal or exceed 3x “base amount”
 - “Base amount” – average compensation over previous five years
 - Certain amounts excluded from definition of “parachute” payments
 - Special rules apply for accelerated payments and vesting

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ACA Update

Texas v. U.S. ACA Decision

- District Court ruling creates new uncertainty –
 - Individual mandate is unconstitutional without the penalty/tax, which Congress zeroed out in 2017 Tax Cuts and Jobs Act (effective in 2019); no other constitutional basis to support it
- Other ACA provisions cannot stand without the individual mandate and are invalid
 - In follow up ruling, the Judge issued a stay and final summary judgment, so the ACA remains in place during immediate appeal to Fifth Circuit
- What's Next?
 - Appeal in Fifth Circuit Court of Appeals
 - Will U.S. Supreme Court have to decide fate of ACA (again)?

Texas v. U.S. ACA Decision (cont'd)

- Possible implications for employer health plans if ACA invalidated
 - End of employer shared responsibility mandate, market reform mandates such as pre-existing condition exclusion prohibition, child coverage to age 26, external claims review, preventive services mandate, cost-sharing limits, etc.
 - Employers could choose provisions to maintain and provisions to eliminate
 - States likely to become more active with individual mandates and other mandates
 - ERISA may preempt such efforts for self-funded plans

2018 ACA Reporting Deadline Extended

- IRS Notice 2018-94 provides an extension to employers for distributing Forms 1095-B and 1095-C to employees and covered individuals
 - These forms are due to employees by March 4, 2019 (extended from January 31, 2019)
 - Similar extensions have been granted in prior years, but Notice 2018-94 indicates no additional extensions will be granted

2018 ACA Reporting Deadline Extended (cont'd)

- No extension for filing forms with the IRS
 - Due date for employers filing 250 or more returns is April 1, 2019 (must file electronically); February 28, 2019 for paper filings
- IRS issued updated forms and instructions for reporting 2018 coverage

Employer Shared Responsibility Payment (ESRP) Assessment Activity

- ESRP penalties remain in force – proposed legislation to suspend the penalties has not advanced
- IRS has made ESRP assessments (Letter 226J) for 2015, and is now making 2016 assessments
 - Penalties assessed in Letter 226J are proposed, not final
 - Review records and return Form 14764 (ESRP Response) with explanation and/or corrections
 - Many early assessments relate to errors in reporting

Preliminary Injunction Stops Enforcement of Exemptions from Contraceptive Coverage Mandate

- Final rules expanding exemptions based on religious and moral objections to the ACA's contraceptive mandate were to take effect January 14, 2019
- IRS/DOL/HHS authority to issue final regulations was challenged, and nationwide preliminary injunction blocks the agencies from enforcing final regulations
- Obama-era accommodation to the contraceptive mandate remains in effect

Cadillac Tax Repeal Effort

- “Cadillac” tax on the amount by which the cost of an employee's employer-sponsored health coverage exceeds a threshold amount under the ACA (generally, \$10,200 single, \$27,500 family, as adjusted)
- Cadillac tax delayed until 2022 (originally to be effective in 2018, then 2020)
- House of Representatives has reintroduced bipartisan legislation to repeal the 40 percent tax on high-cost employer-sponsored health coverage (Middle Class Health Benefits Tax Repeal Act)
 - Absence of offset for lost tax revenue may impede passage

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Administrative Agency Developments

Two New Types of Health Reimbursement Arrangements Proposed (to be effective 1/1/2020)

- (1) **Integrated HRA** - integrated with individual health insurance coverage; requirements include that the same class of employees offered Integrated HRA cannot be offered coverage under the employer's traditional group health plan
- (2) **Excepted Benefit HRA** - contributions limited to \$1,800 annually to reimburse medical expenses, excluding premiums for individual health insurance coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or for Medicare Part B or Part D; employer must offer other traditional medical plan coverage to employees eligible for the HRA
 - IRS Notice 2018-88 provides safe harbors for determining the affordability and minimum value of an Integrated HRA under ACA
 - Employees cannot be offered both new types of HRAs
 - *Caution:* questions remain and watch for discrimination under IRC §105(h)

Wellness Programs – Update on EEOC Regulations

- EEOC rule setting 30% incentive limit for wellness program to be “voluntary” under ADA vacated as of 1/1/19
- Other parts of the rule, *e.g.*, notice, reasonable design and confidentiality requirements remain in effect
- No new regulations likely to be issued until EEOC appointees confirmed by the Senate
- Options for providing incentives:
 - Continue using the EEOC rules
 - Use the HIPAA/ACA rules even if not a group health plan
 - Stop using incentives for ADA covered programs

Health Savings Accounts – IRS Information Letter on Mistaken Contributions

- Information Letter 2018-0033 clarifies that an employer may request the return of mistaken HSA contributions upon clear documentary evidence of an administrative or processing error - among the examples:
 - Amount withheld/deposited greater than HSA election
 - Unintended employer contribution
 - Certain payroll or election change processing errors

HHS Proposal to End Prescription Drug Rebates

- Prohibits drug companies from paying rebates to Medicare Part D and Medicaid plan sponsors and their PBMs
- Certain point-of-sale discounts for participants and PBM service fees would be permitted instead
- Probably out-of-pocket costs will decrease but premiums will rise - most beneficial to those taking expensive drugs
- Unlikely to become a final rule – PBMs and insurers will lobby against; opposed by Democrats and AARP (similar proposal)
- HHS rule not applicable but employers should consider working with their PBM to pass on discounts to participants

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Case Law Developments and Cases to Watch

Louis J. Peterson, D.C., et al. v. UnitedHealth Group

Cross-Plan Offset Decision

- Eighth Circuit affirmed lower court decision that ERISA plan terms did not permit United Health Group (and affiliates) to engage in cross-plan offsetting
 - *Cross-plan offsetting*: Third party administrator practice of recouping benefit overpayments made to a provider under one plan by reducing payments to the same provider under another plan
- Court found that plan document language granting the plan administrator broad authority to interpret and implement the plan was not sufficient to authorize the practice of cross-plan offsetting
- Court did not reach a conclusion on whether cross-plan offsetting *per se* violates ERISA, but noted that the practice “is in some tension with” ERISA’s exclusive benefit rule

Louis J. Peterson, D.C., et al. v. UnitedHealth Group
Cross-Plan Offset Decision (cont'd)

- **Takeaways from the case:**
 - Periodic review of administrative services agreements is important, to ensure that plan fiduciaries are aware of all potential approaches the third party administrator may take to recover overpayments
 - Periodic review of plan language is important, to ensure that the plan terms authorize the approaches being used for recovering overpayments
 - The question of whether cross-plan offsetting is permissible under ERISA remains open, and plan fiduciaries should monitor how this issue develops

Shore v. The Charlotte-Mecklenburg Hospital Authority Class Action Fiduciary Breach Complaint

- Complaint alleges that the health system employer breached its fiduciary duties by engaging a subsidiary entity as the network administrator for the health plan, resulting in:
 - higher participant costs for benefits than would apply under comparable networks
 - higher reimbursement rates to the health system employer from the health plan than would apply under comparable networks
- Complaint also alleges that the employer engaged in ERISA prohibited transactions by virtue of the fact that plan administration fees are paid to a subsidiary of the employer

Shore v. The Charlotte-Mecklenburg Hospital Authority Class Action Fiduciary Breach Complaint (Cont'd)

■ **Takeaways from the case:**

- Allegations of fiduciary breach aren't only reserved for retirement plans, and welfare benefit plans are equally at risk for lawsuits
- Plan sponsors may want to complete a fiduciary check up for their welfare benefit plans, including:
 - Review of the current fiduciary structure and processes that are in place for their welfare benefit plans
 - Review of delegations of fiduciary authority against which individuals are actually making the fiduciary decisions
 - Review of third party administrative services arrangements and fee structures

Morehouse v. Steak N Shake, Inc.

COBRA Notice Decision

- An Ohio district court found that the employer violated its obligation to provide a COBRA notice to an employee who went on leave of absence due to a work-related injury
 - The court found that the employee's reduction in hours due to the leave of absence was a COBRA qualifying event, even though she continued to be eligible for medical coverage during the leave (she later lost coverage when she failed to make a premium payment)
 - The court reasoned that a change in the way the employee paid for medical coverage (premium payments were deducted from her worker's compensation benefits while she was on leave) was a loss of coverage for COBRA purposes because the employee "cease[d] to be covered under the same terms and conditions"
- The court assessed statutory damages against the employer at a rate of \$50/day for the period the employee was without coverage

Morehouse v. Steak N Shake, Inc.

COBRA Notice Decision (Cont'd)

- **Takeaways from the case:**

- Plan fiduciaries should review their procedures for COBRA compliance, particularly around:
 - identifying when a COBRA “loss of coverage” occurs in connection with an employee’s leave of absence
 - timely providing COBRA notices that are written clearly and explain the rules for continuing and paying for coverage in a way that is understandable to an average employee

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Fiduciary Considerations Related to the Opioid Crisis

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- Employer plan sponsors have ERISA fiduciary obligations to administer plans in accordance with plan terms, for the exclusive purpose of providing benefits to plan participants and beneficiaries and defraying reasonable plan administrative expenses
- Based on these responsibilities, a plan sponsor has an obligation to identify fraud against the plan, including opioid-related claims that are fraudulent

Fiduciary Considerations Related to the Opioid Crisis (cont'd)

- **Impact to Plan Sponsors:** Consider plan design options to address opioid use; understand what the pharmacy benefit manager is doing to address opioid use
 - Reservation of rights provision in plan, allowing retroactive rescission of coverage for participant fraud or intentional misrepresentation (how are “fraud” and “intent” defined)
 - Limits on quantity of opioid pills covered
 - Mandatory step therapy for opioids (or other utilization management techniques)
 - Limit coverage of opioids to in-network pharmacies
 - Require high opioid users to use a single pharmacy or a single medical provider for opioid prescriptions
 - Review/expand network of mental health and substance abuse treatment providers
 - Expand coverage of alternatives for pain management (e.g., physical therapy, behavior therapy, lifestyle adjustments, acupuncture and massage)

Contact Information

Philadelphia	Chicago
Monica Novak, Partner monica.novak@dbr.com (215) 988-1114	Joshua Waldbeser, Partner joshua.waldbeser@dbr.com (312) 569-1317
Karen Gelula, Counsel karen.gelula@dbr.com (215) 988-2729	Dawn Sellstrom, Counsel dawn.sellstrom@dbr.com (312) 569-1324