Kutak Rock LLP

EMPLOYEE BENEFITS NEWS

Kutak Rock Announces Launch of New Retirement Plan Opinion Letter Program

Earlier this year, Kutak Rock announce the first of its kind Retirement Plan Opinion Letter Program ("RPOL") in response the Internal Revenue Service's elimination of its determination letter program (with limited exceptions) for qualified retirement plans. This article summarizes the issues created by the IRS' decision and the benefits RPOL can provide to plan sponsors.

Beginning January 1, 2017, the IRS will eliminate the determination letter program for individually designed qualified plans (subject to certain limited exceptions), which means employers can no longer rely on the IRS to issue an opinion as to the tax qualification of the employer's retirement plans. Opinions on the tax qualification of retirement plans are important for a number of reasons, including:

- Most lenders will require an opinion as to the tax qualification of an employer's retirement plans.
- Standard due diligence in corporate transactions requires evidence of the current tax qualification of all retirement plans.
- Retirement plan auditors may charge significantly more for the audit, or may specifically disclaim part of the audit, if the employer does not have a current opinion letter for the retirement plan.
- Regular opinion letters will protect employers from many penalties associated with the plan's qualification
- The opinion letter process affords plan sponsors the opportunity to implement best practices, identify potential issues before they occur and correct minor issues before they become more substantial.

Kutak Rock's Retirement Plan Opinion Letter ("RPOL") Program

To provide plan sponsors assurances their plan documents comply with the applicable Internal Revenue Code requirements, earlier this year Kutak Rock LLP introduced its RPOL program, under which Kutak Rock's Employee Benefits and Executive Compensation Practice Group will:

- Conduct an annual review of an employer's retirement plans to confirm compliance with the Internal Revenue Code's documentary requirements;
- Provide employers with recommendations regarding best practices;
- Identify potential issues and provide guidance on correcting minor operational issues; and
- Issue an opinion letter allowing plan sponsors to demonstrate their retirement plan documents comply with applicable law.

A number of clients have already availed themselves of the RPOL program, and we expect many more to follow. We expect the RPOL program to become the standard for plan sponsors across the country in the coming years.

Kutak Rock Welcomes Sevawn Foster in Little Rock

Sevawn Foster is a 2015 graduate of University of Arkansas at Little Rock School of Law and received her LL.M. in Taxation, Certificate in Employee Benefits in 2016 from Georgetown University Law Center. She joined our group in June. Ms. Foster joins us from a national Washington D.C. firm, where she gained experience in employee benefits compliance and taxation. She will assist all the attorneys in the Employee Benefits and Executive Compensation Group, with a focus on tax law.

Overhaul of Form 5500 in the Works

In July, the Department of Labor ("DOL") introduced proposed revisions to Form 5500. If implemented, the revisions will allow government agencies to collect a much wider array of plan information, particularly as it relates to group health plans. The DOL is seeking public comments through October 4 on its proposed revisions, which are tentatively set to affect plan years beginning on or after January 1, 2019.

Form 5500 allows plan sponsors to satisfy their reporting obligations under ERISA and the Internal Revenue Code. However, more and more, the IRS and DOL use Form 5500 to identify their compliance and enforcement initiatives. The proposed revisions to Form 5500 indicate additional scrutiny is on the horizon.

The three major proposed revisions include: (1) the elimination of the small plan exception; (2) the addition of Schedule J; and (3) the revision of Form 5500-SF eligibility. Retirement plans will also be impacted. All told, these changes will affect millions of plan sponsors.

Small Plan Exception

Under the existing reporting regulations, group health plans with fewer than 100 participants that are fully insured, self-insured or combination of the two are exempt from filing Form 5500. The DOL proposes eliminating this exception and requiring all group health plans to file Form 5500, regardless of size or funding. However, the existing exemptions from reporting on Schedules C, G and H would continue to apply to welfare plans, regardless of size.

Schedule J

Schedule J, Group Health Plan Information, is part of the DOL's and IRS' efforts to determine whether a group health plan complies with ERISA, the Internal Revenue Code and the ACA. As proposed, it will request the following information:

- Whether the plan offers coverage to spouses, children or retirees
- Whether the plan is grandfathered, a HDHP, health FSA or HRA
- How many people are receiving COBRA coverage
- The types of coverage the plan offers (e.g., preventive care, mental health, etc.)
- Stop-loss premiums and attachment points
- Rebates, refunds and reimbursements received from a service provider
- Whether the plan's summary plan description, summaries of material modifications and summaries of benefits and coverage are compliant
- Whether the plan complies with HIPAA, GINA, the Mental Health Parity and Addiction Equity Act, and the ACA

- Detailed claim information, such as the number of claims submitted, appealed, approved and denied each year, as well as the total dollar amount of claims paid

Form 5500-SF Eligibility

The DOL is seeking to have fewer small welfare plans use Form 5500-SF. Currently, a welfare plan (including one that provides group health benefits) may file Form 5500-SF if it has fewer than 100 participants. Under the proposed revisions, small welfare plans that provide group health benefits will no longer be eligible to use Form 5500-SF. Plan sponsors still eligible to file Form 5500-SF will need to provide additional balance sheet information and categorize the plan's investments. If a small plan is invested in any asset other than the eight categories listed, it would be ineligible to file Form 5500-SF.

Retirement Plans

Other proposed Form 5500 revisions would affect retirement plans and include the:

- Collection of information on employer contributions, employee participation rates, asset allocation by age, and the number of participants invested in default investment options

- Reintroduction of Schedule E for employee stock ownership plans. The revised Schedule E would include some of the same questions that appeared on the pre-2009 document, revisions to those questions and new questions

- Expansion of information collected in Schedules G, H and R, including details on plan fees; terminations, mergers and consolidations; account balances; required minimum distributions; discrimination testing; and how the match is calculated

Finally, the DOL's proposed revisions will improve data mining by making additional data fields searchable. More minable data means plans are more likely to be inspected by the government or plaintiffs' lawyers.

Form 5500-SF
Department of the Treasury
Internal Revenue Service
Department of Labor
Employee Benefits Security Administration
Pension Benefit Guaranty Corporation

Short Form Annual Return/Report of Small Employee Benefit Plan
This form is required to be filed under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA), and sections 6057(b) and 6058(a) of the Internal Revenue Code (the Code).
▸ **Complete all entries in accordance with the instructions to the Form 5500-SF.**

OMB Nos. 1210-0110
1210-0089
2016
This Form is Open to Public Inspection

Part I **Annual Report Identification Information**
For calendar plan year 2016 or fiscal plan year beginning and ending

A This return/report is for: ☐ a single-employer plan ☐ a multiple-employer plan (not multiemployer) (Filers checking this box must attach a list of participating employer information in accordance with the form instructions.) ☐ a one-participant plan ☐ a foreign plan

B This return/report is ☐ the first return/report ☐ the final return/report ☐ an amended return/report ☐ a short plan year return/report (less than 12 months)

C Check box if filing under: ☐ Form 5558 ☐ automatic extension ☐ DFVC program ☐ special extension (enter description)

Part II **Basic Plan Information**—enter all requested information
1a Name of plan
1b Three-digit plan number (PN) ▸
1c Effective date of plan
2a Plan sponsor's name (employer, if for a single-employer plan)
Mailing address (include room, apt., suite no. and street, or P.O. Box)
City or town, state or province, country, and ZIP or foreign postal code (if foreign, see instructions)
2b Employer Identification Number (EIN)
2c Sponsor's telephone number

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Proposed Regulations Under Code 409A

Earlier this year, the Internal Revenue Service (the "IRS") issued proposed regulations that both clarify and modify the final Internal Revenue Code ("Code") Section 409A final regulations—the regulations that govern nonqualified deferred compensation ("NQDC"). This represents the first proposed changes to the final regulations since 2007.

The proposed regulations allow for more flexibility on NQDC distributions, provide employers the ability to offer stock rights to prospective employees, and relax certain administrative requirements. Employers are permitted to rely on the proposed regulations immediately.

NQDC Distribution Changes

The proposed regulations include the following changes regarding distribution of NQDC:

- **Payments Upon Plan Termination**. The regulations clarify payments may be accelerated upon plan termination only if all similar plans are terminated and liquidated.
- **Payments Upon Beneficiary's Death, Disability, or Unforeseeable Emergency**. The regulations allow for acceleration of payment upon a beneficiary death, disability, or unforeseeable emergency. Previously, the law only allowed this for participants.
- **Payments Upon Death.** The regulations allow a grace period for making payments upon death due to practical issues (e.g., confirmation of death and probate).
- **Payments to Independent Contractors on Separation From Service**. The regulations include additional information regarding how to determine whether an independent contractor has separated from service to determine whether a payment is due.
- **Payments To Comply With Debt Collection Laws**. The regulations allow accelerated payments to the extent "reasonably necessary" to comply with federal debt collection laws.

Stock Rights Changes

The proposed regulations include the following changes concerning distribution of NQDC:

- **Stock Rights Before Employment**. The regulations revise prior law to allow employers to grant Code Section 409A-exempt stock rights to an individual who is reasonably expected to begin providing service to the employer within 12 months. However, if services do not begin within 12 months, the stock right must be forfeited.
- **Reduction of Payment for Bad Actors**. The regulations allow employers to reduce stock right payments for cause or violation of non-compete or nondisclosure agreements.

Other Changes

In addition to the above changes, the proposed regulations also include the following:

- **Short-Term Deferral Rule**. The regulations modify the short-term deferral exemption from Code Section 409A to permit a delay in payment to avoid violating federal securities or other applicable laws.

- **Separation Pay Plans**. The regulations allow employers to apply separation pay plans to employees who earn no compensation during the year before the separation from service.

- **Income Inclusion for Unvested Amounts**. Currently, where a plan violates Code Section 409A, the plan can be corrected with respect to unvested amounts, in order to avoid penalties, subject to an anti-abuse rule. The regulations seek to strengthen the anti-abuse rule.

If you would like to discuss how you might take advantage of any of the new rules under the proposed 409A regulations please contact your Kutak Rock LLP attorney or a member of our Employee Benefits and Executive Compensation practice group.

EEOC Finalizes Wellness Program Regulations

Earlier this year, the Equal Employment Opportunity Commission ("EEOC") published proposed regulations for wellness programs under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). (See our Client Alert for more information on the proposed regulations.) The EEOC finalized these rules in May 2016 adopting the proposed regulations with one notable exception.

The final regulations now apply to all wellness programs regardless of whether they are a part of a group health plan. This means employers offering wellness programs outside of a group health plan may offer incentives to their employees in exchange for providing information that would normally be protected by the ADA or GINA. For example, an employer may offer incentives to all employees in exchange for filling out a health risk assessment that requests information regarding an employee's disability status. Under the proposed regulations, this type of incentive could only be offered to employees enrolled in the employer's plan. However, employers may now offer incentives to employees not participating in an employer's group health plan. The new regulations apply on the first day of the first plan year that begins on or after January 1, 2017.

The Cadillac Tax

The Patient Protection and Affordable Care Act ("PPACA") created the Cadillac Tax—a forthcoming annual excise tax on high-cost employer health benefit plans. Any group health plan made available to an employee by an employer, which is excludable from the employee's gross income, is potentially subject to this tax.

What is the Cadillac Tax?

The Cadillac Tax will impose a 40% tax on amounts exceeding the cost of coverage threshold, which is currently $10,200 for individual coverage and $27,500 for family coverage (indexed for inflation). Employer and employee premium contributions will count against the threshold, as will most employer and employee contributions to health savings accounts, flexible spending accounts, and health reimbursement accounts.

If the health coverage is fully insured, the health insurance issuer is liable for the tax. If the coverage is self-insured, the person that administers the plan benefits is liable for the tax. This may be the employer or the third-party administrator.

The 2016 Consolidated Appropriations Act implemented two major changes to the Cadillac Tax: (1) the Cadillac Tax will not go into effect until 2020, and (2) the person who pays the Cadillac Tax may deduct it for federal income tax purposes.

How does the Cadillac Tax Work?

During the 2020 calendar year, a business provides its employee with a self-insured health care plan subject to a $14,200 premium. Under the PPACA's current cost of coverage threshold, the first $10,200 of the premium would be exempt from the Cadillac Tax. Only the remaining $4,000 would be subject to a 40% excise tax. Overall, the business would owe $1,600 as a result of the Cadillac Tax.

Assuming the business faces a tax rate of 35%, every deductible dollar will generally reduce the business' income tax burden by 35 cents. So, the business will still face a Cadillac Tax of $1,600, but it will be able to deduct an additional $1,600 from its taxable income, which will reduce its income tax by $560. Overall, the Cadillac Tax on this employee's health coverage will lead to $1,040 in tax liability for the business.

Next Steps

Although the effective date of the Cadillac Tax has been delayed until 2020, employers should already be considering changes to their group health plan designs to avoid the Cadillac Tax's application. It is possible that Congress could further amend the Cadillac Tax prior to the new effective date, so employers should also continue to monitor legislative developments.

Paid Sick Leave Laws Create Challenges for Employers

In recent years, a multitude of cities and states have passed laws requiring employers to provide paid sick leave to their employees. As of November 2016, seven states, 30 cities, two counties, and the District of Columbia have laws requiring employers to provide paid sick leave. Additionally, a new executive order requires certain federal contractors to provide paid sick leave. These laws present the following challenges for employers:

- **Finding out about the law**: With laws and amendments being passed at a rapid rate, it is difficult for multistate employers to keep track of which business locations are subject to paid sick leave requirements. Since many of these laws are city ordinances, they are often not publicized in national news outlets, which makes it more difficult for employers to find out when a new paid sick leave law has been passed.

- **Understanding the law**: The non-uniformity of paid sick leave laws adds another complication for employers. Differences in substance and drafting style can make it difficult for employers to understand what is required by each law.

- **Deciding which law applies**: In addition to complying with multiple state and local laws in the case of multistate employers, some employers are subject to multiple paid sick leave laws in the same city. For example, an employer who operates a business in San Diego, California must take the time to understand how the California state statute on paid sick leave interacts with the San Diego ordinance on paid sick leave. In situations like this, an employer will be required to apply the more generous provisions between the two laws. Deciding which provisions apply can be a complicated and uncertain process.

- **Applying the law**: Some states and cities provide helpful resources for employers such as regulations, frequently asked questions, or guidelines. These resources can be especially helpful when a statute is not clearly drafted. Unfortunately, many jurisdictions provide minimal guidance, and some cities provide no guidance at all.

- **Cost of complying with the law**: The biggest challenge for most employers is the cost of creating and operating paid sick leave plans. Paying employees for time not worked increases labor costs. Additional expenses also arise from the administrative task of setting up payroll systems to track paid leave hours.

Employers should be on the lookout for new statutes and ordinances requiring employers to provide paid sick leave. Employers should also examine their paid sick leave policies in each of their locations to determine if the policies they offer comply with state and local laws. Employers may also explore the possibility of structuring their plans as welfare plans under ERISA so that any paid sick leave law would be preempted by ERISA.

USERRA Leaves No Man (or Woman) Behind

Whittington v. Vossloh Trucking Material, Inc.

On June 21, 2016, the United States District Court for the Southern District of West Virginia denied a motion to dismiss the plaintiffs' Uniformed Services Employment and Reemployment Rights Act ("USERRA") claims even though the plaintiffs were not uniformed service members. This case illustrates the importance of USERRA compliance.

Ms. Whittington and her son, Jim (collectively, the "Whittingtons"), worked for Vossloh Trucking Materials (the "Company"). Ms. Whittington's husband held a managerial position in the Company, and the Company asked him to recommend his successor. The Company, refused to accept his recommendation, Mr. Landers, because Mr. Landers was a veteran. Mr. Landers pursued a USERRA claim against the Company on that information.

In the meantime, the Whittingtons aided Mr. Landers in his claim. When the Company found out, it threatened to terminate them. The Company had the Whittingtons sign agreements stating they would stop assisting Mr. Landers. However, the Whittingtons continued to help Mr. Landers, and they were terminated by the Company. The Whittingtons then brought USERRA claims against the Company.

In its motion to dismiss, the Company argued the Whittingtons were not terminated for supporting Mr. Landers' USERRA claim. The court overruled the Company because the Whittingtons were terminated once they volunteered to appear as fact witnesses on Mr. Landers' behalf. Ultimately, the court allowed the claims to continue.

This case serves as an important reminder not to take discriminatory employment actions on the basis of a candidate's uniformed service and how reprisals can lead to additional litigation. Employers should be familiar with USERRA's requirements, including the protections it provides for individuals who are not actually in the uniformed services.

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Newsworthy Items

Increased Civil Penalties for Reporting/Disclosure Violations. The DOL issued final rules that adjust ERISA's civil penalties for inflation and significantly raise certain penalties. The potential penalty for failing to timely file Form 5500 increased to $2,063 per day, and the potential penalty for failing to provide automatic enrollment notices increased to $1,632 per day. The new rates apply to penalties assessed after August 1, 2016.

Revised Retirement Plan Correction Procedures. In September, the IRS issued Rev. Proc. 2016-51, which modifies the Service's correction program, known as the Employee Plans Compliance Resolution System ("EPCRS"), in light of changes to the determination letter program. The revenue procedure also includes a revised approach to determining Audit CAP sanctions, whereby the minimum Audit CAP penalty will be no less than the fees associated with voluntary correction ("VCP"). This suggests the IRS expects plan sponsors to utilize VCP and will penalize plan sponsors on audit accordingly.

Proposed Regulations on Missing Participants Program. The PBGC published a proposed regulation relating to ERISA's missing participants program in September. The proposed regulation expands the current program, which covers only terminated single employer defined benefit plans, to terminated defined contribution plans, small professional service defined benefit plans, and multiemployer plans covered by the PBGC.

2017 Cost-of-Living Increases. The IRS announced its annual cost-of-living adjustments for qualified retirement plans for the 2017 tax year. These adjustments affect the amount of benefits payable and contributions allocable under qualified retirement plans. A chart of the 2017 limitations can be found here.

Cities and States Continue To Pass Paid Leave Laws. In 2017, paid sick leave laws are scheduled to take effect in Berkeley, CA; Chicago, IL; Cook County, IL; Minneapolis, MN; Morristown, NJ; Santa Monica, CA; Spokane, WA; and St. Paul, MN. In addition, a paid sick leave law applicable to federal government contracts will take effect next year, along with statewide laws in Arizona and Vermont. We anticipate the proliferation of paid sick leave legislation will continue.

2017 Health Savings Account Increases. The IRS adjusted its maximum annual Health Savings Accounts ("HSAs") contribution amount for family coverage, effective 2017. The annual limit for an individual with self-only coverage under a high deductible health plan will be $3,400 (an increase of $50 from 2016). Individuals with family coverage under a high deductible health plan can continue to contribute up to $6,750 (no increase from 2016) per year.

No End Soon to High Fee Cases. Class action lawsuits have been filed against 12 major universities relating to the

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Newsworthy Items, cont'd.

schools' retirement plans. The complaints focus on large service providers like TIAA-CREF, Fidelity and Vanguard and allege that plan participants pay unreasonable fees by, among other things, offering numerous investment options at multiple vendors. These cases highlight the importance of regularly reviewing service providers and negotiating lower fees.

Cycle A Filing. In accordance with the IRS cyclical process for submitting an individually designed retirement plan for a determination as to its tax-qualified status under the Internal Revenue Code, employers in "Cycle A" must submit their qualified plans to the IRS no later than January 31, 2017. Generally, plans maintained by employers with employer identification numbers ending in either 1 or 6 are Cycle A eligible. If you think you sponsor a Cycle A plan, this is your last opportunity to restate under the IRS' determination letter program.

Fiduciary Rule To Take Effect April 10, 2017. The fiduciary rule is still set to take effect in 2017. If you have not heard from your record keeper regarding changes to participant advice, investment education or distribution option counseling, you should request that information now so you can carefully review the changes.

In Case You Missed It

In case you missed any of our client alerts this year, please find them at the following links:

January 22, 2016
Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan: Robbing Peter and Not Paying Paul

April 7, 2016
Department of Labor Finalizes Fiduciary Rule

April 11, 2016
Group Health Plans and Their Business Associates: Phase 2 of the HIPAA Audit Program Is Underway

April 18, 2016
Denial Letters Must Disclose Plan-Imposed Statutes of Limitation

April 21, 2016
Paid Leave Laws Continue To Gain Momentum

May 25, 2016
EEOC Finalizes Wellness Program Regulations

July 8, 2016
IRS Issues Guidance on Post-2017 Required Plan Amendments

August 11, 2016
Six Paid Sick Leave Laws to Take Effect in 2017

October 13, 2016
How a Recent HIPAA Settlement Impacts Benefit Plans

November 8, 2016
2017 Cost-of-Living Adjustment and Other Participant Notices

December 12, 2016
President Expected to Sign 21st Century Cures Act

December 20, 2016
U.S. Department of Labor issues New Disability Claims Regulations

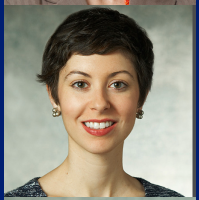
Kutak Rock Welcomes Law Clerk Alex Engelkamp

Mr. Alex Engelkamp is a third year law student at the University of Nebraska-Lincoln College of law, where he is expected to graduate in May of 2017. He joined our group as a law clerk in May, and plans to work as an associate starting September of 2017. Prior to law school, Mr. Engelkamp studied political science at Benedictine College, where he graduated summa cum laude. He will assist all the attorneys in the Employee Benefits Group.

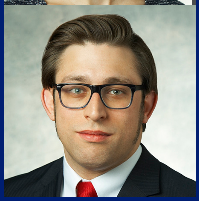
Kutak Rock Employee Benefits Key Contacts

John E. Schembari
Partner
John.Schembari@KutakRock.com
402-231-8886 *direct*

Michelle M. Ueding
Partner
Michelle.Ueding@KutakRock.com
402-661-8613 *direct*



Alexis Pappas
Associate
Alexis.Pappas@KutakRock.com
402-661-8646 *direct*



Jeffrey J. McGuire
Associate
Jeffrey.McGuire@KutakRock.com
402-661-8647*direct*

William C. McCartney
Partner
William.McCartney@KutakRock.com
949-852-5052 *direct*

P. Brian Bartels
Partner
Brian.Bartels@KutakRock.com
402-231-8897 *direct*

Sevawn S. Foster
Associate
Sevawn.Foster@KutakRock.com
501-975-3120 *direct*

Alexander Engelkamp
Law Clerk, Omaha