EMPLOYEE BENEFITS
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EMPLOYEE BENEFITS

Employee Benefit Issues to Consider in M&A Transactions –

Getting a Seat at the Deal Table

For those of us involved in employee benefit plans, we understand the complexities of employee benefit issues in major corporate transactions. Whether it is selling a division, merging with another company, or hiring a large group of employees from another company, each of these major transactions creates issues for the buyer and the seller. And as we all know, HR and the Benefits team are usually the last ones involved in any of these transactions!

The following article briefly highlights some of the employee benefit issues that can come up in a merger or acquisition transaction. Hopefully, this list of issues will arm you with some tools to facilitate getting an HR or Benefits person a seat at the "deal" table so that some of these issues can be addressed before the deal is done.

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IRS Creates New Broad-Based Equity Plan Under 83(i)

The Tax Cuts and Jobs Act (the "Act") created a new section of the Internal Revenue Code (the "Code"). Code Section 83(i) ("83(i)") allows privately held corporations to offer a broad-based tax-qualified equity compensation program, which permits employees receiving awards of stock options and/or restricted stock units ("RSUs") to delay income recognition and limit the amount of the stock's future appreciation that will be subject to ordinary income tax rates.

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Transaction Structure – Asset Sale/Stock Sale/Merger

The type of transaction you engage in will impact whether or not you assume or dispose of an employee benefit plan and its attendant liabilities. In a stock sale or merger, buyers take on all employee benefit plans and thus should engage in heightened due diligence and require more representations and warranties from sellers, whereas in an asset sale, buyers generally are free to choose what plans and liabilities to accept (with certain important exceptions as discussed below).

Successor Liability and Withdrawal Liability

Withdrawal liability occurs when an employer's obligation to contribute to a multiemployer pension plan ends or is significantly reduced. The withdrawing employer becomes liable for its share of the multiemployer plan's unfunded liabilities. This liability is often surprisingly large and can last up to 20 years. Asset sales are often done with companies participating in multiemployer plans in the hope of avoiding this liability.

However, courts can treat buyers of assets as successors liable for the seller's withdrawal liability and other multiemployer plan obligations. Courts have imposed successor liability on asset purchasers if they assume substantially all assets, have notice of a potential liability, and maintain a significant continuity of operations from the previous employer. Successor liability can be imposed even if the purchaser explicitly excluded any liability related to the multiemployer plans in the asset purchase agreement.

Controlled Group Liabilities

A buyer should determine if a target company is part of a controlled group or affiliated service group. If the target is a member of one of these groups, the target's liabilities may include those of employee benefit plans that the target does not directly sponsor but are sponsored by other members of the controlled group.

Defined Benefit Plans

Although more and more uncommon, some employers still sponsor defined benefit pension plans. Whenever a party in an M&A deal sponsors or contributes to a defined benefit plan, HR's and Benefits' antennae should immediately go up. It is imperative to teach the deal team that if they catch wind that one of the parties has a defined benefit plan, you need to get involved quickly to assess and mitigate the potentially expensive issues.

401(k) Successor Plan Issues

Usually, a plan can be terminated before or after a transaction, but this is not the case with stock sales involving 401(k) plans (without considerable hurdles). If a target and buyer both have 401(k) plans, the Internal Revenue Code's "successor plan" rule may prevent a buyer from terminating the seller's 401(k) plan after the transaction closes.

Self-Funded Health Plans

Self-funded health plans pose their own unique set of issues in connection with a major corporate transaction. Determining how claims will be funded, and paid, and how to handle potential deficits and surpluses all pose complicated discussions in an M&A transaction. Dealing with COBRA and mid-year open-enrollment issues can also complicate the integration or divestiture process.

Transition Services

Oftentimes a buyer is not ready to offer employee benefit plans to newly hired employees in an M&A deal. Buyers routinely request that the seller keep the employees on their plans for a period of time and then "bill" the buyer for the cost. Many times, this accommodation is negotiated by the deal team (minus HR or Benefits representation) and is included in a broader Transition Services Agreement. These types of arrangements create many issues for buyers and sellers and their respective plans. The issues include determining

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the common law employer, understanding risk/liability with "leasing" employees, multiple employer issues, allocating costs, etc. All of these issues can be resolved, but it usually takes someone in HR or Benefits who understands the issues involved in the negotiations to ensure a favorable outcome.

Next Steps

HR and Benefits professionals are well aware of the integration and divestiture challenges that occur in an M&A transaction. However, getting a chance to preempt some of the more complicated issues is often a challenge. Hopefully, this article highlights a few issues that you can use to gain a seat at the deal table. And if you need any further ideas or leverage to gain a seat, please contact any member of Kutak Rock's Employee Benefits Group.

New Guidance on Mental Health Parity and Addiction Equity Act

This year, the United States Department of Labor and the Department of Health and Human Services released new guidance under the Mental Health Parity and Addiction Equity Act (the "MHPAEA"). The MHPAEA generally requires that plan sponsors of group health plans who choose to provide mental health or substance use disorder benefits provide such benefits at comparable levels as other medical or surgical benefits. The guidance released this year under the MHPAEA came in a variety of formats and included a self-compliance tool, proposed Department of Labor FAQs, a Department of Labor fact sheet that included its enforcement statistics for 2017, and the enforcement action plan of the Department of Health and Human Services. Plan sponsors should consider how this new guidance will affect their group health plans, and in particular should utilize the self-compliance tool to evaluate whether their plans comply with the complex requirements of the MHPAEA.

The Unexpected and Lingering Consequences of Tax Reform on Employee Benefit Plans

On December 22, 2017, the Tax Cuts and Jobs Act (the "Act") was signed into law, marking one of the most sweeping reforms to the Internal Revenue Code (the "Code") in decades. Early versions of the Act proposed significant changes to the world of employee benefits, such as a proposal that would have effectively scrapped nonqualified deferred compensation plans by 2025. Ultimately, the Act kept non-qualified deferred compensation plans intact, and many of the provisions affecting employee benefit plans were removed from the final version. That being said, the Act still managed to have a far-reaching impact on compensation, retirement plans, the Affordable Care Act, and fringe benefits. We covered tax reform's major provisions with broad strokes in our Client Alert, and we discuss the Act's effect on compensation later in this newsletter. In this article, we will take you on a brief foray into some of the lesser known (and possibly accidental) effects that tax reform had on employee benefit plans.

Hardship Withdrawals

The Act significantly narrowed the circumstances under which a taxpayer may take a deduction for uncompensated damage to his or her home under Code Section 165 by limiting the deduction to losses incurred in connection with a federally declared disaster. But what does this have to do with hardship withdrawals? The regulations under Code Section 401(k) allow for participants to take hardship withdrawals for expenses "that would qualify for the casualty reduction under Section 165." It does not appear that Congress had hardship withdrawals on its mind when it narrowed the deduction under Code Section 165, but without further guidance from the IRS, plan administrators should not approve hardship distribution requests for damage to a participant's home unless that participant's home was located in a federally declared disaster area.

Moving Expenses

Definition of Compensation

Before the Act, certain employer-provided moving expenses were excludible from income. The Act removed this exclusion beginning in the tax year of 2018 (with exceptions for military relocation). This may have an impact on the calculation of compensation for purposes of Code Section 415 because some defined contribution plans exclude moving expenses that would have qualified for this exclusion from compensation. With the elimination of the exclusion for moving expenses, employer reimbursements or payments for moving expenses may need to be included in compensation for the 2018 plan year.

Moving Expenses Incurred in 2017, Paid in 2018

As a related matter, many employees had qualified moving expenses in 2017 that were not actually paid or reimbursed until 2018. This left them wondering, "can I still take advantage of the exclusion for the 2017 tax year?" Under previous IRS guidance, a taxpayer could choose which year to take the exclusion when the moving expenses arose in the previous year but were not actually paid until the subsequent year. The IRS recently confirmed that a taxpayer who incurred moving expenses in 2017 but did not actually pay the expenses until 2018 could still take advantage of the exclusion for employer-provided moving expenses.

Qualified Transportation Fringe Benefits

The Act removed the employer deduction for payments or reimbursements made to employees for transportation costs such as transit passes, qualified parking, transportation in a commuter highway vehicle, and bicycle commuting reimbursements ("Qualified Transportation Fringe Benefits" or "QTFB").

Pre-Tax Salary Reductions Included

The IRS later confirmed that amounts paid for QTFB through pre-tax salary reductions are also not deductible by employers. For most employers, this may impact their decision on whether or not to offer subsidized parking or reimbursements for transit passes. Not everyone has this choice, however. Some employers, such as those

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located in San Francisco and New York City, are required by local law to provide pre-tax commuter benefits.

Unrelated Business Taxable Income
The Act also affected QTFB offered by tax-exempt entities, requiring these entities to increase their Unrelated Business Taxable Income ("UBTI") by the amount of the QTFB provided. The IRS in informal comments stated that pre-tax salary reductions for QTFB also increase UBTI.

Effect on Employees
Employees may still exclude QTFB from income with the exception of bicycle commuting reimbursements.

Family Medical Leave Credit

The Act created a limited tax credit for employers who provide paid family and medical leave for the taxable years of 2018 and 2019. The IRS recently released Notice 2018-71, which provided a more detailed discussion of the specifics of the credit, including which employers are eligible for the credit, the requirement for employers to have a written paid family and medical leave policy, and the methods for calculating the amount of the credit. The IRS also announced in Notice 2018-71 that it intends to publish regulations on the credit.

Tax Reform 2.0

The United States House of Representatives recently passed the Family Savings Act of 2018, which is being hailed as part of "Tax Reform 2.0." If signed into law, the Family Savings Act of 2018 would affect retirement plans by, for example, clarifying the rules for electing safe harbor 401(k) status, allowing employers to adopt qualified plans up to the due date of their tax returns, and modifying nondiscrimination rules to protect more senior participants. The legislation would also create a new "Universal Savings Account," which provides a flexible savings account that would allow individuals to take distributions at any time without a tax penalty. Although the bill passed in the House, it is unlikely to pass in the Senate during this session.

As IRS guidance and proposed legislation continues to trickle through, plan sponsors should consider how the developments discussed in this article affect their employee benefit offerings and should continue to monitor the news for the lingering and even unexpected effects of tax reform.

Paid Sick Leave Laws Continue to Spread

2018 has been another whirlwind year for paid sick leave laws across the country. Here is a recap of the laws in five states that helped shape the paid sick leave landscape this year.

- **Texas** – Austin and San Antonio both passed paid sick leave ordinances this year, but current litigation over whether the ordinances are preempted by Texas state law could void both ordinances.

- **New Jersey** – The New Jersey Paid Sick Leave Act was signed into law, requiring New Jersey employers to provide paid sick leave to their workers. The law preempts the extensive patchwork of paid sick leave laws that were previously in effect in New Jersey.

- **Maryland** – The Maryland Legislature voted to override the Maryland governor's veto of the Legislature's paid sick leave law, resulting in a statewide requirement to provide paid sick leave and the preemption of the Prince George's County paid sick leave ordinance.

- **Rhode Island** – Rhode Island finalized its paid sick leave regulations a month before the statewide paid sick leave statute took effect.

- **Minnesota** – Just a few weeks after a judge ruled that the Minneapolis paid sick leave ordinance did not conflict with state law, Duluth passed its own paid sick leave ordinance.

Also of note is H.R. 4219, which was introduced in the United States House of Representatives. If passed, the law would allow employers who provide some paid leave to their workers to be exempt from state and local paid sick leave laws.

IRS Limits Grandfathered Performance-Based Compensation Under 162(m)

Earlier this year, the IRS issued guidance regarding the grandfathering rules for performance-based compensation agreements existing prior to November 2017. Notice 2018-68 (the "Notice") contains guidance on Section 162(m) of the Internal Revenue Code ("162(m)"), as amended by the Tax Cuts and Jobs Act (the "Act"), and clarifies who is a covered employee under the new rules. 162(m) disallows a deduction by publicly held corporations for compensation paid to any covered employee to the extent the employee's compensation for the tax year exceeds $1 million.

Covered Employee

Prior to the Act, 162(m) applied only to a publicly held corporation's principal executive officer and the next three highest paid employees (excluding the principal financial officer) holding office on the last day of the corporation's tax year. The Act amended the definition to include the principal financial officer. Further, if any employee is a covered employee in 2017 or any later tax year, the employee is considered a covered employee under 162(m) for all future tax years. Despite requests to the contrary, the Notice confirms that an employee is a covered employee even if he or she is not serving as an executive officer at the end of a tax year. Accordingly, an individual considered a covered employee for even a single day in 2017 or later will retain covered employee status going forward, even after termination of employment.

Written Binding Contract

Under the Act, certain compensation paid pursuant to a written binding contract in effect on November 2, 2017 is grandfathered from the amended rules, provided that the contract is not materially modified on or after that date. Practitioners were optimistic that the IRS would interpret the Act as allowing the majority of compensation arrangements exempt from 162(m) prior to the Act to maintain grandfathered status. Unfortunately, this is likely not the case.

In general, compensation is treated as paid under a written binding contract only to the extent the corporation is obligated under applicable law (including state law) to pay such compensation if the employee performs service or satisfies applicable vesting conditions. As a result, certain types of arrangements may not be grandfathered, such as arrangements where the compensation committee retains discretion to reduce or eliminate an employee's compensation payable under the arrangement and employment agreements that provide for future equity award grants subject to board approval. For many employers, existing performance-based equity awards and bonus plans often include such negative discretion provisions and, therefore, will not be grandfathered from the Act's amended 162(m) rules.

The Notice provides helpful examples of contract changes that rise to the level of a material modification resulting in a loss of grandfathered status. For example, a material modification occurs if a contract is amended to increase the amount of compensation paid to the employee; modified to accelerate the payment of compensation, unless the accelerated payment is discounted to reasonably reflect the time value of money; or modified to defer compensation in certain circumstances. Until future guidance is issued, however, the extent to which an employer may modify an agreement without resulting in a material modification remains unclear.

IRS Releases New Cost of Living Adjustments

The IRS adjusted several of its contribution and compensation limits effective 2019. The Service's elective deferral limit will increase to $19,000 for 401(k), 403(b) and 457 plans (up $500 from 2018). The dollar limit for catch-up contributions to 401(k), 403(b) and 457 plans will remain unchanged at $6,000. The IRS will also increase its annual compensation limit to $280,000 (up $5,000 from 2018). Health savings account ("HSA") contribution limits will rise to $3,500 (self-only coverage) and $7,000 (family coverage) (increases of $50 and $100, respectively).

Your PTO Plan Could Have a Constructive Receipt Issue

Almost all employers provide some sort of paid time off, vacation or sick leave (together, “PTO”) to their employees. Many states govern whether an employee must be allowed to roll over PTO from one year to the next. To avoid having employees accrue excessive PTO, many employers allow participants the option to cash out PTO at any time or at designated times. This practice, however, may cause constructive receipt issues.

> “A PTO arrangement is generally not considered deferred compensation so long as it is a ***bona fide*** vacation or sick leave plan.”

A PTO arrangement is generally not considered deferred compensation so long as it is a ***bona fide*** vacation or sick leave plan. There isn’t much guidance regarding what constitutes a ***bona fide*** vacation or sick leave plan; however, **the IRS considers a number of factors to determine if a plan is *bona fide*, including:**

1. The number of hours cashed out is small in relation to hours banked
2. The total number of leave days offered is not excessive
3. Programs are broad based (not just for Highly Compensated Employees)
4. Programs are not constructed to provide deferred compensation

There is little guidance directly addressing whether it is permissible for a PTO policy to allow participants to cash out their accrued PTO voluntarily. Many employers allow for this, but that doesn’t mean it’s allowed. If a participant has the option to cash out PTO on election, that could constitute “constructive receipt” of the PTO cash-out. If this is the case, an employee would have taxable income on the first day he or she is allowed to cash out the PTO (even if the employee doesn’t cash it out at the time).

Fortunately, although it is not clear whether cash-out PTO provisions are generally safe, the IRS has provided guidance with respect to certain PTO cash-out arrangements.

Under one such arrangement, after participants accrue a set amount of hours, they are given the option to elect that any PTO accrued in the future will be paid to them in cash, as opposed to accruing additional PTO hours. Under this arrangement, the employees are receiving cash as the PTO accrues, rather than withdrawing from already accrued PTO, which alleviates the constructive receipt problem. The IRS has also provided guidance regarding how employers may allow participants to contribute unused PTO to their 401(k) and other benefit plans.

If you’re concerned your PTO arrangement may have a constructive receipt issue, or you’d like to redesign your PTO arrangement to allow for safe, elective cash-outs or benefit plan contributions, please contact a member of Kutak Rock’s Employee Benefits and Executive Compensation team.

Common Errors Uncovered During HIPAA Audits and Enforcement Actions

Recent results from the U.S. Department of Health and Human Services' Office for Civil Rights ("OCR") Phase 2 Audit Program, as well as its enforcement measures, provide important lessons for group health plans and business associates. These lessons include the need to properly identify and secure electronic protected health information ("ePHI"), conduct security risk analyses, and comply with HIPAA's security risk management requirements.

Phase 2 Audit Results

OCR's Phase 2 Audit Program assessed covered entities' (such as group health plans) and business associates' compliance with certain HIPAA requirements.

OCR published preliminary results of the audits, which revealed that many covered entities had difficulty providing the required content for the notice of privacy practices. The audits also showed that covered entities had problems complying with HIPAA's rules that allow individuals to access their protected health information ("PHI"). A significant number of covered entities also demonstrated challenges in complying with HIPAA's requirements relating to conducting a security risk analysis and following HIPAA's security risk management rules. Based on these audit results, group health plans should review their notice of privacy practices, ensure they have policies and procedures to provide individuals access to their PHI, conduct a security risk analysis, and implement security risk management policies and procedures.

HIPAA Enforcement Action

Recent HIPAA enforcement actions highlight the importance of complying with HIPAA's privacy and security rules. For example:

- In February 2018, a health care provider agreed to pay $3.5 million to OCR and adopt a comprehensive action plan to settle potential HIPAA violations. Those violations included failing to conduct an accurate and thorough analysis of potential risks and vulnerabilities to the confidentiality, integrity, and availability of all of its ePHI; failing to implement policies and procedures to govern the receipt and removal of hardware and electronic media containing ePHI into and out of a facility; failing to implement policies and procedures to safeguard facilities and equipment from unauthorized access, tampering, and theft; and failing to implement a mechanism to encrypt and decrypt ePHI when reasonable and appropriate to do so under the circumstances.
- In June 2018, an administrative law judge ruled that a medical center violated the HIPAA privacy and security rules and ordered the medical center to pay over $4.3 million in civil monetary penalties to OCR. Among other things, the penalties relate to three separate data breach reports involving the theft of an unencrypted laptop and the loss of two unencrypted USB thumb drives containing ePHI of more than 33,500 individuals.

Next Steps

Group health plans should take a variety of steps to help ensure compliance with HIPAA's privacy, security, and breach notification requirements. These include:

- Conducting a compliance review or gap analysis to determine whether the plan is in compliance with HIPAA.
- Identifying any gaps in compliance and addressing those gaps.
- Periodically reviewing and revising the plan's HIPAA policies and procedures.
- Conducting HIPAA training for workforce members.
- Reviewing their notice of privacy practices and updating if necessary.
- Conducting a security risk analysis in accordance with HIPAA and the plan's policies and procedures.
- Implementing and following security risk management rules.
- Maintaining documentation demonstrating compliance with HIPAA and the plan's policies and procedures.

IRS Issues Guidance Allowing Employers to Match Student Loan Payments in 401(k) Plans

Earlier this year, the IRS issued guidance that could make it easier for employees who are repaying student loan debt to save for retirement at the same time.

The amount of student loan debt—currently around $1.4 trillion in the United States—can make it difficult for some employees to afford to make student loan payments and contribute to their 401(k) plans at the same time. Employers have been looking for ways to help employees do both, and now the IRS has provided guidance on how they can help.

Pursuant to the guidance, under certain circumstances, an employer can make matching contributions to an employee's 401(k) account based on student loan payments made by the employee outside the plan. Under the guidance, participation would be voluntary on the part of the employee. A participating employee would receive matching contributions based on student loan payments equal to what the employee would have otherwise received as a matching contribution if the loan payments had been contributions to the plan. To the extent the student loan payments do not exhaust the maximum employer match, the employee may also participate in the 401(k) plan to receive additional matching contributions.

The student loan repayment benefit is subject to nondiscrimination testing, contribution limits, and other requirements for a qualified plan.

If you would like to explore adding a student loan repayment match to your 401(k), please contact a member of Kutak Rock's Employee Benefits and Executive Compensation team.

Responding to IRS "Employer Mandate" Penalty Notices

IRS efforts are in full force to notify employers of their obligation to pay employer shared responsibility payments ("ESRPs") under the Affordable Care Act (also known as the "Employer Mandate"). Employers receive these notices in the form of IRS Letter 226J, which is an initial proposal, not a formal assessment. An employer receiving Letter 226J should not accept the IRS' proposal at face value. Instead an employer receiving Letter 226J should:

1. **Note the deadline for responding to the letter;**
2. **Read the letter carefully for inaccuracies or inconsistencies;**
3. **Review the information reported by the employer to the IRS for accuracy and completeness because the IRS uses this information to calculate the amount of the ESRP;**
4. **Respond to the IRS using IRS Form 14764 to indicate whether the employer agrees or disagrees with the IRS assessment of the amount of employer shared responsibility payments due; and**
5. **Complete Form 14765 to explain any disagreement with the IRS regarding its assessment.**

Once the IRS receives Form 14764 and Form 14765 (if applicable), the IRS responds with Letter 227, which generally describes any further action that will be taken by the IRS. If there is any disagreement following the receipt of Letter 227, the employer may request a conference with the IRS Office of Appeals. Once the IRS determines the final amount of the ESRP, the employer will receive a formal assessment in the form of CP220J. For any questions about responding to Letter 226J, feel free to contact a member of the Kutak Rock employee benefits group.

New 83(i) Equity Plans from page 1

The tax advantages of 83(i) awards are contingent on the employer and the employee satisfying the following requirements:

1 The employer may not have stock readily tradable on an established securities market during any prior calendar year.

2 83(i) awards must be granted under a written broad-based equity plan sponsored by a privately held company that provides stock options and/or RSUs to at least 80% of the employer's U.S. employees.

3 83(i) awards must be granted by the employer in connection with the employee's performance of services.

4 83(i) awards cannot be granted to 1% owners, the chief executive officer, the chief financial officer, or any of the four highest compensated officers of the company.

5 Within 30 days of the date the award would otherwise become taxable, the employer must provide the employee written notice of the award's 83(i) qualification, the ability to make an 83(i) election, and the tax consequences of such an election. Failure to provide compliant notice on a timely basis may result in a penalty of $100 for each failure with a maximum $50,000 penalty for all penalties in a calendar year.

6 83(i) awards cannot permit the employee to sell the stock to the employer or receive cash in lieu of stock upon vesting.

7 The employer cannot have repurchased any of its outstanding stock in the prior calendar year, with limited exceptions.

8 The employee must elect to defer the tax associated with the 83(i) award and file his or her election with the IRS within 30 days of vesting.

83(i) awards provide employees two distinct tax advantages. First, the employee can elect to defer income recognition for up to five years from the date the award vests or becomes transferable. The amount that would normally be taxed is the fair market value of the stock, less any amount paid for the stock. Note, however, that 83(i) does not defer employment taxed (e.g., FICA and FUTA). Second, the holding period for long-term capital gain tax treatment begins on the date the stock is transferred to the employee, even though the employee will not pay taxes on the value of the stock for up to five years. Accordingly, any gain during the five-year period is taxed at a lower rate.

While 83(i) imposes strict qualification requirements, privately held companies should consider whether this favorable tax-deferral opportunity for employees is worth the administrative complexities. Employers should also begin assessing whether their existing equity arrangements permit deferral under 83(i). If so, the employer must satisfy the 83(i) notification requirements referenced above to avoid incurring penalties.

403(b) Litigation Update

In August 2016, the law firm of Schlichter, Bogard & Denton filed lawsuits against several high-profile universities alleging that their 403(b) plan fiduciaries breached their duties, particularly with respect to monitoring service providers and selecting investments. These lawsuits have given plan fiduciaries a wealth of useful guidance on meeting their obligations. This article briefly summarizes some of that guidance and the current state of 403(b) litigation.

Dismissed Cases

In July, a federal judge decided that the plaintiffs in NYU's excessive fee litigation did not prove that NYU's plan fiduciaries acted imprudently or caused the plans any loss. The plaintiffs originally alleged that the fiduciaries caused $358 million in damages by breaching their duties with respect to selecting and monitoring recordkeepers and investments, including the TIAA Real Estate Account and CREF Stock Account. Although the court ruled in NYU's favor, both parties have filed post-trial motions and the plaintiffs may appeal the decision.

In her opinion, the judge singled out problematic deficiencies in committee members' knowledge, including knowledge of whether those individuals were on the committee, what was in their plan documents, and whether they were responsible for reviewing fees. However, the conduct of one committee member, NYU's CIO, was a significant factor in the judge's opinion. In part, that committee member engaged in detailed discussions of investment recommendations and asked questions regarding fiduciary decisions "all the time."

Northwestern University and Washington University in St. Louis also defeated similar challenges. The opinions in these cases reinforce the discretion of plan fiduciaries to determine how fees are paid and the fact that negotiating recordkeeping fees for 403(b) plans is more complex than doing so for 401(k) plans.

Ongoing Cases and New Complaints

The majority of the 403(b) excessive fee lawsuits filed in 2016 are still ongoing. In general, courts have dismissed claims alleging that fiduciaries have breached their duties by offering an excessive number of investment options or by "locking-in" participants to TIAA by virtue of their recordkeeping agreement. However, several courts have allowed the following claims to proceed:

- Claims regarding the alleged unreasonableness of recordkeeping fees;
- Claims regarding the failure to monitor recordkeeping fees; and
- Claims regarding the failure to monitor and remove underperforming investments.

Further, plaintiffs continue to file new lawsuits against universities and to amend existing complaints to reflect developments in the first wave of 403(b) litigation. For example, plaintiffs have filed a copycat lawsuit against Georgetown and a narrower lawsuit focusing on TIAA's fees against the University of Rochester.

Changes for Wellness Program Rewards in 2019

Recent litigation challenged the legality of regulations under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") that limited the amount of rewards a wellness program may offer. After January 1, 2019, the ADA's and GINA's limits on wellness program rewards will no longer be in effect. As such, employers should review their wellness programs to confirm the amount of rewards are compliant and update their wellness program documents.

Background

The Equal Employment Opportunity Commission ("EEOC") finalized regulations for wellness programs under the ADA and GINA, which became applicable as of the first day of the first plan year that began on or after January 1, 2017. Among other things, the ADA and GINA wellness program regulations established the amount of rewards a wellness program could provide while still being considered "voluntary."

The AARP challenged those rules in federal court, generally arguing that the maximum allowed reward was inconsistent with the "voluntary" requirements of the ADA and GINA. The court originally remanded the regulations to the EEOC for reconsideration. In September 2017, the EEOC indicated it intended to propose new regulations by August 2018. In December 2017, the court vacated the ADA and GINA regulations limiting the amount of rewards a wellness program may offer but stayed that order until January 1, 2019.

In January 2018, the EEOC informed the court that it did not plan to issue new ADA or GINA rules addressing the maximum allowed rewards for wellness programs. Accordingly, the EEOC's regulations limiting the amount of wellness program rewards under the ADA and GINA will be vacated effective January 1, 2019. However, the other ADA and GINA wellness program regulations will remain in effect. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") wellness program regulations are unaffected by the litigation.

Consequences and Next Steps

The vacation of the ADA's and GINA's limits on wellness program rewards creates uncertainty regarding the maximum amount of rewards a wellness program may offer. Without clear guidance from the EEOC, a risk exists that a wellness program's rewards could be too large to be "voluntary," in violation of the ADA and/or GINA. To help ensure a wellness program is compliant for 2019, employers should:

- Review the amount of rewards offered by the program and determine whether they comply with HIPAA. Similarly, the amount of the rewards should be reviewed to determine whether the wellness program is "voluntary" under the ADA and GINA, as applicable.
- Document the steps the employer took to determine the amount of the reward.
- Update the wellness program documents for 2019.
- Ensure appropriate notices and program materials are provided to wellness program participants.

Budget Act Changes Hardship Withdrawal Rules

The rules governing hardship withdrawals from defined contribution plans will be less restrictive for plan years beginning after December 31, 2018 thanks to the Bipartisan Budget Act of 2018. Among the changes to rules are the elimination of both the six-month prohibition on contributions following a hardship withdrawal and the requirement to take plan loans before taking a hardship withdrawal. Employers should review their plans to determine whether they should amend their plans to comply with the new rules. For more information on the Bipartisan Budget Act of 2018, see our Client Alert.

Claims Procedures May Require a Revamp

Regulations from the United States Department of Labor which became effective in April 2018 require changes to the claims procedures for plans that offer benefits that are contingent on a finding of disability. This not only includes disability plans, but also welfare and retirement plans that offer benefits upon a finding of disability (e.g., accelerated vesting or pension benefit upon finding of disability). For more information on the new regulations, see our Client Alert.

IRS Changes the 2018 HSA Contribution Limits Mid-Year (Twice)

In an unusual turn of events, the IRS lowered the limit for HSA contributions made by an individual with family coverage in a high deductible health plan and also lowered the maximum exclusion for employer-provided adoption assistance programs for 2018 after the year had started. Nearly two months later, the IRS, citing the administrative burden of changing the HSA limits mid-year, decided to treat the original HSA limit as the limit for 2018. In the second announcement, the IRS also provided complex tax guidance for employers who proactively changed the limits for their employees. For more on these changes, see our Client Alert.

IRS Publishes New Safe Harbor Rollover Notices

The IRS recently published an updated safe harbor notice explaining participants' rollover options from a qualified retirement plan. This notice, titled "Your Rollover Options," is often referred to as a "402(f) notice." Plan administrators must provide this notice to participants when they receive a distribution that can be rolled over to another plan or IRA. Service providers usually distribute this notice and should have been changing this notice from time to time to comply with law changes. Now, plan administrators should verify that their service providers are incorporating the new safe harbor notice language into their current notices.

New Section 415 Notice Will Be Required for 403(b) Plans

In the coming years, all prototype and volume submitter 403(b) plans will be restated using new plan documents that have been pre-approved by the IRS. These new pre-approved 403(b) plan documents require an annual participant notice regarding the Code Section 415 contribution limit ($55,000 for 2018 not including catch-up contributions). This notice will provide the general rule for aggregating contributions made to 403(b) plans under Section 415, which requires that a participant's contributions to a 403(b) plan be combined with contributions made to a plan sponsored by an entity controlled by the participant. Plan sponsors who have adopted new pre-approved 403(b) plans should check with their service provider to determine who is responsible for distributing these notices.

In Case You Missed It!

February 9: Bipartisan Budget Act of 2018 Includes Changes to Hardship Withdrawal Rules, Wildfire Relief

March 8: IRS Announces Revised 2018 Cost of Living Adjustments

March 16: Fifth Circuit Vacates Fiduciary Rule

March 30: Deadline Approaching for Compliance with New Disability Claims Regulations

April 30: IRS Again Modifies 2018 Annual Limits on HSA Contributions

May 11: IRS Announces 2019 HSA and HDHP Inflation Adjustments

May 23: Another ERISA Fiduciary Duty Settlement Highlights Need for Good Fiduciary Governance

June 28: Fiduciary Rule Officially Vacated

June 28: Supreme Court Holds Fees Imposed by Public Unions on Non-Members are Unconstitutional

June 28: Department of Labor Issues Final Regulation on Association Health Plans

August 28: Fidelity Announces New Zero-Fee Index Funds, Decrease in Fees on Existing Funds

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