2015 Retirement Plan Regulatory Update

September 30, 2015

Agenda

Case Law:

- Plan Sponsor Duty to Continuously Monitor Investments

Current Regulatory Matters:

- Restatements required for most qualified DC plans (401(a) and 401(k))
- EPCRS Correction Program Updated with Two 2015 Revenue Procedures

On The Horizon:

- 403(b) Pre-Approved Plan Program
- IRS Limiting Favorable Determination Letter Program for Individually Designed Plans
- Amendment and Restatement of the DOL's Voluntary Fiduciary Correction Program (VFCP)
- DOL's Fiduciary Rule

Miscellaneous Topics Of Interest:

- Non-binding IRS Comments Regarding Plan Loans and Hardships

Case Law Update: Tibble v. Edison

Supreme Court of the United States: ERISA Plan Sponsors Have A Continuous Duty To Monitor And Remove Imprudent Investments

- Allegations of fiduciary violations by imprudently offering higher priced retail-class mutual funds as plan investments when materially identical lower priced institutional-class mutual funds were available
- Central to this issue is when was ERISA's six-year statute of limitations (to file a claim for a breach of fiduciary duty) triggered?
    - Did clock start running at the time the funds at issue were originally selected?
    - Was passive retention of allegedly imprudent investments an "action" or "omission" that triggered the running of the six-year limitations period?

SCOTUS held that fiduciary trustee has a continuing duty, separate from prudence when initially selecting investments, to monitor and remove imprudent investments

- Clarifies the *timing* of when a claim may be brought for breach of fiduciary duty.
- Question still remains as to what actually constitutes a diligent review

http://www.supremecourt.gov/opinions/14pdf/13-550_97be.pdf

Current Regulatory Issues: Restatements (Qualified DC Plans)

Plan documents must be updated from time-to-time to conform to changes in the federal tax laws made by Congress, or to reflect regulations under the Internal Revenue Service or Department of Labor.

Pre-Approved Plans (Master & Prototype or Volume Submitter plans)
In this current restatement period (May 1, 2014 – April 30, 2016), the plan document will be re-written to incorporate previously required interim amendments

- Plans created prior to or around May 1, 2014 likely need to be restated
- Plan sponsors should consult with their document provider to determine whether restatement is necessary

Failure by plan sponsors to complete the restatement during this window could result in plan disqualification leading to unintended tax consequences for both employers and participants.

Plan sponsors may also adopt discretionary amendments

- Discretionary amendments generally must be adopted by the end of the plan year in which the plan amendment is to be effective

http://www.irs.gov/irb/2014-17_IRB/ar08.html

Current Regulatory Issues: EPCRS

Early in 2015, the Internal Revenue Service (IRS) provided two updates to the latest version of the Employee Plans Compliance Resolution System (EPCRS)

- Modifications such as added flexibility in recoupment of overpayments
- Extended period for self-correcting excess annual additions
    - Previously limited to 2-1/2 months following plan limitation year end
    - Now 9-1/2 months following year-end (October 15th for calendar year limitation year)
        - Allows more time to determine employer contributions after year-end while not limiting employee deferrals during the year
- Reduced compliance fees for applications under the Voluntary Compliance Program (VCP)

Current Regulatory Issues: EPCRS

Additional correction methods for failure to implement or provide opportunity to defer. For example: Automatic enrollment, automatic increases, or traditional salary deferrals

- Previously resulted in a mandatory employer contribution of 50% of the missed deferrals plus 100% of any related matching contribution for the period

Now require

- Timely implementation of deferral elections after the failure (ranges from three months to the end of two plan years following year of failure) and
- Notice to the employee within 45 days of the failure and ensuing correction

If the plan offers a match

- Employer still makes up the matching contributions for the missed deferral period, *however*
- Correction no longer requires a 50% contribution for the missed deferral

For correction that misses the initial windows

- Correction by the end of the second year following the year of failure
  - reduces the employer contribution to 25% of the missed deferral (still requiring the full missed matching contribution, if applicable)

Current Regulatory Issues: EPCRS

These added options allow for both more time to detect and correct the missed deferrals, *however* provides a reduction in the employer contribution (making up for money actually paid to employees and not deferred)

- These modifications allow for more flexibility in corrections under EPCRS
  - Self-correction still requires the plan to have proper policies and procedures in place
  - Documented (and followed) policies and procedures should limit exposure to errors and allow better reliance on corrections under the Self Correction Program (SCP) and EPCRS as a whole

http://www.irs.gov/pub/irs-drop/rp-15-27.pdf

http://www.irs.gov/pub/irs-drop/rp-15-28.pdf

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On The Horizon: Pre-Approved (403(b) Plans)

The deadline to submit 403(b) document language to the IRS was April 30, 2015

The 403(b) pre-approved plan program is limited to opinion and advisory letters for prototype and volume submitter plans ("pre-approved plans")

- An employer that adopts a 403(b) pre-approved plan generally has assurance that its plan document complies with IRC Section 403(b)

Prototype Plans*:*

- *Basic plan document*
  - All of the plan's nonelective provisions that apply to all adopting eligible employers and that does not have any options or blanks, and
- *Adoption agreement*
  - Allows an adopting eligible employer to select among plan design alternatives available under the basic plan document

Volume Submitter Plans*:*

- *Specimen Plan*
  - A model plan document (as opposed to the actual plan of an employer), and
- *Adoption agreement*
  - If applicable (adoption agreements are not required for volume submitter plans)

On The Horizon: Pre-Approved (403(b) Plans)

The IRS will not provide determination letter for *individually designed* 403(b) plans

- Employers who currently sponsor these plans must restate onto pre-approved plans for reliance that plan terms comply with section 403(b) of the Code

Vendors began submitting prototype and volume submitter plan documents for IRS approval starting June 28, 2013. The submission window closed* April 30, 2015

- *Filings submitted after April 30, 2015 can generally be made – but issuance of letters will be delayed
- The IRS is expected to take two years to approve the submissions, then IRS will establish the restatement deadline for adopting employers (likely be a period that begins in 2017 and ends in 2019)

Employers should not have to adopt pre-approved plans until at least one year after the IRS has ruled on all of the vendor applications that it received during the window

Expectation is that pre-approved 403(b) plans will need to be restated every six years to reflect subsequent changes in the law, regulations, revenue rulings, or other IRS guidance

- This six-year remedial amendment cycle is modeled after the pre-approved plan program for qualified plans

On the Horizon: Determination Letters for Individually Designed Plans

The IRS formally announced its intent to limit the scope of the employee plan determination letter program with relation to individually designed plans

- Beginning as early as January 1, 2017, the IRS will typically only review a plan document upon inception of the plan and termination
  - Plan document restatements and amendments will continue to be required intermittently, however the IRS will not review a document to confirm qualification requirements are met on an ongoing basis

Changes to the program leave questions as to the burden of document maintenance over multiple iterations and what will be required for submission upon a second (and likely, final) application at plan termination

- IRS is expected to issue further guidance following the comment period ending October 1, 2015
  - The IRS has requested public comments on remedial amendment periods, interim amendment requirements, conversion to a pre-approved plan, and other potential changes to EPCRS to help clarify these questions

http://www.irs.gov/pub/irs-drop/a-15-19.pdf

On the Horizon: DOL's Voluntary Fiduciary Correction Program

In the Spring 2015 Unified Agenda and Regulatory Plan, the DOL and Employee Benefits Security Administration (EBSA) noted an intention to amend and restate the Voluntary Fiduciary Correction Program (VFCP)

The VFCP was originally was adopted in 2002 (and last revised in 2006)

- Designed to encourage the voluntary correction of fiduciary violations by permitting persons to avoid potential civil actions and civil penalties if they take steps to correct identified violations in a manner consistent with the VFCP

The amendments will expand the scope of some transactions currently eligible for correction and streamline correction procedures for certain others.

EBSA will issue a restatement of the VFCP in its entirety and request public comments

http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1210-AB64

On the Horizon: DOL Fiduciary Rule

The DOL conducted public hearings from August 10 through August 13 regarding its proposed “Definition of the Term 'Fiduciary'; Conflict of Interest Rule--Retirement Investment Advice”

- Published in the Federal Register on April 20, 2015
- Proposed new prohibited transaction exemptions and changes to existing prohibited transaction exemptions

Deadline for submitting written comments closed on September 24, 2015

- DOL has received over 2,800 letters
- Has met with approximately 90 industry and consumer groups
- Has held four days of public hearings

Timothy Hauser, deputy assistant secretary of labor, recently stated:

- “You're likely to see that feedback's going to be reflected in the final rule,”
- “We're taking every bit of it seriously.”

Houser did not speculate on when a final rule would be released.

- Anticipated to come out next spring

Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

Earlier this year, an IRS newsletter (Issue No. 2015-4, April 1, 2015) highlighted certain deficiencies found during audit relating to hardship withdrawals and plan loans

Given the prevalence of plan hardships and loans, the IRS seems to have made their opinion clear that

- Self-certification as the *exclusive* means of documentation is not adequate
  - Self-certification is permitted to show that a distribution was the only way to alleviate a hardship, *however*
  - Self-certification is not allowed to prove the nature of a hardship
- IRS auditors are looking *specifically* at this issue

Additionally, Plan sponsors must retain documentation of hardship distributions and plan loans (in either paper or electronic format)

- Hunting down records from participants is not a viable solution, as such records could be lost, non-existent, or inaccessible (for example, after termination of employment)

Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

In the event of audit, sponsors must be able to provide:

- Documentation of a hardship request, review and approval;
- Financial information and documentation that substantiates the employee's immediate and heavy financial need;
- Documentation to support that the hardship distribution was properly made in accordance with the applicable plan provisions and the Internal Revenue Code; and
- Proof of the actual distribution made and related Forms 1099-R

Sponsors should also keep documentation evidencing plan loan administration:

- Evidence of the loan application, review and approval process;
- An executed plan loan note;
- Evidence of loan repayments; and
- Evidence of collection activities associated with loans in default (and the related Forms 1099-R, if applicable)

Also noted in the newsletter "The plan sponsor must obtain and keep hardship distribution records. Failure to have these records available for examination is a qualification failure that should be corrected using the Employee Plans Compliance Resolution System (EPCRS)."

Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

Plan sponsors may want to consider reviewing outstanding hardship distributions and loans, to ensure the documentation satisfies IRS regulations

- If lacking, sponsors may consider attempting to obtain necessary documents
- In the event hardship distributions and/or loans have been made or administered improperly -- sponsors may consider correction under EPCRS

Finally, for plan sponsors who use a third party to handle these types of transactions

- Be aware that sponsors are ultimately responsible for the proper administration of the retirement plan – which includes the oversight of their vendors.
- Any sponsor utilizing a third party to process hardships and loans might want to consider reviewing their service agreement to determine if adequate language is included to ensure conformance with the regulations

http://www.irs.gov/pub/irs-tege/epn_2015_4.pdf

Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

Loan Defaults:

A deemed distribution generally occurs, and a Form 1099-R must be issued, whenever a borrower fails to make a loan installment payment by its due date (including any additional cure period provided by the plan)

- If the participant fails to make repayment, an operational failure will occur if the employer does not, at that time, default the loan, and issue the Form 1099-R
- This can only be corrected through VCP

Loan Repayments:

To be permissible the loan must be "required to be repaid within five years."

- Neither the Code nor the regulations specifies when the five-year period begins
- The regulations state that a loan must be repaid within **five years from the date of the loan**
- Many recordkeepers treat the start of the five-year repayment period as the date the first payment is withheld from the borrower's pay

Per an IRS representative – the date of the loan is supposed to be specified in the terms of the plan agreement

- The representative noted the start date cannot be after the loan is funded or after the loan proceeds are paid to the participant - at the very latest, that is when the loan starts

http://**www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf**

Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

A 401(k) plan permits participants to receive hardship distributions in accordance with the "safe harbor" rules

- Elective contributions suspended for at least 6 months

Does the plan document provide that participant contribution elections will be reinstated after the six (6) month suspension period?

- If so, the plan must *automatically* reinstate contribution elections (unless participant elects otherwise) or potentially experience an operational failure under EPCRS (e.g., failure to follow plan provisions, missed deferrals)
- If the plan document provides for suspension for six months and there is other added time which is not directly related to administration -- then there could be a failure to follow the terms of a plan
- If the plan document does not expressly provide for a grace period, the plan may experience an operational failure if it fails to reinstate participant elections as soon as administratively practicable after the end of the 6-month suspension
  - Nothing in the regulations appear to prohibit suspension for six months plus a grace period (e.g. 30 days or two pay periods)

http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf

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