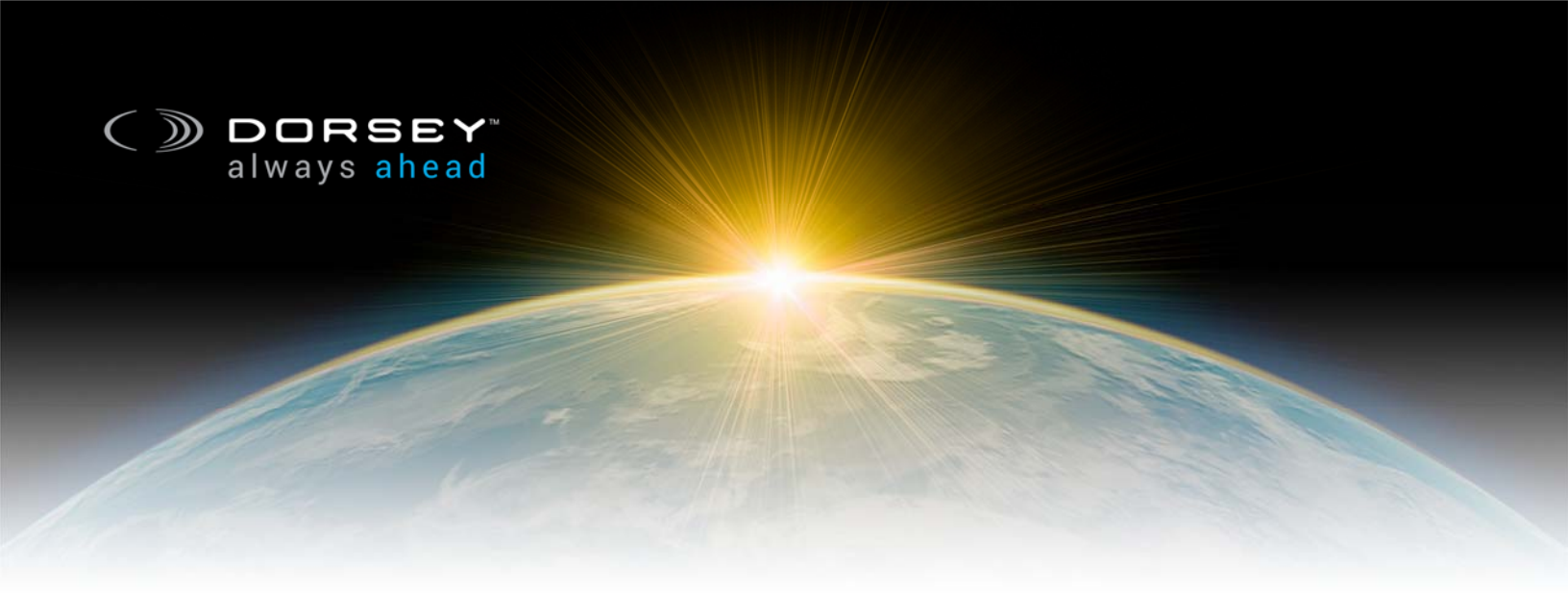

Benefits & Compensation Group

Forum on Employer Retirement Plans

November 12, 2019

www.dorsey.com

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Benefits & Compensation Group

Forum on Employer Retirement Plans

Tuesday, November 12, 2019

Contents

Dorsey Blogs

Dorsey Health Law Blog available at: https://dorseyhealthlaw.com/

Dorsey Labor & Employment Quirky Questions Blog available at https://quirkyemploymentquestions.com/

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Benefits & Compensation Group

Forum on Employer Retirement Plans

Tuesday, November 12, 2019

Program Overview
Dorsey Benefits & Compensation Group will conduct its annual forum on issues affecting employer sponsored retirement plans. Sessions will focus on practical advice and guidance.

9:00 – 9:25 am CT **Registration and Breakfast**

9:25 – 9:30 am CT **Welcome (Tim Arends)**

9:30 –10:30 am CT **Fiduciary Duties for Employers: Best Practices for Plan Administrators and Employees Working on Retirement Plans**

Employees who manage an employer's retirement plan – from selecting investments to deciding claims – can become fiduciaries, which creates the risk of fiduciary liability. This session will review fiduciaries duties under ERISA, including what actions make an individual a fiduciary, what duties fiduciaries have, what best practices are, and more. This is intended to be an interactive session - come prepared to ask questions and share ideas.

Liz Deckman, Partner, Dorsey & Whitney
Andrew Holly, Partner, Dorsey & Whitney

10:30 – 10:40 am CT **Break**

10:40 –11:40 am CT **Retirement Plan Developments and Updates: News Laws, Regulations, and Guidance, Plus case Law Developments**

Despite divisions in Congress, legislation has passed and is being considered that affects retirement plans (The Balanced Budget Act of 2018 changed the hardship distribution rules). This session will look at that legislation, regulations and guidance from federal agencies (including MEPs and developments on the fiduciary rule). It will also review recent case law developments.

Tim Arends, Partner, Dorsey & Whitney LLP
Liz Deckman, Partner, Dorsey & Whitney
Holly Fistler, Senior Attorney, Dorsey & Whitney LLP
Tim Goodman, Partner, Dorsey & Whitney LLP
Paul Heiring, Of Counsel, Dorsey & Whitney LLP

Benefits & Compensation Group

Forum on Employer Retirement Plans

Speaker Biographies

Timothy Arends
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Tim is Chair of the Benefits & Compensation Group. Tim devotes a substantial portion of his practice to evaluating the effect of employee benefit programs on mergers, acquisitions, reorganizations, corporate financing and similar transactions. Tim's practice focuses in the design, formation, IRS qualification, administration, merger and termination of employee retirement, health, welfare and executive compensation plans.

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Liz is a Partner in Dorsey's Benefits & Compensation Group. She has designed and implemented all types of tax-qualified retirement plans and trusts, including Section 401(k), profit sharing, money purchase, employee stock ownership (ESOP), cash balance, and defined benefit plans. Liz also drafts and implements health and welfare plans and advises employers on related issues, such as COBRA, health care reform, and fiduciary issues. She also works with deferred compensation plans and IRC Section 409A. Liz's work covers issues such as: the effect of new laws on plans, nondiscriminatory coverage and contribution requirements, limitations on benefits, IRS determination-letter applications and plan defect-correction programs, plan terminations, and early-retirement window benefits. She also assists clients in the employee benefits aspects of mergers and acquisitions.

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Holly is a Senior Attorney in Dorsey's Benefits & Compensation Group. She helps clients achieve their business goals through designing and maintaining employee benefit plans. Holly advises clients on ERISA, tax and related issues affecting qualified retirement plans, non-qualified retirement plans, and health and welfare plans. Holly regularly assists clients with plan documents and administration, as well as with navigating compliance issues with the Affordable Care Act, HIPAA and other changing laws in this field. She devotes a substantial portion of her practice to advising public and private companies on their employee benefits issues.

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Tim is a Partner in Dorsey's Benefits & Compensation Group. Tim works with employers on medical plans, retirement plans, executive compensation, and a wide range of benefits. Tim works with a broad array of employers, with a special focus on assisting cooperatives, agribusiness companies, hospitals and health care entities, and financial institutions. Employers have Tim provide advice on health care reform (the ACA), wellness plans, and other welfare plan matters (ranging from cafeteria and health FSAs to severance and tuition plans). With respect to health care reform, Tim advises employers on the new fees (from the employer shared responsibility fee to the Cadillac tax), assists them in preparing for reporting on Form 1095-C, and explains the new requirements ranging from notice requirements to plan mandates. Tim recognizes the complex nature of the rules governing retirement plans and works with employers to review operations, address errors, and help employers maintain the tax-qualified status of their plans. Tim advises employers on qualified and nonqualified retirement plans (including defined benefit, 401(k), 403(b), 457(b), and 457(f) plans, and section 409A).

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Paul is Of Counsel in Dorsey's Healthcare Litigation Group. He has over 30 years of experience and practices exclusively in the area of ERISA litigation and other employee benefit disputes. In addition to litigating a broad range of ERISA cases, he also counsels clients on issues that might eventually lead to litigation, with the goal of either avoiding litigation or putting the client in the best position to defend itself. He has represented Fortune 500 companies including retailers, manufacturers, insurers, financial institutions, TPAs, and trustees. He has also been involved in complex litigation involving non-ERISA plans, such as church plans. Paul has a detailed understanding of the numerous issues presented in ERISA litigation, including the causes of action and remedies available under ERISA, statutes of limitation, fiduciary duties, prohibited transactions, ERISA preemption of state laws, and the rules that govern claims for benefits and appeals of claim denials. He is a frequent speaker at continuing legal education and other programs on ERISA and benefits litigation topics.

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Andrew is a Partner in Dorsey's Trial Group. He has extensive experience as lead counsel defending fiduciaries, sponsors, and insurers in ERISA fiduciary class actions, including cases involving company stock, 401(k) plan fees, defined benefit plans, pension age discrimination claims, Taft-Hartley pension plans, prohibited transaction claims, claims for plan benefits, executive compensation claims, and other fiduciary and plan investment matters. Andrew also handles various other complex civil matters, including tax disputes, and various complex civil matters. Andrew has handled dozens of jury and court trials, arbitrations, regulatory matters, and other evidentiary hearings. In addition to his primary work as defense counsel, he has also litigated various multi-million dollar plaintiffs' actions to successful trial judgment or settlement. A prolific speaker and writer, he has twice been named a "rising star" by *Minnesota Law and Politics* Magazine.

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Retirement Plan Committee Best Practices

Elizabeth Deckman
Andrew Holly

November 12, 2019

Overview

- ERISA Fiduciary Duties
- General Best Practices
- ERISA Plan Governance
  - Settlor Functions
  - Service Providers
  - Investment Managers
- Audits, Litigation and Claims for Benefits

ERISA Fiduciary Duties

- Loyalty
  - "Exclusive purpose" rule
  - "Two Hats" doctrine
- Prudence
  - Good process, not good results
  - An empty head with a clean heart is not enough
  - "Prudent man acting in a like capacity and familiar with such matters would use…"
  - Don't just rely on the experts blindly
- Diversification
- Follow plan terms

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Breach of Fiduciary Duties

- A fiduciary may be personally liable to the plan and beneficiaries
  - Damages include restoring losses caused by the breach and disgorging any profits made from the transaction
- Fiduciaries may be subject to civil and criminal penalties and excise taxes
  - DOL may impose civil penalties equal to 20% of the amount may be recovered due to a court order or DOL settlement
  - For willful violations of ERISA, may be convicted of a criminal offense and fined up to $100,000 ($500,000 for an entity), imprisoned up to 10 years, or both
- If the fiduciary engages in a prohibited transaction, it will be subject to liability for excise taxes
  - 15% of the amount involved in the transaction for each year
  - If not corrected within the taxable period, the IRS imposes a second tier tax equal to 100% of the amount involved

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General Best Practices

- Document, document, document
- Deliberate
- Don't fear difficult issues
- Understand privilege issues
- Do what you say, and say what you do
- Keep documentation up to date

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Plan Governance

- Must have a "named fiduciary"
- Much flexibility about who manages the plan
- Charters help manage duties and authority
- Committee structure
  - Size
  - Membership
    - Do you really want the Board of Directors/CFO involved?
  - One committee or two
  - Reporting, coordination and cooperation
- Independent fiduciaries/investment experts
- Investment policy statement
- Committee meetings and documentation
  - Frequency
- Fiduciary education for committee

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Settlor/Sponsor Functions

- Who's amending the plan?
- Assigning and dividing settlor & fiduciary functions

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Service Providers

- How is my vendor getting paid and how can you know?
  - Transparency
- RFPs/Benchmarking Studies
- Optional services
- Who pays for what?
- What does the DOL say to consider when selecting?
  - Information about the firm itself: financial condition and experience with retirement plans of similar size and complexity;
  - Information about the quality of the firm's services: the identity, experience, and qualifications of professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; and the firm's experience or performance record; and
  - A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled; and whether the firm has fiduciary liability insurance

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Service Providers - Monitoring

- What does the DOL say to consider when monitoring?
  - Evaluating any notices received from the service provider about possible changes to their compensation and the other information they provided when hired (or when the contract or arrangement was renewed);
  - Reviewing the service providers' performance;
  - Reading any reports they provide;
  - Checking actual fees charged;
  - Asking about policies and practices (such as trading, investment turnover, and proxy voting); and
  - Following up on participant complaints

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Investment Management

- Constructing an investment menu
  - ERISA 404(c) and QDIAs
  - Diversified investments
  - Levels of participant sophistication
  - Number of options
  - What kind of options
- Knowing your participants
- Participant education
- Monitoring investments – fees and performance
  - Expense ratios, lowest cost available share classes
- How to deal with third-party advisors
- Documenting problems and the plan to deal with them
- Fees, fees, fees

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10

Audits, Litigation & Claims for Benefits

- Managing claims for ERISA benefits
  - Pay attention to deadlines
  - Follow claims procedures
- Fiduciary insurance policies
- Make use of VFCP/DFVCP
- Other DOL issues in plan investigations
  - Late 401(k) contributions
  - Missing participants
  - Disclosure distribution methods
- Watch litigation trends
  - 401(k) fee cases
  - Cybersecurity
- Are plaintiffs' counsel watching you?

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Questions?

Elizabeth Deckman Andrew Holly

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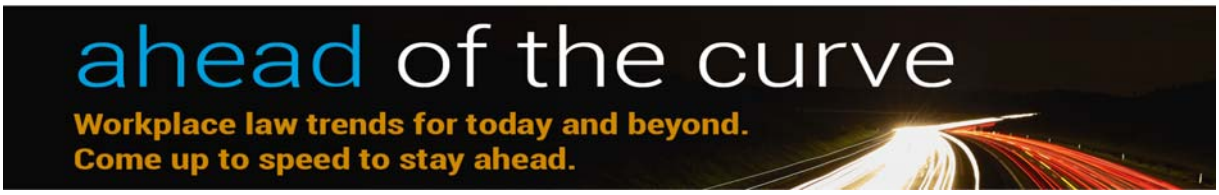

Retirement Plan Developments and Updates: New Laws, Regulations, and Guidance, Plus Case Law Developments

November 12, 2019

Liz Deckman
Tim Arends
Holly Fistler
Paul Heiring
Tim Goodman
Dorsey & Whitney LLP

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Overview

- **Legislation**
  - SECURE Act
- **Regulations**
  - Electronic disclosure
  - Fiduciary regulations
  - Hardship distributions
  - MEPs
  - DB lump sum windows
  - DB hybrid submissions
  - EPCRS update
- **State developments**
- **Litigation**
  - Supreme court cases
  - Other litigation

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Legislation
SECURE Act

- **Legislation (pending legislation)**
  - **Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) (HR 1994)**
  - **Status**
    - **House – Passed 417-3 (5/23/19)**
    - **Senate – Holds placed prevent unanimous consent vote**

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Legislation
SECURE Act

- **Legislation (pending legislation)**
  - **Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) (HR 1994)**
  - **Key provisions**
    - **MEPS: Enhance ability of employers to participate in multiple employer plans (MEPs) known under the Act as "Pooled Employer Plans"**
      - **Permits unrelated employers to join together under single plan**
      - **Removes risk of compliance issue from one employer impacting other employers under plan**
      - **Effective for plan years beginning after 12/31/20**
    - **Auto enrollment: Increase the 401(k) automatic enrollment safe harbor deferral cap to 15% (now 10%) effective for plan years beginning after 12/31/19**

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Legislation
SECURE Act

- **Legislation (pending legislation)**
  - **Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) (HR 1994)**
  - **Content**
    - **Safe harbor plans: Simplify 401(k) safe harbor rules and give employers more flexibility in electing to implement a safe harbor design**
      - **Eliminates notice for nonelective safe harbor plans**
      - **Permits plan to be amended to be safe harbor plan any date prior to 30th day before end of plan year**
      - **Permits plan to be amended to be safe harbor after 30th day before end of plan year provided a minimum 4% nonelective contribution is provided**
      - **Effective for plan years beginning after 12/31/2019**
    - **MRDs: Raise minimum required distribution age from 70½ to age 72**

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Legislation
SECURE Act

- **Legislation (pending legislation)**
  - **Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) (HR 1994)**
  - **Key provisions**
    - **Lifetime income disclosures and fiduciary relief for provider selection**
      - **Requires 401(k) plans to provide annually a monthly life annuity income estimate based on participant's balance**
      - **Provides fiduciary relief for selection of annuity provider**
    - **Part-time employee participation**
      - **Require plans to include in participation part-time employees working 500 hours or more in 3 consecutive 12-month periods effective for plan years beginning after 12/31/20**

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Legislation
SECURE Act

- **Legislation (pending legislation)**
  - Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) (HR 1994)
  - Key provisions
    - Consolidated Form 5500 filing for controlled groups
    - Penalty free withdrawals (up to $5,000) for childbirth or adoption expenses
    - Post death IRA distribution changes
    - Remove age 70½ age limitation on IRA contributions

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Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - On 10/23/19, DOL published proposed regulations to add new safe harbor for electronic disclosures of ERISA-required notices by retirement plans only
  - Plan administrators may furnish "covered documents" electronically to "covered individuals," subject to certain notice and other requirements
  - Proposed regulations (84 Fed. Reg. 56894 (10/23/19) (Prop. 29 C.F.R. § 2520.104b-1)
  - Executive Order 13847 (8/31/18)
    - Secretary of Labor in consultation with Secretary of Treasury to complete review of actions that could be taken to make retirement plan disclosures under ERISA and Code more understandable and useful for participants, "while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution'' and shall include review of exploration of potential for broader use of electronic delivery

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Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - **Covered documents**
    - Disclosures that are required for retirement plans under Title I of ERISA, like summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), pension benefit statements and blackout notices
    - Documents that are provided upon individual's request must be provided in hard copy, even if they are available on website
  - **Covered individuals**
    - Persons who provide electronic address, such as email address or smartphone number
    - Employees who receive employer-provided email addresses, or who receive employer-issued smartphones, automatically satisfy this requirement

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Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - **Individuals may opt out and receive only paper versions of some or all covered documents**
  - **Administrators must ensure that electronic addresses for terminated employees remain valid or get new addresses following termination**
  - **Before posting any disclosures, plan administrator must provide each covered individual with initial paper notice stating that:**
    - Covered documents will be furnished electronically, along with statement of right to request and obtain paper version of covered document, free of charge
    - Statement of right to opt out of receiving covered documents electronically and explanation of how to exercise right

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Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - **Notice of internet availability**
    - Plan administrators must give "Notice of Internet Availability" to each covered individual for each covered document
      - Given at time covered document is made available on website, but no later than date that covered document is required to be provided under ERISA
      - Contains only above information, except for pictures, logos, and design elements that are not misleading
      - Written in manner that is calculated to be understood by average plan participant
    - Combined notices can cover SPDs, SMMs, SARs, certain investment-related disclosures, QDIA notices, and pension benefit statement
      - Provided annually, but within 14 months of last notice

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Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - **Internet website**
    - Must take measures reasonably calculated to ensure that covered document is posted on website by its ERISA due date and that it stays posted until it is superseded by later version
    - Will not fail to comply with safe harbor if covered documents are temporarily unavailable due to unforeseen events or circumstances beyond control of plan administrator
    - Have procedures to ensure that covered documents are available and take prompt action to cure problems

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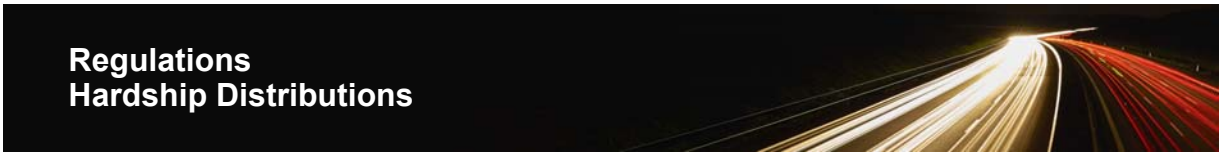
Regulations
Electronic Disclosure (Retirement Plans)

- **Regulation**
  - **Invalid addresses**
    - System for delivering notices of internet availability must alert plan administrators of invalid electronic addresses
    - If become aware of invalid address, must promptly take reasonable steps to cure or act as if individual elected to opt out of electronic delivery
      - Examples of curing include sending notice to secondary electronic address or obtaining new address
  - **Effective date – presumably 1/1/21**
    - Applicable for first calendar year following publication of final rule
    - DOL has asked for comments on proposed rule by 11/22/19

Regulations
Hardship Distributions

- **Legislation**
  - **Tax Cuts and Jobs Act of 2017 (TCJA)**
    - Casualty deductions are limited to Presidentially declared disaster – limits casualty losses that qualify for hardship distributions
      - Impacts
  - **Bipartisan Budget Act of 2018 (BBA)**
    - Hardship rule changes (BBA § 41113; Code § 401(k); effective 2019)
      - Removes need to suspend elective contributions for 6 months
      - Removes need to take loans before requesting hardship
      - Expands money sources – allows withdrawal from QNECs, QMACs, and earnings on them and elective contributions
- **Regulations**
  - **Proposed regulations (83 Fed. Reg. 56763 (11/14/18) (26 C.F.R. § 1.401(k)-1(d))**
  - **Final regulations (84 Fed. Reg. 49651 (9/23/19) (26 C.F.R. § 1.401(k)-1(d))**

Regulations
Hardship Distributions



- **Administration**
  - Eliminating 6-month suspension of elective deferrals
    - Not intended to apply to Code § 409A nonqualified deferred compensation
    - Optional in 2019, required starting 1/1/2020
  - Making changes to safe harbor list of expenses
    - Expenses to repair damage to employee's principal residence need not be due to federally-declared disaster
      - Restores safe harbor expense to requirements in effect prior to TCJA
      - Optional in 2018 and 2019, required starting 1/1/2020
    - Employee's expenses (including loss of income) due to federally-declared disaster, provided principal residence or principal place of employment located within FEMA-designated area
      - Optional starting in 2019
  - Expanding sources of contributions available for hardship distributions
    - Special rules apply to Code § 403(b) plan contributions
    - Optional starting in 2019

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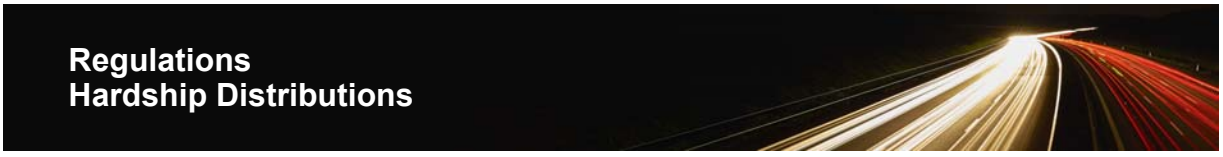
Regulations
Hardship Distributions



- **Administration**
  - Removing requirement to take all available loans
    - Optional starting in 2019
  - Documenting financial need
    - "Facts and circumstances" test eliminated
    - Replaced with objective standards: (1) distribution may not exceed amount of need (including necessary taxes or penalties), (2) employee must first obtain all available distributions, (3) employee represents he or she has insufficient assets "reasonably available" to satisfy need
    - Optional in 2019, required starting 1/1/2020
  - Amending plan for hardship distribution rules
    - Individually-designed plans: end of second calendar year beginning after issuance of Required Amendment List
      - Assuming 2019 RAL → December 31, 2021
    - Pre-approved plans: later of plan sponsor's tax-filing deadline (including extensions) for year in which amendment takes effect or last day of plan year in which amendment is effective
    - Code § 403(b) plans: March 31, 2020 (possible extension)

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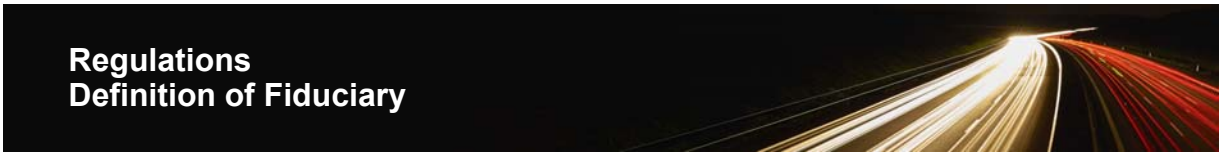
Regulations
Definition of Fiduciary



- **Legislation**
  - No change
- **Regulation – DOL**
  - Proposed regulations issued in 2010
  - Proposed regulations withdrawn in 2011
  - New proposed regulations issued in 2015
  - Final regulations issued in 2016
  - Final regulations delayed and revised in 2017
  - Final regulations withdrawn in 2018 after court ruling
  - DOL has plan to issue new proposed regulations
- **Regulation – SEC (Regulation BI or Regulation Best Interest)**
  - Final regulations (84 Fed. Reg. 33318 (7/12/19))

Regulations
Definition of Fiduciary

- **Litigation**
  - DOL fiduciary rule
    - Struck down by Fifth Circuit in March of 2018
    - Trump administration did not appeal
    - Fifth Circuit then vacated rule
    - *Chamber of Commerce of the U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018)
  - SEC fiduciary rule
    - Seven states (California, Connecticut, Delaware, Maine, New Mexico, New York, and Oregon) and the District of Columbia have filed suit asking that Regulation Best Interest be vacated for having exceeded SEC's statutory jurisdiction and for being arbitrary and capricious
    - *State of New York, et al. v. S.E.C.*, Case 1:19-cv-08365-VM, __ F.Supp.3d __ (S.D.N.Y. 9/9/18)
    - In addition, private entities have brought suit

Regulations
Multiple Employer Plans (MEPs)

- **Legislation**
  - Pending legislation (SECURE Act)
- **Regulation**
  - Multiple employer plans on retirement plan side
  - Final regulations – DOL (84 Fed. Reg. 37508, 7/31/19, 29 C.F.R. § 2510.3-55)
    - Provide clarity regarding "bona fide" groups and associations
  - Request for information – DOL (84 Fed. Reg. 37545, 7/31/19)
  - Proposed regulations – IRS (84 Fed. Reg. 31777, 7/3/19, Prop. 26 C.F.R. § 1.413-2)
    - Provide clarity regarding "bona fide" groups and associations of employers and professional employer organizations ("PEOs") that can sponsor MEPs

Regulations
Multiple Employer Plans (MEPs)

- **Administration**
  - Executive Order 13847 (8/31/18)
  - Field Assistance Bulletin 2019-01 (7/24/19) (https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/guidance/field-assistance-bulletins/2019-01.pdf)
    - Provides relief for MEP reporting

Regulations
DB Plans – Lump Sum Windows

- **Regulation (guidance)**
  - **DB plan lump sum offer to retirees, Notice 2019-18, 2019-13 I.R.B. 915 (3/25/19)**
  - **Background**
    - **Generally – regulations provide that pension annuity payments cannot be changed once they commence and must be "non-increasing," with exception of increased benefits resulting from plan amendment**
    - **Employers have been offering lump sum "windows" to retired participants in pay status wherein they receive their full remaining benefit in a lump sum**
    - **In 2015, IRS suspended ability to offer lump sum to retired in-pay status participants**
      - **Notice 2015-49 (intended to prohibit offering lump sum to retired in-pay status participants)**
  - **IRS guidance**
    - **Permits DB plans to include retired in-pay status participants in lump sum window**
    - **IRS will continue to study**

Regulations
DB Plans – Hybrid Submissions

- **Regulation (guidance)**
  - **DB plan hybrid determination letter submissions, Revenue Procedure 2019-20, 2019-20 I.R.B. 1182 (5/13/19)**
  - **Background**
    - **Historically, IRS has had different processes for obtaining favorable determination letters – most recently before 2017 a five-year determination letter cycle for individually designed plans**
    - **In 2017, IRS revised to limit favorable determination letter program to initial plan qualification, qualification upon plan termination, and certain other circumstances as determined annually by IRS**
    - **Notice 2015-49**
  - **IRS guidance**
    - **Permits DB plans that are hybrid plans to be submitted to IRS for favorable determination letter**
    - **Submission to occur between 9/1/19 and 8/31/19**

Regulations
EPCRS Update

- **Regulation (guidance)**
  - **EPCRS, Revenue Procedure 2019-19, 2019-19 I.R.B. 1086 (5/6/19)**
    - Employee Plans Compliance Resolution System (EPCRS)
    - Updates prior version Revenue Procedure 2018-52
    - Expands Self-Correction Program ("SCP") by allowing correction of certain plan failures without involving IRS or paying user fee
      - Certain plan document failures
      - Certain plan loan failures
      - Additional categories of operational failures
  - **Plan document failures**
    - Failure to timely amend plan (usually these are significant failure)
      - To correct
        - » Plan must have favorable determination letter (opinion letter)
        - » Correction done within two-years (end of second plan year following plan year in which failure occurred)
    - Not available to correct failure to timely adopt plan document

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Regulations
EPCRS Update

- **Regulation (guidance)**
  - **Plan loan failures**
    - Failure to repay loan in accordance with terms (defaulted loan) may be corrected by repaying missed payments in lump sum with interest and re-amortizing outstanding loan balance
      - If defaulted loan not corrected, may treat as deemed distribution in year of correction instead of year of failure (DOL still requires Voluntary Correction Program ("VCP" – IRS submission) to qualify for relief under DOL's Voluntary Fiduciary Correction Program)
    - Failure to obtain spousal consent for loan may be corrected by notifying affected participant and spouse and then obtaining spousal consent
      - If consent not obtained, SCP not available
    - Failure to limit number of loans to plan limit may be corrected by adopting retroactive plan amendment to match number of loans
      - To correct
        - » Plan amendment must satisfy Code's amendment requirements
        - » Plan amendment must satisfy Code's qualification requirements
        - » Excess must have been available on nondiscriminatory basis or only to non-highly compensated employees

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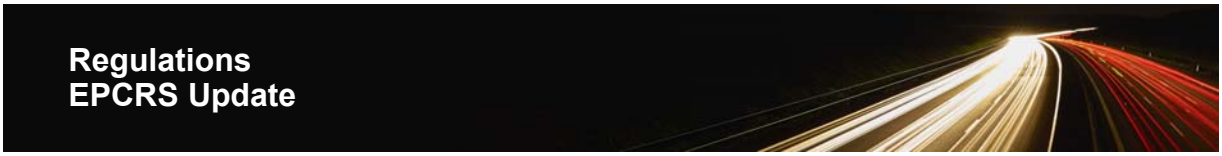
Regulations
EPCRS Update



- **Regulation**
  - **Operational failures**
    - **Failure to operate plan in accordance with plan terms**
    - **If operational failure involves providing increased benefits, may correct operational failure by adopting retroactive plan amendment to conform written plan document to actual operation**
      - **To correct**
        - » **Plan amendment may only result in an increase of benefit, right, or feature**
        - » **Increase in benefit, right, or feature must be available to all eligible employees;**
        - » **Increase in benefit, right, or feature is permitted under the Code and satisfies correction principles of EPCRS section 6.02**

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State Developments
State Run Private Plans

- **Legislation**
  - **States have enacted mandatory and voluntary retirement plans for employees who do not have access to employer retirement plans**
  - **Although generally limited to small employers, states are expanding scope of their involvement**

State	Enacted	Implemented	Form	Mandatory
California	2016	2019 anticipated	State IRA	Mandatory
Connecticut	2016	2019 anticipated	State IRA	Mandatory
Illinois	2015	2018 in waves	State IRA	Mandatory
Maryland	2016	2020 anticipated	State IRA	Mandatory
Massachusetts	2012	2017	MEPs	Voluntary
New Jersey	2016	Not specified	Marketplace	Voluntary
New York	2018	2020 anticipated	State IRA	Voluntary
Oregon	2015	2018 in waves	State IRA	Mandatory
Vermont	2017	2019	MEPs	Voluntary
Washington	2015	2018	Marketplace	Voluntary

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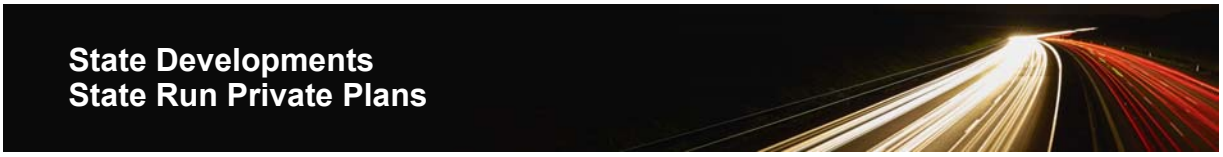
State Developments
State Run Private Plans



- **DOL had issued guidance allowing states and cities to create state-run retirement plans that cover employees at private employers**
  - Many states interested in encouraging retirement savings
  - State law or city ordinance would mandate employer to auto enroll anyone not eligible under employer's retirement plan
  - Employer uses its payroll to enroll, and collect and forward deductions
    - See 29 C.F.R. § 2510.3-2(h) (state final regulation) (Aug. 30, 2016) https://www.gpo.gov/fdsys/pkg/FR-2016-08-30/pdf/2016-20639.pdf
    - See 29 C.F.R. § 2510.3-2(h) (subdivision (city) final regulation) (Dec. 20, 2016) https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-30069.pdf
- **Administration and Congress have repealed political subdivision rule using Congressional Review Act (CRA)**
  - House passed 234-191 on 2/15/17
  - Senate passed 50-49 on 3/30/17
  - President Trump signed Pub. Law 115-35 (H.J. Res 66) on 5/17/19
  - One of rare uses of CRA (until 2017, only 1 use)

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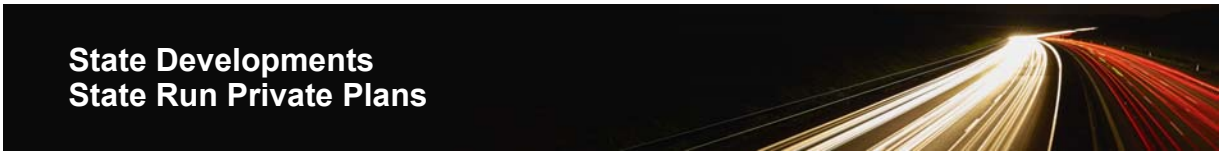
State Developments
State Run Private Plans



- **Legislation – Illinois example**
  - Illinois Secure Choice Savings Act (Secure Choice Act) (820 ILCS 80)
  - Requires private employers with more than 25 employees that have been operating in Illinois for at least two years to participate in Illinois Secure Choice program or offer another qualified retirement plan
  - Covered employers required to automatically enroll employees and withhold 5% of pay unless employee elects different amount or opts out
- **Administration – Illinois example**
  - Employers with 500 or more to register by 11/1/18
  - Employers with 100-499 to register by 7/1/19
  - Employers with 25-99 to register by 11/1/2019
  - Resources
    - http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3588&ChapterID=68
    - https://www2.illinois.gov/rev/questionsandanswers/pages/924.aspx
    - https://www.ilsecurechoice.com/home/faq.html

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State Developments
State Run Private Plans

- **Litigation**
  - **California**
    - ***Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program*, No. 2:18-cv-01584. 2019 WL 1430113, __ F.Supp.3d __ (E.D. Cal.)**
    - **U.S. Department of Justice filed "statement of interest" requesting judge deny state's motion to dismiss lawsuit**

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- **Three ERISA retirement plan cases are currently pending before Supreme Court**
  - **One involves the statute of limitations for bringing a claim for breach of fiduciary duty – *Intel Corp. Investment Policy Committee v. Sulyma***
  - **One involves the ability to bring so called "stock drop" cases involving ESOPs and other plans that offer an "employer stock" fund – *Retirement Plans Committee of IBM v. Jander***
  - **One involves the ability of participants in overfunded defined benefit plans to sue for investment-related losses – *Thole v. U.S. Bank, N. A.***

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- ***Intel Corp. Investment Policy Committee v. Sulyma* (No. 18-1116)**
  - **ERISA's statute of limitations states that participant must sue within 3 years of date she had "actual knowledge" of fiduciary breach**
  - **Does participant have "actual knowledge" if the issue in dispute was covered in the ERISA-required disclosures, but she did not read those disclosures?**
    - **If the answer is "no," the 3-year statute will rarely apply**
    - **That rewards participants who are inattentive, or who are willing to lie about whether they read the disclosures**
  - **That would not eliminate the statute of limitations entirely, as there is also a 6-year statute that runs from the date of the last act or omission constituting the breach**
  - **Oral argument is scheduled for 12/4/19**

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- ***Retirement Plans Committee of IBM v. Jander* (No. 18-1165)**
  - **This is a narrow but important issue for those employers that are publicly-traded companies and that offer an "employer stock fund" as one of their investment options**
  - **Background:**
    - **For years, when something happened that caused the value of the employer stock to fall, the plaintiffs' bar would file a lawsuit alleging that the plan fiduciaries knew or should have known of the facts that ultimately caused the stock to drop, and they should have acted to protect the plan and its participants before the stock declined in value**
    - **These became knows as "stock drop" suits**
    - **Very popular beginning in the 1990s, and generated lots of litigation**
  - ***Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014)**
    - **The Supreme Court set out some pretty strict rules for what the plaintiffs have to allege in their Complaint to get past a motion to dismiss**

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- ***Retirement Plans Committee of IBM v. Jander* (continued)**
  - **There are two different tests under *Dudenhoeffer*:**
    - **Public information. If the claim is that the fiduciaries should have acted based on publicly-available information, the assumption is that an efficient market has taken all of the publicly available information into account in setting the market price of the stock**
    - **To state a claim, the plaintiff has to plead "special circumstances" showing that the market was not working properly**
      - **That is very hard to do**
    - **"Inside" information. If the claim is that the corporate executives who were also plan fiduciaries should have acted based on "inside information," the plaintiffs have to plausibly allege that there was something the plan fiduciaries legally could have done that would not have done "more harm than good" to the plan**
      - **Insider trading is illegal, so there is no obligation to sell all of the employer stock held by the plan, or to advise the participants to sell all the employer stock in their accounts**
      - **The plaintiffs have shifted their focus to allegations the fiduciaries should have done other things, such as stopping any further purchases of employer stock, or disclosing the non-public information to the market**

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- ***Retirement Plans Committee of IBM v. Jander* (continued)**
  - ***Jander* concerns the second test involving inside information**
    - **The plaintiffs allege that the IBM executives on the plan committee had inside information about problems at one of its divisions that caused IBM's stock price to be artificially inflated**
    - **They allege that the fiduciaries should have immediately disclosed that information to the market as a whole (not just to the ERISA plan participants)**
    - **They concede that disclosure would harm the plan by causing the value of the employer stock held by the plan to decline**
    - **But they allege that when disclosure is inevitable, early disclosure leads to smaller losses than later disclosure, so no prudent fiduciary could reasonably conclude that it was better to wait and make the disclosures under the timing provided by the securities laws**

Litigation
Supreme Court Cases (Pending)

- **Litigation**
- ***Retirement Plans Committee of IBM v. Jander* (continued)**
  - **IBM's argument:**
    - **This type of general allegation can be made in almost any stock drop case**
    - **One of *Dudenhoeffer's* stated goals was to give the trial courts the ability to "divide the plausible sheep from the meritless goats"**
    - **If plaintiffs allegations are sufficient, the "meritless goats" will get through a door that has been opened even wider than it was before**
    - **Where the plaintiffs are alleging that disclosures should be made to the market as a whole, that is a subject governed by the securities laws, and the courts should not add an ERISA overlay to those already detailed rules**
  - **Oral argument was held last week**

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Litigation
Supreme Court Cases (Pending)

- **Litigation**
  - ***Thole v. U.S. Bank, N.A.* (No. 17-1712)**
    - **Disclaimer – Dorsey is one of the law firms representing U.S. Bank**
    - **Case involves plaintiffs alleging fiduciaries breach with respect to investment of plan's assets**
    - **Case was dismissed by 8th Circuit**
    - **Supreme Court will hear case this term**
      - **Court will consider whether participant in DB plan may bring suit to restore plan losses under ERISA 502(a)(2) or seek injunctive relief under ERISA 502(a)(3) where there is no financial harm to the participants**
        - **Timeline:**
          - **2009 – DB plan became underfunded after being overfunded**
          - **2013 – Plaintiffs brought action; DB plan underfunded**
          - **2014 – DB plan overfunded**
          - **2015 – District court dismissed (*Adepipe v. U.S. Bank, N.A.*, 2015 WL 11217175 (D. Minn., Dec. 29, 2015)**
          - **2017 – 8th Circuit affirmed (873 F.3d 617 (8th Cir. 2018))**

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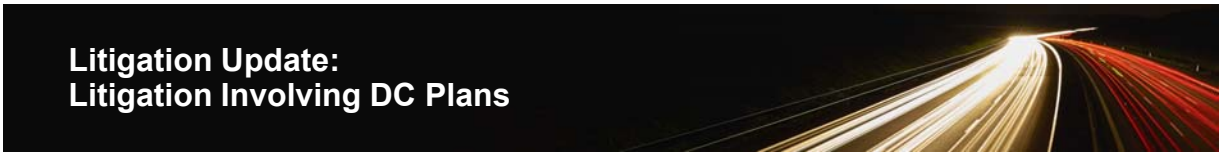
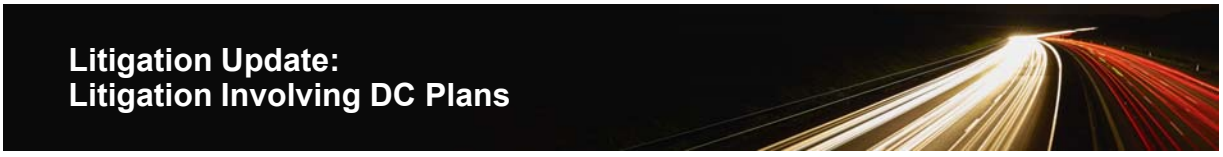
Litigation Update: Litigation Involving DC Plans



- There continues to be considerable litigation over the mutual funds included in the plan's investment lineup, and the reasonableness of the fees that are paid to the plan's service providers
  - The main targets in the most recent cases are the "plan sponsor fiduciaries"
  - These are the people at the plan sponsor who choose the funds that are going to be made available under the plan, and who are responsible for determining the compensation of the service provider
- There are several recurring areas of dispute
  - The reasonableness of the fees paid to the record keeper and other service providers, especially when those fees are paid with revenue sharing
    - The plan sponsor fiduciaries need to understand the direct and indirect (e.g., revenue sharing) compensation being paid to the service provider, and need to take that into account when determining the reasonableness of the service provider's fees
    - May need to do regular RFPs and/or benchmarking to demonstrate fees are consistent with the going market rate

Litigation Update: Litigation Involving DC Plans



- DC plan disputes (continued)
  - Claims alleging that it is imprudent to pay service providers asset-based fees rather than per-participant fees
    - The allegation is that asset-based fees are inherently imprudent, because the fees go up as the plan's assets increase, even though no additional services are being provided
    - The cases indicate there is no *per se* rule against asset-based fees
      - The test is whether the total amount paid is consistent with the going market rate for comparable services
      - If an asset-based fee is used, the plan fiduciary should monitor to make sure it remains competitive
    - Recent Schlichter Bogard settlements
      - They often require the plan sponsor to use a "per participant" methodology to calculate the total amount of the fee to be paid
      - It is then left up to the plan sponsor how to allocate that among plan participants – for example, each participant could be charged the same amount, or the amount charged could vary based on the size of the participant's account

Litigation Update: Litigation Involving DC Plans

- DC plan disputes (continued)
  - Claims based on cheaper share classes of the same fund
    - Retail shares vs. institutional shares
    - If a share class with a higher expense ratio has been chosen, the plan sponsor fiduciaries need to be able to demonstrate why that was better for the plan participants
  - Claims based on "similar" funds that were allegedly cheaper
  - Claims based on choice of actively-managed funds rather than index funds
  - Claims challenging the decision to offer affiliated funds
  - Claims alleging too many record keepers
  - Claims alleging too many funds are being offered, either directly or through a brokerage window

Litigation Update: Litigation Involving DC Plans

- DC plan disputes (continued)
- There have been many sizeable recent settlements in these cases.
  - Long-running case of *Tussey v. ABB* case finally settled for $55 million
    - Litigation took 12 years, and involved two trips to 8th Circuit
  - MIT – $18.1 million
  - Phillips North America – $17.5 million
  - Vanderbilt University – $14.5 million
  - Johns Hopkins -- $14 million
  - Duke University – $10.65 million
  - Safeway – $8.5 million
  - University of Chicago – $6.5 million
  - Brown University – $3.5 million

Litigation Update: Litigation Involving DB Plans

- **DB plan actuarial litigation**
  - **A flurry of cases have been filed challenging the mortality tables used by some DB plans**
    - ***Masten v. Metropolitan Life Insurance Company*, Case No: 1:18-cv-11229 (S.D.N.Y. 12/3/18)**
    - ***Martinez Torres v. American Airlines, Inc.*, Case No: 4:18-cv-00983 (N.D. Tex. 12/11/18)**
    - ***DuBuske v. PepsiCo, Inc.*, Case No: 7:18-cv-11618 (S.D.N.Y. 12/12/18)**
    - ***Smith v. U.S. Bancorp*, Case No: 0:18-cv-03405 (D. Minn. 12/14/18)**
    - ***Smith v. Rockwell Automation*, Case No: 2:19-cv-00505 (E.D. Wisc. 4/8/19)**
    - ***Duffy v. Anheuser-Busch*, Case No: 4:19-cv-001189 (E.D. Mo. 5/6/19)**
    - ***Herndon v. Huntington Ingalls Industries, Inc.*, Case No: 4:19-cv-00052 (E.D. Va. 5/20/19)**
    - ***Cruz v. Raytheon Company*, Case No: 1:19-cv-11425 (D. Mass. 6/27/19)**
    - ***Belknap v. Partners Healthcare System, Inc.*, Case No: 1:19-cv-11437 (D. Mass. 6/28/19)**
    - **And more…**

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Litigation DC Plans Fee Litigation

- **DB plan actuarial litigation (continued)**
  - **Background**
    - **ERISA requires plans use Treasury mortality tables to calculate the single life annuity benefit for participant**
    - **ERISA, however, does not require particular interest rate and mortality assumptions to be used to convert a single life annuity**
    - **Guidance indicates these assumptions must be "reasonable," but neither ERISA nor Internal Revenue Code define reasonable**
      - **To convert single life annuity to optional form (such as joint and survivor form)**
        - » **26 C.F.R. § 1.401(a)-11(b)(2) (conversion of single life annuity to optional form)**
      - **To reduce single life annuity for early commencement**
        - » **26 C.F.R. § 1.401(a)-14(c)(2) (conversion of single life annuity to early commencement amount)**

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Litigation Update: ERISA and Arbitration

- Use of arbitration clauses in ERISA plans
- Can plan sponsors require the mandatory arbitration of ERISA claims?
  - Yes, that seems to be possible for many types of ERISA claims
  - There have been several recent decisions out of the Ninth Circuit addressing this issue
- Is it a good idea to do so?
  - That is a harder question
  - One reason plan sponsors are interested is because the plaintiff can be barred from bringing the claim as a class action
  - However, there are also significant downsides, and there is no "one size fits all" answer

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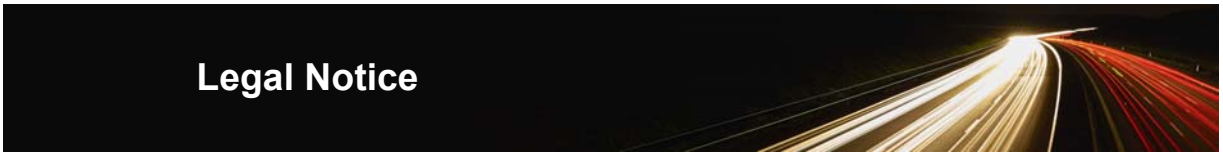

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