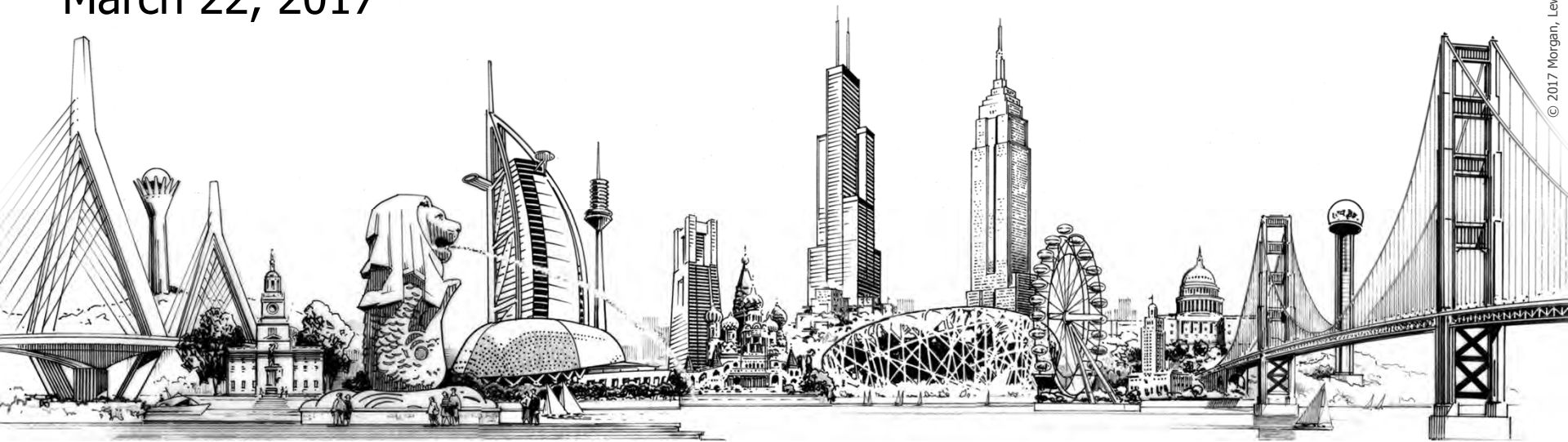


# Morgan Lewis

## HOT TOPICS IN EMPLOYEE BENEFITS: WHAT WE'RE SEEING

Presenters: Amy Pocino Kelly (moderator), Andy Anderson, Althea Day,  
Brian Dougherty, Julie Stapel, and Mims Maynard Zabriskie  
March 22, 2017



# Agenda

- Health and Welfare
- Fiduciary Considerations
- Plan Sponsor Considerations
- Executive Compensation
- Multiemployer Plans

**PRESENTER: ANDY ANDERSON**

# **HEALTH AND WELFARE**

# “Repeal and Replace”

- Day 1 executive order
  - Notable for its failure to reference “employers”
- CMS market stabilization proposed rule
- American Health Care Act (AHCA)
  - Passed 3 House Committees on party-line votes
    - Revisions made; text not yet available
  - Gets to Full House?
    - Revisions?
  - Gets to Senate?
    - Revisions?
  - Signed by Easter?
- AHCA based on budget reconciliation process
  - Can be done without any Democratic votes
  - Can only reach Affordable Care Act (ACA) provisions that have a federal budget impact
    - Contains:
      - 2016 repeal of individual and employer mandate
      - 2018 (2017?) repeal of PCORI, Reinsurance, Risk Corridors, Risk Adjustment, Credit Recapture, over-the-counter drug prohibition, FSA \$ cap, HSA 20% penalty (reduced to 10%), Device Tax, Health Insurance Tax, deduction of Medicare Part D reimbursement
      - 2025 (2026?) delay of Cadillac Tax
      - 2019 repeal of Premium Credits, Cost Sharing, etc.
    - Does not contain a cap on tax-free employer health insurance

# “Repeal and Replace”

- AHCA does not change (among others):
  - Age 26
  - EHB rules
  - Reporting (adds to it, actually starting in 2020)
  - Preventive care
  - Lifetime/annual \$ limits
  - SBCs
- AHCA followed by (2nd and 3rd “Buckets”):
  - Secretary of HHS revising existing regulations
    - Limited actions and may be court tested
    - Some ACA rules are DOL or IRS specific
  - Broader legislation addressing purchase of coverage across State lines, medical malpractice reform, etc.
    - Requires 60 or more Senate votes—likely DOA

# “Repeal and Replace”

- Risks for employers:
  - Cap on tax-free nature of group health coverage
    - Perhaps through Tax Reform?
  - Failure to repeal Cadillac Tax
  - HHS promoting state innovation waivers (Section 1332 waivers)
    - 5 states already applied (HI, MA, VT, CA, AZ)
    - May weaken ERISA preemption

# 2018 Open Enrollment Planning

- Prepare for repeal of employer and individual mandates:
  - Change eligibility rules back to “traditional” full-time definition?
  - Drop “least expensive” plan and/or abandon affordability-based premiums?
  - Abandon PEO contracting efforts focused on employer mandate?
- Prepare for broader HRA/HFSA rules:
  - Eliminate HFSA contribution limits?
  - Recognize use of HRA/HFSA for over-the-counter?
- Abandon EGWP and go back to traditional Retiree Part D subsidy (since it will again be deductible)?
- Begin to think about, in 2020, whether some workers are “better off” under proposed tax credit (in its current or possibly modified form) and do not offer them employer group health coverage?
- Will Medicaid changes impact your population?

**PRESENTER: JULIE STAPEL**

# **FIDUCIARY CONSIDERATIONS**



# The Fiduciary Rule—A Long and Winding Road

- To go way back, the DOL originally proposed changes to the definition of “fiduciary” in 2010, but backed away after ferocious opposition.
- To go not quite as far back:
  - Revised proposed rule in April 2015
  - Final rule published in April 2016 with “effective date” of June 8, 2016 and “applicability date” of April 10, 2017
- To go back not too far at all:
  - November 8, 2016—election of Donald Trump caused many to question ultimate fate of the rule.
  - January 21, 2016—President’s chief of staff issued customary memo from a new administration halting adoption of currently proposed regulation for a specified period of time. *But the fiduciary rule was final—just not yet applicable.*
  - February 3—President issues memo directing the DOL to consider specified questions about the fiduciary rule but did not delay it (to the surprise of many).

# The Fiduciary Rule—A Long and Winding Road

- Basically Now:
  - On March 2, the DOL published its proposal in the Federal Register to delay the April 10, 2017 applicability date by 60 days.
    - The proposed regulation *does not* itself delay the applicability date. A delay is still not guaranteed.
    - The proposed regulation proposes a 60-day delay, which would make the effective date June 9, 2017.
    - There are two different comment periods set forth in the proposed regulation. The comment period on the 60-day delay lasts 15 days from publication, making the last day to comment *on the 60-day delay* March 17, 2017.
    - Then there is a separate comment period on a variety of other questions—both the questions from the President’s memorandum as well as a list of other questions that the DOL included in the proposal—that lasts for 45 days from the date of publication. That comment period ends April 14, 2017 (which, we note, is after the original applicability date of April 10, 2017).

# The Fiduciary Rule—A Long and Winding Road

- Basically Now (cont.):
  - On March 10, DOL issued Field Assistance Bulletin 2017-01, which announced a temporary enforcement policy regarding the fiduciary rule and the related exemptions.
    - DOL acknowledged concern presented by timing and concern about investor confusion caused by conflicting or ambiguous notices.
    - Indicated DOL intends to issue a decision regarding a delay before April 10, 2017 (but just looking at the calendar suggests it won't be too much before April 10).
    - If no delay until after applicability date, no enforcement during the “gap” period (presumably between April 10 and the date of the announced delay).
    - If no delay at all, no enforcement action if the financial institute sends out applicable notices or disclosures “within a reasonable period after the publication of a decision not to delay the April 10 applicability date.”
    - Helpful as far as it goes, but . . .
      - DOL does not have enforcement jurisdiction over IRAs (the IRS does)
      - The enforcement policy would not apply to private rights of action

# The Fiduciary Rule—What's the Next Twist?

- What Do We Think Will Happen Next?
  - We expect that the 60-day delay will happen, but not with much advance notice.
  - What happens during that 60-day delay is anyone's guess. Some possibilities:
    - Possibility that the comments on the rule due on April 14 may provide a basis for the DOL to propose additional delays, revisions, or repeal
    - Possibility of legislative action to further delay, or to revise or repeal
    - Possibility of further judicial action (although a less likely scenario). DOL has "won" all efforts to enjoin implementation of the rule, but those legal challenges continue.
    - Possibility of no further developments at all (and the rule goes into effect June 9)?
- What Do We Think You Should Do?
  - Depends on how the rule affects you.
  - In many cases, we have counseled continuing efforts to prepare for compliance but caution with respect to client notices or disclosures.

**PRESENTER: BRIAN DOUGHERTY**

# **PLAN SPONSOR CONSIDERATIONS**

# PBGC Early Warning Program

- Historically focused on transactions perceived to impair ability to continue to maintain underfunded pension plans
- Controlled group breakup, transfer of underfunded pension liabilities in sale of business, substitution of secured debt for unsecured debt
- PBGC seeks additional contributions, security interest, letter of credit, corporate guarantee
- Now acknowledged to have expanded to reach credit deterioration, downward cash flow patterns

# IRS Proposed Change to 401(k) Regulations

- Changes definitions of QNEC and QMAC to permit use of forfeitures to correct ADP/ACP failures
- Immediate reliance by plan sponsors
- Reliance unaffected by Trump administration regulatory initiatives

# IRS Audit Standards for Substantiation of Hardship Withdrawals

- Retention of summary information, in lieu of actual documents, is sufficient
- Itemized list of information that must be included in summaries
- Notifications to participants requesting hardship withdrawals
- Where summaries are incomplete, auditors may obtain supporting documents directly from participants



**PRESENTER: MIMS MAYNARD ZABRISKIE**

# **EXECUTIVE COMPENSATION**

# Share Withholding for Taxes

- Prior rule: In order to maintain favorable financial accounting treatment for a share-based award, share withholding for taxes could not exceed the *minimum* statutory withholding amount
- The Financial Accounting Standards Board (FASB) has changed this rule so that it is permissible to allow share withholding for taxes up to the *maximum* statutory tax rate in the applicable jurisdiction

# Share Withholding for Taxes

- Effective date:
  - Public companies – annual reporting periods beginning after December 15, 2016
  - Nonpublic companies – annual reporting periods beginning after December 15, 2017
  - Companies may elect to adopt the new standards early, but must adopt all of the FASB updates

# Share Withholding for Taxes

- Considerations
  - Gives employees added flexibility for tax planning
  - Useful for equity awards made outside of the United States, given the difficulty in determining the minimum tax rate applicable to such awards
  - Cash flow effect
  - Payroll and administrative complexity
  - Securities law implications
  - Is a plan amendment required?

# Share Withholding for Taxes

- Is shareholder approval required for an equity plan amendment to allow increased share withholding?
- NYSE rules require shareholder approval of a material revision to an equity plan
  - NYSE FAQs provide that an amendment to allow share withholding based on the recipient's maximum tax obligation is not a material revision if the shares withheld were never issued, even if the shares withheld are added back to the plan
  - Special attention is required if the plan allows shares withheld from restricted stock awards to be added back to the plan reserve

# Share Withholding for Taxes

- Nasdaq rules require shareholder approval of a material amendment to an equity plan
  - Nasdaq FAQs provide that a plan amendment to increase the share withholding rate to satisfy tax obligations is not considered a material amendment to the plan
- ISS may recommend against approval of an equity plan where the plan is amended to allow increased share withholding for taxes if the plan allows withheld shares to be added back to the share reserve

# Share Withholding for Taxes/Securities Law Issues

- In order to exempt the disposition of shares through share withholding from being a “sale” of shares under Section 16 (insider trading rules), a company’s compensation committee or board of directors should approve the resolutions before any shares are withheld for Section 16 officers
  - The company should not retain discretion to determine whether shares will be withheld, or the amount of share withholding, for Section 16 officers
  - The resolutions authorizing share withholding should be as specific as possible
- Share withholding for Section 16 officers should not exceed the participant's estimated tax obligations attributable to the payment of the award, in order to avoid creating a derivative security

# Share Withholding for Taxes/Securities Law Issues

- Section 16-related complaints have been filed against companies with respect to open market purchases occurring within six months of share withholding transactions, even though the transactions were reported as exempt
- Focus on the complaints in situations where Section 16 officers had a choice as to whether tax withholding would be made in shares or by cash/check
- Until this issue is resolved, Section 16 officers should consider not engaging in non-exempt purchases of company stock within six months before or after elective share withholding



# Share Withholding for Taxes/Payroll Issues

- Federal tax withholding on equity awards can be determined in one of two ways:
  - By treating the payment as a supplemental wage payment subject to the 25% withholding rate on supplemental wages up to \$1 million (39.6% on supplemental wages of greater than \$1 million)
  - By aggregating the equity awards with other wages and applying the withholding amount generated by the employee's Form W-4

# Share Withholding for Taxes/Payroll Issues

- If Form W-4 is used:
  - An employee may file a revised Form W-4 claiming a reduced number of exemptions or entering a specific dollar amount of increased withholding as a means of increasing the withholding rate toward the 39.6% level
  - Form W-4 does not allow an employee to specify a percentage rate for federal income tax withholding
  - Form W-4 must apply to all wages paid to the employee while Form W-4 remains in effect
  - Companies using Form W-4 should implement procedures to ensure that an employee does not direct withholding of amounts in excess of the maximum applicable tax rate or, in the case of Section 16 officers, their estimated taxes on the equity award distribution

# Share Withholding for Taxes

- A company does not have to treat all employees the same with respect to tax withholding on equity awards
- Before implementing increased share withholding for taxes, companies should discuss the issues with their executive compensation and securities law counsel, and with their payroll departments and stock plan administrators

**PRESENTER: ALTHEA DAY**

# **MULTIEMPLOYER PLANS**

# Multiemployer Pension Plans in Critical and Declining Status

- Multiemployer Pension Reform Act of 2014 (MPRA) provided new benefit suspension and partition opportunities for pension plans in “critical and declining status” to assist in avoiding insolvency
  - Critical and declining plans
    - Plan projected to become insolvent in current or any of 14 succeeding plan years (~15 years); or
    - Plan projected to become insolvent in current or any of 19 succeeding plan years (~20 years) and
      1. Ratio of inactives to actives exceeds 2 to 1; or
      2. Plan is less than 80% funded.
- Suspension rules permit trustees to reduce accrued benefits of active and retired participants
  - Conditions
    - Actuary must certify that plan is projected to avoid insolvency with proposed benefit suspensions.
    - Plan determines that even though it has taken “all reasonable measures to forestall insolvency,” plan still projected to become insolvent unless proposed benefits are suspended.
  - Limitations
    - Monthly benefit cannot be reduced below 110% of the PBGC guarantee.
    - Limitations on suspensions for participants/beneficiaries ages 75 to 79.
    - Participants/beneficiaries ages 80 and older and those receiving disability pensions are exempt from suspensions.
    - Benefit suspensions are to be reasonably implemented to avoid plan insolvency.
    - Suspensions must be “equitably distributed” across plan participants, taking into consideration various factors set forth in the statute.
  - Notice/vote requirements

# Plans in Critical and Declining Status

- Partition rules permit trustees to apply to the PBGC for financial assistance (to have the PBGC relieve the plan of some of its financial obligations)
- Conditions
  - The plan has taken all reasonable measures to avoid insolvency, including the maximum benefit suspensions;
  - PBGC expects partition will reduce its long-term loss with respect to the plan, and partition is necessary for the plan to remain solvent; and
  - PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by the partition.
    - Partition must be in the interests of the participants and beneficiaries of at least one of the plans, and
    - Not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.
- Suspension prerequisite for partition; no suspension approval/no partition approval

# Plans in Critical and Declining Status

- Temporary and proposed Treasury Regulations and PBGC Interim Final rules were issued in June 2015.
- Final PBGC rules were issued in December 2015 and final Treasury Regulations were issued in April 2016.
- Since June 2015, 11 plans have submitted applications to Treasury for benefit suspensions.
- As of December 15, 2016, of the 11 plans, several were withdrawn, 4 denied
  - Denied applications included Central States Southeast and Southwest Areas Pension Fund, one of the largest multiemployer pension plans in the United States

# Plans in Critical and Declining Status

- On December 16, 2016, the Iron Workers Local 17 Pension Fund became the first multiemployer pension plan to receive approval from Treasury to reduce benefits under MPRA.
  - Under MPRA, once Treasury approves a plan's application to reduce benefits, Treasury conducts a vote of that plan's eligible participants and beneficiaries.
    - The proposed reductions become effective unless a majority of all participants and beneficiaries vote to reject them.
  - On January 20, 2017, participants in the Iron Workers Fund voted to approve benefit reductions.



# Plans in Critical and Declining Status

- 3 applications for MPRA benefit suspensions remain under review with Treasury
- Following approval of the Iron Workers Fund's application, trustees of other plans in critical and declining status may apply or reapply for approval of benefit suspension
- Stay tuned!

**Morgan Lewis**

**QUESTIONS?**

**Register for the next webinar in this series:**  
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