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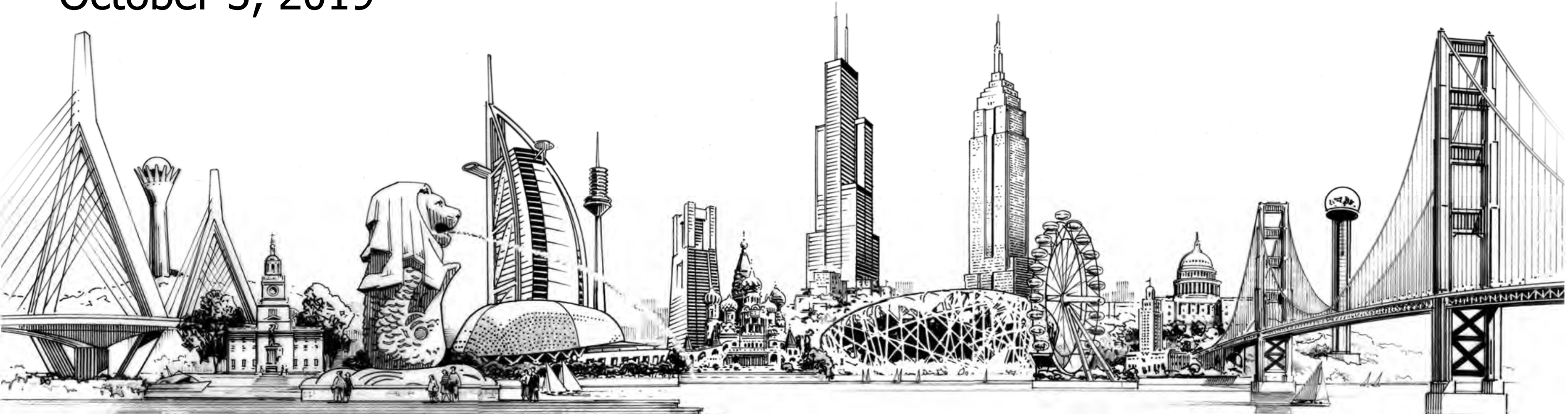
HOT TOPICS IN EMPLOYEE BENEFITS: WHAT WE'RE SEEING

Sage Fattahian, Anna Pomykala, Michelle McCarthy, Elizabeth Goldberg, Mark Simons

October 3, 2019



Presenter: Sage Fattahian

HEALTH AND WELFARE PREVENTIVE CARE SERVICES NOTICE 2019-45

Background

- Section 223 of the Code permits eligible individuals to establish a Health Savings Account (HSA)
  - Individuals covered under a high deductible health plan (HDHP) are eligible to make contributions to a HSA
    - HDHP is a health plan that satisfies certain requirements with respect to minimum deductibles and maximum out-of-pocket expenses
    - Generally, the HDHP may not provide benefits until the minimum deductible for that year is satisfied
  - No other disqualifying coverage permitted
    - Other group health plan coverage not permitted: HRA, general purpose health FSA
  - Permitted Insurance
    - Insurance which substantially all of the coverage relates to
      - ➢ Liabilities incurred under workers' compensation laws;
      - ➢ Tort liabilities
      - ➢ Liabilities relating to ownership or use of property (home, auto)
      - ➢ Other similar liabilities

Background

- Permitted Insurance (Cont.)
  - Insurance for a specified disease or illness (cancer insurance)
  - Insurance that pays a fixed amount per day (or other period) of hospitalization (hospital indemnity insurance)

- Preventive Care
  - A plan that applies no deductible to its coverage of preventive case does not fail to qualify as a HDHP (does not endanger HSA eligiblity)
  - IRS has provided a safe harbor definition of preventive cate
    - Periodic health evaluations (annual physicals)
    - Routine prenatal and well-child care
    - Immunizations for adults and children
    - Tobacco cessation and obesity weight loss programs; and
    - Screening services

Preventive Care Guidance

- Preventive care generally does not include services or treatments intended to treat an existing illness, injury or condition
- The benefit cannot provide "significant benefits in the nature of medical care"
- Guidance over the years defining preventive care benefits

- Executive Order 13877
  - Directed the Secretary of Treasury to issue guidance to expand guidance in this area resulting in IRS Notice 2019-45
  - Make HDHPs more appealing

Preventive Care Guidance

- IRS Notice 2019-45
  - Notice expands the list of preventive care benefits permitted to be provided by a HDHP at no cost-sharing (or reduced cost-sharing)
  - Expanded list provided in Appendix
    - Medical care, including Rx drugs, for certain chronic conditions
    - (Beta blockers for coronary artery disease, insulin for diabetes, statins for heart disease, blood pressure monitors, hypertension and glucometers for diabetes)
    - Treated as preventive care only when prescribed to treat an individual diagnosed with the associated chronic condition specified in the Appendix and only when prescribed for the purpose of preventing the exacerbation of the chronic condition or the development of a secondary condition
    - List reviewed periodically

Presenter: Anna Pomykala

FRINGE BENEFITS
IRS ALLOWS EMPLOYERS TO INCLUDE TRUNCATED TINS ON FORMS W-2 AND W-2C TO EMPLOYEES

The Rule

- Treas. Reg. § 301.6109-4 allows but does not require employers to use truncated taxpayer identification numbers – "TTINs" – to identify any person on a Form W-2 and certain other returns, statements and documents required to be filed or furnished after December 31, 2020
  - *I.e.*, effective for Forms W-2 for tax year 2020 that employers issue to employees in January of 2021*
- A TTIN includes:
  - An individual's social security number (SSN)
  - IRS employer identification number (EINs)
- Purpose: help prevent identity theft

*Employers are required to issue W-2 statements to employees and file a copy with the Social Security Administration by January 31st for the prior tax year

History and Context

- A pilot program for truncating TINs was implemented a decade ago.
- Since 2014, employers have been able to truncate TINs on most information returns: Forms 1099, 5498 (IRA contributions) 1095-C (employer-provided health insurance) and 1098 (mortgage interest) but not 1098-C (contributions of motor vehicles, boats, and airplanes)
- The 2015 Protecting Americans from Tax Hikes (PATH) Act amended Code section 6051(a)(2), which required that a taxpayer's "social security account number" be reported on Form W-2, to allow an "identifying number" for each employee and allowed the Treasury to issue regulations.
- These regulations, adopted in July of 2019, finalize rules proposed in 2017 that were not substantively changed

Applies to *Employee* Copies/ *Employee* TINs

- The voluntary rule applies *unless* use of a TTIN is prohibited by statute, regulation, IRS guidance or IRS forms or form instructions, or if use of an SSN or EIN is specifically required.
  - An employer **cannot truncate**:
    - an employee TIN on a Form W-2 that is being sent to the IRS
    - an employee TIN on the Form W-2 copy filed with the Social Security Administration
  - An employer **can**:
    - Use a TTIN on Forms W-2 to report third-party sick pay provided to employees
    - Use a TTIN to report wages paid in the form of group term life insurance
    - Use a TTIN on employee copies of the form 1098-C
  - **An employer can never truncate its own EIN**

Implementation

- Specific format required: replace the first five digits of a TTIN’s 9-digit number with Xs or asterisks
  - XXX-XX-1234 or ***-**-1234 (SSN)
  - XX-XXX1234 or **-***1234 (EIN)
- Choosing not to truncate TINs will <u>not</u> trigger penalties under either Code section 6721 (Failure to file correct information returns) or section 6722 (Failure to furnish correct payee statements).
  - These penalties can be significant - $250 per return, or $50/$100 if corrected within particular time periods (subject to maximums, limitations and exceptions for certain de minimis failures and a gross receipts test).

Concerns and Next Steps on TTINs

- In response to taxpayer comments concerned about taxpayer/preparer difficulties verifying the accuracy or correct mistakes on a form, the IRS believes that the benefits outweigh any potential risks, all of which can be mitigated
- Before deciding whether to truncate TINs, employers will need to:
  - track whether state and local governments permit the use of TTINs
  - ensure that payroll tax reporting software vendors have adapted to the new rules.
- If employers with employees in multiple states find the process too burdensome, they can choose not to truncate.

Presenter: Michelle McCarthy

MULTIEMPLOYER BUTCH-LEWIS ACT OF 2017: WHERE WE ARE NOW

Butch-Lewis Act of 2017

- Establishes the Pension Rehabilitation Administration (PRA) within the Department of the Treasury and a related trust fund
- Purpose is to make loans to certain multiemployer defined benefit pension plans
- Treasury must issue bonds to fund the loan program
- The Pension Rehabilitation Administration may use the funds, without a further appropriation, to make loans, pay principal and interest on the bonds, or for administrative and operating expenses
- The bill also appropriates to the PBGC the funds that are necessary to provide the financial assistance required by this bill

Eligibility for Plan Loan and Other Relief

- To receive a loan, a plan must be in critical and declining status or insolvent
- A multiemployer pension plan that is applying for a loan under this bill may also apply to the Pension Benefit Guaranty Corporation (PBGC) for financial assistance

Legislative History

- On July 24, the House or Representatives passed H.R. 397 – the so-called "Butch Lewis Act"
- The bill was approved by a vote of 264-169 with 29 Republicans joining all 235 House Democrats
- On the same day as the House vote, 28 Senate Democrats introduced S. 2254 establishing a similar federal loan program for ailing multiemployer pension plans
- Under both H.R. 397 and S. 2254, the loan program would be administered through the PRA, housed within the Department of Treasury

Outlook for S. 2254

- The outlook for Senate action on S. 2254 remains in question
- Anticipated that Senate Finance Committee staff would use month-long August recess to develop an alternative plan but that did not happen
- Meetings were held but with little to no progress
- Chairman of the Senate Finance Committee, Charles Grassley (R-IA) publicly stated that he wanted to address the multiemployer crisis before the end of the year
- The Senate Democratic Leader, Sen. Chuck Schumer (D-NY), sent a letter to the Senate Republican Leader, Rep. Mitch McConnell (R-KY), informing him that the Democratic agenda for the remainder of the year includes addressing the multiemployer pension issue

Potential Cost

- The Congressional Budget Office (CBO) estimates that 157 multiemployer pension plans would be eligible to apply for loans under the criteria set forth in HR 397
- Of those 157 plans, CBO estimates that eight would be ineligible for loans, 19 would receive loans but not grants, and 130 would receive loans and grants
- The CBO released an analysis for HR 397 on July 23, 2019 estimating that loans disbursed in 2020 would total $43.3 billion
- CBO estimates that the present value of the repayments would total $7.9 billion
- This would result in a net subsidy cost of $31.8 billion

Presenter: Elizabeth Goldberg

FIDUCIARY
ERISA FIDUCIARY ISSUES ABOUND IN THE UPCOMING SUPREME COURT TERM

Supreme Court ERISA Developments

- After more than 2 years without one, the Supreme Court will hear 3 ERISA cases this fall

- ***Intel Corp. Inv. Comm. v. Sulyma*, No. 18-1116 (9th Cir.)**
  - **Issue:** When does a plaintiff have "actual knowledge" for ERISA's 3-year limitations period?
  - Under ERISA's statute of limitations for fiduciary breach claims, a claim must be brought on the earlier of six years from the breach or three years from the plaintiff's actual knowledge of the alleged breach
  - Case involves claims of fiduciary breach stemming from plan investments and the cost of those investments
  - Defendants argued that these allegations were time barred after three years because certain plan disclosures gave the plaintiff "actual knowledge" of all information necessary to challenge the plan's investments and fees

Supreme Court ERISA Developments

- ***Intel Corp. Inv. Comm. v. Sulyma*, No. 18-1116 (9th Cir.)**
  - CA9: Held that plaintiff's knowledge of the facts at issue (i.e., the fact of the investment and fees) did not alone create actual knowledge
  - "'Actual knowledge'" must therefore mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue… the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action is filed"
  - Decision conflicted with other Courts of Appeal
  - Argument is set for December 4, 2019
  - **Significance:** If the Court agrees that a plaintiff can have actual knowledge based on such disclosure documents alone, or in any way on the knowledge of facts alone (rather than knowledge of the breach), it will likely increase the number of ERISA cases that are dismissed for being filed too late

Supreme Court ERISA Developments

- ***Jander v. IBM Corp.*** **No. 18-1165 (2d Cir.)**
  - **Issue:** Pleading standard for stock-drop claims based on failure to disclose inside information
  - "Stock drop" claims are lawsuits over the offering of employer stock in ERISA plans; they are so named because they usually assert claims that plan fiduciaries should have taken action to correct a plan's investment in employer stock that is inflated in value, such as by making a disclosure regarding the stock or selling the stock, and that the failure to do so resulted in a loss to the plan when the stock "dropped" in value
  - The court considered whether this claim was adequately pled under the pleading standard for stock drop cases that has existed since the Supreme Court's holding in 2014 in *Fifth Third Bancorp v. Dudenhoeffer*
  - The court held for the plaintiffs, making it one of the few post-*Dudenhoeffer* stock drop cases that has survived a motion to dismiss

Supreme Court ERISA Developments

- ***Jander v. IBM Corp.*** **No. 18-1165 (2d Cir.)**
  - Oral argument is set for November 6, 2019
  - The Court may resolve the post-*Dudenhoeffer* question of whether the pleading standard for such stock drop cases is “would have” or “could have” (i.e., that no prudent fiduciary “could have” viewed an alternative action as more likely to harm the plan than help)
  - Also, there are securities law issues as the DOL/SEC filed an interesting *amicus* brief, supporting neither side directly but arguing that any disclosure duty imposed by ERISA should be coextensive with securities laws
- **Significance:** The case is likely to have an impact of future stock drop litigation, including if it resolves this split between the “would have” or “could have” standards

Supreme Court ERISA Developments

- ***Thole v. U.S. Bank*, No. 17-1712 (8th Cir.)**
  - **Issue:** Standing for DB participants where plan is overfunded and/or absent individual loss
  - CA8: participants lack statutory standing to seek losses or injunctive relief absent individual monetary harm; did not reach the question of Article III constitutional standing
  - Created Circuit splits – and CA8 stands alone in requiring loss to seek *injunctive* relief under 502(a)(3)
  - Briefing scheduled to close in December 2019, with argument during the January 2020 sitting

Supreme Court ERISA Developments

- ***Thole v. U.S. Bank,*** **No. 17-1712 (8th Cir.)**
  - It has historically been more difficult for participants to bring breach of fiduciary duty claims with respect to defined benefit plan investments because the financial responsibility (and thus the consequences of failed investments) fails on the plan sponsor and may not rise of the level of threatening the viability of the participant's benefit under the plan
  - **Significance:** A decision in favor of the plaintiffs may create new interest by the plaintiff's bar in defined benefit plan investments

Presenter: Mark Simons

PLAN SPONSOR CONSIDERATIONS
A YEAR-END UPDATE SEGMENT

SECURE ACT

- The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) was approved by the House of Representatives on May 23, 2019, but has yet to be approved by the Senate. It contains several significant provisions relating to retirement plans:
  - Multiple employer plans
  - Safe harbor 401(k) plans
  - Church plans
  - Participant by part-timers in 401(k) plans
  - Required minimum distributions

Multiple Employer Plans

- New rules apply for both Title I (ERISA) and Title II (Code) purposes
  - Title I – “Open MEPs” under ERISA Section 210(a)
    - DOL Advisory Opinion 2012-04A (“Association MEPs” vs. “Open MEPs”)
  - Title II - Disqualification risk implications (“One Bad Apple”)

Safe Harbor 401(k) Plans

- 401(k)(13) – Increase in auto enrollment cap from 10% to 15%
- Option of adopting non-elective safe harbor design after the beginning of the plan year
- Safe harbor notice requirement - - - only for matching contribution plans (Code Sections 401(k)(12) and 401(k)(13))

Church Plans

- Church-controlled organizations and retirement income accounts
  - Non-QCCO fix to Code Section 403(b)(9)

Required Minimum Distributions

- The Code would be revised to increase the required beginning date to 72
  - SECURE also revises the post-death RMD distribution deadline rules

Part-Timers and 401(k) Plans

- Solely with respect to the right to make deferrals (but not necessarily to receive a match or other employer-funded contribution), 401(k) plans would be required to allow certain long-term part-time employees to participate

  – Eligible part-timers would exclude those under age 21

  – Non-discrimination (ADP) test and top heavy rules would not apply to these part-timers

Final 401(k) Regulations Regarding Hardship Distributions

- Deemed immediate and heavy financial need
- Distribution necessary to satisfy financial need
- Expanded sources for hardship distributions
- Applicability dates
- Amendment deadlines

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QUESTIONS?

Biography

Sage Fattahian
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Sage Fattahian counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

Biography

Anna Pomykala
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Anna Pomykala works with a team of employee benefits lawyers to assist clients in finding creative solutions to their employee benefit–related business challenges. Our clients include small, middle-market, and Fortune 500 companies in the technology, consumer goods, retail, pharmaceutical, healthcare, hospitality, and energy industries. We also represent many financial institutions, startups and tax-exempt organizations, educational institutions, and state and local governments. Prior to joining Morgan Lewis, Anna earned her LL.M. in taxation from New York University School of Law.

Biography

Michelle McCarthy
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Michelle McCarthy is partner in the employee benefits and executive compensation practice. She advises both multiemployer and single employer clients on a variety of issues, including legal compliance, tax-qualification, drafting and design, healthcare reform, participant communications, plan investments, fiduciary responsibility, prohibited transactions, withdrawal liability, service provider contracts, benefit claims and appeals, and ERISA litigation. Michelle also represents plans and plan sponsors in connection with US Department of Labor and Internal Revenue Service audits.

Biography

Elizabeth Goldberg
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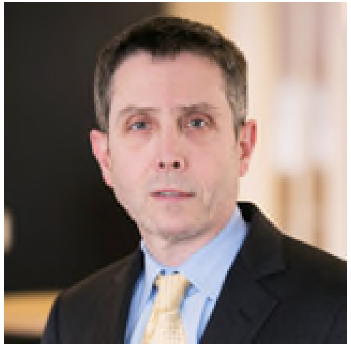
Elizabeth Goldberg advises clients on ERISA matters with a focus on fiduciary responsibility provisions, prohibited transaction rules and exemptions, and the management of employee benefit plan assets. She negotiates investment-related agreements on behalf of plans and financial services providers; designs, implements, and administers employee benefit plans; and counsels clients on US Department of Labor (DOL) investigations, plan fiduciary governance structures, ERISA reporting and disclosure obligations, ERISA litigation, and general benefit plan compliance considerations. Elizabeth's work experience includes several years at the DOL's Office of the Solicitor.

Biography



Mark Simons is involved in all aspects of Morgan Lewis's employee benefits and executive compensation practice. With a primary focus on employee compensation, Mark addresses matters related to qualified benefit plans and nonqualified deferred compensation plans. Prior to joining Morgan Lewis, Mark worked as an associate at another large international law firm on Wall Street.

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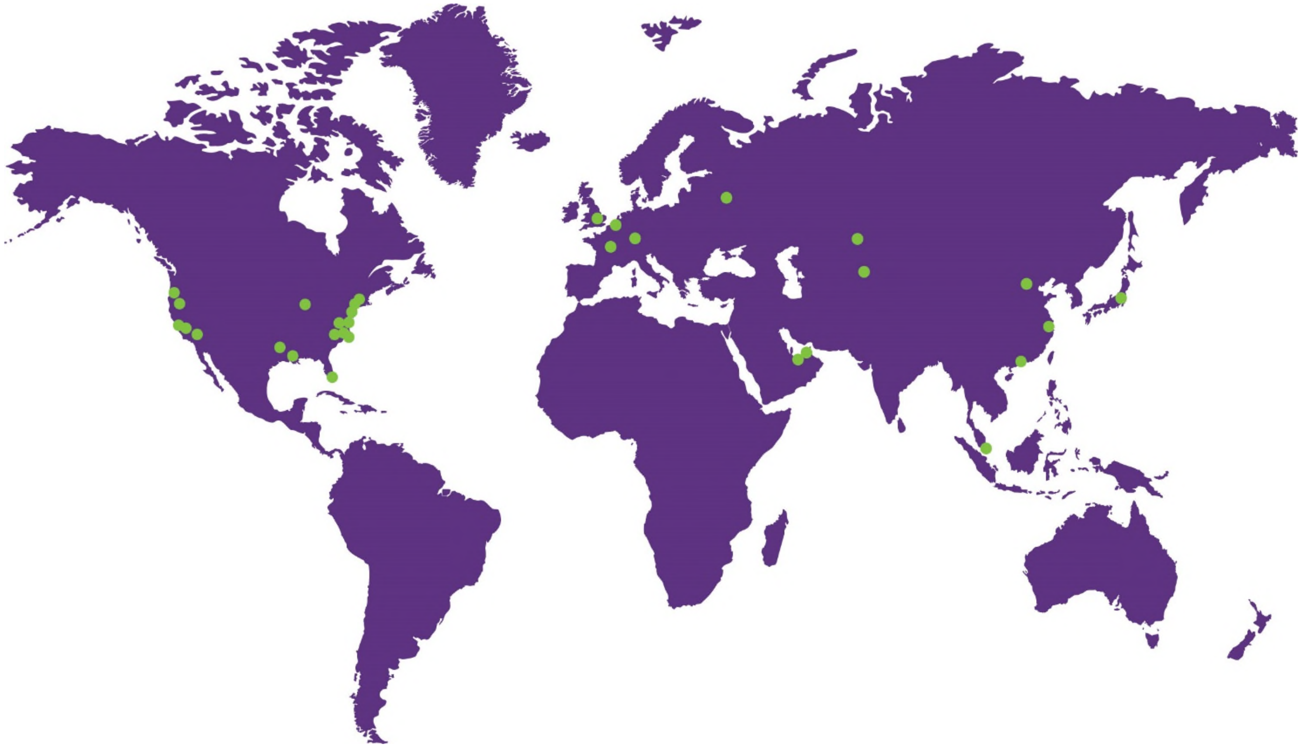

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