

IMPORTANT CHANGES IN LAWS, REGULATIONS & NOTICES IMPACTING DEFINED BENEFIT RETIREMENT PLANS

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I. PBGC Activity

- a. Final Rule on Mergers and Transfers Between Multiemployer Plans
 - i. Issued on September 14, 2018 and takes effect October 15, 2018
 - ii. Updates general requirements on plan mergers and transfers of plan assets and liabilities between multiemployer plans under the Multiemployer Pension Reform Act of 2014
- b. Final Rule on Guaranteed Benefits and Asset Allocation for Retirement Plans with Owner-Participants
 - i. Issued on October 2, 2018 and takes effect November 2, 2018
 - ii. Amends PBGC regulations on guaranteed benefits and asset allocation for terminated single-employer defined benefit plans to phase in rules for participants with ownership interests
 - iii. Adds language to DOL Reg. § 4022.26 to clarify that in the case of a bankruptcy termination, the length of time of plan existence is measured from later of the effective date or the adoption date of the plan, and other changes regarding calculation of benefits following a plan's bankruptcy termination
- c. Missing Participants Program
 - i. Issued final rule on December 22, 2017 to expand the program, including fewer benefit categories and fewer sets of actuarial assumptions for determining the amounts to transfer to PBGC
- d. PBGC Q&A Web Page
 - i. The PBGC developed a new web page that compiles staff responses to questions received from various practitioners, such as bankruptcy claims, liens arising from large missed contributions, guaranteed benefits, and reportable events
 - ii. Web page will be updated periodically with additional Q&A
 - iii. The web page can be accessed here: <https://www.pbgc.gov/prac/staff-responses-prac-questions>

II. IRS Activity

a. Updated Cost of Living Adjustments for 2019

i. Notice 2018-83 – Some of the more commonly applicable limits:

Applicability	2018 Limit	2019 Limit
Annual benefit under defined benefit plan - Section 415	\$220,000	\$225,000
Limitation for defined contribution plan – Section 415	\$55,000	\$56,000
Exclusion for elective deferrals – Section 402(g)	\$18,500	\$19,000
Annual compensation limit – Section 401(a)(17)	\$275,000	\$280,000
Limitation for determination of "highly compensated employee" Section 414	\$120,000	\$125,000
Catch Up Contributions	\$6,000	\$6,000

b. IRS Offers Pensions Ways to Calculate Split Payout Option

- i. IRS Notice 2017-44 offers plans the option of using two tax code compliant suggested model amendments to calculate payments for participants who want to receive their benefits using both an annuity and lump-sum option
- ii. Plans that adopted one of the model amendments by the end of 2017 were eligible for limited relief from the application of Section 411(d)(6) provisions

c. IRS Issued New Model 402(f) Safe Harbor Notice

- i. Plan administrators of Code Section 401(a) qualified plans must provide this notice to any recipient of an eligible rollover distribution
- ii. IRS has been publishing safe harbor notices to help plan administrators comply, and most recently IRS Notice 2018-74 provides two updated safe harbor notices to reflect certain legislative changes, including:

1. The extended rollover deadline for qualified plan loan offset amounts under the Tax Cuts and Jobs Act
2. Exception to the 10% additional tax under Code Section 72(t) for phased retirement distributions to certain federal retirees under MAP-21;
3. Expanded exception to 10% additional tax under Code Section 72(t) for certain qualified public safety employees who participate in a governmental retirement plan and have reached age 50; and
4. The self-certification procedures for claiming eligibility for a waiver of the 60-day deadline for making rollovers

d. New EPCRS Guidance

- i. User fees changed in the beginning of 2018 to eliminate reduced fees for streamlined errors. The current filing fees are as follows:

Plan Assets	\$500,000 or less	More than \$500,000 but less than \$10 million	Over \$10 million
User Fees	\$1,500	\$3,000	\$3,500

- ii. Rev. Proc. 2018-52 was issued in September 2018 and made changes to the Employee Plans Compliance Resolution System (EPCRS) to require electronic filing and payment (voluntary compliance date is January 1, 2019, and mandatory compliance date is April 1, 2019). No other changes were made to the prior Revenue Procedure covering EPCRS.

e. Mortality Table Changes

- i. IRS issued Notice 2018-02 with updated mortality tables that defined benefit plans will have to use for minimum funding, maximum benefits, and minimum lump sums for plan years beginning in 2019

f. Impact of Tax Reform

- i. While the Tax Cuts and Jobs Act did not specifically address defined benefit plans, the changes to the business deductions have led to employers sponsoring defined benefit plans to make larger than expected employer contributions for the year beginning in 2017. The primary reason for the increase in contributions is the significant reduction in the top corporate tax rate. These larger contributions

coupled with strong market returns have led to more defined benefit plan terminations this year.

III. The Legislative Landscape

a. Tax Reform 2.0

i. Retirement Enhancement and Savings Act (RESA)

1. Introduced by Sen. Orrin Hatch (R-UT) and Sen. Ron Wyden in March 2018
2. One of the most comprehensive bills to be introduced
3. Bill would, among other things: tackle reduced required minimum distributions, create a new employer tax credit to offset initial expenses involved with setting up a new 401(k) or SIMPLE IRA plan that includes automatic enrollment, expand multiple employer plans (MEPs), create a safe harbor for plan sponsors electing annuity providers, remove the cap on automatic employee contribution rate increases, permit access to funds for families welcoming a new child, and modify hardship rules
4. Despite having bipartisan support and the support of industry groups, since being introduced it has only been referred to the House Committee on Ways & Means and the House Committee on Education and the Workforce

ii. Family Savings Act of 2018

1. Approved by House and has bi-partisan support; perhaps the most likely of all the bills introduced to be voted in by year-end
2. Largely focuses on eliminating the required minimum distribution requirements for those with account balances under \$50,000 and reducing the required minimum distribution amount for larger accounts, permitting access to retirement accounts to pay for expenses relating to welcoming a new child (\$7,500 per spouse, or \$15,000 combined), relaxing the commonality rules for MEPs, offering greater portability of accounts to allow those with annuities in a 401(k) plan to transfer their accounts to an IRA without tax, and providing a safe harbor to plan sponsors selecting an annuity provider
3. Unlike RESA, the Family Savings Act has already passed the House on Sept. 27 (with the vote being 240-177), and has been

sent to the Senate where it was referred to the Committee on Finance

- a. Executive Order on Strengthening Retirement Security in America
 - i. There has been bipartisan support to liberalize ERISA rules to permit unrelated employers to participate in multiple employer plans (MEPs)
 - ii. Executive Order directs the DOL and Department of Treasury to consider policies that would expand the availability of MEPs, relax the required minimum distribution (RMD) rules, and improve notice requirements to reduce paperwork and administrative burdens on retirement plan sponsors
 - iii. DOL issued proposed rules in response to the Executive Order; however, guidance focused largely on how to sponsor a "closed" MEP, and did not eliminate the commonality requirement. The proposed rules request comments on ways MEPs can be expanded or "opened;" therefore it is likely we will see additional guidance that may address open MEPs following the expiration of the comment period.
 - iv. Executive Order also tasks the Department of Treasury with reviewing the required minimum distribution rules, and consider updating the life expectancy tables to reflect current mortality data and further stretch out the period over which RMDs are paid

II. Recent Litigation

- a. *Jumblat v. Ali Baba Rest.*, 2:18-cv-00949 (W.D. Pa. Oct. 30, 2018)
 - i. Employee brought case against employer claiming the employer breached their fiduciary duty and wrongful denial of benefits after he attempted to collect retirement benefits and was told by the employer that there were no more funds in the plan
 - ii. After the employee called the DOL, the DOL investigated and found that the plan was never actually put into place and the plan document that the employee received was not on file with the pension plan company, Metlife
 - iii. Court dismissed claims against the employer, Ali Baba, and Adamo (one of the named defendants) because the complaint lacked enough facts to show he was a fiduciary and a proper defendant under ERISA; however, court did not dismiss complaints against Makhoul (who was named as the sole plan administrator)
- b. *PBGC v. Findlay Industries, Inc.*, 902 F.3d 597 (6th Cir. 2018)

- i. Single-employer defined benefit plan sponsored by defendant (Findlay) until it went out of business in 2009
- ii. Defendant transferred property in 1986 to its founder and owner (Phillip), and then less than a month later Phillip transferred it to an irrevocable trust, and trust leased it back to Defendant
- iii. In 2009 when Defendant failed, new company was formed (FI) which purchased inventory and receivables from Defendant, but did not assume Defendant's underfunded pension plan
- iv. PBGC sued Findlay, the Trust, Michel (son of Phillip who started FI) for plan's termination liability, alleging the trust was a "trade or business" under common control with Findlay because they shared a substantial economic nexus as a result of the lease
- v. Sixth Circuit Court applied categorical test applied in the 7th and 8th circuits, which states any entity that leases property to a commonly controlled entity is a "trade or business" under ERISA
- vi. Sixth Circuit also reversed District Court's holding on the issue of successor liability. District Court said it was not appropriate to create federal common law under ERISA to impose successor liability in the context of a single-employer plan. Sixth Circuit stated applying successor liability would promote ERISA's fundamental policy of enforcing employer's promises to their employees by guaranteeing that substance matters over form.
- vii. Buyers in asset deals need to be aware that the successor liability doctrine could be used in both the single-employer pension plan and multi-employer plan context to recover pension termination and withdrawal liabilities

III. Connecticut Activity

a. New Connecticut Withholding Requirement

- i. Effective January 1, 2018, private or public employers that (1) maintain an office or transact business in Connecticut, or (2) make taxable payments to resident individuals, must withhold state income tax from distributions from employer pensions, annuities, profit-sharing plans, stock bonuses, deferred compensation plans, IRAs, endowments, or life insurance contracts.
 1. Plan sponsors required to send CT-W4P to participants. Residency is determined based on address of record, or a plan sponsor may rely on residency statements submitted with the CT-W4P.

- ii. Withholding is calculated the same as it is for payroll purposes, with the highest marginal rate (6.99-percent) being used for those recipients who do not submit the proper form, or receive a lump sum equal to their entire balance (unless a portion of the distribution was previously taxed or it was rolled over as a direct trustee-to-trustee transfer)
 - 1. No withholding for amounts not taxable (direct rollovers, distributions from Roth IRAs).
- iii. Exemptions available for those earning \$75,000 or less (\$100,000 for married couples)
- iv. There are still numerous questions outstanding regarding the withholding rules and additional guidance is expected from DRS

b. 403(b) Reporting Requirements for Municipalities

- i. "An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest" enacted June 27, 2017; came as a result of several teachers claiming they were not given proper information regarding plan fees and therefore regretted their investment selections
- ii. Political subdivisions in CT administering Code Section 403(b) retirement plans must provide certain disclosures to participants by January 1, 2019, and annually thereafter
- iii. Disclosure must set forth certain information regarding fees. State has not provided additional guidance; however, disclosures similar to those provided to participants under ERISA 404(a) may be sufficient

c. Fiduciary Duties Applicable to Certain Financial Planners

- i. "An Act Protecting the Interests of Consumers Doing Business with Financial Planners" enacted July 5, 2017 (effective immediately); generally applies to financial planners that are not regulated by some other state/federal law
- ii. Requires covered financial planners to disclose to consumers, upon request, each time they make a recommendation to the consumer, whether the financial planner has a fiduciary duty to the consumer

IV. Fiduciary Rule

- a. U.S. Department of Labor recently stated that it planned to issue a revised fiduciary rule package by September 2019; however, it is still unclear what that might look like

- b. Some States Moving Forward with Fiduciary Rules Following Demise of U.S. DOL Fiduciary Rule
 - i. New Jersey (requested comments on Oct. 15, 2018)
 - 1. Currently soliciting comments on its proposed fiduciary rule that would affect broker-dealers, agents, investment advisers and investment adviser representatives registered to do business in New Jersey
 - 2. Being touted as "the strongest investor protections in the nation"
 - ii. New York has also adopted a rule, but is more limited to life insurance and annuity suitability
- c. In the Matter of Scottrade, Inc.
 - i. Claims brought against Scottrade by the Office of the Secretary of the Commonwealth of Massachusetts Securities Division for violations of the MA Uniform Securities Act and coincident regulations
 - ii. In preparation for the DOL fiduciary rule, Scottrade adopted a statement in its manuals that generally stated that the firm didn't use certain bonus or incentives with its employees that are "intended or reasonably intended to cause associates to make recommendations that are not in the best interest of Retirement Account clients or prospective Retirement Account clients"
 - iii. Despite this, Scottrade launched several sales contests in violation of their own policies, which involved cold-calls and making recommendations and referrals to its investment advisory program, and Scottrade circulated internal metrics and rankings, and weekly reports tracking new assets
 - iv. Secretary alleged that Scottrade knowingly violated its own internal policies designed to ensure compliance with the DOL fiduciary rule
 - v. Case is still moving through the courts, with MA regulators recently defeating an attempt to transfer their case to federal court, and the judge remanding the case back to a state administrative proceeding