Latest in Non-COVID Benefits Issues

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September 29, 2020

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Agenda

- Hardship Distribution Regulations
- SECURE Act
- Proposed DOL Regulations on Fiduciary Duties
- SCOTUS Ruling on Statute of Limitations

Hardship Distribution Regulations

No More Deferral Suspension

- Six-Month Prohibition on Deferrals Eliminated
  - May be applied as of the first day of the 2019 plan year, even if the distribution was made in the prior year
  - Required to eliminate suspension January 1, 2020
- Sponsors of non-qualified plan may still suspend elective contributions

Goodbye "Facts and Circumstances"

- "Facts and Circumstances" Test Eliminated
  - Replaced with more objective standard to determine if hardship is necessary to satisfy financial need
    - Does exceed the financial need (including taxes)
    - Employee takes all other available distributions
    - Employee provides representation that he or she has insufficient cash or liquid assets "reasonably available" to satisfy the financial need
  - May rely unless plan administrator has "actual knowledge" to contrary
    - Not required to inquire
    - Applies only when administrator already has information

Plan Loans

- Plan Loans No Longer Need to Be Sought First
  - Requirement to first seek a plan loan has been eliminated
    - Optional elimination
    - May continue to require
  - Should still exhaust other available distributions from all plans of deferred compensation, ESOP dividends, etc.

Expanded Sources

- Expanded Sources for 401(k) Plans
  - Elective deferrals—including all earnings
  - QNECs, QMACs, and safe harbor contributions
- Limited Expansion for 403(b) Plans
  - Earnings on elective deferrals still ineligible
  - QNECs and QMACs
    - Held in a custodial account are ineligible
    - Held in non-custodial 403(b) annuity are eligible

Hardship Reasons

- May Take a Hardship Distribution for a Casualty Loss
  - Tax Cuts and Jobs Act limited Code section 165 casualty loss provision to a federally declared disaster
  - Final regulations clarify that change does not apply to plan hardships
    - So, you may still allow hardship distribution for damage to the participant’s principal residence, for example

Hardship Reasons

- New Hardship Reason - FEMA Disaster
  - Expenses and losses (including loss of income) on account of a FEMA-declared disaster
  - Employee's principal residence or principal place of employment must be located in an area designated by FEMA for individual assistance with respect to the disaster
    - Not all disasters are designated for individual assistance
    - Have to check FEMA website

SECURE Act

Changes Affecting Most Plans

Overview

- Expanding Coverage – Part-time Employees
- Birth/Adoption Withdrawals
- Lifetime Income Disclosure
- Change to Required Minimum Distributions
- Late Filing Penalties

Expanding Coverage

- Minimum Participation Requirement for 401(k) Plans Expanded
  - Employees who work over 500 hours in at least 3 consecutive years MUST be included in the elective deferral feature of plan
    - Long-term part-time employees
    - Service requirement--doesn't impact other (class-based) exclusions
    - Age requirement must be met by last 3-year period
- Effective for PY beginning in 2021

Expanding Coverage

- Minimum Participation Requirement for 401(k) Plans Expanded
  - Three consecutive year period does not begin until January 1, 2021
    - Employers will not have to permit employee deferrals until 2024
    - BUT must start tracking hours in 2021
  - Impact on Testing
    - Expanded class not counted for testing
    - Not required to provide top heavy contribution
    - Don’t have to receive gateway contribution
  - Collectively bargained plan employees are not covered

Expanding Coverage

- Vesting of Employer Contributions
  - If you do provide employer contributions…
  - Year of Service for vesting is 500 hours per year for employees participating as LTPT employees
    - What happens if they cross 1,000 hour threshold?
    - Still count the 500+ hour years?
    - Note that it wouldn't apply in reverse (to someone who drops to part-time)
  - Must count all prior years (even those before 2021)

Birth/Adoption Withdrawal

- New Distribution Opportunity
  - Up to $5,000
  - Within 1-year <u>after</u> birth or legal adoption
  - No early withdrawal penalty
  - Not subject to rollover and mandatory withholding
- Available for Distributions Beginning 1.1.2020
  - Appears child may be born/adopted in 2019
  - 401(k), 403(b), and 457(b) plans

Birth/Adoption Withdrawal

- May be Repaid
  - To any IRA
  - OR to an employer plan
    - Can only repay distributions taken from that particular plan
    - Can only repay if the individual is eligible to make contributions to the plan
- Unclear if There is a Repayment Deadline

Lifetime Income Disclosure

- Must Provide Lifetime Income Disclosure Annually
  - Estimate of monthly annuity income that account could produce in retirement
    - QJSA and Single Life estimate
- Within 1 year, DOL Must:
  - Provide model disclosure
  - Issue guidance prescribing assumptions
  - Issue interim regulations
- Will Apply 12 months after DOL Issues Required Guidance

Lifetime Income Disclosure

- Model Disclosure
  - Must be issues within 1 year (so sometime in 2020)
  - Explain this is only an illustration
  - Explain actual annuity purchase may vary substantially
  - Explain assumptions
  - Provide other explanations DOL finds appropriate

Increasing Age for RMDs

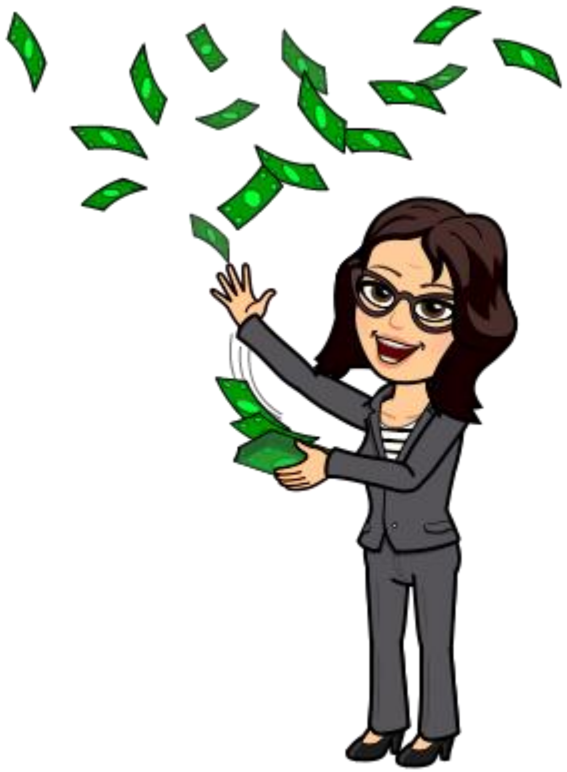
- RMD Age is Raised from 70½ to 72
  - Applicable to all types of plans
  - Good for owners

- Effective for Participants Who Attain Age 70½ after 2019

Changes to RMD After Death

- Required Distributions after Participant's Death
  - Life expectancy of beneficiary for surviving spouses, certain disabled beneficiaries, and minor children
    - Minor children transition to 10-year rule in adulthood
  - Otherwise by the end of the 10th calendar year
- Effective for Participants Who Die after 12.31.2019

Penalties



- Gotta Raise that Money, Money, Money
- Late Penalties Increase
  - **Form 5500**: $25 to $250 per day (capped at $150,000; up from $15,000)
  - **Form 8955-SSA**: $1 to $10 per day (capped at $50,000; up from $5,000)
  - **Form 8822-B**: $1 to $10 per day (capped at $10,000; up from $1,000)
- For Returns/Statements **Due** after 12.31.2019

Proposed DOL Regs on Fiduciary Duties

Advice Exemption

- Person Giving Investment Advice for a Fee is a Fiduciary
- Fiduciary Cannot Receive Compensation Unless an Exemption is Met
- DOL Proposed New Exemption for Investment Advice

Advice Exemption

- Available for:
  - Recommendation of investment products
    - Including recommendation of an institution’s own proprietary investment products
  - Rollover recommendations
  - Recommendations of investment managers or advice providers
  - With certain exclusions

Advice Exemption

- Must Comply with Certain Conduct Standards
  - Best Interest
    - Prudence plus
    - Cannot place the interests of the investment professional or financial institution, or other party ahead of the investor's interest
  - Reasonable Compensation
    - Not required to be lowest compensation
  - Best Execution
    - Intended to bring in standards applicable to the industry
  - No Materially Misleading Statements
    - Indemnification or exculpatory clause in a contract that violates ERISA may constitute such a misleading statement

Advice Exemption

- Disclosures
  - Certain disclosures re: fiduciary status and conflict policy must be provided
- Policies and Procedures
  - Promote compliance
  - For rollover recommendation: documentation of whether rollover is in the best interest of the investor
    - Investor’s alternatives to a rollover, including leaving the money in current plan
    - Fees/expenses associated with options, including whether employer pays for some expenses
    - Services and investments available under the options

ESG Investments

- Environmental, Social, Governance Investments
- Proposed DOL regulations May Restrict Investment in ESG
  - Would amend statute to clarify ERISA fiduciary must always prioritize the economic factors over “non-pecuniary” factors (like ESG or religious factors)

SCOTUS Ruling on Statute of Limitations

Statute of Limitations

- ERISA Statute of Limitations
  - Six years, normally
  - Three years when participants have “actual knowledge”

Actual Knowledge

- *Intel Corp. Investment Policy Committee, et al. v. Sulyma*, 589 U.S. ____ (2020)
  - Considered whether providing a disclosure with information that revealed breach was “actual knowledge”
  - Ruled: “to have actual knowledge of a piece of information, one must, in fact, be aware of it.” Providing evidence of a disclosure is no longer demonstrative proof the participant had actual knowledge of facts relayed by the disclosure

Searching for answers to your questions?

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