Fiduciary Hot Topics

FOURTH QUARTER 2018

DOL's New Fiduciary Rule & the SEC's Best Interests Rule - Hopefully they will Intersect

This past March, almost 10 years after the "new" Fiduciary and Best Interest Contract (BIC) rules were first proposed, the Fifth Circuit of the U.S. Court of Appeals vacated the rules in their entirety. The Department of Labor (DOL) elected not to appeal to the Supreme Court.

Quickly following this, and to no one's surprise, the Securities and Exchange Commission (SEC) issued a package of its own proposed advice standards. This includes a "Regulation of Best Interest." Comments on these proposed standards were due to the SEC by Aug. 7th.

In October, the DOL released its regulatory agenda for the coming year. Notably, this agenda includes plans to issue a revised Fiduciary Rule in Sept. of 2019.

This announcement does not include any details regarding the upcoming re-worked rule. However, it seems likely this will be a significantly watered down version of the original rule.

The DOL's timeframe is in line with the agenda the SEC released, which puts its regulation on track to be finalized by September of next year as well.

We hope the DOL and the SEC will collaborate and coordinate their efforts as they have not done to date. This will avoid these two agencies issuing conflicting and/or redundant standards.

IRS Guidance Indicates Employer Contributions to Retirement Plans may be Linked to Student Loan Payments

In August, the Internal Revenue Service issued a private letter ruling (PLR) clarifying that employer contributions to retirement plans may be tied to student loan payments.

Since the great recession of 2008-09, student loan debt in the U.S. has mushroomed. It is estimated that Americans now hold approximately $1.5 trillion in student loans. As a result, many employers are looking for ways to assist their employees in paying off this debt.

Studies show, not surprisingly, that the burden of student loan debt hampers the ability to save for retirement. A recent study indicates that by age 30, employees with student loans have saved 50 percent less, on average, through their employer's retirement plan, as compared to employees who do not have student loans.

Employers may make additional contributions to retirement plans for virtually any reason so long as these contributions do not favor highly compensated employees. The PLR clarifies that this includes profit sharing contributions that may be tied to student loan payments made outside of the retirement plan.

The plan sponsor requesting the ruling proposed making profit sharing contributions to its retirement plan based on student loan payments. In other words, an employee making loan payments, rather than electing to defer into the retirement plan, would receive a profit sharing contribution which would be the equivalent of a matching contribution if they had instead deferred into the retirement plan.

It should be noted that only the taxpayer who receives a letter ruling may explicitly rely on it. However, letter rulings simply reflect black letter law and are a good indicator of the IRS's thinking with regard to the matter addressed.

As 2019 is fast Approaching, a Reminder about the Changing Rules for Hardship Withdrawals

The opportunities to take in-service distributions from retirement plans are limited prior to age 59½. An exception is hardship withdrawals.

The requirements for hardship withdrawals are changing as follows:

- **No Plan Loan** – To qualify for the safe harbor for hardships, plans no longer have to require that participants take the maximum loan available before requesting a hardship withdrawal.
- **No Suspension of Deferrals** – Also, to qualify for the safe harbor, plans no longer have to suspend employees from making deferrals for six months after receipt of a hardship withdrawal.
- **Withdrawal of Earnings** – Earnings on elective deferral contributions may now be included as part of a hardship withdrawal. This does not apply to earnings on elective deferral contributions in 403(b) plans.
- **Withdrawal of Qualified Non-elective Contributions (QNECs), Qualified Matching Contributions (QMACs), and Safe Harbor Plan Contributions** – QNECs, QMACs, and safe harbor plan contributions may now be available for a hardship withdrawal along with earnings. This includes post 1988 earnings on deferrals

It should be noted that plan sponsors have always been free to define the circumstances under which employees

qualify for hardship withdrawals. The requirements to take a loan and suspend contributions are part of the safe harbor which most employers have chosen to adopt. Where the safe harbor is adopted, the IRS will not challenge hardship withdrawals. Some employers have elected to follow the safe harbor with the exception of the suspension of contributions.

Adopting these changes in the hardship rules will require a plan amendment. Those sponsors using a service provider's prototype or volume submitter document are best advised to wait for the provider to update its procedures and prepare the necessary amendment.

At this point, it is unclear whether employers may continue to impose the requirements to take a loan and suspend contributions and still qualify for the safe harbor. We hope further guidance from the Department of Treasury will answer this question.

These changes are effective for plan years beginning on or after January 1, 2019.

Members of Congress Call Out the Department of Labor on its Enforcement Activities Regarding ESOPs

Twenty-seven members of Congress sent a letter to the president which, in its essence, claims the DOL is engaging in enforcement activities against ESOPs without providing meaningful guidance.

This letter states the DOL "has released very little guidance on substantive issues including, for example, valuations…." It goes on to state that "the Department has also employed counterproductive enforcement tactics, including taking inconsistent positions on legal issues. Ultimately, this investigatory approach is having a detrimental effect on employee ownership, which ESOP companies fear will result in material losses for workers…." This letter was also sent to the Secretary of Labor, Alexander Acosta, and the Solicitor of Labor, Kate Scanlon.

The Internal Revenue Code explicitly endorses employer stock in retirement plans. The statute provides for both ESOPs and stock bonus plans. Over the years, many members of Congress have spoken publically in favor of retirement plans investing in company stock.

However, beginning with the Enron case in 2001, company stock in retirement plans has generated much controversy and litigation. Following the market collapse in 2008-09, there were many lawsuits involving plans holding company stock, known as "stock drop" cases. Because of the adverse publicity surrounding these cases, many companies agreed to significant settlements in order to reach a quick resolution. Through all this, it has been clear from public statements and positions taken regarding litigation, that staff at the DOL are not an enthusiastic advocate of these plans.

As a result of uncertainty about their fiduciary responsibilities regarding company stock, many employers in recent years have terminated ESOPs or stopped making contributions in company stock.

Although the controversy surrounding ESOPs and company stock will most likely continue, it should be noted that the Supreme Court's 2014 decision in Fifth Third v. Dudenhoeffer was a big step forward in clarifying plan sponsors' fiduciary responsibilities under ERISA, at least, with regards to publically traded stock.