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EMPLOYEE BENEFITS LAW

Legal Developments Impacting Retirement Plans

2016 Year-End Update

1. In July 2016, the IRS issued guidance formalizing major changes to its **determination letter program**. Notably, the guidance confirmed the IRS will stop issuing most types of determination letters, advised that expiration dates in prior determination letters no longer apply, and stated the IRS's intent to annually publish a Required Amendments List establishing deadlines for certain plan amendments.

2. The DOL finalized its regulation on the **definition of an ERISA fiduciary**. The regulation is scheduled to take effect in April 2017 and would make it more likely that a person providing investment advice will be held to the standards of an ERISA fiduciary. Republicans recently introduced a bill that would delay the regulation by two years.

3. In September 2016, the IRS updated its **correction program for plan qualification failures**, known as the Employee Plans Compliance Resolution System ("EPCRS"). The new EPCRS reflects the IRS's changes to the determination letter program, provides a revised approach for determining Audit CAP sanctions, and incorporates previously announced changes to VCP user fees and corrections for certain errors (such as plan overpayments and employee elective deferral errors).

4. The Kline-Miller Multiemployer Pension Reform Act of 2014 (MPRA) established a process for **multiemployer plans to propose benefit reductions** if the plan is in "critical and declining status"—which generally means the plan is projected to run out of money within the next 15 years. The plan must submit an application to the IRS showing that the benefit reductions are necessary to prevent the plan from becoming insolvent, and must give participants a chance to vote on the reductions. The IRS approved its first MPRA application in December 2016, which was submitted by the Iron Workers Local 17 Pension Fund. That plan covers about 2,000 participants, is 41% funded, and is expected to go insolvent by 2032.

5. In a win for multiemployer plans, the Tenth Circuit Court of Appeals ruled that a construction company was liable for **withdrawal liability** because its newly acquired, non-union subsidiary performed covered work, even though the construction company acquired the subsidiary after it withdrew from the plan. MMPL represented the winner in that case, the Centennial State Carpenters Pension Trust.[1]

[1] *Ceco Concrete Constr., LLC v. Centennial State Carpenters Pension Trust*, 821 F.3d 1250 (10th Cir. 2016).

6. Distributions received from a retirement plan or IRA can be rolled over to another retirement plan or IRA within 60 days. Previously, the deadline could be waived only with IRS approval. In August 2016, the IRS issued guidance allowing individuals to self-certify that they qualify for **waiver of the 60-day rollover deadline** in certain situations—for example, where the distribution check was lost and had to be reissued. Plans and IRAs can rely on a self-certification unless they know it to be false.

7. A number of states have established **mandatory retirement savings programs** for private-sector employers that do not offer retirement plans to their employees. In final regulations issued in August 2016, the DOL announced a safe harbor exempting these programs from ERISA so long as certain requirements are met—for example, employees must be allowed to opt out and employers cannot contribute to the program. In response to local governments' interest in establishing similar programs, the DOL has extended this safe harbor to certain cities and counties.

8. In July 2016, the First Circuit Court of Appeals joined the Eighth Circuit in holding that **float income** Fidelity received in the course of processing participant distributions was not a plan asset, so did not belong to the plan or the participants who received the distributions.[2]

9. In 2014, the U.S. Supreme Court eliminated the presumption that employer stock is a prudent investment under ERISA. However, in order to sue retirement plan fiduciaries for **employer stock losses**, plaintiffs must allege what the fiduciary should have done differently, and must show the alternative action "would not have done more harm than good." In its 2016 *Amgen v. Harris* decision, the Court emphasized that these lawsuits should be dismissed unless plaintiffs include detailed factual allegations to support their claims.[3] p

10. In December 2016, the DOL updated the **ERISA claims procedures for disability benefits** to include many of the same requirements PPACA imposed on claims for group health plan benefits—for example, that benefit denial notices be written in a "culturally and linguistically appropriate manner." The new requirements apply to claims for disability benefits filed in 2018 or later.

11. The IRS issued guidance relating to **nondiscrimination testing**. The guidance included proposed regulations regarding "new comparability" plans (the IRS withdrew some of these proposed regulations a few months later), and a notice on how a safe harbor 401(k) plan could retain its safe harbor status notwithstanding certain mid-year changes.

12. The DOL increased the **penalties** for certain ERISA violations. For example, the maximum penalty for failure to file a Form 5500 increased from $1,100 to $2,063 per day, and the maximum penalty for failure to furnish a blackout notice increased from $100 to $131 per affected person per day.

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[2] *In re Fid. ERISA Float Litig*., 829 F.3d 55 (1st Cir. 2016).

[3] *Bancorp v. Dudenhoffer*, 134 S.Ct. 2459 (2014); *Amgen Inc. v. Harris,* 136 S.Ct. 758 (2016).

13. The IRS announced the retirement plan **compensation and benefits limits** for 2017, including:

    - The maximum elective deferral to a 401(k) or 457(b) plan remains at $18,000 (plus $6,000 catch-up).
    - The highly compensated employee threshold used for nondiscrimination testing remains at $120,000.
    - The maximum compensation taken into account under a qualified retirement plan will increase from $265,000 to $270,000.

From all of us here at MMPL, your employee benefits law firm.

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