Fourth Quarter 2018

Aon Quarterly Update

Retirement Legal Consulting & Compliance

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Notes From Your Editor

The end of the calendar year is just around the corner! Plan sponsors are well into their 2019 planning and preparing year-end amendments. Now is the time to ensure that plan design changes made in 2018 have been appropriately documented.

We start this issue with an article about Aon's *The Real Deal* study. This study examines the amount of retirement savings that employees will need to maintain their standard of living in retirement and compares that to employees' expected retirement resources. In the past many employees relied on a single rule of thumb to save for retirement. However, The Real Deal demonstrates how retirement needs vary by individual. This study examines how employers can better understand the retirement readiness picture of their employees to help them be able to retire more comfortably.

We have reported extensively on strategies for the redeployment of VEBA assets. In this issue we provide an update on the current position of the Internal Revenue Service (IRS) with respect to the redeployment of these assets. The IRS has announced new benefit limits for 2019. Highlights of those changes are discussed in this issue. We also provide two updates on the IRS's position regarding voluntary compliance program (VCP) submissions under the Employee Plans Compliance Resolution System (EPCRS).

A topic that has caused confusion is the intersection of state escheat laws and qualified retirement plans. We provide an article on this topic and ideas for how to avoid getting caught in the escheat trap. Another topic that has caused confusion is the changes made to the laws regarding hardship distributions by recent federal legislation. We discuss actions that plan sponsors could consider taking in response to these changes.

Plan sponsors have a fiduciary duty to manage disclosures from covered service providers. Aon has established a process to assist plan sponsors with this task.

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

Regards,

Jennifer R Berrian

Jennifer Ross Berrian
Partner
Aon

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Will Your Employees Be Retirement Ready?

by Grace Lattyak and Melissa Hollister

Only one in three workers will have saved enough to retire comfortably by age 67. Do you know how your employees stack up? At what age will they be able to retire with adequate retirement resources?

Aon's *The Real Deal: 2018 Retirement Income Adequacy at U.S. Plan Sponsors* study provides powerful insights into retirement savings behavior and investment experience of U.S. private-sector plan sponsors. The 2018 study offers insight into the overall retirement readiness of U.S. workers and a benchmark for employers across 28 different industries as they measure the effectiveness and sufficiency of their retirement programs.

The 2018 study found that workers who participate in their employer's benefit plans for their entire career typically need to accumulate retirement assets (in addition to Social Security) worth about 11.1 times their final pay for an age 67 retirement to maintain their preretirement standard of living over an average life expectancy. Retirement needs vary by participant based on individual circumstances and could be different for your workforce.

In addition, the 2018 study compared projected retirement resources to target needs and found that roughly one out of five workers (19%) is expected to have retirement resources that exceed the amount needed at retirement. Another 15% is projected to have resources that are close to, but do not exceed, their retirement needs. These workers will likely fall close enough to their targeted needs to allow them reasonably adequate retirement income if they adjust their post-retirement spending or supplement their retirement savings with assets outside their employers' plans. However, that leaves a majority of workers who are projected to fall short and will need to increase their savings, delay their retirement, significantly adjust their standard of living in retirement, or some combination. What percentage of your workers is on track to save enough for retirement?

Employees on average need to be saving 16% of pay for their retirement fund each year between their own savings and the amount their employer provides in retirement benefits. Your employees look to you for guidance on how much to save. Is your defined contribution (DC) plan designed to encourage higher savings rates? Does your DC plan offer contribution escalation and set the escalation target rate at an appropriate level for retirement income adequacy? Do you allow savings into Roth accounts and Health Savings Accounts to allow your employees to maximize tax efficiency?

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The age at which an employee retires also significantly impacts expected retirement adequacy. The 2018 study found that age 70 is the median age at which full-career contributors are projected to have resources that meet their needs. However, the industry in which an employee works can significantly affect retirement readiness. The median age of retirement adequacy varies by industry from age 67 to over age 75. The market dynamics driving these industry differences come down to employee pay, benefits, and savings rates. Help your employees understand how to achieve their retirement goals, based on your specific population and the benefits you offer.

For more comprehensive information regarding the findings of the 2018 study, please click **www.aon.com/therealdeal** to obtain a copy. Aon's retirement consultants can assist you in evaluating the retirement readiness of your employees and any resulting workforce implications.

IRS Reopens and Expands PLRs on Stranded VEBA Assets

by Tom Meagher and Jennifer Ross Berrian

As reported in the past, many Voluntary Employees' Beneficiary Associations (VEBAs) are holding more assets than can reasonably be used for the originally intended benefits. Because of the significant tax consequences that may result if VEBA assets are improperly accessed, many plan sponsors have been asking the Internal Revenue Service (IRS) for private letter rulings (PLRs) to allow them to amend their VEBAs to pay benefits for different classes of participants or for different benefits than originally intended. While the IRS informally suspended these VEBA asset redeployment ruling requests for a few months over the summer (to address certain recently raised tax issues), the IRS is again issuing PLRs regarding the redeployment of VEBA assets.

If you recall from the Third Quarter 2016 and Fourth Quarter 2015 issues of the *Quarterly Update*, we noted that many employers have previously funded their postretirement medical benefits in a VEBA (please contact the authors for copies of these issues). Due to superior investment performance and a reduction in both retiree medical benefits and the number of employees eligible for retiree medical coverage, VEBAs have in many cases become overfunded. While the IRS had been issuing PLRs allowing postretirement health VEBA assets to be used for active medical benefits, the IRS subsequently had concerns involving the use of VEBA assets in excess of prior tax deductions, and with respect to an employer's obligation to provide active medical benefits to collectively bargained employees.

With the IRS's renewed willingness to continue issuing PLRs in this area, employers having overfunded VEBAs or VEBAs with stranded assets may want to consider a redeployment strategy to access postretirement health VEBA assets for active medical benefits. Aon's Retirement Legal Consulting & Compliance consultants are working with several clients who are pursuing these VEBA strategies, and we will be glad to discuss these opportunities further at your convenience.

2019 Limits for Benefit Plans

by Linda M. Lee

Each year the Internal Revenue Service (IRS) announces new dollar limitations for pension and other retirement-related plans. These include limits on the amount of contributions that may be made to defined contribution (DC) plans, the annual amount that can be paid from defined benefit (DB) plans, and the amount of compensation that can be used while calculating benefits. The limits are adjusted for price and wage inflation and general law changes. Qualified retirement plan administration must be adapted annually to remain compliant.

Following are highlighted cost-of-living adjustments made for 2019:

- The employee elective deferral limit for 401(k) and 403(b) plans increased from $18,500 to $19,000;
- The annual addition limit for DC plans under Internal Revenue Code (Code) Section 415 increased from $55,000 to $56,000;
- The annual benefit limit for DB plans under Code Section 415 increased from $220,000 to $225,000;
- The qualified plan annual compensation limit under Code Section 401(a)(17) increased from $275,000 to $280,000;
- The pay threshold for highly compensated employees under Code Section 414(q) increased from $120,000 to $125,000; and
- The limit on catch-up contributions in 401(k) and 403(b) plans for employees age 50 or older remained the same at $6,000.

Please contact your Aon consultant if you have any questions regarding the limitations for 2019.

IRS Provides Tips to Avoid Incomplete VCP Submissions

by John Van Duzer

The Internal Revenue Service (IRS) offers resources and guidance on its website regarding Voluntary Compliance Program (VCP) submissions. This year, the IRS created three webpages, each of which addressed common mistakes in VCP submissions. In the most recent webpage created in September 2018, the IRS again provided a list of common mistakes that plan sponsors are making in their VCP submissions. By publishing the list, the IRS hopes to prevent plan sponsors from filing incomplete VCP submissions in the future and to permit resolution on an expedited basis.

The IRS notes that incomplete VCP submissions are detrimental to everyone. They take longer for the IRS to process, thereby delaying the plan sponsor's goal of obtaining a compliance statement. Furthermore, incomplete submissions must be assigned to an IRS specialist to resolve issues, thereby using limited IRS resources.

The following are some of the key items included in the latest IRS list:

- **User Fee Missing or Submitted Fee in Incorrect Amount.** Earlier this year, the IRS indicated that it will no longer contact plan sponsors to request missing user fees. Plan sponsors who intend to file paper VCP submissions between now and March 31, 2019, should be aware that the IRS will likely not offer an opportunity to cure a user fee problem. If the IRS closes a VCP submission without issuing a compliance statement due to lack of payment, a plan sponsor can resubmit the submission as a new case, subject to the user fee schedule at the time of the new submission.
- **Signature Errors.** The IRS has reported instances where unsigned forms are submitted, or the Form 8950 (Application for Voluntary Correction Program) is signed by a person without authority to bind the plan sponsor (e.g., a trustee, plan administrator, or even the VP of HR). The IRS also notes that the representative's signature on IRS Form 2848 (Power of Attorney) must not be dated more than 45 days after the taxpayer's (i.e., plan sponsor's) signature.
- **Deficient Narrative Attachments.** These required attachments describing plan failures and correction methods must be clear and provide sufficient detail, including references to plan sections not followed and the number of participants affected by the failures. The methodology used to determine earnings for corrective contributions or distributions must be adequately explained.
- **Other Missing Items.** In the case of operational failures, the VCP submission must include detailed computations showing how corrective amounts and earnings were determined, as well as a copy of the relevant plan section or plan document in effect during the failure period.

The complete list of IRS tips and warnings is included on the IRS website. Plan sponsors considering a VCP submission would be well-advised to review this entire list prior to filing the submission.

Aon's Retirement Legal Consulting & Compliance consultants are here to assist plan fiduciaries with their plans' compliance issues. We provide qualified plan status checkups to identify document, administrative, and governance issues. We know and understand the many details of EPCRS (including the details required to ensure complete and detailed VCP submissions) and can assist with preparing any necessary VCP submission while navigating the myriad of challenging IRS rules and procedures.

New EPCRS Guidance Requires Paperless VCP Submissions

by Susan Motter

The Internal Revenue Service (IRS) released new guidance on September 28, 2018, that has modified the Employee Plans Compliance Resolution System (EPCRS). As our readers know, the EPCRS is a comprehensive system of correction programs involving the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit CAP) that was established by the IRS for sponsors of retirement plans that have failed to satisfy certain requirements under Section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code (Code).

EPCRS has long been relied upon by plan sponsors to correct document, operational, demographic, and employer eligibility failures involving their retirement plans. The IRS released Revenue Procedure 2018-52 (New EPCRS) to primarily set forth new paperless VCP submission procedures that require the use of the www.pay.gov website for the filing of VCP submissions and the payment of the required VCP user fees.

Beginning April 1, 2019, plan sponsors can no longer submit paper (hard copy) VCP submissions to the IRS but must instead use www.pay.gov when filing submissions and paying applicable user fees. To ease the transition to the new paperless procedures, from January 1, 2019 through March 31, 2019, plan sponsors can choose whether to file by paper or use www.pay.gov. However, the IRS will not accept paper VCP submissions postmarked on or after April 1, 2019.

While the New EPCRS requires VCP submissions to be filed electronically with the IRS, the required components of VCP submissions (e.g., the IRS forms, disclosures, attachments and any required samples of corrective calculations) generally remain unchanged. However, because of the nature of paperless submissions, the IRS established a few new rules:

- The VCP submission must be converted into a single PDF document not exceeding 15 MB.
- If the converted VCP submission exceeds 15 MB, some submission documents (or parts thereof) will need to be removed and separately faxed to the IRS.
- A previously filed VCP submission that is not yet assigned to an IRS agent cannot be revised or amended by filing a new submission using www.pay.gov. Instead, the plan sponsor must call the IRS to request guidance regarding how to submit the revised documents.
- The IRS will no longer mail a letter acknowledging receipt of a VCP submission. Instead, the filer of a VCP submission will receive a unique www.pay.gov Tracking ID which will serve as the IRS control number for the filed VCP submission and as the official acknowledgement of the receipt of the VCP submission.

The New EPCRS is effective January 1, 2019. This guidance is helpful to clients making VCP submissions to the IRS after discovering a document, operational, demographic, or employer eligibility failure. Aon's Retirement Legal Consulting & Compliance group can assist with all aspects of corrections, including SCP and VCP submissions under the New EPCRS.

Missing Participants and the State Escheat Problem

by Hitz Burton

Over the last several years, perhaps no area of qualified plan administration has proved as challenging to plan sponsors and plan administrators as "missing participants." The Internal Revenue Service, the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation have weighed in, and Aon has previously covered this topic in the **First Quarter** and **Second Quarter** 2018 editions of the *Quarterly Update*. As previously discussed, the DOL has taken an aggressive enforcement position on missing participants in its defined benefit (DB) plan audit initiative. Specifically, the DOL has maintained that a fiduciary of an ongoing DB plan must follow the guidance of Field Assistance Bulletin (FAB) 2014-01, which by its express terms is limited to terminated defined contribution plans. In the DOL's view, failure to follow the FAB is a fiduciary breach under the Employee Retirement Income Security Act of 1974 (ERISA).

> "The state may act as a custodian holding the property until the appropriate owner or beneficiary can be located or take actual legal title to the property under escheat."

In addition to the challenges from the federal government, plan sponsors and fiduciaries should be aware that states may also attempt to reach qualified plan assets belonging to a missing participant or beneficiary by applying state escheat or unclaimed property law. As background, every state has a law that requires legal entities (e.g., companies, financial institutions, and trusts) holding unclaimed or abandoned funds or property to turn over the funds or property to the state after certain specified periods of time. The state may act as a custodian holding the property until the appropriate owner or beneficiary can be located or take actual legal title to the property under escheat. Administration and enforcement in this area varies by state. Some states, such as Ohio, aggressively enforce their property rights and can impose significant civil and criminal penalties for noncompliance (e.g., $200 per day per violation accumulated with interest of 2% per month).

Fortunately, for plan sponsors there is a relatively straightforward way to avoid scrutiny from aggressive states, without needing to incur the time and expense to prove that a specific state or local escheat law is preempted by ERISA. Under Treasury Regulations Section 1.411(a)-4(b)(6), a vested plan benefit can be forfeited under the terms of the plan where the participant or beneficiary has been determined to be "missing" provided that the plan also provides for full reinstatement of the vested benefit when the participant or beneficiary comes forward to make a formal claim for the benefit. Before vested benefits may be forfeited, the plan fiduciaries must make a reasonably diligent effort to locate participants or beneficiaries believed to be missing. These search procedures should be well-documented, consistently followed, and updated as governmental standards are developed.

If you would like additional information on amending your qualified retirement plan document to avoid possible application of state escheat laws or if you have questions about whether your plan's missing participant procedures are adequate in light of developing governmental standards, Aon's Retirement Legal Consulting & Compliance consultants have significant experience in helping clients with these matters.

401(k) Hardship Distributions—New Developments

by Jennifer Ross Berrian

In the **Third Quarter 2018** issue of the Quarterly Update, we described recent federal legislation affecting 401(k) plan hardship distributions. The Bipartisan Budget Act of 2018 (BBA) generally liberalized the hardship distribution rules, while it has been uncertain whether the Tax Cuts and Jobs Act (TCJA) restricted safe harbor hardship distributions for certain casualty losses.

On November 9, 2018, the Internal Revenue Service (IRS) announced that proposed regulations regarding hardship distributions would be published on November 14, 2018. The proposed regulations include changes made by the TCJA, BBA, and older IRS guidance. They also modify and clarify existing rules.

Changes to the current safe harbor list of expenses include:

- Updating the regulations to add language from the Pension Protection Act of 2006 (PPA) and Revenue Ruling 2007-7, expanding the list of individuals for whom qualifying medical, educational, and funeral expenses may be paid with a hardship distribution to include the "primary beneficiary under the plan" (i.e., a person designated as a beneficiary who has an unconditional right to all or a portion of the plan's assets upon the participant's death);
- Clarifying that casualty losses under Internal Revenue Code (Code) Section 165 do not need to comply with Code Section 165(h)(5) (i.e., language added by the TCJA limiting personal casualty loss deductions to losses attributable to federally declared disasters); and
- Adding expenses incurred due to certain disasters (similar to relief given by the IRS after major federally declared disasters like Hurricane Maria).

Pursuant to the BBA, the proposed regulations also modify the rules for determining whether a distribution is necessary to satisfy an immediate and heavy financial need. There is no longer a requirement that a participant be prohibited from making contributions to the plan after receipt of a hardship distribution for any specific period. In fact, plans are prohibited from suspending contributions for hardship distributions made on or after January 1, 2020. In addition, the requirement that a participant take all available plan loans prior to obtaining a hardship distribution was eliminated (but plans are permitted to retain this requirement).

Existing rules require plan sponsors to consider all relevant facts and circumstances when determining whether a distribution is necessary to satisfy a financial need. The proposed regulations instead provide one general standard for determining whether a distribution is necessary. Under this new standard, the following conditions must be met:

- The amount of the distribution may not exceed the amount of an employee's need (including any amounts necessary to pay income taxes or penalties reasonably anticipated to result from the distribution);
- The participant must have obtained other distributions available under the employer's plans (including both qualified and nonqualified deferred compensation plans); and
- The participant must represent that he or she has insufficient cash or other liquid assets to satisfy the need (applicable for distributions made on or after January 1, 2020).

Finally, the proposed regulations permit hardship distributions from expanded account sources including elective contributions, QNECs, QMACs, and earnings on these amounts, regardless of when such amounts were contributed or earned. Plans may choose to limit the type of contributions available for hardship distributions and whether earnings on those contributions are available for distribution. There are special rules regarding account sources available for hardship distributions from 403(b) plans that are more restrictive than those applicable to 401(k) plans.

The changes to the hardship distribution rules are generally effective for plan years beginning after December 31, 2018. However, special rules apply to certain provisions (e.g., the restriction against suspending contributions with respect to hardship distributions made on and after January 1, 2020). Plan sponsors should review the proposed regulations and determine whether any modifications of their 401(k) plans' hardship distribution provisions and plan administration are needed or desired. Aon's Retirement Legal Consulting & Compliance consultants can assist plan sponsors in assessing what changes to make and how best to communicate such changes.

Managing Covered Service Provider Disclosures

by Bridget Steinhart, Rhonda Jinks, and Elizabeth Groenewegen

Covered service providers (CSPs) to qualified retirement plans are obligated to make certain disclosures to covered plans, and plan fiduciaries must monitor whether complete disclosures have been made. Why must plan fiduciaries manage CSP disclosures as a critical element of their fiduciary obligations? The CSP disclosures not only provide information needed for key fiduciary decision-making (such as assessing the reasonableness of compensation for services provided and conflicts of interest), but there are also potential consequences for failures. For example, it is a prohibited transaction under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code) for plan fiduciaries to continue to do business with a CSP if that CSP is delinquent in providing required disclosure. Penalties for both parties can include a 15% excise tax on the amount involved (typically, the annual fees under the contract).

Although it's been more than six years since the DOL issued CSP disclosure regulations under ERISA, confusion among plan fiduciaries and their benefits staff is not uncommon. This is likely due to uncertainty about which benefit plans are covered, which of the many providers to a plan are indeed CSPs, and for what use is the information intended. Questions often include those related to which reporting deadlines apply in which instances, and what information is reportable to plan fiduciaries (as compared to the information required to be reported to plan participants).

Call to Action

The following are suggested steps plan fiduciaries should consider in managing the CSP disclosure process:

- **Determine Which Plans Are Covered.** At this time, the CSP disclosure rules apply only to qualified retirement plans subject to ERISA. Excluded are governmental plans, non-electing church plans, simplified employee pension plans, and certain individual annuity contracts or custodial arrangements under Code Section 403(b).
- **Identify Which Providers Are CSPs.** Generally, a CSP is any third party serving as a fiduciary to the plan, any recordkeeper or broker for an individual account plan whose services include certain investment alternative structures, and specified types of service providers who expect to receive "indirect" compensation for plan-related services. Complexities can arise as CSPs may include managers of certain "plan asset" investment vehicles, such as collective trust funds.
- **Address the Status of the CSP Disclosures.** For new service contracts, request the disclosure along with the drafted contract. For existing contracts, if there is any question about the current status of a CSP's disclosure, request that the CSP provide this, along with any additional disclosure reporting material—as applicable—that, in the aggregate, fulfill the disclosure requirements.
- **Review All Disclosures for Required Reporting Elements.** These include the following:
  - Description of services provided
  - Statement of the CSP's fiduciary status to the plan, if applicable
  - All direct and indirect compensation received, any relationship between the CSP and the payer of indirect compensation, and any service termination fees
  - Manner of payment, and any allocations of plan-related compensation to affiliated parties
  - Investment-related information, except from self-directed brokerage funds (defined contribution plans only)
- **Determine Whether the Plan has a Sound CSP Listing and Tracking Process.** Consider whether a process should be developed (or revised) in order to facilitate the fiduciaries' timely review and assessment of disclosure information.
- **Consider the Fiduciaries' Preferred Role in the Review Process.** For example, plan fiduciaries may prefer to review all new disclosures and changes, but to delegate tracking the completeness and timeliness of all disclosures on file.
- **Assess Reasonableness of Plan Fees Periodically.** Plan fees must be assessed periodically, particularly plan fees that are paid directly from participant accounts or other plan assets.
- **Document Compliance.** Memorialize in fiduciary meeting minutes that the CSP review was completed, along with any action items.

Summary

Affecting every qualified plan fiduciary are the fiduciary's duties of loyalty and prudence under ERISA. An inherent part of these obligations is to assess the reasonableness of plan fees, to understand the channels of plan-related revenue, and to identify any potential conflicts of interest a service provider may have. A critical requirement in fulfilling that obligation is to assess a plan's CSP disclosures.

While the DOL's CSP disclosure regulations may present complexities for some plan fiduciaries, Aon believes that the plan fiduciary's duty to address CSP disclosure requirements can be made less onerous by use of a sound, practical process for tracking and addressing CSP disclosure status. Aon can assist in establishing the process and evaluating whether complete disclosures have been received. Included in our support is helping benefits staff support plan fiduciaries in managing this important matter. Please contact the authors of this article for additional information.

Please see the applicable disclosures and disclaimers on page 9.

Quarterly Roundup of Other New Developments

by Teresa Kruse, Jan Raines, and Bridget Steinhart

A Roth By Any Other Name

With so many nomenclatures being reported in the news (such as "Backdoor Roth," "Mega Roth," "Rich Person Roth," and "Super Roth"), it's no wonder retirement plan participants can be confused about the Roth contribution feature offered by their defined contribution (DC) plans. Roth contributions provide DC plan participants the ability to save retirement account money on an after-tax basis, where earnings on these contributions grow tax-free and certain qualifying distributions are not taxed. Roth contributions tend to benefit plan participants who are young, in lower tax brackets, or those who expect to be in a higher tax bracket during retirement.

Some plans allow participants to convert all or a portion of their pre-tax deferrals to their DC plan into Roth contributions. These are referred to as Roth "in-plan" conversions. As with regular Roth contributions, taking advantage of an in-plan Roth conversion will allow the converted dollars to grow tax-free with no taxation at ultimate distribution if requirements are met. However, it's important to remember that, in exchange for a tax-free distribution in the future, participants are required to report the converted amounts as taxable income in the tax year of conversion for income tax purposes.

These other "Roth" names referenced above are simply names that describe how participants can "supercharge their 401(k)" plan as described in an article in the First Quarter 2015 issue of the *Quarterly Update* (please contact the author if you would like a copy of this issue). This "supercharging" is done by taking advantage of in-plan conversions. We have experienced an increase in discussions regarding this "supercharged" concept in an environment where financial advisors continue to advocate retirement savings adequacy and participants are consequently interested in contributing as much as possible to a DC plan—often up to the Internal Revenue Code Section 415 annual additions limit (i.e., for 2019, the lesser of $56,000 or 100% of compensation). Nondiscrimination testing should be considered when determining if the "supercharged" concept is a viable option for a particular DC plan.

We believe Aon consultants can help identify ways to structure your DC plan to maximize your employees' retirement savings and tax advantages.

Regional EBSA Office Takes a Harder Stance on Late Deposits

A regional office of the Employee Benefits Security Administration (EBSA) has targeted, for "alternative enforcement measures," certain plan sponsors that reported late participant deposits or loan repayments on Form 5500 without also using the Department of Labor's (DOL's) Voluntary Fiduciary Correction Program (VFCP). DOL regulations require that participant contributions and loan repayments to retirement plans be segregated from corporate assets as soon as administratively possible, but no later than the 15th business day of the month after the month in which the amounts were withheld from wages or paid to the plan sponsor. Historically, many plan sponsors have "self-corrected" late deposits without using the VFCP, a voluntary program. The EBSA regional office appears to be taking the position that submitting an application under the VFCP is required to correct late deposit errors. While these measures appear to be isolated to one regional EBSA office, Aon will continue to monitor developments. Plan sponsors with concerns regarding late deposits should contact any Aon consultant for assistance.

7th Circuit Holds ERISA Does Not Preempt Slayer Statute

Section 514 of ERISA generally provides that ERISA preempts state laws insofar as they relate to employee benefit plans. Recently, the 7th Circuit Court of Appeals reviewed the Illinois "slayer statute" to determine whether ERISA preempted the statute. In general, "slayer statutes" are state laws which prohibit a killer from benefiting from his or her crime by providing that the killer is deemed to have predeceased the victim. After a criminal trial in which the defendant was found not guilty of the murder of her husband by reason of insanity, the Laborers' Pension Fund sued to determine the appropriate beneficiary of her husband's pension benefit. The 7th Circuit upheld the Illinois "slayer statute" and denied the defendant's claim for the survivor benefit. The court determined that ERISA did not preempt the Illinois "slayer statute," relying on the fact that these statutes are typically found in state family law, traditionally an exclusive area of the state. On June 11, 2018, the U.S. Supreme Court denied the defendant's petition to review the 7th Circuit's decision, making it the third case which the Supreme Court has refused to address whether ERISA preempts state slayer statutes. *Laborers' Pension Fund v. Miscevic*, 880 F.3d 927 (7th Cir. 2018).

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade affecting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans. Defined contribution plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently, several cases involving financial institutions and universities have been dismissed (in full or in part) or settled, including:

- Financial Institutions
  - *Patterson v. Capital Group Companies, Inc.* – Case fully dismissed
  - *Leber v. Citigroup 401(k) Plan Investment Comm*. – Case settled for $6.9 million
  - *Moreno v. Deutsche Bank Americas Holding Corp.* – Case settled for $21.9 million
  - *Meiners v Wells Fargo & Co.* – Case fully dismissed
- Universities
  - *Sacerdote v. N.Y.U.* – Case fully dismissed
  - *Short v. Brown Univ.* – Some claims dismissed, excessive fee and imprudent investment choice claims continue
  - *Davis v. Wash. Univ.* – Case fully dismissed

Plan sponsors seeking to reduce their litigation risk liability use a variety of strategies including increasing the number of passive funds in their plans and implementing better fee transparency. *Patterson v. Capital Group Companies, Inc., No. CV 17-4399 DSF (PJWx), 2018 WL 748104 (C.D. Cal. Jan. 23, 2018); Leber v. Citigroup 401(k) Plan Investment Comm., No. 1:07-cv-09329-SHS-DCF (S.D.N.Y. Oct. 3, 2018); Moreno v. Deutsche Bank Americas Holding Corp., No. 1:15-cv-09936-LGS (S.D.N.Y. Oct. 9, 2018); Meiners v Wells Fargo & Co., No. 0:16-cv-03981-DSD-FLN (8th Cir. 2018); Sacerdote v. N.Y.U., No. 16-cv-6284 (KBF), 2018 WL 3629598 (S.D.N.Y. July 31, 2018); Short v. Brown Univ., No. 1:17-cv-00318 (D.R.I. July 11, 2018); Davis v. Wash. Univ., No. 17-cv-1641 (E.D. Mo. Sept. 28, 2018).*

Duke University Faces Additional Lawsuit Regarding 403(b) Plan
Over 20,000 former and current employees of Duke University have filed a second lawsuit against the fiduciaries of their 403(b) plan. The first lawsuit is similar to challenges facing nearly 20 other universities wherein plan participants allege that the plans provided imprudent investment fund choices and/or charged excessive plan fees. This time the Duke plaintiffs focus on investment fund revenue sharing, alleging excessive revenue sharing was not managed appropriately by not recovering the excess for the plan. Instead, the plaintiffs contend that the plan fiduciaries arranged for excess revenue sharing to pay plan fees, Duke's own expenses, as well as salaries and fringe benefits of employees in Duke's human resources department. *Lucas v. Duke Univ., No. 1:18-cv-00722 (M.D.N.C. complaint filed 8/20/18).*

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