Fiduciary Hot Topics

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FiduciaryAdvisors LLC
A Corporate Retirement Plan Advisory Firm

SOME CORONAVIRUS RELIEF

- The CARES Act directed the Department of Labor to delay deadlines under ERISA for up to a year to provide relief during the Coronavirus pandemic. In response to this directive, both the Department of Labor and the Internal Revenue Service provided relief on several fronts. The number of notices issued both jointly and separately by these agencies has created a bit of confusion. Although the time to take advantage of this relief has passed, the following is noted as a point of clarification:

Mid-Year Changes to Safe Harbor Plans on or before August 31st

- Generally, mid-year changes to safe harbor plans are not permitted. A plan sponsor may change a safe harbor contribution mid-year only if the right to do so is reserved in the safe harbor notice or the sponsor is operating at an "economic loss." An amendment affecting a safe harbor contribution cannot take effect sooner than 30 days after participants are notified.

- An amendment may be adopted between March 13th and August 31st reducing a safe harbor contribution across the board even if the right to do so was not reserved in the safe harbor notice and the sponsor is not operating at an “economic loss.” Participants must be notified of this reduction before it takes effect which cannot be later than August 31^{st}.

- The Internal Revenue Service also clarified that a safe contribution may be reduced or eliminated for highly compensated employees without the plan losing its safe harbor status. The only requirement is that affected participants must receive notice of the change before it takes effect.

Required Minimum Distributions / Rollovers on or before August 31^{st}

- Individuals must begin receiving required minimum distributions (RMDs) after attaining age 72 (age 70 & ½ before 2020) from retirement plans and IRAs. The intent is to prevent taxpayers from effectively using these vehicles for estate planning purposes. RMDs can never be rolled over.

- The CARES Act suspends RMDs due in 2020.

- The Internal Revenue Service has clarified that participants who have received an RMD in 2020 may return the distribution to the plan or roll it to an IRA on or before August 31^{st}.

Delayed Due Date for Form 5500 did not Apply to Calendar Year Plans

- Annual returns for plans are due at the end of the seventh month following the end of the plan year – July 31^{st} for calendar year plan years. Often plans do not make this deadline and ask for an extension to October 15^{th} usually because the plan audit has not yet been completed.

- The deadline was extended to July 15^{th} for plans with a September, October, or November plan year whose 2019 return was due at the end of April, May and June respectively. There was no extension for calendar year plans.

Some Due Dates were Delayed Until July 15^{th}

- Some due dates that fell within the first six months of 2020 were pushed back to July 15^{th}. These were:
    - Distributions required due to a testing failure that normally must be made by April 15^{th},
    - Loan payments due between April 1^{st} and July 14^{th} and
    - Section 83(b) elections that normally must be made within 30 days of the transfer of certain restricted property.

New Standards for Electronic Delivery will Reduce the Burden and Expense of Delivering Notices

- The final version of the Department of Labor’s new rules regarding electronic delivery of required notices was published this past May and took effect July 27^{th}. These new rules will greatly reduce the burden and expense of delivering required participant notices. Many notices may now be posted to a website or provided via electronic mail and paper delivery is no longer the default. Participants still have a right to receive paper notices but must now affirmatively request this, or affirmatively opt out globally from electronic disclosure.

EXISTING LAW

- **Basic Rule for Delivery**
    - Notices may be delivered by any means “reasonably calculated to ensure actual receipt of the

material."

- **Safe Harbors for Electronic Delivery**
    - There are two existing safe harbors for electronic delivery which remain in place. Under these safe harbors, two methods of electronic delivery are deemed to satisfy the basic rule.
        - "Wired at work" Delivery to individuals with a computer access at work.
        - "Affirmative Consent" Delivery to individuals who agree to receive notices electronically. Practically speaking, this means the individual has provided an email address.
    - Notices may be posted to a website so long as participants receive a notice with a link to the website.

WHAT HAS CHANGED

- **New Opt-out Safe harbor**
    - Allows delivery of notices by means of a "continuous access website."
- **Preliminary Paper Notice**
    - In order to take advantage of this new safe harbor, plan sponsors must first send participants a one-time paper notice that describes the new process for delivery in detail and informs participants they have the right to request paper notices.
- **Notice of Internet Availability**
    - In addition to the preliminary notice, participants must receive a "Notice of Internet Availability" (NOIA) whenever a notice is posted to the website. This may be delivered electronically. The following can be combined into a single NOIA;
        - Summary Plan Descriptions
        - Annual fee notice
        - QDIA Notice
        - SAR
        - Annual funding notice
    - Excluded are the following:
        - Summary of Material Modifications
        - Black out notices
        - Investment mapping notices
        - Fee and investment changes notices
        - Quarterly account statements
    - This new safe harbor does not apply to notices required by the Internal Code such as the rollover notice and the auto enroll notice. It is anticipated the Internal Revenue Service will follow the Department of Labor's lead on electronic delivery.

ILLINOIS FINALLY FINDS A SOLUTION TO IT PENSION WOES – A FEDERAL BAILOUT

- The coronavirus crisis has laid bare the dire financial straits of many state and local governments. Much of their predicament is due to ever growing unfunded pension liabilities. Even before the pandemic, it was estimated that pension liabilities of state and local governments exceeded $5 trillion. Falling revenues, along with investment losses, has created a cash flow crisis. The large tax increases necessary to fully fund public pension systems are a political impossibility.
- Under ERISA, private employers must fund pension liabilities as they accrue and are tightly constricted in the assumptions they may use to calculate these liabilities. States and local governments are not subject to ERISA for constitutional reasons.
- Illinois has long been at the forefront of pension mismanagement. The State has approximately $500 billion in unfunded pension liabilities and 25 cents of every tax dollar Illinois collects is now devoted to pension funding.
- How Illinois got to this point is typical of many state systems:
    - Generous pension benefits– the average pension for a career state employee is almost $50,000 with a guaranteed COLA every year of three percent,
    - Aggressive actuarial assumptions understate pension liabilities – the assumed investment return is eight percent, but over the last decade the actual return on invested assets has averaged slightly more than five percent, and
    - The state has been funding only 80 percent of the actuarially determined contributions.
- The president of the Illinois Senate has asked Illinois' congressional delegation to request $41 billion in direct federal aid for the State. Of this amount, ten billion would go directly to the state pension system and another nine billion would be devoted to propping up local pension schemes.
- If Illinois receives any of this federal aid, undoubtedly, many other states with poorly funded pension systems will quickly line up to ask for a lifeline as well – New Jersey, Connecticut and Kentucky come to mind.

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