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CLIENTS & FRIENDS SEMINAR – MAY 5, 2016

(Note that this Outline is not intended as legal advice for any particular situation.)

HEALTH AND WELFARE PLANS

I. Relaxed Guidance for Opt-out Payments, SCA Cash-in-Lieu Payments, and the Like.

A. The IRS Position. As discussed at prior seminars and in our e-Alerts, beginning in 2014 the regulators began to state that Section 125 Cafeteria Plan benefit dollars, payments to participants who opt-out of medical benefits, Service Contract Act and Davis-Bacon cash-in-lieu-of-fringe payments, cash options required under Union contracts, and similar types of payments create issues under the "affordability test" of the Affordable Care Act. The typical example provided by the regulators was as follows: An employer charges $200 per month for its lowest cost self-only medical benefits coverage. The employer offers a $100 opt-out bonus if the employee waives coverage (or simply pays the employee $100 as cash-in-lieu of coverage). The employer is treated, for ACA affordability purposes, as "charging" the employee $300 for its lowest cost self-only coverage. (The regulators' rationale is that an employee wishing to enjoy coverage must pay $200 plus "forego $100" to have coverage, and therefore the coverage "costs" the employee $300.)

B. Response from the Commentators and the IRS Notice. As we also reported, numerous commentators challenged the regulators' logic on this point and requested that they withdraw this position. (We learned, for example, that the AFL-CIO held an in-person meeting with the regulators formally requesting that they withdraw this position.) In December, the regulators issued Notice 2015-87 which, although it does not withdraw the position, provides additional time for employers to comply with it in some cases (and, perhaps, is intended to provide additional time for the regulators to consider withdrawing their position). The following are some of the most important points made in this extremely complex Notice:

-For plan years beginning before 2017 (as defined in the Notice), employer "benefit dollars" or "flex contributions" that can be used by Section 125 plan participants for health, other benefits or cash are not added to the stated cost of the employer's lowest cost self-only health coverage for ACA affordability test purposes.

-Until future guidance, opt-out payments under existing opt-out arrangements (as defined in the Notice) are not added to the stated cost of the employer's lowest cost self-only health coverage for ACA affordability test purposes.

-Until future guidance is issued, cash-in-lieu payments under the SCA or Davis-Bacon Act are not added to the stated cost of the employer's lowest cost self-only health coverage for ACA affordability test purposes.

The regulators hinted in the Notice that they would consider further relief for opt-out payments that are "conditioned on the employee meeting certain conditions such as demonstrating that the employee has other coverage," and hinted that they may consider further unspecified relief for SCA and Davis-Bacon employers. The Notice provides retroactive, limited and highly technical relief that at least will provide some breathing room to some employers who found themselves struggling to comply with the regulators' position.

C. Recommendations. Employers that currently utilize any of these features – or that are contemplating utilizing them – and that could face ACA affordability problems under the IRS world view should study the details of the temporary relief and monitor the expected future guidance.

II. Out of Network Provider Suits Against Self-funded Health Plans

A. It's All About UCR. Early versions of these lawsuits were aimed at making out-of-network Usual, Customary and Reasonable calculations more transparent and often targeted insurers acting as administrators of self-funded

plans. There has also been a surge of litigation filed by individual out-of-network providers and facilities against individual self-funded health plans and their employer sponsors. Many of these suits allege that the plan documents do not define how UCR will be calculated (often still true in spite of the earlier lawsuits) or allege that the plan administrator used an improper UCR database or used an improper reduction percentage off of the Medicare reimbursement rate.

B. The Lawsuits. If the plan administrator denies the claim administratively, the providers assert standing to sue on the patient's behalf in federal court. The providers seek to recover the full amount of their billed charges.

C. ERISA Anti-Assignment Provisions. An ERISA plan is permitted to prohibit the assignment of benefits. How then can these providers assert standing to sue? The participant signing papers assigning his/her benefits to the provider could be invalid under ERISA. What happened? Unfortunately, although many plans do contain anti-assignment provisions, the medical schedule of benefits often specifically provides for such assignment. The danger then exists that a court will utilize the provision most favorable to the participant.

D. Outcome. Many of these suits are settled before going to trial.

E. Recommendations. We recommend (1) making sure that the plan's provisions for calculating UCR are detailed in the medical schedule of benefits and that the TPA is applying them as written, (2) reviewing the medical schedule of benefits and adding specific anti-assignment provisions, (3) adding language to the plan document overriding any contrary provisions in the schedule of benefits, and (4) asking for assistance in responding to any non-routine requests for information from out-of-network providers.

III. FSA, HRA and HSA Update

A. FSA Carry-over Provisions. An employee can now be permitted to carry over up to $500 of unused health care FSA funds to the following plan year. Plans must be amended to permit the carry-over. Plans utilizing the grace period are not eligible. If the plan also has health savings accounts, those have to be taken into account in writing the carry-over provisions. Most commonly funds are automatically carried over to a limited purpose FSA as needed to preserve HSA eligibility.

B. FSA as Excepted Benefits. Prior to health care reform, employers wanted health care FSAs to be treated as excepted benefits in order to avoid the HIPAA portability rules. After health care reform, FSAs that are not excepted benefits also fail various market reforms, such as the requirement to provide free preventive care, potentially creating $100 per person, per day penalties. To maintain excepted benefit status, no more than $500 in employer contributions (including opt-out credits that can't be cashed out) should be permitted to be made to any health care FSA.

C. Nondiscrimination Rules. All of these accounts are subject to nondiscrimination rules and should be tested at least annually.

D. HRAs and ERISA. HRAs are ERISA benefits and therefore are subject to ERISA plan document, SPD and claim processing requirements (among others). Plan documents and SPDs should specify what expenses are reimbursable from the HRA, especially if the list of reimbursable expenses is less than all permissible expenses.

E. HRAs and ACA. Generally, an HRA by definition violates several ACA requirements, including the requirements that a group health plan have no annual limit on benefits and that it provide certain preventive care free of charge. However, if the HRA meets the requirements to be "integrated" with other coverage, it will be exempt from those requirements. Among other things, that generally means that an employee who isn't enrolled in the Employer's group medical coverage should not receive HRA contributions. These rules do not apply to an HRA that reimburses solely excepted benefits or that benefits fewer than two active employees (e.g. retiree HRAs).

F. HRAs, Employer Payment Plans, and Reimbursement of Individual Premiums. IRS guidance generally precludes (1) an employer's reimbursement of individual health insurance premiums on a pre-tax or after-tax basis and (2) an employer's direct payment of individual health insurance premiums on a pre-tax or after-tax basis. There is a limited exception for a program that qualifies as a "payroll practice". There is also an exception for a retiree only Medicare premium reimbursement arrangement. An employer can give pay increases to employees to use to buy individual coverage as long as the money is provided unconditionally.

G. Health Savings Account and Plan Documents. Generally, an HSA is not an ERISA benefit and therefore the

ERISA plan document and SPD requirements do not apply. However, if there are pre-tax contributions, the Section 125 plan document requirements do apply. There is no Section 125 SPD requirement but most employers will put the HSA requirements in the SPD for informational purposes.

H. Health Savings Accounts and Limited Purpose/Post Deductible Health Care FSA. In order to preserve HSA eligibility, an employee cannot participate in a general purpose Health FSA. If the plan offers a limited purpose and/or post deductible health FSA, those provisions should be detailed in the plan document and SPD. Plan provisions should specify what expenses will be reimbursed, especially if the list of reimbursable expenses is less than all permissible expenses.

I. Health Savings Accounts and Telemedicine. HSA eligibility is conditioned on enrollment in a high deductible health plan. The HDHP may provide limited preventive care before the plan's deductible is met. If a telemedicine benefit provides any other employer paid care before the deductible is met, HSA eligibility may be jeopardized.

J. Recommendations. We recommend that all employers compare plan documents, SPDs, benefit booklets, and employee handbooks to ensure that (1) they are consistent; (2) they contain no compliance errors and (3) accurately describe how the plan is administered.

IV. The ACA Lookback Rules In General. (If you have questions on the infrequently used monthly measurement period rules, the special rules for educational organizations, or any other special rules please feel free to contact us.)

A. Plan Eligibility in General. A plan does not need to use either the monthly or lookback measurement period rules to define an eligible employee. A plan that does opt to use these rules for eligibility can either use them exclusively or add them to the plan's current provisions. Their use can be restricted to benefits subject to the ACA.

B. Identifying FTEs for IRS Reporting. Every plan subject to the ACA must use these measurement period rules for identifying "full-time employees" for IRS reporting purposes. An employer is not free to substitute its own definition(s) for that purpose.

C. Lookback Measurement Period/Ongoing Employees. A lookback measurement period is most commonly 12 months, ending prior to the first day of the associated stability period. In between, there can be an administrative period of at most 90 days.

D. Pay Periods. For employees paid on a weekly, biweekly or semi-monthly basis, if hours are tracked on a pay period basis, rather than a daily basis, hours during a measurement period can be counted from the start of the first payroll period that ends within the measurement period through the last day of the last payroll period that ends within the measurement period.

E. Classifications. IRS regulations limit an employer's flexibility with respect to determining which categories of employees can be treated differently. Acceptable classifications include salaried/hourly, employees whose principal places of employment are in different states, union/nonunion, and union/union.

F. Stability Period/Ongoing Employees. An employee who is determined to be a full-time employee based on the lookback measurement period must be offered coverage for the entire associated stability period. The stability period must be defined in terms of calendar months.

G. New Employees Expected to be Full-Time. A new employee who is reasonably expected to be full-time and is not a seasonal employee must be permitted to elect coverage. Because of the nondiscrimination rules, most plans will want to use the plan's existing entry date for these employees. With the exception of seasonal employees, the employer cannot take into account the fact that a given employee's termination date is predetermined so be cautious in excluding "temporary employees".

H. New Variable Hour Employees/Initial Measurement Period. The new employee initial measurement period can be up to one month shorter than the measurement period for ongoing employees and can start on the employee's start date or the first day of the following month (or any date in between) and can be followed by an administrative period. The administrative period can't exceed 90 days, the initial measurement period can't exceed 12 months, and the combined length of both cannot extend beyond the last day of the first calendar month beginning on or after the employee's first anniversary.

I. New Variable Hour Employees/Initial Stability Period. The initial stability period begins the day after the initial

administrative period ends. Typically the initial stability period is 12 months although the transition rules (from new employee to ongoing employee) may require that a new employee be treated as full-time (or not full-time) for a longer period.

J. Transitioning from New Employee to Ongoing Employee. Once a new variable hour employee (including a seasonal employee) has been employed for one full standard measurement period the employer must test him/her for full-time employee status, beginning with that standard measurement period.

K. Rehired Employees. A former employee who has not had an hour of service for at least 13 consecutive weeks can be treated as a new employee upon rehire.

L. Calculating FTE Status. An employee is an FTE if he or she averages 30 hours per week (or 130 hours per month) during the applicable measurement period. Certain leaves of absence are ignored. Employees for whom hours' records are not available generally must have hours calculated under one of the acceptable equivalency methods.

M. Recommendations. This summary is highly simplified. We recommend reviewing the plan's current documents and administration to make sure they are compliant and asking questions whenever a given situation arises for the first time.

V. Changes in Employment Status and Special Employee Categories (e.g., Seasonal, Adjuncts, On-Call, Leased, Etc.) Under the ACA Lookback Rules

A. Changes in Employment Status. In general, under the lookback measurement period rules, an employer is required to treat an employee who is determined to be a full-time employee (i.e., expected to work, on average, at least 30 hours per week) during a measurement period as a full-time employee during the entire following stability period. However, special rules may apply when an employee moves from full-time to part-time status or vice versa. If a new part-time employee moves into a full-time position during the initial measurement period, the employer generally is required to offer employer mandate-compliant coverage as of the first day of the fourth full calendar month following the change in status. If an employee is hired as full-time (i.e., expected to work, on average, at least 30 hours per week), then the employee generally must be offered employer mandate-compliant coverage by the 91st day of employment. For each month thereafter, the employee must be offered employer mandate-compliant coverage if the employee averages at least 30 hours per week during the particular month until the employee has completed one full standard measurement period. Once an employee is an ongoing employee for purposes of the lookback measurement period rules, his or her status as a full-time employee is locked in for the corresponding stability period regardless of whether the employee has a change in status during that stability period. However, under an optional rule, an employer may cease offering employer mandate-compliant coverage to an employee following his or her change to part-time status, provided certain requirements are satisfied.

B. Seasonal Employees. A seasonal employee is defined as an employee who is hired into a position for which the customary annual employment is six months or less. Employers can track seasonal employees' hours over an initial measurement period, even if the seasonal employee is expected to work full-time (but only for the season).

C. Adjunct Faculty. Teachers and adjunct faculty present challenges since compensation is often not directly tied to the number of hours they work (e.g., compensation does not take into account time spent on non-classroom activities such as preparing lessons, grading papers and counseling students). Until further guidance is issued, the IRS has provided a safe harbor which credits 2.25 hours of service for each hour of classroom time. In addition, adjunct faculty should be credited with an hour of service for each hour spent performing other duties for the school, such as attending meetings or holding office hours.

D. Educational Institution Student Employees. Hours worked under a federal or state work-study program, or hours worked in an uncompensated internship do not count as hours of service for ACA purposes. However, all other hours for which an educational institution compensates students as employees are hours of services for ACA purpose.

E. On-Call Hours. Until specific guidance is issued, employers of employees who have on-call hours are required to use a reasonable method for crediting hours of service.

F. Leased Employees. In determining who is a full-time employee of an employer under the ACA rules, the IRS has indicated that it intends to use a fact-based "common law" definition of employee. An employer who has

authority over workers hired through a temporary staffing agency is at risk of having those workers characterized as the employer's employees for purposes of the employer mandate rules. However, there is an option under the ACA that allows employers to "take credit" for an offer of health insurance by a temporary staffing agency, provided certain requirements are satisfied.

G. Recommendations. Employers should evaluate and develop appropriate policies and procedures for handling changes in employment status, and confirm that the eligibility provisions contained in their plan documents correspond to the change in employment status rules. In addition, for those certain categories of employees whose hours of service are challenging to identify and track, employers should review their policies and procedures on counting and tracking those hours to evaluate whether those policies and procedures are reasonable under current guidance

VI. Preserving Your Plan's Subrogation Rights After the Supreme Court's Montanile Decision

A. Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan. In January, the Supreme Court issued a decision in this case regarding a health plan's rights to recover from a participant based on subrogation language in the plan document. Mr. Montanile was injured in a car accident and received a $500,000 settlement. The plan had paid more than $120,000 in benefits as a result of the accident and sought to recover that amount from Montanile. However, they could not reach an agreement with Montanile, so Montanile's attorney informed the plan's Board of Trustees that it would release $240,000 of the settlement to Montanile unless the Board objected within 14 days. The Board did not object within that time period so the funds were released to Montanile. Six months later, the plan sued Montanile to impose an equitable lien on Montanile's assets. By this time, Montanile had spent most of the $240,000.

The Supreme Court held that the plan could not impose an equitable lien on the participant's general assets. If there were any remaining assets that could be traced to the settlement amount, the plan might have an equitable lien, but not on "nontraceable assets". The decision, like other Supreme Court ERISA subrogation provisions was based on interpretation of ERISA's reference to the right of plan fiduciaries to "obtain other appropriate equitable relief . . . to enforce . . . the terms of the plan". That provision is the basis for plans being able to recover amounts based on subrogation language. The key phrase in that provision is "equitable relief". The Court has consistently interpreted that phrase to be a reference to the old and otherwise mostly obsolete common law distinction between "equitable relief" and "legal relief". Under common law, equitable relief did not include simple money damages, so the fact that Mr. Montanile received a settlement amount did not give the plan the right to a judgment that he simply owed them $120,000. Instead, the plan needed to identify a pool of assets to which its equitable lien could apply. The Court remanded the case back to the district court so that the lower court could determine if there were any traceable assets that would be subject to the plan's equitable lien.

B. Main Lesson. The most significant lesson from the Montanile decision is that plan sponsors and their service providers who are responsible for subrogation should act quickly to enforce their subrogation rights or they may lose their right to recover amounts they would otherwise be entitled to. For example, in the Montanile case, the plan waited until six months after the expiration of the time period that the plaintiff's attorney had offered for objecting to the distribution of the settlement amount. If they had filed suit during that 14-day period or shortly after it expired, they presumably would have had an easier time applying any equitable lien to traceable assets.

C. Secondary Lesson. The decision did not result from any failure of the plan to have appropriate plan language for subrogation but it does emphasize the importance of having subrogation language that enhances the plan's ability to support its position that, in enforcing its subrogation rights, it is seeking equitable relief.

D. Recommendations.

1. Review current subrogation procedures to ensure they encourage prompt action to enforce the plan's subrogation rights. 2. Review current subrogation provisions in plan documents, SPDs and participant subrogation agreements to ensure they have adequate language to preserve the plan's rights to equitable relief.

VII. COBRA and the ACA; Administering COBRA Under the Lookback Rules and Reporting COBRA.

A. COBRA and Lookback Measurement Periods. The ACA did not modify COBRA requirements, but it has a number of indirect effects on COBRA administration. For employers that use the lookback measurement periods to satisfy the employer mandate, one issue raised by the measurement period rules is whether COBRA must be offered when an employee ceases to be eligible for health coverage at the end of a stability period. Generally, that would be

a loss of coverage because of a reduction in hours, which would trigger the obligation to offer COBRA at the end of the current stability period. Also, before the employer mandate rules became effective, if a full-time employee who is eligible for health coverage, moves to part-time status working 20 hours per week, and was no longer eligible for coverage (or was required to pay more for coverage than as a full-time employee), that employee previously would have been offered COBRA based on a loss of eligibility due to a reduction in hours. For employers that use the lookback measurement period rules, the COBRA analysis is now a bit more complicated because that employee may still be eligible for coverage for the remainder of the current stability period (and maybe the next one), but if the employee continues to work 20 hours per week, the employee will eventually cease to be eligible under those rules as well, so a reduction in hours likely will still lead to a loss of eligibility for coverage at some point, which may be many months later. There is no detailed guidance from the regulators about when the COBRA event occurs in such cases, so more than one approach may be acceptable for now. Of course, employers should have uniform policies for offering COBRA in such cases and should make sure their plan documents and COBRA administration is consistent with those policies (and any applicable guidance).

B. Reporting COBRA Coverage. There are special rules for reporting COBRA coverage for purposes of IRS Forms 1095 and 1094. Generally, if a current employee is offered COBRA coverage (e.g., because of a reduction in hours), that is considered an offer of coverage for reporting purposes. Of course, if the coverage is offered at full COBRA rates, it may not be affordable. For former employees, an offer of COBRA is not considered an offer of coverage for reporting purposes. For the year in which the employee terminates employment, Code 1H generally should be entered on Line 14 of the 1095-C for any month when the former employee was offered COBRA. For any later year when the employee was not employed and was not enrolled in COBRA, there would be no need to complete a 1095-C.

VIII. The Latest on the Wellness Front

A. ADA Issues. In April 2015, the EEOC issued proposed regulations regarding wellness programs that offer an incentive for participation. These regulations would apply to programs that require employees to answer any disability-related questions or submit to any medical tests as a condition for the incentive. Those proposed regulations generally provided that a program that complies with the HIPAA nondiscrimination rules and wellness program requirements generally will also comply with the ADA proposed rule as well, but they added a few additional requirements including a notice requirement. Those regulations have not yet been finalized, but complying with them is the safest way to ensure that wellness programs do not violate the ADA restriction on requiring employees to answer disability-related questions or submit to medical exams.

There have been two federal district court decisions—one in Florida in 2012 and one in Wisconsin in 2015—that suggest that the EEOC may be overreaching in attempting to regulate wellness programs through its proposed regulations (and through a few enforcement actions). These two court decisions determined that the employers were permitted to implement their wellness programs as part of their health plans based on a safe harbor underwriting exception to the ADA, that generally provides that the ADA should not be construed to prevent employers from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks". The Florida case was appealed to the 11th Circuit, which agreed that the safe harbor provision applied. The EEOC recently announced it is appealing the Wisconsin case to the 7th Circuit Court of Appeals. For now, these decisions are binding in the 11th Circuit (Alabama, Florida and Georgia) and in western Wisconsin, so employers in those areas appear to be free for now to ignore the EEOC's position and the proposed regulations. Of course, employers in other areas should be cautious about relying on the safe harbor argument for now.

B. GINA Issues. The Genetic Information Nondiscrimination Act (GINA), generally prohibits employers from requesting "genetic information" or requiring genetic tests from employees. However, there is an exception for voluntary wellness programs (as long as they include a statement that any genetic information requested will not be used for "underwriting purposes" as broadly defined under GINA). Until recently, the EEOC took the position that, if there was any reward for participating in the wellness program that required the employee to provide genetic information, participation would not be considered voluntary for purposes of GINA. For example, if a health risk assessment included any request for genetic information, including questions about family medical history, providing any financial incentive for completing the assessment apparently would have violated GINA. Fortunately, on October 30, 2015, the EEOC issued a proposed rule that permits such incentives in some cases. The proposed rule clearly provides that a wellness program incentive can be conditioned on the employee's spouse providing information about the spouse's "current or past health status". Unfortunately, there is conflicting information in the proposed rule about whether the incentive can be conditioned on the employee providing information about the employee's own "current or past health status", but that also arguably is permitted.

The EEOC's description of this proposed rule says it makes the rules under HIPAA, ADA and GINA consistent with respect to the incentives that can be provided under a wellness program that is part of the employer's group health plan. However, there are differences. For example, the proposed rule states that the employer must obtain the prior, written, knowing and voluntary consent of the employee (and spouse, if spouse's information is requested) before obtaining the genetic information. Also, the proposed rule prohibits any request for any genetic information about the employee's children as a condition of obtaining any incentives. Finally, the method of determining the limit on any wellness program incentive is similar to 30% of the total cost of coverage that applies under the HIPAA nondiscrimination rules, but for employees who are not enrolled in individual coverage, the calculation method is more complicated.

IX. Stop Loss Insurance as an ERISA Plan Asset (DOL Advisory Opinion 2015-02A)

A. DOL Guidance. Over the years, the benefits community and the DOL have struggled with the question as to whether "stop-loss insurance" constitutes "plan assets" under ERISA. (Avoiding plan asset status is desirable for minimizing a plan sponsor's obligations under ERISA, including 5500 reporting requirements.) Recently, the DOL issued an Advisory Opinion that sets forth the DOL's latest thinking on the question. Very generally, if the employer (i) holds the stop-loss policy in its name (and, therefore, the stop loss policy would be subject to the claims of the employer's general creditors and participants would not have any beneficial interest in the policy), (ii) pays the premiums and (iii) receives the insurance proceeds itself because the employer remains obligated to pay plan benefits, the stop-loss insurance will not be treated as a plan asset. Therefore, under the DOL's current thinking, generally, a stop-loss policy constitutes ERISA plan assets if (i) the stop-loss policy is issued to the plan or (ii) where plan assets, including participant contributions, are used to pay the premiums.

The DOL concluded in the most recent Advisory Opinion that despite the presence of participant contributions, the stop-loss policy at issue was not a plan asset. Under the applicable facts, the employers' (i.e., a parent and a subsidiary corporation) use of a special accounting system ensured that the payment of premiums included no employee contributions. (While not binding on anyone other than the party to whom the Advisory Opinion is addressed, the Advisory Opinion is at least reflective of the DOL's latest thinking on the issue.)

B. Recommendations. For an employer a with self-funded health plan, the employer should review its stop-loss policy to be sure that it complies with the granular details of the DOL's latest thinking on this issue.

X. Cadillac Tax Delay Update. The ACA imposes on a "Cadillac plan" an excise tax in the amount of 40% of the excess of the "value" of the plan over the ACA's Cadillac plan limit of $27,500 family/$10,200 self-only (as adjusted). The non-deductible tax that was originally to be effective in 2018 has been delayed by two years and the tax is now scheduled to be deductible for certain employers subject to the tax. The delay will also impact the dollar limits noted above as the dollar limits are designed to be indexed for years after 2018. While rumblings remain about the potential repeal of the Cadillac tax, at this point, it seems likely that the tax will be further modified before it is effective.

Recommendations. Despite the delay in the effective date, employers should continue to monitor the guidance and be mindful of the potential impact of the Cadillac Tax on their health insurance plans and whether design and/or benefit changes might be needed in the future to avoid/minimize the tax.

XI. Recent DOL Audit Activity. The DOL has increased substantially the number and scope of compliance audits of health and welfare plans, focusing on issues ranging from ERISA, HIPAA, COBRA, ACA, etc.. The DOL's initial audit requests often contain pages and pages of detailed questions about the plan's document and operational compliance with various statutory and regulatory requirements. (In some cases, the DOL skips the document/information "requests" and instead issues a "subpoena" for the relevant documents and information.) Common causes of DOL audits include, but are not limited to, (i) participant complaints, (ii) Form 5500 Annual Report filing errors and failures, (iii) referrals from other agencies, and (iv) the DOL's review of industry publications. Naturally, if the DOL finds a violation of applicable law, an employer could not only face penalties imposed by the DOL, but the employer could also potentially be subject to an enforcement action by another agency (because of the regulators' policy of referring violations to other agencies). As a result, it is very important that employers review their plan documents, SPDs, administrative forms, etc. to ensure compliance (and to avoid potential penalties). In addition, employers should review their operational compliance with the applicable rules of ERISA and the like.

B. Recommendations. Conduct an internal self-diagnostic to determine compliance of your health and welfare plans

before the DOL comes calling!

XII. ACA Reporting Obligations for Employers. Under the ACA, the following new reporting obligations are imposed on employers with group health plans under Code Sections 6055 and 6056:

A. "Small" Employers. If an employer did not employ at least 50 full-time employees, counting its full-time employee equivalents, during the preceding calendar year, the employer does not have any ACA reporting obligations unless the employer has a self-funded health plan. If a "small" employer has a self-funded health plan, the employer must issue a Form 1095-B to each covered employee and to certain covered non-employees (e.g., retirees). In addition, "small" employers with self-funded health plans must file the Forms 1095-B, along with a transmittal Form – Form 1094-B – with the IRS.

B. "Large" Employers. If an employer employed at least 50 full-time employees, counting its full-time employee equivalents, during the preceding calendar year, the employer must issue a Form 1095-C to each "full-time" employee (as defined in the employer mandate guidance), regardless of whether (i) the employer has a fully insured or self-funded health plan and/or (ii) a full-time employee had coverage under the employer's group health plan. If the employer has a self-funded health plan, Part III of the Form 1095-C must be completed. In addition, the employer must file Forms 1095-C, along with a transmittal Form – Form 1094-C – with the IRS.

C. Deadlines. Generally, the Forms 1095-B and 1095-Cs must be provided to employees no later than January 31st of each year. In addition, the Forms must be filed with the IRS, along with the applicable transmittal Form, no later than February 28th unless the Forms are being filed electronically, in which case the Forms must be filed with the IRS no later than March 31st. If an employer fails to timely provide the Forms to employees or timely file the Forms with the IRS, penalties may apply. For Forms filed in 2016 (for the 2015 year) only, special extended deadlines apply. That is, the Forms 1095-B (for "small" self-funded employers) and 1095-Cs (for "large" employers with fully insured or self-funded plans) must have been provided to employees no later than March 31, 2016. The applicable Forms must generally be filed with the IRS by May 31, 2016 unless the employer is filing electronically, in which case the deadline is June 30, 2016.

D. Recommendations. Note that the codes used on the applicable Forms are not intuitive. To the extent that a material mistake is made, an employer should consider issuing and filing amended Forms. Employers should also be certain to provide the Forms to employees and file with the IRS by the applicable deadlines. If the Forms are provided and/or filed late, an employer should attempt to limit penalties by satisfying the reporting requirements as soon as possible. Finally, the determination of whether an employer is "small" or "large" for purposes of the ACA reporting requirements takes into account whether the employer is a member of a controlled group or affiliated service group so employers should make certain that they are aware of their controlled group and affiliated service group status.

XIII. Same-sex Spouses; Civil Unions; Domestic Partners; Etc. Health Benefits.

This is our annual placeholder to remind our clients and friends that, notwithstanding the positions being taken by isolated public servants in the American South, all individuals in the United States may marry their loved ones regardless of the gender(s) of the spouses, and the employee benefit and executive compensation laws of the United States treat married individuals as married regardless of the spouses' gender(s). Now that significant time has passed since the Supreme Court's landmark decision, many employers have revisited benefit plan provisions that provide coverage to employees' civil union partners, domestic partners, and the like, simplifying their plans and communicating to their employees that only spouse coverage will be provided going forward. One caution: for employers that oppose same-sex marriage on some personal grounds and therefore do not offer benefit plan rights to same-sex spouses, the first Title VII plaintiffs' cases have been filed (as we predicted in our early advice on this development).

Recommendations: Employers should consider their benefit plan provisions impacting the same-sex question and consult with counsel about any concerns.

XIV. Spouse Coverage Exclusions in Health and Welfare Plans.

There is nothing in the law that prohibits an employer from excluding spouses from coverage under its health and welfare plans. Of course, if an employer desires such an exclusion, it must be careful to specify it in its plan document, SPD, SBC and other communication materials. Similarly, excluding only those spouses who have coverage available at their own places of employment is permissible, if challenging to monitor and enforce. Note

that excluding children from health plan coverage is an issue because they are included with employees in the group of individuals looked at to determine if an over-50 employer meets the employer mandate requirements of the Affordable Care Act. Finally, spouses have certain statutory rights under tax-qualified retirement plans that must be observed.

Recommendations: Employers that wish to exclude some or all spouses from its health and welfare plans should ensure that their documents clearly communicate this exclusion, and should consider the operational and employee relations challenges of such an exclusion.

XV. Spotting, and Avoiding, MEWAs. A Multiple Employer Welfare Arrangement is an arrangement that provides ERISA Section 3(1) welfare benefits to employees of two or more employers that are not members of the same controlled group. Although ERISA generally preempts State laws that attempt to regulate ERISA-governed benefit plans, ERISA provides an exception that permits States to regulate MEWAs. States may require a fully-insured MEWA to maintain specific reserves, require contributions designed to ensure that the MEWA will be able to satisfy its benefit obligations, and comply with State licensing, registration, certification, financial reporting, examination, audit and other insurance laws necessary to ensure compliance with the State's insurance reserves, contributions and funding requirements. ERISA permits self-funded MEWAs to be subject to any State law "to the extent the law is not inconsistent with Title I of ERISA." Although MEWAs are permitted in a few States, many States apply significant portions of their onerous and costly insurance laws to MEWAs, and especially to those MEWAs that provide health benefits. Maryland imposes a fine of up to $50,000 for each violation of operating a MEWA without a certificate of authority from the Maryland Insurance Administration.

Recommendations. In light of the above, it is important for employers to ensure that all employees covered by a particular welfare benefit plan are employed by employers within the same controlled group. Because entity ownership often is a dynamic thing, multi-entity employers should establish a procedure to review ownership facts on a regular basis to ensure that they know where the controlled groups are, and are not, within their benefit plan universe.

XVI. DOL and IRS Electronic Delivery Rules. Federal law imposes a number of participant notification and communication requirements on sponsors of employee benefit plans (including welfare benefit and retirement benefit plans). These requirements can be satisfied by providing documents in an electronic format if certain specific requirements are met. The requirements for electronic delivery vary depending on the source of the particular notice requirement. If the disclosure is required under ERISA, the DOL's electronic delivery rules apply. If the disclosure is required by a section of the Code that's not part of ERISA, then the IRS's electronic delivery rules apply. Other agencies, such as the Department of Health and Human Services and the Centers for Medicare and Medicaid Services, impose a separate set of requirements that apply to certain employee benefit plans and the requirements for electronic delivery of notices required by those agencies may be different.

Recommendation: Review any electronic delivery processes being used by you or your vendors to confirm they comply with the most recent regulatory requirements.

XVII. Voluntary Benefits Issues. Voluntary benefit plans are plans that are insured, completely optional for election, and paid for by employees. Typically, voluntary benefits include life, dental, vision, disability, critical illness and hospital indemnity insurance. Employers are often surprised to learn that their "voluntary benefits" are truly not voluntary under ERISA, and that, consequently, they have not met their ERISA compliance obligations (which include the requirement to file a Form 5500, provide an SPD to plan participants and comply with ERISA's claims procedures.

A. DOL Safe-Harbor Voluntary Benefit Exemption. DOL regulations provide a safe harbor under which ERISA does not apply to certain voluntary group, or group type insurance programs. To fall within the safe-harbor, the program must meet several specific requirements, including that it be established as a voluntary, 100% employee pay-all arrangement and that the employer have minimal involvement.

B. Employer Involvement. Under the DOL safe-harbor, employer involvement will be considered minimal if the sole function of the employer is, without endorsing the program, to permit the insurer to publicize the arrangement to employees and to collect premiums from employees through payroll deductions and remit them to the insurer. DOL guidance states that "endorsement" occurs if the employer urges or encourages participation in the program or engages in activities that would lead employees to reasonably conclude that the program is part of a benefit arrangement established or maintained by the employer. Actions that can be construed as endorsement include: 1) taking some position or action on behalf or in coordination with the insurer, such as making suggestions or

negotiating with the insurer as to plan design; 2) representing the plan to employees as part of its benefit package, such as incorporating the terms of the insurance program into a SPD or characterizing the program as an employer program in a brochure; 3) assisting employees with claims or disputes; 4) deciding key contract terms (such as amount of coverage), or deciding issues of employee eligibility; or 5) permitting pre-tax premium payments through the employer's cafeteria plan.

C. Recommendations. Employers with programs that they believe to be ERISA-exempt voluntary benefits should evaluate those arrangements and the employer involvement with those arrangements to confirm that they meet the DOL safe-harbor exemption. If avoiding ERISA's application is not a priority, an employer may want to consider whether it is appropriate to treat a voluntary arrangement as subject to ERISA and include it in a wrap plan document with other employer-provided health and welfare plans.

QUALIFIED RETIREMENT PLANS

I. IRS Proposed Nondiscrimination Rules for Frozen Pension Plans and other Retirement Plans.

A. Recent Guidance. A "frozen" or "closed" defined benefit ("DB") pension plan (e.g., a plan that provides ongoing accruals only for employees who participated in the plan on a specified date ("grandfathered employees")) must continue to comply with applicable minimum coverage and nondiscrimination requirements under the Code. IRS Notice 2014-5 provided temporary relief, through plan years beginning before 01/01/2016, for meeting these requirements. IRS Notice 2015-28, extended this temporary relief through plan years beginning before 01/01/2017. On January 29, 2016, the IRS issued proposed regulations that provide "permanent" relief to these plans.

B. Proposed Regulations. The proposed regulations modify the nondiscrimination tests that apply for purposes of a combined DB/DC Plan to allow greater flexibility for passing the nondiscrimination tests as the closed plan ages and the coverage of the DB plan diminishes. To take advantage of these closed plan nondiscrimination tests, an amendment to the closed plan cannot increase accrued benefits or future accruals, reduce the ratio percentage under any applicable nondiscrimination test, or expand coverage (except an amendment to add an acquired group of similarly situated employees, or to add nonhighly compensated employees to satisfy the nondiscrimination tests, is permitted). The proposed regulations also provide relief from certain nondiscrimination testing for a benefit, right or feature under the closed plan, or for a rate of matching contributions under a DC plan that is provided to a grandfathered group as a replacement of some or all of the value of lost DB plan benefits. Under this special rule, if the benefit, right or feature was in existence for at least 5 years before the DB plan is closed, and satisfies the "currently available" requirement during the first 5 years after the DB plan is closed, the benefit, right or feature satisfies the applicable nondiscrimination requirements indefinitely (as long as no amendment changes the eligibility for the benefit, right or feature).

C. Reliance and Effective Date. Until final regulations are issued, employers can rely on the guidance under the proposed regulations for plan years beginning on or after 01/01/2014.

D. Recommendations. Employers with "closed" DB plans should confirm that the closed DB plan and any benefit for grandfathered employees under a DC plan continue to meet the applicable nondiscrimination and coverage requirements taking advantage of the new flexibility under the proposed regulations as needed.

II. New Guidance on Mid-Year Changes to Safe Harbor Plans. In the past, the IRS has generally taken the position that safe harbor 401(k) and 403(b) plans may not be amended during the plan year unless the IRS has specifically approved the particular amendment in question (e.g., implementation of a Roth deferral feature mid-year). This has led to significant consternation among employers who, for a number of reasons, wish to amend their safe harbor 401(k) and 403(b) plans for reasons other than those specifically approved by the IRS, but do not want to take the risk that the plan will lose its safe harbor status due to those mid-year amendments. In response to these concerns, the IRS issued Notice 2016-16, which provides more detailed guidance regarding mid-year safe harbor plan amendments.

A. Permissible Mid-Year Amendments. Generally, if the amendment does not impact the safe harbor notice's content, it is permissible. In addition, many amendments that impact the content of the safe harbor notice are permissible, as long as the employer provides advance notice of the change to employees and gives employees a reasonable opportunity before the effective date of the amendment to make changes to their deferral elections.

B. Impermissible Mid-Year Amendments. Despite the more flexible approach toward mid-year safe harbor plan

amendments detailed above, the new IRS guidance makes clear that certain types of amendments still are not permissible unless required by legal or regulatory guidance. For example, it is not permissible to amend a safe harbor plan mid-year to narrow the group of employees who are eligible to receive the safe harbor contribution. Certain other mid-year changes also are prohibited.

C. Recommendations. If an employer has a safe harbor 401(k) or 403(b) plan and wishes to amend the plan mid-year, the employer should first make certain that it confirms that the amendment is permissible. Assuming that the particular mid-year amendment that the employer wishes to make is permissible, the employer should also make certain that, prior to the amendment effective date, the employer satisfies any advance notice and deferral election requirements associated with the amendment.

III. The New IRS Determination Letter Program; Form 5310 Issues.

A. Announcement 2015-19. Sponsors of individually designed qualified plans have for years submitted their plans for a determination letter to the IRS which allows the sponsor to rely on the qualification of the plan document in form. The determination letter gives the plan sponsor the comfort that the IRS will not question the qualified status of the plan provided that the plan is operated pursuant to the plan's terms. In Announcement 2015-19, the IRS announced that, effective January 1, 2017, the 5-year staggered determination letter cycles for individually designed plans will be eliminated. Determination letters for individually designed plans will be limited to initial plan qualification and qualification upon plan termination. In addition, effective July 21, 2015, the IRS no longer accepted off-cycle determination letter applications, except for determination letter applications for new plans and for terminating plans.

B. Notice 2016-03. In Notice 2016-03, the IRS announced that it will provide additional guidance in preparation for the elimination of the 5-year staggered determination letter cycles for individually designed plans. The Notice clarifies that the expiration dates in determination letters issued prior to January 4, 2016 are no longer operative. The IRS will issue future guidance on the extent to which a plan sponsor can rely on a determination letter after a change in law or a plan amendment. Plan sponsors whose employer identification number ends in a 1 or 6 can continue to file a determination letter submission in Cycle A from February 1, 2016 to January 31, 2017. The Notice confirms that controlled group plans can also take advantage of the Cycle A option if all members of the controlled group had made the election to file in Cycle A by January 31, 2012. Finally, the Notice extends the deadline by which an employer can adopt a current defined contribution pre-approved plan and may apply for a determination letter, if permissible, to April 30, 2017. This extension only applies to the adoption of a pre-approved plan which is adopted on or after January 1, 2016 or which is converted from an individually designed plan to a pre-approved plan on or after January 1, 2016. Employers who had adopted a defined contribution pre-approved plan prior to January 1, 2016 needed to restate that plan and apply for a determination letter, if permissible, by April 30, 2016.

C. Form 5310. The IRS will still accept determination letter submissions on the qualification of a plan upon termination. Plan sponsors use a Form 5310 to request this letter. Plan sponsors must be aware that the Form requires detailed information on the participants who terminated without full vesting during the plan year of termination and each of the 5 prior plan years. In addition, the sponsor must be prepared to submit past plan documents if requested.

D. Recommendations. Cycle A plans (plan sponsor's EIN ends with 1 or 6) should be submitted to the IRS for an updated determination letter during the period February 1, 2016 through January 31, 2017. New qualified plans and qualified plans being terminated should continue to file for a determination letter with the IRS. Legal review of plan amendments and the timely adoption of amendments will become more important. The burden of ensuring that plan documents are compliant will now shift solely to the plan sponsor. The IRS has stated that it is discontinuing the determination letter program due to "lack of resources." We believe that this will mean additional IRS agents will be assigned to plan audits. Although review and timely adoption of amendments is recommended, it is anticipated that the IRS will issue more model language for amendments which are required in the future. In addition, the IRS is also considering allowing more amendments to be incorporated by reference. The IRS is also considering expanding the voluntary-compliance system. Plan sponsors of individually designed plans will no longer have the expense of submitting for an updated determination letter every five years. For this reason, plan sponsors of prototype or other "pre-approved" plans may want to convert to an individually designed plan.

IV. New Regulations Defining "Normal Retirement Age" for Governmental Plans.

A. Background. The IRS recently released proposed regulations providing rules relating to the determination of

whether the "normal retirement age" under a governmental pension plan satisfies the requirements of IRC Section 401(a). The scheduled comment period ended last week. The 2007 final regulations defining "normal retirement age" generally require that a "normal retirement age" under a pension plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed (the "reasonably representative requirement"). The 2007 regulations provide that a normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement. Whether a normal retirement age that is not earlier than age 55 but is below age 62 satisfies the reasonably representative requirement is based on a facts and circumstances analysis. The 2007 regulations provide that a normal retirement age that is lower than age 55 is generally presumed not to satisfy the reasonably representative requirement.

B. Proposed Regulations. The recently released proposed regulations provide guidance with respect to the applicability of the 2007 final regulations to governmental plans. The proposed regulations provide for a number of safe harbors for governmental qualified plans.

1. General Safe Harbor: Age 62 or later.

2. Additional Safe Harbors: (a) Age 60 and 5 Years of Service; (b) Age 55 and 10 Years of Service; (c) Combined Age and Years of Service of at least 80; and (d) Any Age with 25 Years of Service, but combined with a safe harbor that includes an age -- this prevents someone being hired at age 60 from having an NRA of 85.

3. Safe Harbors of Qualified Public Safety Employees: (a) Age 50; (b) Combined Age and Years of Service of at least 70, or (3) Any Age with 20 Years of Service.

A normal retirement age outside of a safe harbor might still be acceptable, but the normal retirement age would have to satisfy the "reasonably representative" requirement.

C. Recommendations. Governmental employers should monitor these developments and review the terms of their plans to ensure compliance with the new rules, when finalized. The scheduled effective date is generally for plan years beginning on or after January 1, 2017 (or later depending on the timing of the governmental employer's legislative session).

V. Updates on Church Plan Status Rules. Retirement plans which are "church plans", as defined in ERISA and the Internal Revenue Code, are exempt from ERISA and, if they are non-electing plans, are exempt from some Internal Revenue Code requirements and subject to different, less stringent requirements under other Code sections. Plans may request a private letter ruling from the Internal Revenue Service, or a letter from the Department of Labor, ruling that they are church plans. In the last few years several cases have been brought by plan participants seeking to have the courts determine that (even though the plan has an IRS private letter ruling) their plan is not a church plan and thus is subject to ERISA and the various IRC provisions affecting qualified retirement plans (see, for example, Rollins v. Dignity Health, Kaplan v. St. Peter's Healthcare System, Overall v. Ascension Health, Medina v. Catholic Health Initiative, Lann v. Trinity Health Corp.). At the federal District Court level several courts have found that, to be a church plan, the plan must be established and maintained by a church (directly or through a pension board) and plans established by a church associated non-profit healthcare organization are not church plans. Other federal District Courts have come to the opposite conclusion finding that a church associated non profit healthcare organization can establish a church plan. These cases are making their way through the appellate courts. The Third and Seventh Circuits have now concluded that, to be a church plan, a plan must be established by a church and not a church affiliated hospital. In both cases the appellate court agreed with the federal District court ruling (see, Stapleton v. Advocate Health Care Network (7th Circuit) and Kaplan v. St. Peter's Healthcare System (3rd Circuit).

Recommendation: Sponsors of church plans should review their plans to determine what effect a loss of church plan status would have on their plans. Depending on the analysis, sponsors may choose to make changes to the plans (for example, should the plan be better funded, should vesting be changed and so forth).

VI. The New DOL Fiduciary Rule, Including Impact on IRAs.

A. Background. On April 8, the DOL issued long awaited/feared final regulations defining "fiduciary" for retirement plan and IRA purposes and creating a new Best Interest Contract exemption that, if complied with, permits these fiduciaries to continue to be paid. The regulations were the culmination of a years-long process and are expected to have a significant real world impact on the financial services industry.

B. The Fiduciary Definition. In very general terms, the regulations define a fiduciary as anyone who, for direct or indirect compensation, advises on retirement plan or IRA investments, policies or procedures, rollovers, transfers, distributions and the like (including the investment of property distributed from a plan or an IRA).

C. Primary Impact. The new fiduciary definition applies in the ERISA retirement plan and IRA settings, so new fiduciaries of IRAs will be held to the fiduciary and prohibited transaction rules with which ERISA plan fiduciaries are familiar (e.g., prudent expert, no self-dealing, no conflicts of interest, no third party compensation or compensation based on investments selected without qualifying for a specific exemption, best interest of client, and the like).

D. The "BIC" Exemption. To enable these new IRA fiduciaries to continue to receive compensation based on investments selected and third party compensation, the DOL issued a new Best Interest Contract exemption from the fiduciary prohibit transaction rules. That's the good news. The bad news is that the requirements that must be met to enjoy the BIC exemption are many and arguably challenging.

E. Recommendations. Before April 10, 2017, all investment and advisory professionals who work with retirement plans, IRAs or their participants and owners will need to review these new rules in detail with their attorneys and determine what steps need to be taken to enable them to continue operate lawfully in these settings. Employers likely will receive new service agreements and disclosures from their financial advisors that they will want to review with ERISA counsel.

VII. **New Money Market Fund Rules.** In 2014 the SEC adopted amendments to the rules that govern money market mutual funds. The amendments generally are designed to reduce the susceptibility of MMFs to heavy redemptions during times of financial crisis.

A. Floating NAVs, Redemption Fees and Liquidity Gates. The new rules, which generally are effective on October 14, 2016, require MMFs that invest beyond government securities and that are sold to institutional investors (like retirement plans) to use a "floating" share price that fluctuates along with changes in the market-based value of the securities in the MMF's portfolio. MMFs that invest beyond government securities also must impose redemption fees and liquidity gates during periods of financial crisis. MMFs that invest only in government securities (and Retail MMFs that have only individual investors) may continue to use a stable NAV of $1.00. Redemption fees and liquidity gates are optional for government MMFs.

B. Disclosures, Liquidity and Diversification. The rules include extensive new disclosure requirements for MMFs, require MMFs to invest no more than 5% of their assets in any one issuer or group of affiliated issuers, and require MMFs to maintain at least 10% of their portfolios in liquid assets.

C. Recommendations. Before October, employers with MMFs in their retirement plan portfolios must consult with their investment professionals to determine if these changes suggest that the current MMF should be replaced with another MMF (or another type of short-term investment option). Because of the plan administration challenges that would be presented by the floating NAV, redemption fee and liquidity gate rules applicable to MMFs that invest beyond government securities, many employers are discussing with their investment advisors whether they should move to a government-only MMF before the October deadline (and whether they should require the government MMF to warrant that it will never adopt the optional redemption fee and liquidity gate rules). In any event, revised disclosures about a retirement plan's MMF option likely will be required before these changes take effect.

VIII. Avoiding IRS/DOL Audits.

A. IRS Employee Plans Compliance Unit 5500 Project. The most recent projects listed on the IRS EPCU website are compliance checks that focus on data errors identified on Forms 5500 and 5330. The compliance checks are not plan audits. According to the EPCU website: "Taxpayers are initially contacted by correspondence, but we may follow up with additional letters and/or telephone calls. Most issues are resolved without an on-site examination of the books and records of the plan, saving time and money for both the taxpayer and the IRS." There is no penalty for failing to respond to an EPCU compliance check letter, but failing to do so can result in a full blown audit.

B. Avoiding IRS/DOL Audits. Accurate completion of Form 5500. New compliance questions focus on some of the top issues audited by the IRS and DOL. Top IRS audit issues: Definition of compensation; updating plan documents; employee eligibility; plan loans; in-service distributions; distribution process/paperwork; suspension of benefits; nondiscrimination testing; vesting; minimum required distributions; QDRO procedures. Top DOL audit

issues: target date funds; revenue sharing; float; investment management; late contributions; ERISA fidelity bonds; blackout notices; investment policy/guidelines; plan committee meetings; changing recordkeepers.

C. Recommendations. Plan sponsors should pay particular attention to those issues that are top audit issues for the IRS and DOL. Plan sponsors should consider legal review of Form 5500 before filing the annual return.

IX. Plan Fiduciaries' Duties Concerning Socially Conscious Investments. The DOL issued guidance in late 2015 regarding socially responsible funds (or, as referred to by the DOL, "economically targeted investments") ("ETI"s) made by retirement plans covered by ERISA. The DOL previously addressed issues relating to ETIs in Interpretive Bulletin 94-1 (IB 94-1) and Interpretive Bulletin 2008-1 (IB 2008-1). The DOL concluded that IB 2008-01 unduly discouraged fiduciaries from considering ETIs and environmental, social and governance factors under appropriate circumstances. As a result, the most recent guidance confirmed the DOL's longstanding view from IB 94-1 that fiduciaries may not accept lower expected returns or take on greater risks in order to secure collateral benefits, but may take such benefits into account as "tiebreakers" when investments are otherwise equal with respect to their economic and financial characteristics. This recent guidance also acknowledges that environmental, social, and governance factors may have a direct relationship to the economic and financial value of an investment, and concludes that, when they do, those factors are more than just tiebreakers, but rather are proper components of the fiduciary's analysis of the economic and financial merits of competing investment choices.

Recommendations. Review your current investment line-ups to confirm that any socially responsible investment options are permitted within the parameters of the most recent DOL guidance, and if offered in a participant-directed account balance plan, confirm you are complying with each requirement of ERISA section 404(c) to protect the plan's fiduciaries from certain liability for losses resulting from investment decisions made by participants and beneficiaries.

X. Revised Form 5500 – New Compliance Questions. New compliance questions were added to the 2015 Form 5500/5500-SF and Schedules H, I and R, some of which request accounting or legal conclusions. On February 17, 2016, the IRS posted instructions on its website that plan sponsors should not complete these compliance questions. Specifically, that "Since the proposed 2015 IRS compliance questions on the Forms 5500 and 5500-SF, and Schedules H, I, and R were not approved by the Office of Management and Budget when the 2015 Form 5500 and Form 5500-SF were published on December 7, 2015, the IRS has decided that plan sponsors should not complete these questions for the 2015 plan year." Form 5500 Preparer Information (page 1 bottom); Schedule H, Lines 4o-p, 6a-d; Schedule I, Lines 4o-p, 6a-d; Schedule R, New Part VII (Lines 20a-c, 21a-b, 22a-d, and 23); Form 5500-SF, Preparer Information (page 1 bottom), Lines 10j, 14a-d, and New Part IX (Lines 15a-c, 16a-b, 17a-d, 18, 19, and 20).

Recommendations. Plan sponsors should pay careful attention to the completion of Form 5500. For 2015, plan sponsors should not answer the new compliance questions. Plan sponsors should respond to any EPCU compliance checks.

XI. Protecting Americans from Tax Hikes (PATH) Act of 2015.

A. Church Organizations Controlled Group Rules. On December 18, 2015, the PATH Act became law. One part of that Act added a new section 414(c)(2) to the Internal Revenue Code, which contains rules for applying the controlled group rules to church organizations. These rules apply retroactively. Generally, aggregation is required if an organization provides at least 80 percent of the operating funds and is directly involved in the day-to-day operations of the other organization. However, the new Code section adds a "permissive aggregation" rule and a "permissive disaggregation" rule, that can be elected to include or exclude organizations that would be excluded or included under the general rule. However, once the election is made, it can only be revoked in the future by notice to the Secretary of the Treasury in a manner to be prescribed in future guidance.

B. Church 403(b) Defined Benefit Plans. Church 403(b) defined benefit arrangements in effect on 09/03/1982 have been subject to both DB (annual benefit) and DC (annual accrual) 415 limits. The Act removes the application of the DC 415 limit to the annual accrual under these plans.

C. Church Plan Automatic Enrollment State Law Pre-emption. ERISA pre-emption does not apply to church plans. The Act extends state law pre-emption to ERISA exempt church plans to ensure that an automatic enrollment feature for elective deferrals in a church plan will not be prohibited by state law.

D. Church QP and 403(b) Plan Mergers Permitted. The Act permits a merger of a qualified retirement plan and a

403(b) plan that are maintained by the same church or convention or association of churches, or the transfer of some or all of a participant's account balance, as long as accrued benefits are the same or greater after the merger as before the merger and the accrued benefits are 100% vested after the merger.

E. Group Trust Can Include Church Assets. The Act permits a group trust to hold assets of a church organization that are co-mingled with church plan assets.

F. Recommendations. Church organizations should review these new laws added by the PATH Act to determine the advantages and disadvantages to these new rules and modify the organization's benefit programs accordingly.

EXECUTIVE COMPENSATION

I. Avoiding 409A Traps for the Unwary. Self-diagnostics should be performed to identify potential 409A violations before they occur and to ensure your plans are meeting their objectives. Generally, you should take inventory of what you have, what you have been doing (and what you have been considering implementing), what documents you have in place, and make sure everything you have been doing (or have been considering) is consistent with the plan documents and is in compliance with 409A or is exempt from 409A. Less obvious 409A traps to look for include: separation from service issues, annual and long-term bonus payment provisions, severance plans and programs (which potentially raise issues under ERISA and other Code sections, such as 457(f) for tax-exempt employers), post-employment health benefits or reimbursement provisions (which raise numerous issues outside of 409A), anti-substitution rules, anti-"toggling" rules, and change in control provisions.

Recommendation: Perform a self-diagnostic of any potential 409A-impacted plan or agreement to confirm it complies with Code section 409A.

II. The 409A Document and Operations Amnesty Program. If you discover a 409A violation – either in your plan operations or in the governing plan document– you may be able to correct the error with no penalty or a reduced penalty. To utilize the IRS's self-correction programs for (a) certain specified 409A operational errors or (b) certain specified 409A document errors, the employer and employee must: i. determine that the error in question is on the IRS list of correctable errors; ii. satisfy the program's general eligibility requirements; iii. satisfy the specific reporting requirements for the correction; and iv. satisfy the specific requirements described for the type of error being corrected. Taking prompt action is crucial because most of the available correction opportunities expire a short period of time after the operational error initially occurs or, in the case of plan document errors, before the impermissible plan provision is enforced.

Recommendation: If you discover a 409A violation in operation or in the governing plan document, immediately determine whether it is correctible under one of the IRS's limited correction programs and take the appropriate corrective action.

III. Using "Phantom" Equity to Compensate Key Employees

A. Equity Compensation. Equity based plans provide officers, directors, employees, and other service providers of the sponsoring corporation with incentives based on the market or financial performance of the stock or membership interests of the corporation, often on a tax-deferred basis. Types of equity plans include incentive stock options, nonstatutory stock options, discounted stock options, restricted stock, stock appreciation rights), phantom stock, and employee stock purchase plans. Because the economic value of the benefits to the participants increases as the value of the sponsor's stock increases, these plans tie the interests of the participants to those of the corporation's stockholders. "Pass-through tax entities", such as LLCs, partnerships and sole proprietorships can offer these types of benefits to key employees.

B. Tax Rules. Benefits generally are taxed to the recipient as ordinary income when paid. In addition, benefits generally become subject to FICA/Medicare/Additional Medicare taxes at the time they become vested. However, under applicable rules, if benefits are not "reasonably ascertainable" at the time they become vested, FICA/Medicare/Additional Medicare taxation may be postponed until the time they become "reasonably ascertainable". Nondiscounted stock options and stock appreciation rights with no right to additional deferral should be exempt from 409A.

C. Phantom SARs. Phantom Units may take the form of SARs, which are rights awarded to each participant representing the right to be paid, on the payment date, an amount equal to the incremental increase, if any, in the value of a specified number of shares of stock or membership interests of LLC measured from the date of the

participant's award of units through the payment date.

D. Phantom Units. Alternatively, Phantom Units may be used, which represent the right to be paid, on the payment date, an amount equal to the date-of-payment value of a specified number of shares of stock or membership interests in LLC. Thus, each Phantom Unit would confer upon the participant not merely the growth in the value of a membership interest during the award period, but the entire value of a membership interest in LLC as of the date of the participant's termination of employment.

E. Recommendations. All types of employers, not just C corporations, should include "phantom" equity benefits in any discussion of compensation alternatives for key employees.

IV. 501(c)(3) Employers – Compliance with the Intermediate Sanctions and Form 990 Rules. Unfortunately, the furor about "excessive compensation to 501(c)(3) executives" in the popular press, various trade presses, among certain interest groups, and among certain members of Congress continues. This furor does not seem to be justified by the relevant data (except in rare cases). Fortunately, the agency with the responsibility for enforcement of the relevant rules (the IRS) seems to be data-driven, rather than furor-driven. However, this makes it as critical as ever that 501(c)(3) (and 501(c)(4)) employers determine the compensation packages of their executives in the precise manner specified in the IRS intermediate sanctions rules, and that they memorialize their efforts in this regard in great detail and again in the manner specified in those rules. It also remains critical that tax-exempt employers prepare the executive compensation sections of their annual Form 990s not only accurately, but just as importantly with sensitivity to the manner in which their Form 990 answers will be perceived by those who view them – especially by those with a particular ox to gore. Fortunately, the current version of the Form 990 permits employers to include detailed explanation of their executive compensation programs, and this opportunity should be utilized carefully by employers and employers should have their Form 990 executive compensation disclosures reviewed by ERISA counsel before they are filed with the IRS.

Recommendations: Tax-exempt employers should perform a regular self-diagnostic to ensure that there executive compensation-setting procedures comply with the finest details of applicable law, that this compliance is carefully documented, and that their Form 990 executive compensation disclosures are reviewed by ERISA counsel to ensure that they are accurate and present the best "optics."

LABOR AND EMPLOYMENT LAW

I. New EEOC Policy Guidance on Retaliation. On January 21, 2016, the EEOC released a proposed draft of new Enforcement Guidance on Retaliation and Related Issues, which would update the EEOC's 1998 guidance on retaliation.

A. New Guidance Broadens Retaliation Claims. The new guidance broadly defines the key elements of a retaliation claim. It also provides examples of retaliation that go beyond the standards almost universally applied by courts. For example, the EEOC states that protected activity may include engaging in a production slow-down or writing critical letters to clients, even if the conduct causes financial harm to the employer. Although EEOC guidance does not have the force of law, the final published guidance will likely make it easier for employees to bring retaliation claims.

B. Recommendations. In light of this new guidance, employers should review and update their handbooks and policies and train supervisors to recognize actions that the EEOC will deem to be retaliatory.

II. ADA Update.

A. Telecommuting as a Reasonable Accommodation. Telecommuting as a reasonable accommodation continues to be a contentious issue in ADA litigation. According to the EEOC, employers should consider telecommuting as an accommodation for employees who may be prevented from regular worksite attendance due to a disability. While each case must be evaluated upon its own individual merits, some courts have made clear that telecommuting does have its limits. For example, in April of 2015, the United States Court of Appeals for the Sixth Circuit held that "regular and predictable on-site attendance" was an essential function of a resale buyer job, a job that was "highly interactive" and involved a significant number of client and team meetings. Although this case was favorable for employers, it is important to keep in mind that the employer was able to prove that the job at issue required significant client meetings, sometimes at a "moment's notice." Because this is a quickly evolving area of law, employers are advised to speak with legal counsel prior to denying a request for telecommuting as a reasonable accommodation.

B. Updated Pregnancy Discrimination Guidance. Following the U.S. Supreme Court's decision in Young v. UPS, the EEOC modified its Enforcement Guidance on Pregnancy Discrimination. Specifically, the EEOC updated its discussion of disparate treatment and light duty work assignments by adopting the Supreme Court's holding that a plaintiff may establish a *prima facie* case of pregnancy discrimination by showing that: (1) she is pregnant, (2) she sought an accommodation that was denied, and (3) the employer accommodated others similar in their ability or inability to work. An employee may also support a claim for pregnancy discrimination by showing that an employer's facially neutral policies created a "significant burden" on pregnant employees without reasons that are "sufficiently strong to justify the burden."

C. Website Accessibility and the ADA. Starting in 2014, plaintiffs have brought a deluge of website accessibility claims under Title III of the ADA (which applies to "places of public accommodation") against various businesses in the retail, e-commerce, financial services, technology, higher education, and other industries. The Department of Justice appears to have taken the position that all private businesses and organizations should make their websites accessible to individuals with disabilities, regardless of whether the business operates a physical location open to the public. Although the DOJ previously promised that it would issue proposed regulations clarifying its position by the spring of 2016, it recently announced that it will not finalize those regulations until fiscal year 2018 at the earliest. In the meantime, employers are left without firm guidance regarding the steps they need to take to make public websites accessible to individuals with disabilities.

D. Recommendations. Employers should review their accommodation procedures to ensure that they are in line with recent guidance on telecommuting as a reasonable accommodation, pregnancy discrimination, and other related issues. Employers should also consider whether their websites meet the needs of individuals with disabilities, including those with hearing or sight impairments.

III. NLRB Developments.

A. Policies Aimed at the Recording of Workplace Meetings and Conversations. In December, 2015, the National Labor Relations Board (NLRB) held in the case of *Whole Foods Market, Inc.* that employers are limited in adopting policies that prohibit employees from recording workplace-related meetings and conversations, unless there is an overriding business interest behind the prohibition. Relying upon Section 7 of the National Labor Relations Act, the NLRB found that broad prohibitions against workplace recordings might "chill" the right of employees to engage in concerted activity for their mutual aid and protection. As an example, the NLRB found that prohibitions against workplace recordings would hinder an employee's ability to document unsafe working conditions.

Although the Board acknowledged some deference to states (such as Maryland) that require universal consent before recording certain protected conversations, it is clear that *Whole Foods Market* is but the most recent in a series of recent moves by the NLRB in which it is tightening its grip over policies that heretofore have seemed "safe" because of their obvious value to the interests of an employer.

B. Confidentiality, Computer Usage, and Employer Logo Policies. The NLRB continues its practice of targeting employer confidentiality, computer usage, and other similar policies. A recent case highlights the severe consequences that employers might face as a result of their policies being deemed to be invalid. In February 2016, the NLRB set aside the results of an election that had been won by the employer, on the basis that the employer maintained the following allegedly overly broad policies: (1) a confidentiality rule that prohibited employees from disclosing employee lists; (2) a computer use rule that prohibited employees from expressing personal opinions even while allowing personal use; and (3) a prohibition on employees using the company's name and logo.

C. Recommendations. Employers should review their policies and procedures to determine whether they are at risk of being found overly broad and likely to "chill" employee speech.

IV. Wage Disparity Issues. Wage disparity has been a hot topic in the news and on the campaign trail this year. A number of high-profile lawsuits have brought even greater attention to wage disparity issues, including a recent complaint filed by several players on the U.S. women's national soccer team. Given the hyper-sensitivity to wage disparity issues, it is recommended that employers conduct a self-audit to confirm that they are in full compliance with the law and to identify any areas that would put them at risk of a wage disparity lawsuit.

A. The Equal Pay Act. The Equal Pay Act of 1963 prohibits employers from discriminating between men and women who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. The pay that must be taken into consideration includes bonuses, expense accounts, insurance, and other

tangible benefits such as company cars. Distinctions in pay may be made based on bona fide factors other than sex, such as education, experience, seniority, and time of shift (e.g., day versus night).

Many employers argue that a bona fide factor other than sex includes an employee's prior salary, as this is related to the employee's "market value." Employers should be cautious when relying upon prior salary as a justification for a pay distinction. The EEOC has opined that "prior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination. Thus, permitting prior salary alone as a justification for a compensation disparity 'would swallow up the rule and inequality in compensation among genders would be perpetuated.'"

B. Lilly Ledbetter Fair Pay Act. The Lilly Ledbetter Fair Pay Act of 2009 made it easier for women to file lawsuits based on wage disparity. Under the Act, each paycheck that contains discriminatory compensation is considered a separate violation for purposes of the statute of limitations, regardless of when the disparate pay began.

C. Proposed Paycheck Fairness Act. The Paycheck Fairness Act was first introduced in 1997 and has been re-introduced many times in the last two decades, although it has received increasing attention and support in recent years. The Paycheck Fairness Act would amend the Equal Pay Act by placing the burden of proof on employers to demonstrate that any pay differences between men and women are job-related and consistent with business necessity. The proposed law would also invalidate an employer's bona fide defense if an employee could show that there is an alternative employment practice that would serve the same business purpose without creating the wage differential and the employer has refused to consider such an alternative practice. Finally, the bill would make it easier for employees to file class action wage discrimination lawsuits and would increase the penalties for violations.

D. State Legislation. In addition to the federal Equal Pay Act, several states have recently enacted more restrictive equal pay legislation.

1. Maryland Equal Pay for Equal Work Law. Maryland has had its own equal pay law—the Equal Pay for Equal Work Act—on the books for nearly 25 years. In April 2016, the General Assembly passed a bill that extends the Equal Pay for Equal Work law to protect against discrimination based on gender identity. Under the newly expanded law, an employer may not pay an employee a lower wage than an employee of another sex or gender identity if both employees work in the same establishment and perform comparable work. Variations in wages are permitted based on bona fide factors other than sex or gender identity (e.g., seniority/merit systems, job-related education, training, or experience). The bill also prevents employers from prohibiting employees from inquiring about, discussing, or disclosing their wage to their colleagues. Finally, the bill extends the statute of limitations to three years after an employee receives a paycheck from an employer. The bill is currently under review by Governor Hogan.

2. California Fair Pay Act. The new California Fair Pay Act, which took effect on January 1, 2016, is an example of state legislation that goes well beyond the current limits of the federal Equal Pay Act. The law makes it easier for employees to bring wage disparity claims by removing the requirements that employees show that a higher-paid employee worked at the same job location and performed "equal" (or identical) work. Under the new law, employees may bring a wage disparity claim if they show that another employee of a different gender was paid more for "substantially similar" work, regardless of whether the job was completely equal, and regardless of that employee's work location. To defend against a claim, an employer must prove that the wage disparity is job related and consistent with business necessity, and must further prove that every relied-upon "bona fide factor other than sex" was applied reasonably, and that those facts in fact accounted for the entire wage differential. Even if the employer can make this difficult showing, the employee still has a final opportunity to succeed by demonstrating that there was an alternative practice that would serve the same business purpose without producing a wage differential.

E. Recommendations. Employers are encouraged to conduct an audit of their workforces to identify the job categories that are at risk of wage disparity claims based on sex or gender identity.

V. FMLA Update.

A. New FMLA Forms. In May of 2015, the DOL posted new model FMLA notices and medical certification forms, with an expiration date of May 31, 2018. One significant change is that the forms now reference the Genetic Information Nondiscrimination Act ("GINA") claims by instructing health care providers that they should not provide any information about genetic tests or the manifestation of disease or disorder in the employee's family members. Although the updated forms provide some protections against GINA claims, the reference is rather vague.

Accordingly, employers may wish to consider adding a more substantive GINA disclaimer to their own FMLA forms.

B. Joint Employment Fact Sheet. The U.S. DOL, in connection with its Administrator's Interpretation on joint employment in the FLSA context, issued a new Fact Sheet focusing on joint employer responsibilities under the FMLA. The fact sheet clarifies that under the FMLA, if joint employers exist, one employer is considered the primary employer, while the other is the secondary employer. Primary and secondary employers have differing obligations under the FMLA.

1. Obligations of the Primary Employer. FMLA obligations of the primary employer include: (1) providing required FMLA notices; (2) providing FMLA leave; (3) maintaining group health insurance; (4) job restoration; and (5) record retention.

2. Obligations of the Secondary Employer. FMLA obligations of the secondary employer include: (1) non-interference with employee's exercise of FMLA rights; (2) non-retaliation based on employee's exercise of FMLA rights; (3) job restoration; (4) maintaining basic payroll and identifying employee data with respect to jointly-employed employees.

C. FMLA and Same-Sex Marriage. On June 26, 2015, the United States Supreme Court ruled that same-sex couples have a fundamental right to marry under the Fourteenth Amendment. Employers are reminded to review their FMLA policies and procedures to ensure that they have been updated to reflect this change. Employers must also determine whether any state leave laws provide additional protections to civil unions and domestic partnerships, which fall outside of the groups covered by the FMLA. If an employee uses leave for an individual who is not covered by the FMLA (e.g., a domestic partner), then the leave may be covered by the state law but not the FMLA. In that case, the employee would be entitled to an additional twelve weeks of FMLA for an FMLA-qualifying event.

D. DOL Investigations of Systemic FMLA Issues: The DOL continues to broaden its FMLA enforcement by identifying systemic compliance problems that impact many employees. The resulting trend is that, upon receiving a single complaint, the DOL regularly investigates the entire workforce, seeking to locate a multitude of common FMLA errors (which may or may not have been the focus of the initial complaint). For this reason, it is more important than ever to engage in a self-audit to confirm that FMLA policies and procedures fully comply with the regulations, and are enforced consistently. For example, the DOL will review an employer's FMLA policy and all of its FMLA forms to confirm that the forms were updated to comply with the March 2013 regulations. If employers have not recently updated their policies, they are likely out of compliance and could face significant penalties.

E. Recommendations. Employers should engage in an FMLA self-audit to confirm that their FMLA policies are up-to-date, including the use of the new FMLA forms. If employers have not yet done so, they should immediately update their handbook policies to address the use of leave to care for same-sex spouses. Finally, employers should consider whether they may be at risk of being deemed a joint employer for purposes of FMLA, and if so, they should ensure that they are fulfilling their FMLA obligations with respect to joint employees.

VI. Update on DOL Proposed Changes to Overtime Law. On July 9, 2015, the Department of Labor ("DOL") issued a proposed rule that would significantly expand the number of employees eligible for overtime. Specifically, the DOL estimates that almost five million currently exempt workers will become non-exempt as a result of its proposed changes to the regulations. According to the DOL, approximately 85% of white collar salaried workers who fail the duties test earn at least $455 per week. Thus, according to the DOL, the current salary level contributes to employer's confusion regarding classification issues. The DOL is allegedly seeking to reduce employers' confusion by reducing the number of employees for whom employers must perform a duties analysis.

A. Changes to Salary Level: Under the current FLSA regulations, exempt white collar employees must be paid at least $455 per week (or about $23,660 a year). To fall under the highly compensated employee exemption, the employee must be paid at least $100,000 or more per year, and at least $455 per week. These salary levels have been in effect since the DOL last updated the regulations in 2004. The DOL's proposed regulations will set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers. Under 2013 data, the proposed salary amount would be $921 per week (or about $47,892 per year). However, the DOL indicated that it will likely implement these regulations using 2016 data. It estimates that the 2016 salary level would be about $970 per week (or about $50,440 per year). The DOL's proposed regulations would also raise the salary level for highly compensated employees to the 90th percentile of earnings for full-time salaried workers, which under current data would be about $122,148 per year. Finally, to prevent the salary levels from becoming quickly outdated, the DOL

has proposed to automatically update salary and compensation levels on an annual basis.

B. Changes to Job Duties Tests: The DOL has not yet proposed any changes to the standards duties test. However, it has sought comments on whether the current duties tests are working as intended to screen out employees who are not bona fide "white collar" workers.

C. Timing. On March 14, 2016, the DOL sent its final regulations to the Office of Management and Budget ("OMB") for review. The length of time for OMB's review typically ranges from 30 to 60 days. Accordingly, we expect that the final regulations will be released imminently. In response to the proposed regulations, Republicans introduced the Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773), which would nullify the proposed DOL overtime rule, and require the DOL to first conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and other groups.

D. Recommendations. Employers should take steps now to identify which employees will no longer qualify for exempt status based on the proposed salary threshold. Employers should work with legal counsel to determine how to transition formerly exempt employees into non-exempt status without incurring a significant increase in labor and overtime costs.

VII. New DOL Interpretation on Employees vs. Independent Contractors. On July 15, 2015, the U.S. Department of Labor published an Administrator's Interpretation discussing the misclassification of employees as independent contractors.

A. The Interpretation Narrows Independent Contractor Classifications. The Interpretation signals that the DOL continues to aggressively focus its vast resources on misclassification issues. The Interpretation does not change the key elements of the "economic realities" analysis, but it does appear to narrow its interpretation of who will qualify as an independent contractor. Specifically, the Interpretation focuses heavily on the "economic dependence" portion of the test, while downplaying the "control" portion of the test. Although the Interpretation does not have the force of law, it is significant because courts frequently defer to agency interpretations when deciding cases.

B. Recommendations. Employers should review their independent contractor relationships and carefully consider whether those relationships are at risk of being deemed to be employment relationships, in light of the DOL's broad interpretation.

VIII. New DOL Interpretation on Joint Employment. On January 20, 2016, the U.S. Department of Labor issued an Administrator's Interpretation on joint employment under the Fair Labor Standards Act. The DOL explained that this guidance was needed because "[m]ore and more, businesses are varying organizational and staffing models by, for instance, sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers" and thus, joint employment has become common. Whether an employer is considered a joint employer has significant legal and financial repercussions. For example, when two or more employers are joint employers, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating overtime.

A. "Horizontal" vs. "Vertical" Joint Employment. The Interpretation breaks from current regulations by, for the first time, making a distinction between "horizontal" and "vertical" joint employment.

1. Horizontal joint employment. Horizontal joint employment is the more traditional interpretation of joint employment, and occurs where "two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. The DOL's examples of horizontal joint employment include home health care providers that share staff and have common management and two separate restaurants that share economic ties and have the same employees supervising and staffing both restaurants.

2. Vertical joint employment. Vertical joint employment is the broader interpretation of joint employment, and occurs where an employee "has an employment relationship with one employer . . . and the economic realities show that he or she is economically dependent on . . . another entity involved in the work." For example, the DOL contends that a hotel may be a joint employer of a worker placed by a staffing company if the hotel sets the worker's hours and schedule and/or supervises the worker.

B. The "Economic Realities" Test and Joint Employment. The Interpretation also announces, for the first time, that the DOL will essentially abandon the current FLSA joint employment regulations and instead apply an "economic realities" test in evaluating whether entities are joint employers. When applying the economic realities test, the DOL

will consider the following seven factors:

1. The extent that the employee's work is directed, controlled, or supervised by the potential joint employer.

2. Whether the potential joint employer controls the employee's employment conditions, such as whether the potential joint employer has the power to hire or fire or determine the rate of pay.

3. Whether the employee has an indefinite, permanent, full-time, or long-term relationship with the potential joint employer.

4. The extent to which the employee's work for the potential joint employer is repetitive and rote, relatively unskilled, and/or requires little to no training.

5. The extent to which the employee's work is an integral part of the joint employer's business.

6. Whether the employee performs the work on the potential joint employer's premises.

7. The extent to which the potential joint employer performs administrative functions relating to the employee, such as handling payroll, providing workers' compensation insurance, and/or providing facilities and equipment.

C. Recommendations. Employers should carefully review contracts and relationships with other entities, including staffing companies and temp. agencies, focusing especially on their degree of control over employees, to determine whether they are at risk of being found to be a joint employer. Employers that are at risk should take steps to decrease the risk of liability by minimizing the degree of control that they have over employees and/or amending contracts with potential joint employers to include indemnification and other protective clauses in the event that a court were to find a joint employer relationship.

IX. Changes to EEO-1 Form and Federal Contractor Issues.

A. Changes to EEO-1: Collecting Equal Pay Data. On January 29, 2016, the U.S. EEOC released a proposed revision to the EEO-1 Form to include collecting pay data from employers. EEO-1 data currently provides the federal government with information regarding race, ethnicity, sex, and job category. The new proposal would require employers to provide aggregate data on pay ranges and hours worked. According to the EEOC, the new pay data would provide "insight into pay disparities across industries and occupations" and assist agency efforts to "combat discrimination."

B. Executive Order Requiring Federal Contractors to Provide Paid Sick Leave. On Labor Day (September 7th) 2015, President Obama issued an Executive Order that requires certain government contractors and subcontractors to provide employees with paid sick leave. The order will apply to certain contracts that are newly entered into or renewed on or after January 1, 2017. Employees who work on covered contracts and/or subcontracts must be entitled to earn at least one (1) hour of paid sick leave for every 30 hours worked, up to a total of 56 hours (7 days) per year. Employees are entitled to use leave for their own medical issues, to care for a family member, and to address issues caused by domestic violence. Under the Executive Order, "family members" are broadly defined to cover individuals who are not otherwise covered by the FMLA (including domestic partners and "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship").

C. Pay Transparency Regulations. On September 11, 2015, the Department of Labor issued a final rule implementing new regulations in connection with Executive Order 13665, which amended Executive Order 11246. The new regulations prohibit federal contractors and subcontractors from retaliating against any employee who inquires about, discusses, or discloses their compensation with other employees or job applicants. The regulations further require covered employers to include a nondiscrimination provisions in their employee handbooks.

D. New Minimum Wage for Federal Contractors. Effective January 1, 2016, all federal contractors are required to pay a minimum wage of at least $10.15 per hour.

E. Recommendations. Covered employers should confirm that their EEO-1 reports contain all required data. Covered employers should further confirm that they are in compliance with all new regulations governing federal contractors and subcontractors, including paid sick leave.

X. Legislative Update on Employment Laws.

A. The Defend Trade Secrets Act. On April 27, 2016, Congress passed the Defend Trade Secrets Act of 2016, which, once it is signed into law, will be the first federal civil remedy for trade secret misappropriation. The White House has indicated that it strongly supports the bill, so it is widely expected to be signed into law. While the law does not preempt state trade secret laws, it will support employers by providing greater uniformity for trade secret protections. In one respect, the law goes beyond the reach of most state trade secret laws by allowing for ex parte seizure of property "necessary to prevent the propagation or dissemination of the trade secret" at issue.

B. Montgomery County Paid Sick Leave. Effective October 1, 2016, employers in Montgomery County are required to provide paid sick and domestic violence leave to all employees who regularly work eight (8) hours or more per week. Employees of all but the smallest employers must be allowed to accrue sick and safe leave at the rate of at least 1 hour for every 30 hours worked in the county, up to 56 hours (seven 8-hour days) per year. Employees are entitled to use the leave for a broad range of purposes, including to care for family members (a term much more broadly defined than in the FMLA), to respond to public health emergencies, and to seek medical attention or services as a result of domestic violence, sexual assault, or stalking.

C. Medical Marijuana in Maryland. Last year, we reported on an overhaul to Maryland's medical marijuana law that allowed private growers to compete for licenses to grow and distribute medical marijuana. In April 2016, the General Assembly approved a bill that expands the number and type of licensed health care providers who may recommend medical marijuana to their patients. The law originally stated that only those with licenses in good standing from the Maryland Board of Physicians would have the ability to prescribe medical marijuana. The new bill, which has been sent to Governor Hogan for consideration, extends prescribing eligibility to licensed dentists, podiatrists, nurse practitioners, and nurse midwives who are in good standing with their respective licensing boards. As a result of this change in law, employers should expect to see an increase in the number of employees who may have access to medical marijuana.

D. D.C. Transit Benefits. Effective January 1, 2016, District of Columbia employers with 20 or more employees are required to provide a transit benefit program to employees. Covered employers must provide at least one of the following benefit programs: (1) a pre-tax election transportation fringe benefits program, under which transit costs may be deducted on a pre-tax basis from an employee's pay; (2) an employer-paid benefit program, under which an employer provides a public transit pass or reimbursement for a vanpool or bicycling costs; or (3) employer-provided transportation by vanpool or bus.

E. Recommendations. Employers in Montgomery County should take steps now to prepare for the October 1st deadline to begin providing paid sick leave in accordance with the new county ordinance. Employers in D.C. should likewise ensure that they are in compliance with the new requirements to provide transit benefits. Finally, employers should consider whether they wish to make changes to their workplace drug policies in light of the expanded access to medical marijuana in Maryland. Smith & Downey will also continue to report on the status and implications of the new federal trade secret bill.

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A 2016 COMPLIANCE CHECKLIST FOR HEALTH AND WELFARE PLANS

The following are some important 2016 compliance tasks for sponsors of health and welfare benefit plans. (Naturally, this Checklist is not meant to provide a comprehensive list of all compliance requirements.)

___1. Consider impact, and monitor developments concerning, IRS transition relief for opt-out payments, cash-in-lieu payments, and the like.

___2. Take the steps necessary to protect self-funded health plans against out of network providers' lawsuits.

___3. Confirm compliance with most recent FSA, HRA and HSA guidance.

___4. Confirm compliance with ACA reporting, 30-hour employee determination rules, lookback rules, change in employment status rules, rules for special employee categories and impact on COBRA compliance efforts.

___5. Confirm self-funded health plan subrogation provisions contain maximum level of protection for the employer after the Montanile decision.

___6. Review and develop position on recent developments affecting wellness programs, including "evolving" EEOC position.

___7. Review self-funded health plan stop-loss policy against latest DOL thinking.

___8. Consider document and operational compliance with same-sex marriage and related rules, and related issues. Ensure that any desired spouse exclusion provisions are clear in plan, SPD, SBC and communication materials.

___9. Confirm that controlled group analysis is up-to-date and that no MEWAs exist.

___10. Monitor ongoing compliance with health and welfare plan nondiscrimination rules (e.g., ACA, Section 125, Section 105(h), Section 79, Section 129, etc.).

___11. Perform compliance self-diagnostic to anticipate potential DOL field audit.

___12. Ensure compliance with DOL and IRS electronic distribution rules.

___13. Ensure that any "voluntary benefits" are truly ERISA-exempt.

___14. Begin planning for ACA Cadillac tax.

___15. Eliminate non-compliant health reimbursement plans.

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A 2016 COMPLIANCE CHECKLIST FOR QUALIFIED RETIREMENT PLANS

The following are some important 2016 compliance tasks for sponsors of qualified retirement plans. (Naturally, this Checklist is not meant to provide a comprehensive list of all compliance requirements.)

___1. Consider impact of new IRS rules for frozen/closed plans.

___2. Note new rules for mid-year changes to safe harbor 401(k) and 403(b) plans.

___3. Plan around new IRS determination letter program.

___4. Consider impact of new "Normal Retirement Age" definition for governmental plans.

___5. If a church plan, review recent litigation to determine if protective steps need to be taken. If a governmental plan, monitor litigation and guidance to determine if protective steps need to be taken.

___6. For advisors, consider potentially substantial impact of new DOL fiduciary rules.

___7. Meet with investment advisor to make decisions on money market option before October.

___8. Perform compliance self-diagnostic to anticipate potential IRS and DOL field audits.

___9. Review impact of recent "socially conscious" investments guidance from DOL.

___10. Prepare for new compliance questions on Form 5500. Have ERISA counsel review Form 5500 before it is filed with the IRS/DOL.

___11. Church plans should consider impact of PATH Act.

___12. Ensure compliance with electronic distribution rules.

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A 2016 COMPLIANCE CHECKLIST FOR EXECUTIVE COMPENSATION PLANS

The following are some important 2016 compliance tasks for sponsors of executive compensation plans. (Naturally, this Checklist is not meant to provide a comprehensive list of all compliance requirements.)

___ 1. Review Section 409A document and operational compliance. Pay particular attention to separation from service issues, executive employment agreements, split-dollar life insurance, severance arrangements, the 2-1/2 month bonus exemption, post-employment reimbursements and in-kind benefits, "disability" deferred compensation, and the like.

___ 2. If Section 409A non-compliance is discovered, utilize (if applicable) the IRS self-correction program.

___ 3. If employer-sponsor is in financial "distress," ensure that nonqualified plans are not funded in violation of PPA distressed employer rules.

___ 4. Consider offering executives voluntary deferred compensation and/or phantom stock/stock appreciation plans.

___ 5. Where applicable, ensure that nonqualified plans are properly coordinated with 401(k) plans.

___ 6. If a 501(c)(3) or 501(c)(4) employer, perform self-diagnostic to ensure that intermediate sanctions rules are being complied with – including the reporting of taxable fringe benefits and the inclusion of benefits in market comparability testing -- and that the compliance is well-documented, and ensure that extensive new executive compensation questions on the annual Form 990 are answered completely in the manner that best portrays the "optics" of the nature of, and care taken with respect to, the employer's executive compensation programs. Have ERISA counsel review Form 990 disclosures before they are filed with the IRS.

___ 7. Review participants in executive deferred compensation plans to ensure that they are limited to members of your top-hat group.

___ 8. Ensure that all nonqualified plans – whether 451 plans, 457(b) plans, 457(f) plans, etc. -- have up-to-date administrative forms, and that comprehensive and correct procedures are in place for their use.

___ 9. Review documentary and operational compliance of any 457(b) plan in light of nationwide IRS field review. Governmental 457(b) plan sponsors should consider whether EPCRS provisions are applicable.

___ 10. Review Domestic Relations Order procedures of nonqualified plans.

___ 11. Review compliance with tax reporting rules applicable to nonqualified plans, with special attention to FICA/Medicare issues.

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A 2016 LABOR AND EMPLOYMENT LAW COMPLIANCE CHECKLIST

The following are some important 2016 compliance tasks concerning labor and employment laws. (Naturally, this checklist is not meant to provide a comprehensive list of all compliance requirements.)

____1. Review and update anti-retaliation provisions in employee handbooks and policies, and train supervisors to recognize actions that the EEOC will deem to be retaliatory.

____2. Review accommodation procedures to ensure that they are in line with recent guidance on telecommuting, pregnancy discrimination, and other related issues. Consider whether the organization's website(s) meet the needs of individuals with disabilities.

____3. Review and revise policies and procedures in light of recent NLRB cases.

____4. Conduct a workforce audit to identify the job categories that are at risk of wage disparity claims based on sex or gender identity. Work with legal counsel to correct any unwarranted wage discrepancies.

____5. Conduct an FMLA self-audit to confirm that FMLA policies are up-to-date, including the use of the new FMLA forms and the use of leave to care for same-sex spouses. Consider whether the organization is at risk of being deemed a joint employer for purposes of FMLA.

____6. Identify which employees will fail to meet the new salary threshold exemption test. Work with legal counsel to determine how to transition formerly exempt employees into non-exempt status without incurring a significant increase in labor and overtime costs and/or legal claims.

____7. Review independent contractor relationships and carefully consider whether those individuals are at risk of being deemed to be employees. Work with legal counsel to identify steps to reduce the risk of an employment relationship.

____8. Review contracts and relationships with other entities, including staffing companies and temp. agencies, to determine whether there is a risk of establishing a joint employer relationship, and take steps as necessary to decrease the risk of liability as a joint employer.

____9. Confirm that EEO-1 reports contain required wage data. Covered federal contractors and subcontractors should further confirm that they are in compliance with all new OFCCP regulations, including paid sick leave, and should revise employee handbooks and policies to reflect necessary changes.

____10. Employers in Montgomery County: Revise paid sick leave policies to ensure that policies are in full compliance with the county ordinance in time for the October 1st deadline.

____11. Employers in D.C.: Confirm compliance with the new transit benefits requirements.

____12. Consider whether to make changes to workplace drug policies in light of the expanded access to medical marijuana in Maryland.