Legislative updates, Q3-Q4 2021.

DOL announced a temporary enforcement policy on prohibited transaction rules applicable to investment advice fiduciaries

On Monday, October 25, 2021, the DOL issued guidance extending its current non-enforcement position of certain prohibited transactions, which was set to expire December 20. As you'll recall, fiduciary advisors generally may not have conflicts of interest that might influence their recommendations. However, the DOL provides certain prohibited transaction exemptions (PTEs), which seek to balance important participant protections with certain common market practices. PTE 2020-02 is one such exemption.

The DOL's non-enforcement position has provided parties making fiduciary advice recommendations to ERISA plans or IRAs additional time to implement procedures to comply with PTE 2020-02 or another available exemption. The recent guidance included two separate extensions:

- A general extension of its non-enforcement position until January 31, 2022; and
- A more limited extension until June 30, 2022, for compliance with specific rollover disclosure requirements in PTE 2020-02, relating to (a) the reasons for a rollover recommendation; and, (b) how the recommendation is in the client's best interest.

Parties seeking reliance on PTE 2020-02 will need to comply with all other requirements of that new exemption beginning February 1, 2022.

Link to the information: https://www.dol.gov/newsroom/releases/ebsa/ebsa20211025

DOL releases informational copies of 2021 Form 5500

On December 29, 2021, The Department of Labor's Employee Benefits Security Administration (EBSA) released information on the 2021 Form 5500 and related instructions—including Form 5500-SF, relating to annual reporting changes for multiple-employer plans (MEPs) and pooled employer plans (PEPs). The IRS also released the 2021 Form 5500-EZ and instructions, which are posted on the EBSA website. The changes are effective for plan years beginning on or after January 1, 2021. EBSA intends to address the other changes to these forms included in its September 2021 release in subsequent notices.

The following are some of the most important modifications made to Forms 5500 and 5500-SF and their instructions.

- As required by the Secure Act, the forms require defined contribution MEPs to report aggregate account balances for each participating employer on a revised attachment to Forms 5500/5500 S-F.
- PEPs must file a new attachment to Form 5500 indicating whether the pooled plan provider has complied with the Form PR filing requirements and, if so, provide its AckID number.
- The forms clarify that PEPs are multiple-employer plan that file a single Form 5500 and may not file Form 5500-SF.
- A new checkbox was added for plans that were retroactively adopted.
- The civil penalty amount for failure or refusal to file an annual report has been updated.

Link to the information: https://www.dol.gov/newsroom/releases/ebsa/ebsa20211229

IRS provides guidance for employers seeking to rehire retirees or retain employees after retirement age

To help address employment needs during the COVID-19 pandemic, on November 3, 2021, the IRS released new frequently asked questions (FAQs) to assist employers looking for ways to encourage retirees to return to work and retain experienced employees.

The FAQs provide general guidance to public and private employers who sponsor qualified retirement plans for their employees by highlighting existing ways employers can meet their employment objectives and remain in compliance with the plan qualification rules.

Generally, an employer can choose to address unforeseen hiring needs by rehiring former employees, even if those employees have already retired and begun receiving plan benefits. If authorized under the plan, those employees may continue receiving the benefits even after they are rehired. Additionally, in most cases, an employer can choose to make retirement distributions available to existing employees who have reached age 59½ or the plan's normal retirement age. This may assist in the retention of employees eligible for retirement.

Link to more information: https://www.irs.gov/newsroom/irs-help-for-employers-wanting-to-rehire-retirees-or-keep-them-after-retirement-age

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IRS revises procedures for interim amendments and pre-approved 403(b) plans

On September 1, the IRS issued new revenue procedures affecting interim amendments for pre-approved 401(a) plans (Revenue Procedure 2021-38) and pre-approved 403(b) plans (Revenue Procedure 2021-37). The IRS indicated that the changes generally are designed to better align the procedures for pre-approved 403(b) plans and pre-approved qualified plans, including with respect to the timing of interim amendment deadlines. The 403(b) guidance also replaces existing guidance for prototype and volume submitter preapproved plans with a single opinion letter program for standardized and nonstandardized plans. **Links for the revenue procedures:** https://www.irs.gov/pub/irs-drop/rp-21-37.pdf and https://www.irs.gov/pub/irs-drop/rp-21-38.pdf.

PROPOSALS TO WATCH/STAY TUNED:

Proposed rule: "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights"

On October 13, 2021, the U.S. Department of Labor announced a proposed rule to clarify the application of ERISA's fiduciary duties of prudence and loyalty to selecting investments and investment courses of action. The proposal would remove barriers, largely imposed by the prior administration's rules, to plan fiduciaries' ability to consider climate change and other environmental, social and governance factors when they select investments and exercise shareholder rights.

The proposed rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," follows Executive Order 14030, signed by President Biden on May 20, 2021. The Acting Assistant Secretary for the Employee Benefits Security Administration Ali Khawar stated: "A principal idea underlying the proposal is that climate change and other ESG factors can be financially material and when they are, considering them will inevitably lead to better long-term risk-adjusted returns, protecting the retirement savings of America's workers."

The comment period after publication in the Federal Register ended on December 13.

Links for more information: https://www.dol.gov/newsroom/releases/ebsa/ebsa20211013; https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights

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