

Significant Issue Update

Western Pension & Benefits Council, Portland Chapter

Legal and Compliance Updates – February 10, 2016

IRS Notice 2016-3: Guidance In Advance of Determination Letter Changes. The IRS recently issued Notice 2016-3, the first in a series of several items of guidance the IRS plans to issue in advance of the changes to the qualified plan determination letter program in 2017. The notice provides that the Treasury and the IRS will issue future guidance providing that: (1) controlled groups and affiliated service groups that have previously made Cycle A elections are permitted to submit determination letter applications during the Cycle A submission period which begins February 1, 2016, and ends January 31, 2017; (2) expiration dates on determination letters issued prior to January 4, 2016, are no longer operative; and (3) the period during which certain employers may, on or after January 1, 2016, establish or adopt a defined contribution pre-approved plan and, if permissible, apply for a determination letter, is extended from April 30, 2016, to April 30, 2017.

The IRS stated that changes described in Notice 2016-3 will be reflected in an update to Revenue Procedure 2007-44, and employers may rely on Notice 2016-3 until Rev. Proc. 2007-44 is updated.

A copy of Notice 2016-3 may be found at: <https://www.irs.gov/pub/irs-drop/n-16-03.pdf>

IRS Notice 2016-4: IRS Extends ACA Information Reporting Deadlines. Recognizing that employers, insurers and other providers of health coverage needed additional time to comply with upcoming reporting deadlines under the Affordable Care Act (“ACA”), the IRS recently issued Notice 2016-4. The Notice extends the due dates for employers of 50 or more full-time equivalent employees (“Applicable Large Employers”) to provide IRS Form 1095 to their employees and to file copies with the IRS.

Under Notice 2016-4:

- Applicable Large Employers now have two additional months—until March 31, 2016—to provide employees with copies of Forms 1095-B and 1095-C (as applicable). The prior deadline was February 1, 2016.
- Applicable Large Employers now have three additional months to file the applicable Forms 1094 and 1095 with the IRS. The new deadlines are May 31, 2016, for employers not filing electronically and June 30, 2016, for employers filing electronically. The prior deadlines were February 29, 2016, and March 31, 2016, respectively.

The notice states that, in light of these extensions, the provisions regarding automatic and permissive extensions of the deadline for providing these forms to employees and filing copies with the IRS will not apply to the extended due dates. Failure to comply with these extended due dates may result in penalties. However, the IRS has previously stated that penalties may be waived if an employer has made reasonable, good faith efforts to prepare for these new reporting requirements and provide the necessary information to employees and the IRS.

Form 1095 is intended to provide individuals with information about their employer-provided health insurance coverage that they need to fill out their income tax returns. Because of the delay, individuals who file their tax returns prior to receiving this information based upon other information received from their coverage providers will not be required to file amended returns for 2015 once they receive Form 1095. Rather, they merely need to keep the information with their tax records.

A copy of Notice 2016-4 may be found at:

<https://www.irs.gov/pub/irs-drop/n-16-04.pdf>

Bipartisan Budget Act Eliminated ACA's Auto-Enrollment Requirement. The Bipartisan Budget Act of 2015 signed into law November 2, 2015, by President Obama repealed the ACA's automatic enrollment requirement for large employers. This provision, when it went into effect, would have required employers with 200 or more employees to automatically enroll their employees into their group health plan. The provision was intended to encourage enrollment by employees who might otherwise forgo coverage if they had to take action to enroll on their own. The requirement never took effect because it was unpopular, a low government priority, and the DOL had not issued regulations for it.

Employers and advisors saw two key problems with the rule:

1. If employees were automatically enrolled in their employer's health plan but had other coverage (e.g., through their spouse's plan), they could end up with (and pay for) double coverage they did not need or want.
2. New employees could potentially lose access to long-time health care providers if the providers were not "in-network" with the employer's health plan.

2016 Appropriations Act: Delays Cadillac Tax and One-Year Pass on Health Insurance Provider Annual Fee.

On December 18, 2015, President Obama signed into law the 2016 Consolidated Appropriations Act. Among its numerous provisions, the Appropriations Act included a 2-year delay of the IRC Section 4980I "Cadillac Tax" and a 1-year suspension of the ACA's annual fee on health insurance providers.

- **Cadillac Tax Delay.** The 40% excise tax on high cost coverage was scheduled to be effective for tax years starting on or after January 1, 2018. The Appropriations Act delays the effective date until tax years beginning on or after January 1, 2020. Commentators have noted that given the intense criticism and repeal efforts surrounding this tax since the ACA's enactment, the delay arguably gives opponents two more years to repeal it, and it also establishes a precedent for near-permanent postponement via successive delays in the manner that Congress typically extends "temporary" provisions in a year-end "extenders" bill. The Congressional Budget Office projects the two-year delay will result in a \$17.7 billion revenue loss over 10 years.
- **Cadillac Tax to be Deductible.** As originally enacted, the Cadillac tax was a nondeductible tax under IRC Section 275(a)(6). The Appropriations Act removed the Cadillac tax from the list of nondeductible taxes. Thus, when the tax eventually is effective in 2020, any payments will be deductible for income tax purposes.
- **Suspension of Health Insurance Provider Annual Fee.** The Appropriations Act suspended for one year, the annual fee paid by covered entities engaged in the business of providing health insurance with respect to U.S. health risks. This fee was originally scheduled to be \$13.9 billion in 2017, but has been suspended. Absent further legislative changes, the fee will again take effect in 2018 in the amount of \$14.3 billion.

President Obama Will Propose Further Modifications to Cadillac Tax in Budget. Reports indicate that President Obama will propose modifying the Cadillac Tax in his upcoming budget proposal to address regional differences in the cost of health care coverage. It will be interesting to see if this idea gains traction or addresses the concerns of its opponents.

President Signs Act Repealing Automatic 3½-Month Extension of Form 5500 Filing Deadline, Thus Restoring 2½-Month Extension. On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation ("FAST") Act, which included a repeal of another recently-enacted law that provided for an automatic 3½-month extension of the due dates for Form 5500 returns. (The law

extending the due dates to 3½ months was scheduled to take effect in 2016.) Thus, the automatic extension for filing Form 5500 remains at 2½ months.

IRS Notice 2016-16: New Guidance on Mid-Year Changes to Safe Harbor 401(k) Plans.

The IRS recently issued Notice 2016-16 providing additional guidance on mid-year changes to 401(k) safe-harbor plans. According to the notice, a mid-year change either to a safe harbor plan or to a plan's safe harbor notice will not violate the 401(k) safe harbor rules merely because it is a mid-year change, provided that applicable notice and election opportunity conditions are satisfied and the mid-year change is not a prohibited mid-year change.

A mid-year change is defined as a change that is either: (a) first effective during a plan year, but not as of the beginning of the plan year; or (b) effective as of the beginning of the plan year but adopted later.

A mid-year change will not violate the 401(k) safe harbor regulations solely on account of being made mid-year provided that:

- in the case of a change to the content of the safe harbor notice, certain notice and election opportunity conditions are satisfied; and
- it is not a prohibited mid-year change.

The notice and election opportunity conditions that must be satisfied include:

- Within a reasonable period before the effective date of the change, an updated safe harbor notice describing the mid-year change and its effective date must be provided to each employee who is required to receive a safe harbor notice. (The notice sets forth certain timing requirements deemed to be “reasonable”).
- Each employee who is required to receive a safe harbor notice must be given a reasonable opportunity before the effective date of the change to change the employee's deferral election. (A 30-day election period is deemed to be reasonable.)

The following are prohibited mid-year changes:

- An increase in the number of years of vesting service required with respect to the employee's account balance attributable to safe harbor contributions under a QACA;
- A reduction (or otherwise narrowing) of the group of employees eligible to receive safe harbor contributions, unless this change is otherwise permissible under eligibility service crediting rules or entry date rules made for employees who are not already eligible to receive safe harbor contributions;
- A change to the type of safe harbor plan (e.g., from a traditional 401(k) safe harbor plan to a QACA safe harbor plan); and
- A change to:
 - modify (or add) a formula used to determine matching contributions (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions; or
 - permit discretionary matching contributions.

The fourth prohibition does not apply if the change is adopted and the updated safe harbor notice and election opportunity are provided at least 3 months prior to the end of the plan year and the change is made retroactively effective for the entire plan year.

Additionally, the following changes are not covered by the Notice 2106-16 framework unless the otherwise applicable regulatory conditions are also satisfied with respect to each:

- Adoption of a short plan year or any change to the plan year;
- Adoption of safe harbor plan status on or after the beginning of the plan year; and

- Reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status.

Notice 2016-16 also requests comments on additional guidance that may be needed, including with respect to mid-year changes to safe harbor plans in cases in which a plan sponsor is involved in a merger or acquisition. Notice 2016-16 is effective for mid-year changes on or after January 29, 2016.

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