EMPLOYMENT LAWSCENE ALERT: REMEMBER MARCH 1 DEADLINE FOR REPORTING A "SMALL" HIPAA BREACH

Employers who are classified as covered entities under HIPAA are required to report any 2018 breach of protected health information that affected fewer than 500 individuals (also known as a small breach) by March 1, 2019. This current breach notification requirement arises from amendments made to HIPAA under the Health Information Technology for Economic and Clinical Health (HITECH) Act, as finalized in 2013. HIPAA defines a covered entity as either (1) a group health plan, (2) a health care clearinghouse, or (3) a health care provider who electronically transmits any protected health information. A covered entity may be an individual, an institution, or an organization.

Background

Under applicable rules, a breach is defined as an impermissible use or disclosure under the HIPAA Privacy Rule that compromises the security or privacy of the protected health information. Some exceptions apply, so that not all incidents will rise to the level of a breach. Still, an impermissible use or disclosure of protected health information is generally presumed to be a breach unless the covered entity demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of several specified factors.

Notification Requirement

Upon the occurrence of a confirmed (or in some cases, suspected) breach, the affected individuals must be provided with detailed notification letters without unreasonable delay and no later than 60 days after the discovery of the breach. While the covered entity, most often, provides the required notifications, the final rules permit the delegation of reporting duties to a business associate.

A HIPAA breach also triggers an obligation to notify the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS).

- When a breach affects 500 or more individuals, the reporting entity must notify OCR contemporaneously with the notification to individuals (and must also notify local media outlets).
- Where a breach affects fewer than 500 individuals (also known as a small breach), however, a reporting entity must maintain a log or other documentation of all breaches occurring during the year, and annually report all such breaches no later than 60 days after the end of that calendar year.

For a small breach occurring any time in 2018, the deadline to report that breach to OCR is March 1, 2019.

Small Breach Reporting Details

A reporting entity is not required to wait until the March 1 deadline to report a small breach. Small breaches may be reported as early as contemporaneously with the occurrence of the breach. Regardless of timing, all small breaches must be reported to OCR in the same manner. Specifically a reporting entity must report the breaches online through the OCR's "Breach Portal."

Note that even when a covered entity delegates the reporting function to a business associate, the covered entity retains ultimate legal responsibility for proper reporting. Accordingly, covered entities who delegate reporting may want to require proof of timely reporting.

Be aware that, while the reporting entity may report all small breaches on a single date, each separate breach incident will require a separate submission. Instead of simply uploading a log of breach incidents occurring in the prior year, the reporting entity must complete a six-section questionnaire to provide: (1) general information; (2) identification of the covered entity, business associate, and relevant contact information; (3) the nature of the breach; (4) a summary of related notices provided and actions taken; (5) an attestation, and; (6) a summary. Multiple fields must be completed within each of these six sections. The HIPAA status of a reporting party (as either a HIPAA covered entity or a business associate) must be indicated on the "Contact" tab of the online filing form.

The online reporting form also requires the reporting entity to indicate the level of pre-breach HIPAA compliance status, including whether or not HIPAA Privacy Rule safeguards and HIPAA Security Rule safeguards were in place.

Because filing the breach notice can be time-consuming, parties tasked with reporting 2018 small HIPAA breaches of unsecured protected health information are advised to gather and prepare the content to be reported before actually logging on to the OCR Breach Portal. Because any changes or updates to the submitted information must be entered as a separate entry, it is preferable to ensure that each submission is fully accurate. Moreover, because the content of Breach Notifications to OCR can form the basis for a future OCR investigation and enforcement action, it is advisable to have legal counsel review content prior to submission.

In addition to ensuring that 2018 breaches affecting fewer than 500 individuals are reported by March 1, covered entities and business associates should continue to ensure that HIPAA Policies and Procedures, as well as the applicable administrative, physical and technical safeguards are up to date and periodically reviewed.

EMPLOYMENT LAWSCENE ALERT: RECENT LEGISLATION IMPACTS QUALIFIED RETIREMENT PLAN HARDSHIP WITHDRAWAL AND PLAN ROLLOVER RULES

The two-year budget agreement passed by Congress on Friday, February 9th, and signed by President Trump later that day, includes tax policy changes that affect qualified retirement plans. Specifically, qualified retirement plan hardship withdrawal operations will be impacted by the Bipartisan Budget Act of 2018 (the Budget Act) as follows:

- **Removal of the six-month prohibition on deferrals following a hardship withdrawal.** Section 41113 of the Budget Act directs the IRS to issue updated guidance to permit 401(k) and 403(b) plan participants who have taken a hardship distribution from a retirement plan to continue contributing to the plan, even immediately following the hardship distribution. Under current rules, once a participant elects to take a hardship distribution, no elective deferrals are permitted to be made until six months have passed from the date of the distribution. The revised rule will take effect on January 1, 2019 for plans that have a calendar-year plan year.
- **Inclusion of QNECs, QMACs, and profit-sharing contributions in hardship withdrawals.** Under current regulations, a plan sponsor may specify the sources of a participant's plan assets eligible for a hardship withdrawal, but such assets may in no event include certain employer contributions. Beginning on January 1, 2019 (for calendar-year plans), the Budget Act rules will permit a participant's 401(k) or 403(b) plan assets deriving from employer profit-sharing contributions, as well as from employer corrective contributions known as Qualified Nonelective Employer Contributions (QNECs) and Qualified Matching Contributions (QMACs), to be included in sources from which a hardship withdrawal may be taken. The earnings on such contributions will also be included among the assets available for withdrawal. Section 41114 of the Budget Act not only expands the potential sources of a hardship withdrawal, but also eliminates the requirement (previously elected by some employers) that a participant must have taken a plan loan before qualifying to take a hardship withdrawal.

The Tax Cuts and Jobs Act of 2017 (the Tax Act), signed into law by President Trump on December 22, 2017, affects certain plan loan distributions. Specifically, for all tax-qualified retirement plans that offer loans, including 401(k), 401(a), 403(b), and governmental 457(b) plans, the Tax Act provides for an:

- **Extended Deadline for Rolling Over Certain Plan Loan Offsets.**
  - Background and prior law: A plan loan "offset" occurs when an individual owes an outstanding loan to a qualified retirement plan, but then experiences a distribution

event that is either (1) a termination of employment; or (2) the termination of the plan. If the plan, in such situation, permits a participant's account balance to be paid out in full, minus the loan amount, then a plan loan offset occurs. A Form 1099-R is issued, indicating that the offset amount is an actual distribution. If a participant receiving a loan offset takes no action, the offset loan amount is considered or "deemed" to be a distribution, and is subject to taxation. Under these facts, taxation of the offset amount can be avoided if: (1) the distribution is otherwise eligible to be rolled over; and (2) the participant rolls the full amount of the distribution, including the amount of the offset, into an IRA. To include the offset amount in the rollover, the participant will need to contribute personal (or borrowed) funds to the rollover amount. Previously, offset loans could only avoid taxation if such a rollover occurred within the 60-day period beginning on the date offset distribution.

- New law, effective for plan years beginning on and after January 1, 2018: The Tax Act expressly extends the time period for avoid taxation by rolling over an offset loan until the participant's deadline for filing a federal income tax return (taking any extensions into account). This change means that in many cases, a participant will have more time in which to effect a tax-free rollover of a loan offset occurring following termination of employment.

Caution: No Change to Basic Tax Rules

Although recent legislation is trending toward easing the rules relating to hardship withdrawals and plan loans, it is important to remember that nothing about the fundamental tax treatment of these distributions have changed.

A common misconception (especially among participants) is that if a participant qualifies for a hardship distribution, then the distribution from the plan is tax-free.
A hardship distribution is subject to the same taxation rules as other plan distributions. Satisfying the standards for a hardship distribution simply entitles the participant to receive an in-service distribution of elective deferrals (and other contributions) from the plan, but the hardship distribution is subject to income taxes applicable to plan distributions. A hardship distribution is also generally subject to a 10% early distribution penalty, unless the participant has reached age 59-1/2. A hardship distribution is never eligible to be rolled over into an IRA.

Similarly, once a plan loan has been deemed distributed (either due to a plan loan repayment default, because a plan does not provide for an offset option upon distribution, or because an offset is not timely rolled into an IRA), the deemed distribution of a plan loan is taxed in the same manner as a regular plan distribution for purposes of determining the tax, including any early distribution penalty. A deemed distribution may never be rolled over into an IRA.

Plan Sponsor Action Items

With respect to plan hardship distributions, employer sponsors of 401(k) and 403(b) plans should prepare for the 2019 plan year by:

- Considering whether it is desirable to add a hardship distribution option to the plan (if not already permitted). If hardship distributions will be added, amend the plan and communicate the availability of the option to participants by preparation and distribution of a Summary of Material Modification (SMM) (or other appropriate form of communication in the event of a non-ERISA plan).
- Plan documents that already provide for hardship distributions should be amended, effective for the first day of the 2019 plan year, to eliminate the 6-month restriction on elective deferrals following a hardship distribution and to expand the permitted accounts from which hardship distributions may be taken. These details should be communicated to participants in the form of an SMM.

With respect to plan loans, plan sponsors of plans that permit loans should:

- Review the plan loan policy and plan loan provisions to determine if either should be updated to reflect this rule, or consider whether to modify the loan policy to take advantage of this rule. For example, if the plan currently permits continued loan repayments following termination of employment consider whether this option should be continued or eliminated. Consider also whether a loan note should be allowed to be rolled over to a successor plan upon plan termination or if the new extended rollover period provides sufficient flexibility to participants absent a rolled over loan note.
- Consider whether plan participant communications should be revised to alert participants to the greater flexibility now allowable for rollover of loan offset amounts.
- As applicable, confer with any third-party administrator for the plan to avoid inadvertently deeming a participant's loan a deemed (taxable) distribution.

EMPLOYMENT LAWSCENE ALERT: INTERNAL REVENUE CODE SECTION 409A SURVIVES REPEAL-AND-REPLACE ATTEMPT

Employer sponsors of nonqualified deferred compensation (NQDC) plans, as well as the executives and other service providers, who benefit from them, can breathe a sigh of relief. The ability to reward and retain key employees with incentive and compensation plans that provide a current opportunity to earn a payment to be provided (and taxed) in the future, will continue to be available, as it has been under American tax law for more than 80 years. Since late 2004, NQDC agreements have been regulated primarily by Internal Revenue Code

(Code) Section 409A.

The House Tax Bill

The ongoing viability of NQDC came under direct threat in the initial draft of the Tax Cuts and Jobs Creation Act (TCJA) as proposed by the U.S. House of Representatives Ways and Means Committee on November 2, 2017 (the House Tax Bill). Section 3801 of the House Tax Bill, which was proposed in substantially similar form to the Section 409A repeal-and-replace proposal introduced in a proposed Tax Reform Act of 2014, would have drastically reduced the ability of employers to reward key employees with deferred compensation arrangements.

As drafted, the House Tax Bill would have eliminated Section 409A and supplanted it with a new Section 409B. These changes, intended to be effective for services performed on and after January 1, 2018, would have meant, as of the New Year, that all NQDC arrangements would become fully taxable upon vesting, with only very limited opportunity to defer taxation until a future year. The proposed law would have applied not only to the common elective, nonelective, incentive payment, and phantom stock forms of NQDC, but would have also expressly *included* the (currently) sometimes-exempt equity-based compensation forms such as stock options, restricted stock units, and stock and stock appreciation rights.

The Joint Tax Committee had estimated that the proposed change would increase revenues by $16.2 billion between 2018 and 2027.

2017 Senate Tax Bill

The language that would repeal section 409A and replace it with a new Section 409B was removed from the final version of the House Ways and Means Committee's Tax House Bill, as issued on November 9, 2017. The Chairman's Mark of the Senate tax reform proposal issued on the same day, however, resurrected the proposals. As unveiled on November 9, 2017 by Senator Orrin Hatch, Chairman of the Senate Finance Committee, the initial Senate version of the TCJA (the Senate Tax Bill) contained the identical Section 409A repeal-and-replace provisions.

Senate Finance Committee Mark Up

Finally, upon the successful amendment offered by Senator Rob Portman, the Section 409A repeal-and-replace proposal was stricken in its entirety from the legislation. This action preserves the current, well-established system, which would have been rendered virtually extinct by the repeal-and-replace proposal. The proposal's demise became known concurrent with the Joint Committee on Taxation's issuance of the Chairman's Modification to the Chairman's Mark of the TCJA late in the day on November 14, 2017.

Impact

The retention of the existing system of taxation for NQDC arrangements is great news for employers and key employees, who can now continue to offer (and benefit from) compensation packages as appropriate to reward and retain top talent. It is also good policy, in that it does not impose limitations on the ability to earn and save for retirement at a time when the general retirement savings rates of Americans across nearly all income levels are widely reported to be insufficient.

EMPLOYMENT LAWSCENE ALERT: ACA EMPLOYER PAYMENT NOTICES ARRIVING SOON

Buried in IRS guidance issued on November 2 is news that the IRS will soon be issuing notices to employers of potential ACA taxes. While the ACA employer payments are widely referred to as “penalties,” they are actually “assessable payments” in the form an excise tax.

Specifically, the IRS has announced that applicable large employers (ALEs) will begin receiving notices of potential liability “in late 2017” if the information reported for 2015 on Forms 1094-C and 1095-C indicates that the employer may owe an employer shared responsibility payment. ALEs are employers with 50 or more full-time (including full-time equivalent) employees for a calendar year. Internal Revenue Code Section 4980H, generally, provides for two circumstances under which an employer may owe an employer shared responsibility payment.

First, under Section 4980H(a), an ALE in 2015 may be penalized if it did not offer health coverage to at least 70% of full-time (30 hour-per-week) employees (and their dependents). The Section 4980H(a) penalty, for 2015, was $177.33 per month (or $2,080 per year, if applicable in all months), multiplied by all full-time employees, and reduced by the first 80 full-time employees. This assessed payment would be triggered if at least one employee (of an ALE not offering coverage) enrolled in subsidized coverage through the Exchange.

Second, under Section 4980H(b), an ALE in 2015 may be penalized if although it offered coverage to at least 70 percent of its full-time employees (and their dependents), at least one full-time employee received a premium tax credit to help pay for coverage through the Exchange, which may occur because the ALE did not offer coverage to that particular employee or because the coverage the employer offered that employee was either unaffordable or did not provide minimum value. The Section 4980H(b) penalty, for 2015, was $260 per month (or $3,120 per year, if applicable in all months) per full-time employee who was not offered coverage (or was offered coverage that was either unaffordable, or did not provide minimum value), and who enrolled in subsidized coverage through the Exchange.

Any potential employer shared responsibility payment that might be assessed would relate to coverage offered (or not offered) to the employer's full-time employees during the 2015 calendar year.

What Information Will the IRS Letter Contain?

The proposed payment notice will be in the form of IRS Letter 226J, which will include:

- a brief explanation of Code Section 4980H;
- an employer shared responsibility payment summary table itemizing the proposed payment by month and indicating for each month if the liability is under Code Section 4980H(a), Code Section 4980H(b), or neither;
- an employer shared responsibility response form, Form 14764, "ESRP Response"; and
- an employee PTC list, Form 14765, "Employee Premium Tax Credit (PTC) List" which lists, by month, the ALE's assessable full-time employees (individuals who for at least one month in the year were full-time employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief (see instructions for Forms 1094-C and 1095-C, Line 16), and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C.

The response to Letter 226J will be due by a specified date, which will generally be 30 days from the date of Letter 226J.

Letter 226J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter.

What Do I Need to Do?

If your business receives a Letter 226J from the IRS, you should carefully review all information and determine whether you believe the proposed payment amount is correct. You may want to consider whether your company was eligible for any transition relief in 2015.

If the Letter is Correct

If you agree with the payment amount determination, you should complete, and return to the IRS the enclosed Form 14764. You should also provide full payment for the amount, either by check, or electronically, using the Electronic Federal Tax Payment System EFTPS system.

If the Letter is Incorrect

If you disagree with the payment amount determination, you will be required to complete and return the "ESRP Response" section of the enclosed Form 14764 to substantiate the basis for your disagreement. Your response may include supporting documentation, such as proof that

health insurance was offered, or relevant coverage records. Your response must also specify, on the "Employee PTC List," which changes are requested in order to correct the Forms 1094-C and 1095-C filed for 2015. The Letter 226J will include instructions on how to complete the required forms.

The IRS will respond to an ALE's formal disagreement by sending Letter 227, acknowledging the ALE's response and describing any further actions required. If the ALE disagrees with the IRS conclusions in the Letter 227, the ALE may request, within 30 days, a "pre-conference assessment" with the IRS Office of Appeals.

If, after any additional correspondence or discussions, the IRS ultimately determines that the payment is owed, the ALE will be provide the ALE with Notice CP 220J, which is a notice and demand for payment.

In light of the imminent arrival of the ACA potential payment notices, employers should be prepared to review and respond to Letter 226J quickly. Now is a good time to revisit the coverage offered in 2015, and to ensure easy access to applicable records.

It is important to note that, while scammers might see an opportunity to contact employers to demand payments, the IRS will initially contact ALEs about ACA payments only by letter (and not by email or phone).

EMPLOYMENT LAWSCENE ALERT: IRS ANNOUNCES 2018 FSA, TRANSPORTATION, AND EMPLOYEE BENEFIT PLAN LIMITS

The Internal Revenue Service has released the cost-of-living adjustments to the dollar limits under various employer-sponsored benefit plans for 2018. Several key limits (indicated in bold, below) have been increased for 2018.

Employer-sponsors of benefit plans should update payroll and plan administration systems for the 2018 limits and ensure that any new limits are incorporated into relevant participant communications, enrollment materials and summary plan descriptions, as applicable.

Health FSA Employee Contribution and Transportation Plan Limits

- For 2018, the maximum dollar limit on employee contribution to health flexible spending arrangements (FSAs) will increase to **$2,650** from the prior limit of $2,600. An Employer is not required to adopt the new Health Care FSA increase, but may do so as

long as the Health FSA Plan document is expressly amended for this purpose.
- The maximum pre-tax value of a qualified transportation plan for employee parking or transit passes will increase by $5 to **$260** per employee, per month in 2018.

2018 Qualified Retirement Plan Limits

For retirement plans beginning on and after January 1, 2018, the following dollar limitations apply for tax-qualified retirement plans:

- The elective deferral limit under Section 402(g) or the Internal Revenue Code (Code) will increase from $18,000 to $**18,500** for employees who participate in:
  - Code Section 401(k) plans;
  - Code Section 403(b) plans; and
  - Most Code Section 457 plans.
- The catch-up contribution limit for those age 50 and over under will remain unchanged at $6,000 for all plans other than SIMPLE 401(k) and SIMPLE IRAs. (For these SIMPLE plans, the catch-up contribution limit for those age 50 and over under will remain unchanged at $3,000).
- The limitation on the annual benefit for a defined benefit plan will increase from $215,000 to **$220,000**.
- The limitation on annual additions (meaning total employee plus employer contributions) to a participant's defined contribution plan will increase from $54,000 to **$55,000**.
- The limit on the amount of annual compensation taken into account under a tax-qualified retirement plan will increase from $270,000 to **$275,000**.
- The limitation used in the definition of a highly compensated employee (HCE) under Code Section 414(q) will remain unchanged at $120,000.
- The limitation used in the definition of a key employee in a top-heavy plan under Code Section 416 will remain unchanged at $175,000.
- The dollar amount under Code Section 409(o) for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period will increase from $1,080,000 to **$1,105,000**.
- The dollar amount used to determine the lengthening of the five-year distribution period will increase from $215,000 to **$220,000**.

Prior Guidance on Additional 2018 Limits

Social Security Taxable Wage Base

As announced in mid-October (and adjusted in November), the Social Security Administration announced that the Social Security wage base for 2018 will increase slightly (from $127,000) to **$128,400**. This is the maximum wage base subject to the FICA tax and is also the maximum "integration level" for retirement plans using "permitted disparity." (The 2018 increase is about 1% higher than the 2017 wage base. In contrast, the 2017 wage base increase was more than 7% higher than the 2016 amount).

2018 Health Savings Account Limits

In May of this year, the IRS announced that combined annual contributions to a Health Savings Account (HSA) in 2018 must not exceed the maximum annual deductible HSA contribution, which will be **$3,450** for single coverage and **$6,900** for family coverage. These limits reflect a $50 and $150 increase over the 2017 maximums, respectively. The catch-up contribution for eligible individuals who will attain age 55 or older by year end remains at $1,000.

EMPLOYMENT LAWSCENE ALERT: IT'S TIME TO AMEND 403(B) RETIREMENT PLAN DOCUMENTS!

If your organization is a public school or university, a tax-exempt charter school or hospital, a church, church-affiliated entity, or other tax-exempt organization, it is eligible to sponsor a 403(b) retirement plan.

For any eligible sponsor of a 403(b) plan, it is critical, to ensure the ongoing tax-compliance of the plan, to conform your document to the form of an IRS pre-approved 403(b) document (available for use since March 2017) no later than March 31, 2020. This date is the IRS-announced end of the "special remedial amendment period" that permits correction of plan language defects retroactive to January 1, 2010, provided that plans are operated in the meantime according to the regulatory requirements.

This means that if your last 403(b) plan amendment and restatement pre-dates March 2017, or is not otherwise in the form of a 2017 IRS-approved document, an amendment and restatement must occur by the deadline to ensure proper compliance. The IRS will not honor, or issue, any letters as to the qualified status of an individual 403(b) plan. This is why all 403(b) plan sponsors must adopt a 2017 pre-approved document. Pre-approved documents are available through a number of plan service providers, third-party administrators, and employee benefits attorneys.

Any employer who, for whatever reason, *never* complied with the final 403(b) regulations (and ERISA, if applicable), and operated 403(b) program subsequent to December 31, 2009 *without* adopting a written 403(b) plan document, may make use of an IRS correction program. Under the IRS's Employee Plan Compliance Resolution System, a properly documented correction and application, together with a fee, can be submitted to obtain

administrative relief for the failure to previously document the plan. It is likely that the ability to correct a failure to have a plan document will become significantly more restricted (and expensive) if not addressed prior to March 31, 2020.

In our experience, the IRS has been active, in recent years, in auditing the operations of 403(b) plans of Wisconsin entities and organizations. It should be anticipated that 403(b) plan audits on and after April 1, 2020 will review not only operational, but also documentational, compliance with the 403(b) plan rules.

While the March 31, 2020 deadline is still two and a half years away, it can take some time for 403(b) plan changes to be fully considered and approved by the required bodies (retirement plan committees, and or boards of education or boards of directors) that are common within the organizations of eligible employers.

The existence of the deadline also presents an opportunity for 403(b) plan sponsors to revisit the extent to which current plan design features are functioning to support human resources objectives (on both a recruitment, retention, and costs basis), and whether any design amendments should be considered in conjunction with the required amendment and restatement.

IT'S (ALMOST) JUNE 9! ARE YOU READY TO COMPLY WITH THE FINAL FIDUCIARY RULE?

At 11:59 p.m. on Friday, June 9, 2017 (the Effective Date), the ERISA definition of a fiduciary will expand to include, for the first time, many financial firms and advisors that provide investment advice to certain employer-sponsored retirement plans and individual retirement accounts (IRAs). This is because part of the final Department of Labor (DOL) Fiduciary Rule (described in our prior post) takes effect at this time, and will apply to anyone receiving a fee for providing a "recommendation" regarding covered investment transactions. "Recommendation" is broadly defined to include communications that are likely to be considered a suggestion to take, or to refrain from taking, a particular course of action.

After the Effective Date, ERISA fiduciary duties will also extend to the provision of a recommendation regarding whether or not to take a rollover or distribution from an ERISA retirement plan or an IRA, even if the rollover or distribution recommendation is not accompanied by investment advice.

While the Fiduciary Rule most directly impacts investment advice providers, employer

sponsors of ERISA retirement plans should also be aware of the new rules and of the ways in which plan service provider arrangements and internal human resources practices may be impacted by them.

Key requirements and recommendations for both investment advisors and employer retirement plan sponsors are briefly summarized, below.

Action Items for Advisors

Unless an exception or exemption applies, financial advisors who give investment advice to participants of covered plans and IRAs must now observe impartial conduct standards, and some portions of the DOL Best Interest Contract (BIC) exemption or Principal Transaction exemption (if applicable). This means that advisors must, as of the Effective Date:

- provide advice in participants' best interests;
- receive no more than reasonable compensation; and
- avoid misleading statements.

By January 1, 2018, the remainder of the BIC and Principal Transaction exemption rules apply and affected advisors must:

- maintain (and adhere to) written anti-conflict policies and procedures;
- make required disclosures to advice recipients; and
- enter into enforceable written contracts relating to the provision of investment advice services relating to covered employer retirement plans and IRAs.

Advisor Transition-Period

Under a temporary non-enforcement policy issued by the DOL on May 22, 2017, neither the DOL nor the IRS will enforce potential violations of the prohibited transaction rules, provided that the advisors are working diligently and in good faith to comply with the new rules. This temporary non-enforcement policy will end on January 1, 2018, which is also when the remaining parts of the Fiduciary Rule (and exemption) requirements take effect.

Taxes and Penalties for Violation

After January 1, 2018, an advice fiduciary that fails to comply with the new rules, and thereby engages in a prohibited transaction, may be required to refund all fees earned from the transaction and to pay an annual excise tax of 15% on such fees until repayment occurs. To the extent that such a prohibited transaction relates to an ERISA-subject retirement plan, a violation of the rules could potentially also result in legal claims by retirement plan sponsors or IRA investors, civil penalties, and personal liability for losses or improper profits.

Certain Assets Unaffected

The new rules do *not* affect any health, disability, term life, or other health-related arrangements or assets that do not contain an investment component. Personal brokerage accounts (not involving an employer-sponsored retirement plan or any IRA) are also unaffected by the changes.

Action Items for Employer Plan Sponsors

Employer retirement plan sponsors should consider taking the following steps:

- Review existing educational materials provided to participants to determine whether they remain non-fiduciary "investment education," or whether they now constitute fiduciary "investment advice."
- Review practices relating to rollovers into and out of the plan to determine whether they trigger fiduciary advice-related obligations.
- Confirm that in-house employees who provide advice to participants (if any) are not being separately compensated for such advice.
- Review contractual arrangements with advisers to determine which advisers are fiduciaries under the new rules. For those service provider serving as a fiduciary for the first time under the Fiduciary Rule, expect that agreements will be amended or replaced before January 1, 2018. Any resulting fee changes must be clearly disclosed.
- Expect to receive additional disclosures beginning in 2018 from investment advice fiduciaries that will rely on the BIC exemption to continue receiving certain types of compensation. Among other things, these disclosures must describe any of the advice fiduciary's conflicts of interest, and the types of compensation paid in connection with plan investment recommendations.
- Carefully review all fee disclosures you receive to ensure that you understand what fees are being charged for plan services. Confirm that the fee structure and amounts of compensation received by advisers are reasonable, in light of the services performed.

EEOC WELLNESS LAWSUIT AGAINST WISCONSIN EMPLOYER ENDS IN $100,000 SETTLEMENT

A Wisconsin employer's settlement last month with the EEOC ended the final round of litigation initiated against it by the EEOC over its workplace wellness plan.

In 2009, Manitowoc-based Orion Energy Systems (Orion) implemented a wellness program that included a health assessment. The health assessment consisted of a personal health questionnaire, a biometric screening, and a blood draw. An Orion employee refused to participate and, as a result, was required to pay her full health premium costs of more than

$400 per month. (Meanwhile, for employees who participated in the health assessment, the employer paid 100% of the premium cost). The employee openly questioned the purpose of the health assessment, the confidentiality of its results, and the CEO's response to her questions. Approximately three weeks after declining to participate in the health assessment, her employment was terminated. She then filed a complaint with the EEOC, which in turn sued Orion in August 2014, alleging that the company's wellness program violated the ADA as "involuntary" and that the company had retaliated against her in violation of the ADA.

The ADA generally prohibits employers with 15 or more employees from requiring medical examinations or making disability-related inquiries of an employee, unless the examination or inquiry is job-related and consistent with business necessity. The law includes an exception for "voluntary" wellness programs, but the EEOC had not finalized its definition of a "voluntary" wellness program until May 2016, nearly seven years after the events at issue in this case.

In a mixed September 2016 decision, the court for the Eastern District of Wisconsin ruled against the EEOC by finding that the wellness plan was voluntary. The court determined that the health assessment incentive (the premium cost) was permitted within the framework of a "voluntary" plan, and therefore was *not* prohibited under the general ADA medical examination and inquiry rules. While shifting even 100% of the premium cost to the employee was a strong incentive, it was still not an involuntary "compulsion," the court reasoned, because employees could still choose between completing the health assessment or paying the full premium.

While the court's ruling essentially approved the design of the wellness plan, it declined to dismiss the employee's ADA retaliation and interference claims. In other words, it was only the termination (allegedly in response to the employee's refusal to participate in the wellness plan) that the court found troubling.

To resolve these remaining issues, Orion agreed to pay the former employee $100,000. Orion also agreed:

- Not to maintain any wellness program in the future with disability-related inquiries or medical examinations that do not meet the criteria for "voluntary" wellness plans as defined under the May 2016 final EEOC regulations;
- Not to engage in any form of retaliation, including interference or threats, against any employee for raising objections or concerns as to whether the wellness program complies with the ADA;
- To tell its employees that any concerns about its wellness program should be sent to its human resources department;
- To train its management and employees on the law against retaliation and interference under the ADA; and
- To conduct an additional training meeting with its chief executive officer, its chief

operating officer, its chief financial officer, its HR director, and all employees responsible for negotiating or obtaining health coverage or selecting a wellness program. This training is to include an explanation of the settlement terms and the ADA's requirements regarding wellness programs.

While Orion, in the consent decree, "continues to deny the EEOC allegations," the settlement serves as a reminder to employers not to base any employment decisions on participation or non-participation in a workplace benefit program. Wellness programs must comply not only with multiple provisions of the ADA, but also with HIPAA, the Genetic Information Nondiscrimination Act (GINA), the Affordable Care Act, and other laws. As these rules, and relevant case law, continue to evolve, it is important that employers maintaining, implementing, or considering updating a wellness plan proceed with an awareness of the potential costs of noncompliance.

DON'T OVERLOOK LIFE-INSURANCE CONVERSION NOTICE OBLIGATIONS

Employer, Not Insurer, Found Liable for Payment of Life Insurance Benefit

A court ruling earlier this month highlights the importance for employers of reviewing internal policies and procedures regarding the communication of post-employment life insurance rights. In *Erwood v. WellStar Health Systems*, a federal judge in Pennsylvania ruled that an employer owes more than $750,000 to the widow of a deceased former employee.

In this case, an employee terminated employment at the end of his FMLA period and died of a terminal illness just over nine months later. Although the former employee and his spouse believed he would continue to be covered under a life insurance policy following the end of his employment, the group policy coverage lapsed and was not continued because the company's benefits representative did not properly explain the post-employment individual policy conversion right.

Although the availability of a conversion right was mentioned in a summary plan description, the court found that the employer did not satisfy its disclosure obligations to the employee because no specific form, deadline, or other essential information about the conversion right was ever mentioned or provided, even when the employee and his spouse had reached out with questions and attended an in-person meeting. Instead, the representative simply provided multiple assurances during the employee's FMLA leave period that all benefit coverages would "remain the same."

The court held that the failure to provide the employee with specific conversion right election information amounted to a breach of the fiduciary obligation imposed by ERISA to convey complete and accurate information material to the beneficiary's circumstances. The court also found that an ERISA fiduciary may not, in the performance of its duties, materially mislead those to whom the duties of loyalty and prudence are owed. That duty not only includes the affirmative duty to inform, but also the duty to inform when the fiduciary knows that silence might be harmful to the beneficiary. The court found that the employer had breached these fiduciary obligations in its failure to provide the required conversion notice, and, as a result, found that such breaches amounted to a material misrepresentation by the employer resulting in harm to the spouse as beneficiary.

Unfortunately, the company's benefit representative was unaware of the company's communication and fiduciary obligations to provide notice to the employee of the conversion right and wrongly assumed that such notice would be provided by the life insurance carrier itself. Because the deceased employee and his spouse had relied on the company's communications to their detriment, the judge used the equitable remedy provisions of ERISA to award the widow the full amount of the life insurance benefit, $750,000 (plus interest), she would have received under the policy, had the life insurance benefit continued from the date on which employment ended.

Compare and Contrast with COBRA

Most employers are quite familiar with the obligation to provide a notice of COBRA or state continuation coverage to group health plan participants who cease to be eligible for the workplace group health insurance plan. The process of providing continuation coverage notices has become routine, and indeed, is often handled by the plan's group health insurance carrier.

However, the opposite is true of group life insurance policies. Not only are some employers less aware that group life insurance coverage applies only to active employees, the contractual language of group policies typically requires the employer (rather than the insurer) to provide the conversion right notices when employment ends.

The court's decision in *Erwood* highlights the importance of periodically reviewing internal post-employment benefits right notice obligations and of understanding who exactly has those obligations. This is particularly important in light of the fact that employers may change carriers over time, and that the details of conversion notice requirements may vary from carrier to carrier.

When the same insurer provides both long-term disability and life insurance, it may be that the insurer will be aware of an employee terminating employment on account of disability. In such case, it is possible that an insurer will be willing to assist in making sure that an

employee receives a life-insurance conversion notice. It is more common, however, that the onus for providing notice of conversion rights rests solely on the employer, and not the carrier. The *Erwood* decision makes that reality clear for employers.

Because beneficiaries often become aware that eligibility or conversion information was inaccurate or incomplete (or that premiums have lapsed) only after the plan participant has passed away, life insurance errors of this kind are prime candidates for the application of an (often expensive) equitable remedy under ERISA that makes the beneficiary whole.

QSEHRAS ALLOW SMALL EMPLOYERS TO REIMBURSE EMPLOYEES' PERSONAL HEALTH COSTS

Although the Affordable Care Act's (ACA's) market reforms eliminated the ability of employers to permissibly reimburse employees for individually-incurred health insurance or medical costs, recent legislation now affords certain small employers with an alternate reimbursement option. The 21st Century Cures Act amended the Internal Revenue Code to authorize the creation of a new stand-alone HRA vehicle known as a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA).

An employer may elect to implement a QSEHRA if the business offers *no* group health plan *and* is exempt from the ACA's Employer Shared Responsibility provisions by virtue of having had fewer than 50 full-time (including full-time equivalent) employees in the prior year. The 50-employee limit applies to the aggregate number of employees across all commonly-controlled or affiliated businesses.

A QSEHRA is not a "health plan" within the meaning of the ACA, but may be used to pay for or reimburse the costs of medical care and health insurance premiums incurred on behalf of an eligible employee or the employee's family members. The employee must provide proof of the expenses or coverage costs and the IRS may later request written substantiation. Reimbursements in a calendar year may range up to $4,950 (for payments relating to only the employee) or up to $10,000 (for family coverage costs). These amounts will be adjusted for inflation, and must be prorated for partial years.

Only an employer may fund a QSEHRA. Funds paid into the QSEHRA must be in addition to salary and not paid as a salary substitute. Accordingly, salary reduction contributions by employees are not permitted. With some exceptions, the reimbursement must be made

available “on the same terms to all eligible employees” of the employer. Employees who have been employed by the QSEHRA sponsor for less than 90 days, or who work part time, are part of a collective bargaining unit, or are under age 25 may be excluded from participation.

The rules require an employer to furnish a written notice to its QSEHRA-eligible employees at least 90 days before the beginning of a year for which the QSEHRA is provided. In the case of an employee who is hired mid-year, the notice must be provided no later than the date on which the employee begins participation in the QSEHRA.

The notice must include the amount of the eligible employee’s permitted benefit under the QSEHRA and advise the employee to inform any health care Exchange of such benefit amount if the employee is applying for advance payment of the premium assistance tax credit.

Under an initial transition rule, the first-applicable QSEHRA notice deadline was March 13, 2017. In Notice 2017-20, however, the Treasury Department and IRS suspended the notice deadline and waived any penalties that could have been imposed on employers for failure to provide the first written notice. Future guidance will specify a revised notice deadline, and will provide at least 90-days’ additional time for employers to prepare and provide the notice.

While QSEHRA benefits must be reported (but not treated as taxable) on the employee’s W-2 and Form 1095-B, its benefits are exempt from COBRA, or similar, continuation coverage requirements.

Ultimately, whether or not implementation of a QSEHRA makes sense for a small employer will depend on the business’s specific personnel-related objectives and goals. For some employers, the cost and administrative requirements may outweigh the potential advantages, while for others a QSEHRA will present the best possible avenue to provide employees with assistance toward paying for health care.