April 29, 2020

QPA Fiduciary News Alert:

Department of Labor Provides COVID-19 Guidance

Early this morning, the Department of Labor (DOL) released "EBSA Disaster Relief Notice 2020-01", which includes "Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak". This Fiduciary News Alert highlights the provisions of the Notice most likely to impact qualified retirement plan sponsors.

Application

The Notice applies from March 1, 2020, to 60 days after the eventual announcement of the end of the COVID-19 National Emergency. We'll refer to this as the "Emergency Period". The DOL coordinated the Notice with the Department of Treasury, Internal Revenue Service, and Department of Health and Human Services. It generally reflects the DOL's "enforcement position" on a variety of issues relating to the CARES Act. Said more casually, the Notice confirms that the DOL will not enforce normal rules - or apply normal standards - during the Emergency Period.

General Commentary

We will be watching for recordkeepers to provide additional guidance regarding the extent to which they may modify their procedures or communications to reflect the DOL's relaxed enforcement stance. With that said, we do not expect *significant* changes because the Notice does not exactly tell plan fiduciaries to simply take their time in otherwise complying with requirements. It does not provide employers license to slow down, but it does provide relief for situations out of employers' control that have made it impracticable or impossible to meet otherwise-applicable standards.

CARES Act Loan Rules

The CARES Act provides two forms of loan relief: (1) access to larger loans; and (2) suspension of loan repayments otherwise due in 2020. Those provisions, on their face, run afoul of ERISA requirements relating to "adequate security" and "reasonably equivalent basis". The Notice confirms that the DOL will not consider those requirements as being violated in the case of loans made or suspended in accordance with the CARES Act.

Participant Contributions and Loan Repayments

In normal times, the DOL places great emphasis on the timeliness of participant contributions and loan repayments. The Notice reflects that during the Emergency Period the DOL "will not -- solely on the basis of a failure attributable to the COVID-19 outbreak -- take enforcement action with respect to a temporary delay in forwarding such payments or contributions to the plan." It confirms the DOL's expectations that employers and service providers act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable.

Verification Procedures

The Notice relaxes the rules around procedural requirements for plan loans or distributions. It reflects that the DOL will not consider there to be a failure if the failure is solely attributable to the COVID-19 outbreak, the plan administrator makes a good faith diligent effort to comply with otherwise-applicable requirements, and the plan administrator makes a reasonable attempt to cure any procedural deficiencies (such as assembling any missing documentation) as soon as practicable.

Distribution of Disclosures

The Notice extends the deadlines for furnishing required notices and disclosures to participants and beneficiaries. The DOL confirms that a plan and its responsible plan fiduciaries will not be considered in violation of ERISA for the failure to timely provide a notice or disclosure "if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances." It further clarifies that good faith acts may include electronic means of communication in the case of intended recipients "who the plan fiduciary reasonably believes have effective access to the electronic means of communication, including email, text messages, and continuous access websites." The Notice highlights that this relief applies to blackout notices.

Separate Joint Notice

The DOL, Treasury, and IRS also will be publishing an extension for a number of deadlines. Most of those extensions apply to group health plans, but they apply to retirement plans in the case of the time for participants and beneficiaries to make claims for benefits and appeal denied claims.

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