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In this Issue:

Department of Labor Releases Highly Anticipated Final Fiduciary Rule

On April 23, 2024, the Department of Labor ("DOL") released its final "fiduciary rule." The highly anticipated

final rule made some changes from the proposal released in October 2023, but ultimately retains the major elements of the proposal and remains very similar to a 2016 DOL regulation that was struck down by a court. The rule is scheduled to go into effect in September 2024.

Background

Under ERISA, a person is considered a fiduciary of a plan if, among other things, they render investment advice with respect to plan assets for a fee or other compensation. In 1975, DOL published regulations that created a five-part test in order to determine when a person is an investment advice fiduciary, including that they render investment advice on a regular basis. DOL published a rule – referred to as the "fiduciary rule" – in 2016 that amended the regulation to significantly expand who is considered a fiduciary under ERISA. Under the 2016 regulation, fiduciaries included advisers who made recommendations to roll over assets from a retirement plan to an IRA, and an adviser could be considered a fiduciary even on a first-time interaction with a plan participant. In 2018, the regulation was struck down by the Fifth Circuit Court of Appeals, which restored the original five-party fiduciary test.

In a related regulatory project, in 2020, DOL issued Prohibited Transaction Exemption ("PTE") 2020-02, which also addressed fiduciary investment advice to retirement investors. PTE 2020-02 allows investment advice fiduciaries of employee benefit plans and IRAs who meet certain criteria to rely on the exemption (thereby allowing them to avoid certain penalties under the Internal Revenue Code), including taking steps to mitigate conflicts of interest and adhering to adhere to impartial conduct standards.

Fiduciary Rule

In a revived effort to update the 1975 fiduciary regulation, in October 2023, DOL announced its proposed "retirement security" rule to expand who is considered an investment advice fiduciary. The proposal also included updates to PTE 2020-02 and other related PTEs to make it more burdensome to rely on the PTEs. The controversial proposal immediately generated concerns that DOL was attempting to once again inappropriately broaden who is considered a fiduciary under ERISA. One major concern with the proposal, which received thousands of public comments, was that it was essentially the same as the 2016 fiduciary rule. When the Fifth Circuit struck down the 2016 rule, one concern it highlighted was that that under the rule, nearly all financial professionals who do business with ERISA plans and IRA holders could qualify as ERISA fiduciaries – and therefore be subject to ERISA's stringent fiduciary duties – even if they did not have a relationship of trust and confidence with the client and even if they did not render advice to that client on a regular basis. Stakeholders voiced similar concerns over the 2023 proposed rule.

On April 23, 2024, DOL released its final fiduciary rule. Under the final rule, the definition of what is a fiduciary remained effectively the same, with minor changes made from the proposal. The final rule provides that a person making an investment-related recommendation is a fiduciary if the following three criteria are met:

1. The person renders investment advice regarding an investment transaction or strategy.
2. The person meets the criteria in either (a) or (b):

a. The person makes professional investment recommendations to investors on a regular basis as part of their business, and the recommendation is made under circumstances that would indicate to a reasonable investor that the recommendation:
    i. Is based on a review of the retirement investor's particular needs or individual circumstances,
    ii. Reflects professional judgment of the retirement investor's needs or circumstances, and
    iii. May be relied upon by the retirement investor as intended to advance their best interest.
b. The person represents or acknowledges that they are acting as a fiduciary.

3. The person receives a fee or other compensation in connection with the investment recommendation.

The final PTE 2020-02 also largely retains the major proposed amendments. However, one important change is that the final amendments eliminate from the proposal a requirement for financial institutions to disclose to retirement investors their rights to obtain specific information regarding costs and fees.

The final rule is scheduled to go into effect on September 23, 2024. However, like in 2016, lawsuits are expected to be filed in order to halt the final rule.

IRS FAQs Answer Questions about Tax Treatment of Employer Provided Work-Life Referral Services

On April 16, 2024, the IRS posted a series of "frequently asked questions" (FAQs) on the tax treatment of "work-life referral" services, a type of employer-provided fringe benefit that provides employees help with a variety of day-to-day issues.

What is a Work-Life Referral Program?

Specifically, the FAQs describe a work-life referral (WLR) program as a program that provides guidance, support, information, and referrals in connection with:

- identifying appropriate education, care, and medical service providers,
- choosing a child or dependent care program,
- navigating eligibility for government benefits, including Veterans Administration benefits,
- evaluating and using paid leave programs offered through the employer or a state or local government,
- locating home services professionals who specialize in adapting a home for a family member with special care needs,
- navigating the medical system, including private insurance and public programs, and utilizing available medical travel benefits, and
- connecting the employee with local retirement and financial planning professionals.

The FAQs define WLR services to include "assistance with completing paperwork and basic administrative tasks that help direct the employee to appropriate providers of the necessary underlying life-management resources."

How are WLR Services Taxed?

According to the FAQs, employer-provided WLR services are not taxable income for employees if they qualify as de minimis fringe benefits under Code section 132(a)(4). Basically, a de minimis fringe benefit is any property or service that is of such minimal value as to make accounting for it unreasonable or administratively impracticable.

The guidance concludes that WLR services would be excluded from gross income as a de minimis fringe benefit. The guidance also concludes that WLR services would also be excluded from employment taxes and exempt from federal income tax withholding.

The guidance states that it is not addressing "the direct or indirect payment for the life-management resources or other services offered through an [employee assistance program] or that may be bundled with a WLR program."

IRS Extends Relief Relating to Proposed RMD Regulations

Extending prior relief announced in 2022 and 2023, the Internal Revenue Service ("IRS") once again granted relief relating to differing interpretations of the agency's 2022 proposed regulations on required minimum distributions ("RMDs"). The relief also provides that the forthcoming final RMD regulations are expected to apply no earlier than 2025.

Background

In general, the Internal Revenue Code ("Code") provides rules which determine the minimum amount that must be withdrawn from a retirement plan account or IRA once the account owner reaches a certain age. Under the corresponding regulations governing RMDs, prior to the enactment of the SECURE Act of 2019, if a defined contribution plan participant or IRA owner died before the date on which his RMDs were required to begin, then the participant's interest must either be distributed: (1) within five years of his death (the five-year rule); or (2) over the life or life expectancy of the participant's designated beneficiary. The SECURE Act of 2019 created a new "10-year rule," which extends the five-year rule and applies to designated beneficiaries regardless of whether a participant died before, on, or after his required beginning date (RBD), i.e., the date by which RMDs must start. There are also special rules for eligible designated beneficiaries (EDBs), such as surviving spouses and minor children.

In February 2022, the IRS published proposed regulations to reflect the SECURE Act's changes to the RMD rules. The proposed regulations explained that, if the 10-year rule applies, distributions from the account must continue *throughout* the 10-year period in the following situations: (1) for any designated beneficiary if the employee dies after RMDs have already begun, and (2) following the death

of an EDB who is "stretching" the benefits they inherited from a participant who died before their RBD. This interpretation surprised many taxpayers, who had thought that the 10-year rule permits a single lump sum distribution at the end of the 10-year period, regardless of when the participant died. These interpretive differences may have caused some beneficiaries to not take RMDs for certain years because they believed it was not required.

New IRS Guidance

On April 16, 2024, the IRS published Notice 2024-35, which provides a one-year extension – through 2024 – to previously granted relief (issued in Notice 2022-53 and Notice 2023-54) addressing the difference in interpretations surrounding the 10-year rule. Like those prior Notices, under Notice 2024-35: (1) a defined contribution plan that fails to make a "specified RMD" (defined below) will not be treated as having failed to take an RMD merely because it did not make the required distribution; and (2) to the extent that a taxpayer fails to take a "specified RMD," the IRS will not impose the excise tax that otherwise applies to RMD failures. In very general terms, a "specified RMD" is a distribution that would be required to be made under the proposed regulations' interpretation of the 10-year rule for: (1) certain designated beneficiaries of a participant who died in the years 2020-2023 after the participant started taking RMDs; and (2) certain beneficiaries of EDBs who died in the years 2020-2023.

The Notice also states that that the forthcoming final RMD regulations, which were originally intended to apply for 2022 and later years under the proposed regulations, are now anticipated to apply for determining RMDs for calendar years beginning on or after January 1, 2025. Although the timeline for the long-awaited final RMD regulations is unclear, senior Treasury officials recently indicated that the regulatory project is far along, and the agency hopes to have them finished soon.

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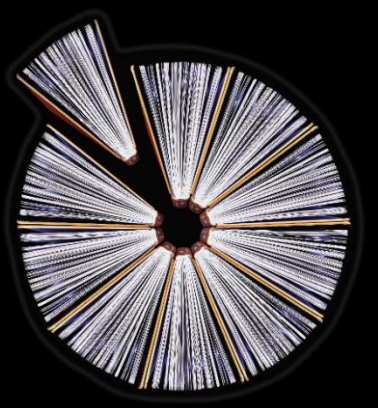

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