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Summer 2015 Client Newsletter

Utz & Lattan, LLC

Overland Park Office:
7285 W. 132nd St.
Suite 320
Overland Park, KS 66213

Phone: 913.685. 0970
Fax: 913.685.1281

St. Louis Office:
1750 S. Brentwood Blvd.
Suite 551
St. Louis, MO 63144-1302

Phone: 314.695.5368
Fax: 913.685.1281

Huntsville Office:
P.O. Box 1547
Huntsville, AR 72740

Phone: 479.738.1083
Fax: 913.685.1281

Katherine Utz Hunter
kutz@utzlattan.com
Phone: 314.695.5368

Lisa H. Lattan
lisalattan@utzlattan.com
Phone: 913.685.8150

Dale K Ramsey
dramsey@utzlattan.com
Phone: 479.738.1083

John L. Utz
jutz@utzlattan.com
Phone: 913.685.7978

www.utzlattan.com

This newsletter provides clients and friends of Utz & Lattan, LLC, with brief updates on legal and regulatory developments affecting employee benefits and executive compensation. If you would like to discuss any of these items in more detail, please contact one of our attorneys.

Department of Labor's Proposed New Fiduciary Definition: Status Update

The Department of Labor released its long-anticipated re-proposal of the definition of an ERISA investment advice fiduciary last April, and the proposed rule has drawn both praise and criticism during the intervening months. The proposed rule would significantly expand the existing 1975 definition of an ERISA fiduciary, and it covers IRAs as well as qualified retirement plans. The extensive proposal from the DOL also included two new accompanying prohibited transaction exemptions (PTEs), as well as proposed amendments to other existing PTEs. The comment period for proposed regulation ended July 21, 2015, and the Department received a multitude of comments on the proposal from many different constituents, including industry advocacy groups, lawmakers, service providers, and other members of the employee benefits community. The Department has stated informally that it expects to make some adjustments to the proposed rule, but the extent of any such changes is unknown at this time. Public hearings on the proposal are scheduled for the week of August 10, 2015.

IRS Clarifies Safe Harbor for Defined Contribution Plan Annuity Selection

In a recent Field Assistance Bulletin (FAB), the Department of Labor attempted to clarify the scope of a plan sponsor's fiduciary obligations with respect to annuity selection under defined contribution plans. The FAB expands on the safe harbor regulation issued by the DOL in 2008 regarding the selection and monitoring of annuity providers and annuity contracts for distributions from such plans. In particular, the FAB clarifies that selection of an annuity provider is subject to ERISA's general fiduciary prudence standard, and that a plan fiduciary must periodically review annuity providers and contracts based on applicable facts and circumstances. The FAB gives examples of how the annuity selection safe harbor rule may be applied. The FAB does not address annuity distributions from defined benefit plans, nor does it address the fiduciary selection and monitoring of annuity providers and contracts offered as investment options under defined contribution plans (although the DOL noted it is considering such guidance).

Plan Sponsors Responsible for Hardship and Loan Documentation

In guidance issued last April, the Internal Revenue Service reminded plan sponsors that they are responsible for maintaining appropriate documentation for plan loans and hardship distributions. The IRS emphasized that maintaining proper documentation for loans and hardship distributions is the plan sponsor's ultimate responsibility, even if a third party administrator (TPA) or recordkeeper is utilized to administer a plan and participant transactions. In particular, the IRS noted that electronic self-certification by a participant is not sufficient documentation for a hardship. The IRS also described the types of documentation that must be maintained for both loans and hardship distributions, in either paper or electronic format. A link to the IRS's guidance can be found here: http://www.irs.gov/Retirement-Plans/Its-Up-to-Plan-Sponsors-to-Track-Loans-Hardship-Distributions. Plan sponsors should review their TPA agreements and procedures to ensure that the proper documentation is maintained in case of an IRS audit.

Recent U.S. Supreme Court Decision on Same-Sex Marriage

The United States Supreme Court ruled on June 26, 2015, in *Obergefell v. Hodges*, that the United States Constitution requires: (1) states to license same-sex marriages, and (2) states to recognize same-sex marriages lawfully licensed and performed in another state.The Court concluded that the right to marry is a fundamental right that is "inherent in the liberty of the person" and the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit states from depriving same-sex couples of this right and liberty.

The precise impact of the case on employee benefit plans is not yet known, but the impact on plans and plan sponsors will likely be minimal, at least in the realm of qualified retirement plans. This is because the Supreme Court previously ruled in 2013, in *United States v. Windsor*, that Section 3 of the Defense of Marriage Act was unconstitutional, and subsequent guidance from the Internal Revenue Service and Department of Labor clarified who a spouse is for purposes of federal laws governing employee benefit plans. As a consequence, many private employers began treating same-sex spouses the same as opposite-sex spouses for health and welfare plan coverage purposes, and they were required to do so with respect to many qualified retirement plan provisions.

One result of the *Obergefell* case is that there should no longer be a difference between federal and state taxation of benefits provided to same-sex spouses since all states must now permit same-sex marriages. This means employers should no longer impute state income tax for health benefits provided to same-sex spouses. Plan sponsors will need to carefully review applicable state law to determine what changes, if any, should be implemented and when such changes should be made. Additionally, employers who sponsor fully-insured health plans issued in states that prior to the *Obergefell* case prohibited same-sex marriages will now presumably be required to offer health coverage to same-sex spouses (if coverage is offered to opposite-sex spouses). Although plan sponsors of self-insured health plans are currently not required to cover same-sex spouses (or opposite-sex spouses), employers may risk facing discrimination lawsuits under federal and state laws if health coverage is denied to same-sex spouses, but is offered to opposite-sex spouses. This is true in part because of recent guidance from the Equal Employment Opportunity Commission ("EEOC") opining that Title VII of the Civil Rights Act of 1964 extends to discrimination based upon sexual orientation. The outcome of these possible employment discrimination lawsuits, though, remains unclear. It is also unclear how the recent Supreme Court case will ultimately impact domestic partnerships and civil unions. Employers who currently offer benefits to domestic partners or individuals in a civil union will want to consider whether to continue or discontinue such benefits.

IRS Closes the Window on Lump Sum Distributions to Participants in Pay Status

On July 9, 2015, the Internal Revenue Service issued a notice indicating that it intends to amend the required minimum distribution (RMD) regulations to provide that defined benefit plans are

generally prohibited from replacing annuities currently in pay status with lump sums or other accelerated forms of payment. The IRS had in the past issued private letter rulings approving plan amendments permitting participants in pay status to elect a lump sum "cash out" during a specified window period. In its recent notice, the IRS indicates that it has concluded that such lump sum windows are inconsistent with the intent of the RMD regulations. Thus, the IRS's notice effectively ends the availability of such windows for participants in pay status as of July 9, 2015 (but note that such lump sum windows still may be offered to participants not yet in pay status, and the notice includes exceptions for lump sum window programs adopted or approved prior to July 9, 2015). Proposed regulations are expected in the near future.

IRS Determination Letter Program to Be Significantly Reduced

On July 16, 2015, the Internal Revenue Service announced that its determination letter program for individually designed retirement plans will be significantly reduced starting in 2017. "Cycle A" submissions - due by January 31, 2017 - will be the last filings accepted by the IRS under its current program. (Cycle E submissions due by January 31, 2016, are still open, as well.) Currently, the IRS accepts determination letter applications on individually designed plans every five years, based on employer tax ID numbers. This "cycle" system has been in place since 2005, but recent IRS budget cuts and limited resources have prompted the IRS to reevaluate the determination letter program. Going forward, the IRS will review newly-adopted individually designed plans, as well as terminating plans. Filings may also be accepted in other limited circumstances to be determined based on future IRS and Treasury guidance. In connection with this announcement, the IRS indicated it is considering alternative ways for plan sponsors to comply with qualified plan document requirements, including model amendments.

Department of Labor Expresses Concerns about Quality of Retirement Plan Audits

A recent report from the Department of Labor found that 39% of the Form 5500 audits it studied included significant deficiencies in one or more generally accepted auditing standards. The DOL made a number of recommendations to address the report's findings, including: (1) The DOL plans to focus its enforcement resources on smaller audit firms that undertake audits of plans with large assets. The DOL also intends to work with national accountancy and CPA associations to increase investigations and sanctions for CPAs who perform poor work. (2) The DOL recommends repealing the limited-scope audit exception and establishing DOL standards to address the unique financial reporting issues of employee benefit plans. (3) The DOL plans to work with accountancy associations to provide training, education, and licensing to CPAs who audit benefit plans.

Plan sponsors may wish to carefully consider the DOL's findings when selecting or working with an auditor. The DOL has other resources available to plan sponsors, including Selecting an Auditor for Your Employee Benefit Plan. See: http://www.dol.gov/ebsa/publications/selectinganauditor.html

New Trade Act May Impact Health Plans

Congress recently passed the Trade Preferences Extension Act of 2015, an Act which - among other things - could modestly impact employer-sponsored health plans. The Act reinstates the "health coverage tax credit," which is a credit equal to 72.5% of the amount paid by an eligible individual for qualified health coverage, including COBRA coverage. An individual may be eligible for the tax credit if he or she lost his or her job (or had hours reduced) as a result of increased imports and is receiving a "trade readjustment allowance" or similar government assistance. The tax credit previously expired December 31, 2013, but the Act reinstated it retroactive to January 1, 2014.

Although the health coverage tax credit was not widely utilized in the past, employers do need to be aware of the Act for two reasons: First, COBRA notices may need to be updated to reference the credit. Second, plan sponsors should be aware that the COBRA rule provides for a second opportunity to elect COBRA for individuals who lost health coverage due to a termination of

employment and become eligible for trade adjustment assistance. This special COBRA rule should be mentioned in a plan's summary plan description.

Additionally, the Act increases the penalty amounts for failing to file correct information returns and payee statements. These penalty increases apply to information returns such as Forms W-2 as well as to health plan coverage filings required to be made on Forms 1094-C and 1095-C (or Forms 1094-B and 1095-B for smaller employers) by the Affordable Care Act. For example, the Act increases the penalty for failure to file or furnish information returns and payee statements from $100 per return to $250 return and increases the cap on the total penalty amount imposed during a calendar year from $1,500,000 to $3,000,000.

Compliance Calendar: Key Upcoming Fall 2015 Deadlines and Due Dates*

- **July 29, 2015**: Summary of Material Modifications (SMM) or updated Summary Plan Description (SPD) generally must be distributed by July 29th (210 days after end of plan year) for plan amendments adopted during prior year
- **July 31, 2015**: Patient Centered Outcomes Research Institute (PCORI) fee of $2.08 per covered life due for 2014
- **September 30, 2015**: Deadline for distribution of Summary Annual Reports (SARs) (unless extended to December 15).
- **October 14, 2015**: Medicare Part D Creditable Coverage Notice due to Part D eligible individuals prior to October 15th
- **October 15, 2015**: Deadline for filing Form 5500 (if extended).
- **First Day of Open Enrollment**: Deadline for distribution of Summary of Benefits and Coverage (SBC) for health plans
- **November 15, 2015**: Transitional Reinsurance Report due for self-insured health plans
- **December 1, 2015**: Deadline for distribution of annual safe harbor, automatic enrollment, and qualified default investment alternative (QDIA) notice (not less than 30 days before beginning of plan year; notices may be combined)
- **December 31, 2015**: Deadline for distribution of annual Women's Health and Cancer Rights Act (WHCRA) notice and Children's Health Insurance Program Reauthorization Act (CHIPRA) notice

*This calendar does not include every compliance date that may be applicable to a retirement, health or welfare benefit plan. It simply highlights certain key dates of note. Dates generally apply to calendar year plans.