SPRING/ SUMMER 2018

B&K BENEFITS UPDATE

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DOL ISSUES GUIDANCE ON SOCIALLY RESPONSIBLE INVESTING AND SHAREHOLDER ACTIVISM

The DOL recently released Field Assistance Bulletin 2018-01 ("FAB"), which stresses that economic factors must be a fiduciary's primary consideration when making plan investment decisions. The FAB warns that fiduciaries who invest plan assets based on social policy goals, or who engage in shareholder activism in connection with plan investments, may violate their fiduciary duties under ERISA. This is a departure from the DOL's previous position, which permitted fiduciaries to take environmental, social, and governance ("ESG") factors into account when making plan investment decisions and voting proxies, provided that they were calculated to enhance the long-term economic value of the investment. Under the new FAB, a fiduciary's evaluation of the economics of an investment must be focused on the financial factors that have a material effect on the return and risk of an investment. While ESG factors may continue to be considered, an investment decision may not be influenced by ESG factors unless the contemplated investment would be equal to or superior to alternative available investments when judged solely on economic factors. The FAB also provides that any contemplated shareholder activism based on ESG factors requires a "documented analysis of the cost of the shareholder activity compared to the expected economic benefit (gain) over an appropriate investment horizon."

As a result of this update, plan sponsors should review any applicable socially responsible investing policies and procedures to ensure compliance with the FAB.

BUDGET ACT MODIFIES HARDSHIP DISTRIBUTION REQUIREMENTS

The recently enacted Bipartisan Budget Act of 2018 modifies the Internal Revenue Code requirements applicable to hardship distributions from defined contribution plans by: (1) removing the six-month prohibition on elective deferrals to retirement plans following a hardship distribution; (2) eliminating the requirement that participants first take all available plan loans before taking a hardship distribution; and (3) expanding the assets available for hardship distributions to include employer qualified non-elective contributions, qualified matching contributions, and profit sharing contributions. These changes are effective for plan years beginning on or after January 1, 2019.

BUDGET ACT CREATES COMMITTEE TO ADDRESS MULTIEMPLOYER PENSION PLAN SOLVENCY

In an attempt to address multiemployer pension system solvency concerns, the Bipartisan Budget Act of 2018 created a new "House and Senate Joint Select Committee on Solvency of Multiemployer Pension Plans" (the "Committee"). The Committee, which consists of 16 members (eight Senators and eight House members appointed by party leaders and divided equally between Republicans and Democrats), is tasked with providing recommendations and draft legislation to improve the solvency of multiemployer plans and the PBGC. The Committee must vote on a report containing detailed findings, recommendations, and proposed legislative language no later than November 30, 2018.

AGENCIES ISSUE PROPOSED FAQs ON MENTAL HEALTH PARITY ADDICTION EQUITY ACT COMPLIANCE

HHS, DOL, and the IRS (the "Agencies") recently issued proposed FAQs providing guidance on compliance with the requirements of the Mental Health Parity Addiction Equity Act of 2008 ("MHPAEA"), as amended by the Affordable Care Act, the 21st Century Cures Act, and ERISA. The proposed FAQs clarify that under MHPAEA a group health plan <u>may not</u>: (1) deny claims for applied behavioral analysis therapy to treat children with autism as experimental/investigational if therapy is supported by professionally-recognized treatment guidelines and the plan approves treatment for medical/surgical conditions that are supported by similar guidelines; (2) set dosage limits for prescription drugs to treat mental health and substance abuse disorders that are less than professionally-recognized treatment guidelines when the dosage limits for medical/surgical benefits equal or exceed such limits; (3) pay reduced reimbursement rates to non-physician practitioners providing mental health/substance use disorder benefits if the plan does not pay reduced rates to non-physician medical/surgical practitioners; or (4) exclude coverage for inpatient, out-of-network, nonhospital treatment for eating disorders (e.g. residential treatment facility) when the plan covers such treatment for medical/surgical conditions. The Agencies have requested comments on the proposed FAQs by June 22, 2018.

TAX CUTS AND JOBS ACT INCLUDES UNINTENDED CONSEQUENCE FOR HARDSHIP DISTRIBUTIONS

The 2017 Tax Cuts and Jobs Act ("TCJA") made numerous changes to the items that individual taxpayers are able to deduct on their personal income taxes. One of these modifications was the elimination of the casualty and loss deduction under Internal Revenue Code §165 for losses that are not incurred in a "federally declared disaster area." An unintended consequence of this change is that hardship distributions from plans that follow the IRS "safe harbor," which allows distributions for expenses to repair damage caused by a casualty loss as defined in Code §165, will be limited to losses incurred in federally declared disaster zones. This means that expenses associated with damages caused by a house fire, for example, would not be treated as eligible safe harbor hardship distributions, unless the fire was the result of a federally declared natural disaster.

As a result of this change, plans that continue to use the IRS safe harbor should ensure that administrative processes are in place to ensure that hardship distributions are made in accordance with Code §165, as amended. Plan sponsors may also want to consider amending their plans to continue pre-TCJA treatment of hardship withdrawals for casualty losses.

DOL WILL NO LONGER ENFORCE 2016 FIDUCIARY RULE – SEC STEPS IN TO FILL GAP

The U.S. Court of Appeals for the Fifth Circuit (whose jurisdiction includes Louisiana, Mississippi and the Eastern District of Texas) recently issued a decision in, *U.S. Chamber of Commerce v.* DOL, vacating the DOL's 2016 Fiduciary Rule, which required broker-dealers and other financial professionals to work in their client's "best interests" when providing financial advice. In response to this ruling, on March 19, 2018, the DOL announced that "pending further review" it "will not be enforcing the 2016 fiduciary rule."

Thereafter, on April 18, 2018, the SEC voted to release a proposed package of three rules, referred to as the "Best Interest Package," which are intended to "fill any gap between reasonable investor expectations and legal standards," according to SEC Chairman, Jay Clayton. Like the Fiduciary Rule, the Best Interest Package would subject broker-dealers and their associated persons to a "best interest" standard of care, requiring them to "act in the best interest of the retail customer at the time the recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer."

BENEFITS UPDATE

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