



Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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IRS EXTENDS DEADLINE FOR NON-GOVERNMENTAL QUALIFIED PLANS TO ADOPT CERTAIN CHANGES UNDER THE SECURE ACT, MINERS ACT AND CARES ACT

On August 3, 2022, the Internal Revenue Service (“IRS”) published Notice 2022-33 extending the plan amendment deadline for certain provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”), the Bipartisan American Miners Act of 2019 (the “Miners Act”), and the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the “CARES Act”). Prior to the relief, these amendments were generally due by December 31, 2022 with the SECURE and Miners Acts amendments due on the last day of the first plan year beginning on or after January 1, 2022. The new deadline for plan sponsors of non-governmental qualified retirement plans to amend their plans for the provisions enumerated in the Notice is December 31, 2025.

THE BEAR MARKET’S EFFECT ON PENSION PLANS

While economists may disagree over whether we have entered a recession, there is no disputing the downturn in the stock market over the last several months. Indeed, the current bear market has forced certain plan sponsors to make harsh decisions in dealing with severe declines in their pension plans, including, requiring their participants to contribute to their retirement plans.

This is the case for the WCBS Radio Pension Plan (“WCBS Pension Plan”), which covers 880 participants. The Trustees of WCBS Pension Plan announced that due to the plan’s investments decline in the stock market, plan contributions would have to increase by almost three percent to cover the anticipated shortfall. While the plan sponsor has pledged to contribute half of the necessary three percent, it is looking to participants to make up the difference. The decision was met with criticism by the Writers Guild of America East, the Union representing 20 of the station’s writers and other employees, and the Union has demanded that the station absorb all of the increase as part of their negotiation for a new contract.

The circumstances surrounding the WCBS’s Pension Plan are not unique. For instance, on July 29, 2022 the New York City Comptroller’s Office released a report revealing that for the Fiscal Year (“FY”) ending June 30, 2022, the New York City Retirement System (“NYCRS”) had a preliminary net investment return of -8.65% across all of its five pension funds. According to the report, when NYCRS undergoes major losses, the City must increase its contributions over the following five years “(with a one-year lag) through a formula determined by the City actuary.”

Nationwide, the median loss for public pensions is 7.9% before fees for year ending June 30, 2022, the worst since 2009. As long as market returns continue to plummet, pension funds such as the WCBS Pension Plan and NYCERS will be faced with tough financial decisions impacting not only the pockets of plan sponsors but potentially those of participants.

BIDEN ADMINISTRATION ISSUES STRONG REMINDER REGARDING CONTRACEPTIVE CARE THROUGH FAQs

On July 28, 2022, the Departments of Labor (“DOL”), Health and Human Services (“HHS”) and the Treasury (collectively, the “Departments”) published a set of Frequently Asked Questions (the “FAQs”) that included a strong reminder to plans and plan issuers of the legal requirement to cover contraceptive coverage, *without cost sharing*. The FAQs follow a string of actions taken by the Departments to ensure compliance with the contraceptive coverage mandate under the Patient Protection and Affordable Care Act of 2010 (“ACA”) as well as to enhance family planning services. The FAQs also precede an Executive Order (“EO”) issued by President Biden regarding securing access to reproductive and other healthcare services.

The FAQs were issued following a June 27, 2022 meeting held by HHS Secretary Xavier Becerra and Secretary of Labor Martin Walsh with health insurers and employee benefit plan stakeholders regarding barriers to accessing contraceptive services required under the ACA. After the meeting, the Departments penned a letter to group health plans and health insurance issuers reminding them of their obligations under the ACA with respect to covering contraceptive services at no cost.

Consistent with the content of the letter, on July 8, 2022, President Biden issued an EO in response to *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ___ (2022) the Supreme Court decision that overturned *Roe v. Wade*, 410 U.S. 113 (1973) and threatened access to reproductive healthcare services. Accordingly, the EO directed the Secretary of HHS to submit a report to the President within thirty (30) days identifying possible actions to take to safeguard and expand access to abortion care and the full range of reproductive healthcare services as well as to enhance family planning services such as emergency contraception among other measures. The FAQs followed.

Most recently, on August 3, 2022, President Biden issued a second EO regarding securing access to reproductive and other healthcare services. Citing that it is the policy of his Administration to bolster women’s access to reproductive healthcare services, “including their ability to travel to seek abortion care in States where it is legal,” President Biden directed the Secretary of HHS to determine steps to develop access to reproductive healthcare services, including via Medicaid for individuals travelling across state lines to the extent it is permitted by Federal law. In addition, President Biden directed the Secretary of HHS to consider taking appropriate actions to advance swift understanding of and compliance with Federal non-discrimination laws by healthcare providers that receive federal funding assistance.

The August 3, 2022 EO outlines certain actions HHS should take and they include “issuing additional guidance,” or taking appropriate steps in response to reports of non-compliance with Federal non-discrimination laws. In the meantime, the Departments, calling the reports of noncompliance “troubling and persistent,” noted that they “may take enforcement or other corrective actions as appropriate” as well.

HHS ISSUES PROPOSED RULE INTENDED TO STRENGTHEN ACA SECTION 1557 NONDISCRIMINATION PROTECTIONS

Section 1557 of the Patient Protection and Affordable Care Act of 2010 (“ACA”) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in federally funded health programs and activities. On August 4, 2022 the Department of Health and Human Services (“HHS” or the “Department”) published a proposed rule regarding Section 1557 of the ACA. The proposed rule revises an older rule (discussed below) which eliminated the prohibition against sex discrimination as inclusive of gender identity discrimination. The proposed rule reinstates regulatory protections from discrimination based on race, color, national origin, sex, age, or disability in covered health programs and activities. It further suggests reading Section 1557 consistently with the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that discrimination on the basis of sexual orientation and gender identity is tantamount to discrimination because of sex under Title VII of the Civil Rights Act of 1964 (“Title VII”).

Section 1557

In 2016, the Department finalized a Section 1557 regulation (the “2016 Rule”) that did not explicitly prohibit discrimination on the basis of sexual orientation but did prohibit discrimination on the basis of gender identity. The 2016 Rule was met with numerous challenges under the Administrative Procedure Act (“APA”) and the Religious Freedom Restoration Act (“RFRA”). In fact, one district court vacated the 2016 Rule because it defined discrimination on the basis of sex as inclusive of gender identity and termination of pregnancy. *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019). In 2021, the district court in *Franciscan Alliance* ordered that the Department be enjoined from interpreting or enforcing Section 1557 against the plaintiffs in a way that would mandate that the plaintiffs perform or provide insurance coverage for gender transition services or abortion. *Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361 (N.D. Tex. 2021), *amended*, No. 7:16-cv-00108-O, 2021 WL 6774686 (N.D. Tex. Oct. 1, 2021), *appeal pending*, No. 21-11174 (5th Cir. Nov. 21, 2021).

In 2020, the Department published its second Section 1557 regulation (the “2020 Rule”). The 2020 Rule rescinded several portions of the 2016 Rule including the prohibition on sex discrimination as inclusive of gender identity discrimination. Unsurprisingly, several parties challenged the rule under the APA. Several days later, the U.S. Supreme Court issued its *Bostock* decision holding that discrimination on the basis of sexual orientation and gender identity constitutes prohibited discrimination

based on sex under Title VII. 140 S. Ct. 1731. On May 10, 2021, the Department publicly announced that it would interpret Section 1557's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity consistent with *Bostock* (the "Bostock Notification"). Several court challenges to the Department's Bostock Notification under the APA and RFRA exist and remain pending.

On March 2, 2022, the Department issued guidance in harmony with the Bostock Notification establishing protection on the basis of gender identity in access to covered health programs and activities. The guidance does not address discrimination on the basis of sexual orientation. The Department's guidance states that "[c]ategorically refusing to provide treatment to an individual based on their gender identity is prohibited discrimination." In that same vein, "federally funded covered entities restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity likely violates Section 1557." One court challenge to the Department's gender-affirming care guidance under the APA remains pending. A district court decided that the March 2, 2022 notice and guidance constituted a final agency action and that plaintiff had credibly stated a threat of enforcement. Order, *Tex. V. EEOC, et al*, No. 2:21-cv-00194-Z (N.D. Tex. May 26, 2022). On March 31, 2022, the U.S. Department of Justice ("DOJ") penned a letter to State Attorneys General reaffirming protections against unlawful discrimination based on gender identity, including Section 1557 protections.

Summary of the Proposed Rule

The Department suggests, among other measures, that the proposed rule revise the 2020 Rule to restore regulatory protections from discrimination on the basis of race, color, national origin, sex, age, or disability in covered health programs and activities in keeping with the statutory text of Section 1557 and Congressional intent. Notably, the proposed rule states that the Department reads nondiscrimination on the basis of sex to include gender identity and sexual orientation, consistent with *Bostock* and related case law, as well as subsequent Federal agency interpretations. Further, according to the proposed rule, it proposes to "ensure equal program access on the basis of sex and prohibit discrimination on the basis of sex related to marital, family, or parental status." Moreover, the Department proposes changing its longstanding position and treating Medicare Part B as federal funding for purposes of civil rights enforcement.

A FEW REMINDERS (Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

AUGUST

ALL PLANS

- **Form 5500 Series (Annual Return/Report of Employee Benefit Plan) and Schedules**
 - August 1, 2022 is the deadline by which a plan administrator must file Form 5500 unless an extension is granted by filing Form 5558 before the due date (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).

HEALTH AND WELFARE PLANS

- **Form 720, Quarterly Federal Excise Tax Return**
 - August 1, 2022 is the deadline by which self-insured group health plans must pay fees to the Patient-Centered Outcomes Research Institute (“PCORI”) through Form 720 (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).

DEFINED BENEFIT PLANS

- **Form 5330**
 - August 1, 2022 is the deadline by which Form 5330 must be filed to report and pay certain excise taxes related to employee benefit plans (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).
- **Form 8955-SSA**
 - August 1, 2022 is the deadline by which Form 8955-SSA must be filed with the Internal Revenue Service (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).
- **Multiemployer Plan Summary Report**
 - August 30, 2022 is the deadline by which to file the multiemployer plan summary report unless the Internal Revenue Service granted an extension of time for filing the Form 5500 then the deadline is within 2 months after the Form 5500 is due.

DEFINED CONTRIBUTION PLANS

- **Form 5330**

- August 1, 2022 is the deadline by which Form 5330 must be filed to report and pay certain excise taxes related to employee benefit plans (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).
- **Form 8955-SSA**
 - August 1, 2022 is the deadline by which Form 8955-SSA must be filed with the Internal Revenue Service (the due date is July 31, 2022, however because it falls on a Sunday, it may be filed on the next day that is not a weekend day or legal holiday).
- **Second Quarter Pension Benefit Statements**
 - August 14, 2022 is the deadline by which benefit statements for the quarter ending June 30, 2022 must be sent to participants and beneficiaries.
- **Lifetime Income Illustrations**
 - August 14, 2022 is the deadline by which the initial lifetime income illustrations must be included with quarterly statements for the quarter ending June 30, 2022.

SEPTEMBER

HEALTH AND WELFARE PLANS

- **Summary Annual Report (“SAR”)**
 - September 30, 2022 is the deadline by which health and welfare plans must distribute the SAR to all plan participants.

DEFINED BENEFIT PLANS

- **Actuary Certification**
 - September 30, 2022 is the last day by which the actuary must certify the 2022 AFTAP to avoid October 1, 2022 presumption that 2022 AFTAP is less than 60%.
- **SAR**
 - September 30, 2022 is the deadline by which the SAR must be distributed to all plan participants unless the defined benefit plan is covered by the Pension Benefit Guaranty Corporation’s (“PBGC”) termination insurance program; PBGC-covered DB plans are required to furnish their participants with an annual funding notice instead.

DEFINED CONTRIBUTION PLANS

- **SAR**
 - September 30, 2022 is the deadline by which the SAR must be distributed to all plan participants.

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