

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

CHANTEL SHEAKS
EXECUTIVE DIRECTOR
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5458

VIA Electronic Delivery

April 3, 2020

Ms. Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC

Mr. Preston Rutledge
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

Ms. Victoria Judson
Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Gordon Hartogensis
Director
Pension Benefit Guarantee Corporation
1200 K St, NW
Washington, DC 2000

Dear Ms. Weiser, Mr. Rutledge, Ms. Judson, and Mr. Hartogensis:

Because of the COVID-19 pandemic, The U.S. Chamber of Commerce's (the Chamber) members are facing both economic and staffing challenges. Human resources and benefits departments are scrambling to respond to the current crisis, and many members do not have any employees physically present in their offices to perform administrative functions, such as preparing and mailing required employee benefit notices. Because of the current financial and staffing constraints, we request, among other items, that 1) the Agencies delay employee benefit plan reporting and disclosure to the full extent allowed by law; 2) provide for good faith compliance; and 3) allow employers additional time to comply with specific notice requirements.

As always, the Chamber and our members appreciate your attention to these matters, especially at a time when the Agencies are under similar staffing constraints as our members.

The Department of the Treasury and Internal Revenue Service

Reporting and Disclosure Delay

Under Code Section 7508A, the Secretary of the Treasury has the authority to delay time sensitive deadlines due to a federally declared disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act on a state by state basis.¹ With respect to pensions or other employee benefit plans, the Secretary of the Treasury may

¹ Revenue Procedure 2018-58 contains a list of time sensitive deadlines that are delayed in the case of a federally declared disaster, including employee benefit filings such as the Forms 5500 and 8955-A and other actions such as loan repayments, required minimum distributions and excess deferral distributions.

specify a period of up to one year which may be disregarded in determining the date by which any action is required or permitted to be completed under the Internal Revenue Code (Code). In the past, the Secretary of the Treasury extended relief to the taxpayer in the disaster area and to taxpayers whose records necessary to meet a deadline are in the covered disaster area.

In the past, disaster relief was based on a set incident period. However due to the unique nature of the COVID-19 pandemic, the current declared disasters have a start date of January 20, 2020 and are “continuing”. Furthermore, each day new states are added to the list of federally declared disaster areas for COVID-19. The Chamber appreciates that the Secretary of the Treasury may not be able to provide official guidance until there is an end date. However, the Chamber urges the Secretary of the Treasury to 1) assure the employee benefit plan community that once an end date is established, relief will apply for any actions on and after January 20, 2020; and 2) implement a delay to the full extent of his authority with respect to employee benefit plans, namely up to one year from any due date. This delay is especially important because the COVID-19 pandemic not only has severely impacted plan sponsors’ businesses but their vendors’ businesses as well, which means that plan sponsors may not be able to obtain the needed information for some forms. Plan sponsors and their vendors will be further hampered by the increased participant requests for loans, loan modifications, hardship withdrawals and other distributions.

Finally, because the Pension Benefit Guarantee Corporation (PBGC) follows the IRS disaster relief, information to the employee benefit community that relief is expected and expected to the full extent possible will ease both administrative and financial burdens for many employers with respect to PBGC payments and filings at a time when cash flow is at a premium.²

Spousal Consent

A defined benefit plan, money purchase plan or target benefit plan must distribute benefits in the form of a Qualified Joint and Survivor Annuity (QJSA) to a married participant unless the participant elects a different form and obtains spousal consent. Code §§ 410(a)(11); 417(a), (b). The spouse’s consent must acknowledge the effect of the election and be witnessed by a plan representative or a notary public. Code § 417(a)(2)(A)(i). Generally, a defined contribution plan will not require spousal consent for a distribution (including a loan or hardship withdrawal) if certain requirements are met. Code § 401(a)(11)(B)(iii); Treas. Reg. § 1.401(a)-20, Q&A 3.

Given the current situation of many employees working remotely and many regions with stay at home orders, a plan representative likely cannot witness such consent and the participant may not be able to have it notarized. We request that the IRS should provide that a plan will not be disqualified for making a distribution other than a QJSA with a spousal consent that is not notarized or witnessed by a plan representative if the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements and obtains such documentation as soon as reasonably possible. To the extent a defined contribution plan would require consent for a distribution, the same rule should apply.

Safe Harbor Plans

Safe harbor plans are not subject to the Actual Deferral and Actual Contribution Percentage (ADP/ACP) testing or the top heavy rules. Code §§ 401(k)(12);(13);(m)(10); (11); and 416(g)(4)(H) . Nothing in the Code provides how a plan may be amended mid-year to reduce or suspend a safe harbor contribution, when the amendment is effective or any required notice. The only statutory notice requirement is the initial notices to all eligible

² See 83 Fed. Reg. 30991 (Jul. 2, 2018) (PBGC Notice explaining that PBGC disaster relief is keyed to the IRS disaster relief. The relief applies to all premiums and filings, except for those on the Exceptions List.)

employees that must be provided within a reasonable time before any year and be sufficiently accurate and comprehensive to “apprise the employee of such rights and obligations.” Code § 401(k)(12)(d).

By regulation (Treas. Reg. § 1.401(k)(12)(g)), the IRS provides that a safe harbor match or nonelective contribution may only be amended during the plan year if:

- The employer either
 - Is operating at an economic loss (defined in Code Section 412(c)(2)(A)) for the plan year; or
 - Included a statement in the initial safe harbor notice that the plan may be amended during the plan year to reduce or suspend the matching or nonelective contributions but only 30 days after a supplement notice of suspension is provide;
- All employees are provided a supplement notice of amendment or suspension;
- The reduction or suspension is effective no earlier than the later of the date the plan amendment is adopted or 30 days after the supplemental notice is provided;
- Eligible employees are given a reasonable opportunity after receiving the notice and before the reduction or suspension to change their election;
- The plan is amended to provide that the ADP/ACP test will be satisfied for the entire plan year using the current year testing; and
- The plan satisfied the safe harbor provisions through the date of the plan amendment.

Because of the current economic situation, employers may need to suspend or reduce the safe harbor match or nonelective contribution to maintain the cash flow needed to meet payroll and other operating needs. The Chamber requests that through the end of the 2020 plan year, any reduction or suspension is effective on the date of the plan amendment if an employer provides the supplemental, regulatory notice no later than 90 days after the date of the amendment.

The Chamber also requests that the Treasury and IRS consider a top heavy safe harbor for 2020 plan year to avoid plans from terminating as a way to comply with the top heavy rules if a match or nonelective safe harbor contribution is suspended or amended mid-year.

Extend the Cash Balance Determination Letter Deadline

In Revenue Procedure 2019-20, the IRS expanded the determination letter program for statutory hybrid plans from September 1, 2019 to August 31, 2020. Given the COVID-19 pandemic, the Chamber requests that this program be extended to August 31, 2021.

Department of Labor and Pension Benefit Guarantee Corporation

Reporting and Disclosure Delay

ERISA Section 518 mirrors Code Section 7508A to provide that with respect to a pension or other employee benefit plan affected by a Presidentially declared natural disaster, the Secretary may prescribe a period of up to one year which may be disregarded in determining the date any action is required or permitted to be completed under the Employee Retirement Income Security Act (ERISA). The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amended ERISA Section 518 to add “a public health emergency declared by the Secretary of Health and Human Services” as an additional reason for a delay.

Similar to the Treasury request, The Chamber urges the Secretary of Labor to 1) assure the employee benefit plan community that once an end date is established for Presidentially declared COVID-19 disasters, relief will apply for any actions on and after January 20, 2020; 2) implement a delay to the full extent of his authority with respect to employee benefit plans, namely up to one year from the due date; and 3) waive any penalties if the required actions or notices are completed by the extended deadline. Not only should this apply to the Form 5500, but also to any other required notice such as the annual funding notice under ERISA Section 101(f) (29 U.S.C. § 1021(f)) and penalties under ERISA Section 502(c) (29 U.S.C. § 1132(c)). Immediate DOL action on the annual funding notices is critical because these notices are due on April 29, 2020 for calendar year plans, and many employers currently do not have the staff available to meet this deadline.

Notice of Required Payment Failure

If an employer fails to make a quarterly or other required contribution to a defined benefit plan, the employer must provide each participant, beneficiary and alternate payee a notices stating that the employer did not make the required contributions. ERISA § 101(j); (29 U.S.C. § 1021(d)). The notice must be given before the 60th day following the due date of the quarterly or other contribution.

The CARES Act allows a plan sponsor to delay any required quarterly minimum contributions due during calendar year 2020 until January 1, 2021, subject to interest from the original due date at the “effective rate of interest for the plan for the plan year which includes such payment date.” Although the CARES Act allows a plan sponsor to delay quarterly payments, it is unclear whether the notice requirement under ERISA Section 101(j) (29 U.S.C. Section 1021(d)) applies.

The Chamber recognizes the importance of these notices; however, given that many employers that will need to take advantage of the CARES Act relief will not have the staffing bandwidth to draft and send these notices, the Chamber requests that the Secretary of Labor allow employers that use this funding relief to provide a one-time notice to participants and beneficiaries 60 days after the contribution is due under the CARES Act.

Failure to make a required contribution is a PBGC reportable event. ERISA § 4043(c)(5); 29 U.C.C. § 1343(c)(5); and 29 C.F.R. § 4043.25. An employer must file the Form 10 with the PBGC within 30 days of the reportable event; however, an employer may instead file the Form 200 within 10 days of the due date for a missed contribution. The Chamber requests that if an employer makes any 2020 quarterly contribution by the date specified in the CARES Act, any missed contributions in 2020 will not be considered a reportable event and neither the Form 10 nor Form 200 will be required.

Good Faith Compliance

As noted above, human resource and benefit staff and service providers are under tremendous strain because of the COVID-19 pandemic. Although employers and plan sponsors are working as diligently as possible to ensure their employee benefit plans remain in compliance, we urge the Department of Labor to issue guidance that it will not take action with respect to employee benefit compliance issues during this period similar to what it has issued during other natural disasters, including

- Verification Procedures for Plan Loans and Distributions;
- Participant Contributions and Loan Repayments;
- Blackout Notices;
- ERISA Claims Compliance; and
- Form 5500 Filings

Conclusion

The Chamber sincerely appreciates the Agencies' attention to these and other employee benefit issues at this critical time. If you have any questions, please feel free to reach out to me directly.

Sincerely,

Chantel L Sheaks

Chantel Sheaks
Executive Director, Retirement Policy

Cc: Jeanne Klinefelter Wilson
Kristin Chapman