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BENEFITS REPORT

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With more than 25 attorneys practicing solely in employee benefits law, Trucker Huss is the largest employee benefits specialty law firm on the West Coast. Our in-depth knowledge and breadth of experience on all issues confronting benefit plans, plan sponsors and plan fiduciaries translates into real-world, practical solutions for our clients.

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Nonqualified Deferred Compensation Plans May Need to Be Updated for Revised Claims Regulations Relating to Disability Determinations

J. MARC FOSSE

While nonqualified deferred compensation plans ("Nonqualified Plans") are generally exempt from most of the substantive provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), Nonqualified Plans are still subject to ERISA's enforcement provisions, including claims regulations implementing section 503 of ERISA. For that reason, a Nonqualified Plan must contain procedures that comply with the ERISA's regulations for resolving participant claims.

Many Nonqualified Plans provide that a benefit will be paid upon a participant becoming disabled. A determination about whether a Nonqualified Plan participant has a disability may be made by the company, the Social Security Administration ("SSA") or the company's long-term disability insurance carrier. If the determination is made by SSA or the company's long-term disability insurance carrier, then the Nonqualified Plan is not required to contain disability claims procedures that are separate from the procedures that apply to claims that are not dependent on a finding of disability. On the other hand, if a company determines whether a participant has incurred a disability under

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Super Lawyers Recognizes Nine Trucker ✦ Huss Attorneys for 2017

Every year Super Lawyers identifies the top five percent of attorneys in each state or region, as chosen by their peers and through independent research to receive this honor. In addition, each year no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of Rising Star. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of exceptional attorneys.

The following Trucker Huss attorneys have been included in the Northern California Super Lawyers list:

Trucker Huss Super Lawyers — Northern California

- Barbara B. Creed
- R. Bradford Huss
- Clarissa A. Kang
- Mary E. Powell
- Robert F. Schwartz
- Benjamin F. Spater
- Charles A. Storke
- Lee A. Trucker

Trucker Huss Attorney **Robert R. Gower** was included in the **Northern California Rising Stars** list.

Brad Huss, Managing Partner of Trucker Huss, was also included in the distinguished list of **Top 100 Attorneys**.

the company's Nonqualified Plan, then the Nonqualified Plan must contain specific claims procedures for disability determinations made by the company.

The Department of Labor's Employee Benefits Security Administration ("EBSA") recently issued revisions to the required claims procedures for employee benefit plans that provide disability benefits to align them with the procedures that apply to group health plans pursuant to the Affordable Care Act. (For an in-depth discussion of the revised regulations, please see Tiffany Santos' article, "DOL Finalizes Disability Benefit Plan Claims Regulations" in the firm's December 2016 newsletter.) The EBSA's updated regulations apply to all claims filed under a Nonqualified Plan on or after January 1, 2018, if the claim requires a determination regarding whether the participant has a disability under the terms of the plan.[1]

Brief Overview of New Requirements for Claims Procedures for Disability Determinations

- ***Impartiality.*** Claims and appeals must be adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the benefit determination. In particular, those decision-makers cannot be hired, promoted, fired, or given a raise based on any expectation that they will support the denial of benefits.
- ***Complete Disclosure.*** Benefit denial notices must contain a complete discussion of why the plan denied the claim and the standards applied in reaching the decision, including the basis for

disagreeing with the views of health care professionals, vocational professionals, or with disability benefit determinations by the Social Security Administration. Pre-existing regulations merely require a statement of the right to bring a civil action and disclosure of any contractual limitations period.

- ***Timely notice of right to access.*** Claimants must be given timely notice of their right to access their entire claim file and other relevant documents and be guaranteed the right to present evidence and testimony in support of their claim during the review process.
- ***Opportunity to respond.*** Claimants must be given notice and a fair opportunity to respond before denials at the appeals stage can be based on new or additional evidence or rationales.
- ***Exhaustion of administrative remedies.*** Plans cannot prohibit a claimant from seeking court review of a claim denial based on a failure to exhaust administrative remedies if the plan failed to comply with the claims procedure requirements, unless the violation was the result of a minor error.
- ***Rescissions of coverage treated as adverse benefit determinations.*** Certain rescissions of coverage are to be treated as adverse benefit determinations triggering the plan's appeals procedures.
- ***Culturally appropriate language.*** Notices and disclosures issued under the claims procedure regulation must be written in a culturally and linguistically appropriate manner. Under certain circumstances, notices and disclosures must prominently display instructions for accessing these documents in a language other than English, and may be required to provide telephone customer service in that language.

Required Action

The claims procedures in a Nonqualified Plan should be updated on or before January 1, 2018, if the Nonqualified Plan requires a determination regarding a disability claim. The updated claims procedures should also be distributed to the plan participants.

If you have any questions, please contact the author of this article.

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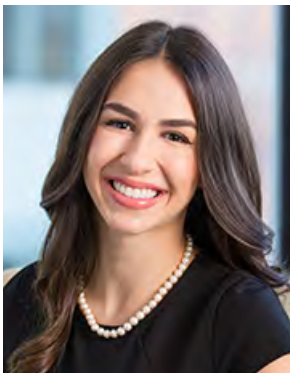
[1] Although the disability benefit claims regulations are expected to apply to claims filed on or after January 1, 2018, the Department of Labor is currently reviewing the regulations for questions of law and policy. As such, the regulations may be subsequently amended.

OTHER DEVELOPMENTS IN EMPLOYEE BENEFITS

ARA and Trucker Huss Weigh In on Nevada Fiduciary Law

The American Retirement Association (ARA) filed a comment letter raising concerns about the application of a new fiduciary regulation in the state of Nevada. Trucker Huss Attorney **Joe Faucher** contributed a written legal analysis to support that comment letter. That analysis concludes that courts would find that the Nevada statute is preempted by ERISA to the extent it seeks to regulate financial advisers who provide services to: (1) a retirement plan governed by ERISA; (2) the plan's fiduciaries; and/or (3) the plan's participants or beneficiaries. Click here for more information about the ARA's position and the comment letter.

18-Month Delay for Fiduciary Rule's Transition Period



ADRINE ADJEMIAN

On Thursday, August 31, 2017, the Department of Labor (the "DOL") published a proposed extension of the transition period and applicability date for the fiduciary regulation's (the "Fiduciary Rule") best interest contract exemption (the "BICE") and the principal transaction exemption. The DOL proposed amendment would also extend the applicability date of certain amendments to Prohibited Transaction Exemption ("PTE") 84-24, which applies to advisory transactions involving insurance and annuity contracts, and mutual fund shares.

The current transition period is from June 9, 2017, to January 1, 2018. The DOL proposes to delay this transition period by 18-months — to end on July 1, 2019. The proposal states the primary reason for this delay is to give the DOL "the time necessary to consider possible changes and alternatives to these exemptions." The DOL is concerned that "without a delay ... regulated parties may incur undue expense to comply with the conditions or requirements that it ultimately determines to revise or repeal." The DOL also notes that is has not yet completed its re-examination of the Fiduciary Rule and PTEs, as directed by President Trump back in February of this year.

The DOL also "anticipates it will propose in the near future a new and more streamlined class exemption built in large part on recent innovations in the financial services industry", but that neither such a proposal nor any changes to the Fiduciary Rule and PTEs "realistically could be implemented by the current January 1, 2018, applicability date."

The DOL is requesting comments regarding this proposed delay by September 15, 2017. Thereafter, the DOL will propose a final rule which will need to be approved by the Office of Budget and Management.

We will continue to monitor the status of the Fiduciary Rule and advise you of any significant developments.

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2018 Annual Open Enrollment Is Here – Are Your Health and Welfare Plans Ready?

TIFFANY N. SANTOS

It's that time of year again for employers and plan sponsors with calendar-year plans — time for annual open enrollment. Here are some items plan sponsors and plan administrators may wish to consider as they prepare amendments and enrollment materials to comply with applicable legal or regulatory requirements for the 2018 plan year:

FAQ Guidance Regarding Affordable Care Act ("ACA") Compliance

MHPAEA Guidance Q&A 5

On October 27, 2016, further guidance on implementing the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") was issued. Of note for calendar-year group health plans is the requirement to commence compliance with the "fail-first" or "step therapy" requirements issued by the Department of Health and Human Services ("HHS"), Department of Labor ("DOL") and Department of the Treasury ("Treasury") starting on January 1, 2018 (under the FAQs, plans have until the first plan year beginning on or after March 1, 2017 to comply). Under this guidance, such a requirement is considered a "non-quantitative treatment limitation" ("NQTL") and may not be imposed with respect to mental health or substance use disorder ("MH/SUD") benefits unless the processes, strategies, evidentiary standards, or other factors used in applying the limitation are comparable and applied no more stringently with respect to MH/SUD benefits than they would be with respect to medical/surgical benefits in the same classification. For example, a plan may not impose a requirement to try an intensive outpatient program before admission for inpatient treatment unless a comparable limitation also applies to medical/surgical benefits in the same classification. Thus, if no intensive outpatient program is available in an individual's geographic location and this limitation only applies to MH/SUD benefits (i.e., outpatient programs are available to access medical/surgical benefits within the individual's geographic area), the limitation would violate the MHPAEA.

FAQs Part 35

- **Preventive Care, Q&A 2** – On December 20, 2016, the Health Resources and Services Administration updated its Women's Preventive Services Guidelines regarding breast cancer screening for average-risk women, breastfeeding services and supplies, screening for cervical cancer, contraception, screening for gestational diabetes mellitus, screening for HIV infection, screening for interpersonal and domestic violence, counseling for sexually transmitted infections, and well-woman preventive visits (see this link). Non-grandfathered plans have until the first plan year beginning on or after December 20, 2017 to cover preventive care recommended by the new guidelines without any cost-sharing. For calendar-year plans, the compliance deadline is January 1, 2018.
- **Special Enrollment Right, Q&A 1** – These FAQs clarify that if an individual loses coverage under an individual plan (including an Exchange/Marketplace plan) for reasons other than the failure to timely pay premiums or for cause (e.g., fraud), such individual must be afforded a "special enrollment right" by a group health plan, provided she is eligible to enroll in the plan.

New Summary of Benefits and Coverage Template

As the ACA requires the summary of benefits and coverage ("SBC") to be provided with enrollment materials if plans permit participants to change their coverage options during an open enrollment period, plan sponsors must ensure that the SBCs they distribute follow current content requirements. On April 6, 2016, the enforcement agencies (HHS, DOL and Treasury) jointly issued a new SBC template for use beginning on the first day of the first open enrollment period that begins on or after April 1, 2017 — for calendar-year plans, this is the open enrollment period relating to coverage that commences on January 1, 2018. Taking into account input from consumer groups, the National Association of Insurance Commissioners and other stakeholders, the new template revises and updates the coverage examples and provides more information about cost-sharing. See this link for the new template and related instructions.

HSA Limits

For plans that offer participants a high deductible health plan with Health Savings Account ("HSA") option, the following inflation-adjusted limits apply for calendar year 2018 (see Revenue Procedure 2017-37):

Contribution to HSA Limit:

- Self-Only Coverage — $3,450
- Family Coverage — $6,900

High Deductible Health Plan

- Annual deductible may NOT be less than:
  - Self-Only Coverage — $1,350
  - Family Coverage — $2,700

- Out-of-Pocket Maximum may NOT exceed:
  - Self-Only Coverage — $6,650
  - Family Coverage — $13,300

Disability Benefit Plan Claims Procedures

For disability benefit claims filed on or after January 1, 2018, disability benefit plans must comply with recently finalized regulations that are intended to provide participants with many of the same protections required by the ACA for health plan participants. For further information about these claim procedure requirements, please see our article from the December 2016 newsletter.

Draft Affordable Care Act Reporting Forms and Instructions

As the employer and individual shared responsibility requirements are still in effect, plan sponsors may wish to review the recent draft forms and related instructions for coverage offered/provided in 2017 [Forms 1094-B, 1095-B (for providers of coverage such as insurers and multi-employer self-insured plans) and Forms 1094-C and 1095-C (employers with 50 or more full-time employees), reporting due in 2018]. See this link.

If you have any questions regarding the foregoing, please contact the author of this article

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FIRM NEWS

On Wednesday, September 20, **Elizabeth Loh** will speak at the 36th Annual ISCEBS Employee Benefits Symposium in Denver. The session, entitled *Go All the Way With HSAs,* will address the tax and legal structure of HSAs.

On Tuesday, October 17, **Nick White** will be the featured speaker at the San Diego Chapter of the Western Pension & Benefits Council meeting. Nick will lead what is anticipated to be a highly interactive presentation entitled, *Your 401(k) is NOT Okay: VCP Corrections for Incorrect Definition of Compensation and Other VCP Trends*.

On Wednesday, October 18, **Ben Spater** will be speaking on *ERISA Fiduciary Training and How to Avoid Personal Liability* at the Estate Planning Council of Stanislaus County — 2017 Annual Fall Seminar.

Callan Carter will be speaking at the 22nd Annual Advanced Employment Issues Symposium in Las Vegas, November 15–17, sponsored by BLR. She will speak on *California Benefits and Wellness in the ACA-Uncertain World.* With the threat of repeal to the federal Affordable Care Act, what do California workplaces need to know to ensure compliance with applicable benefits and wellness requirements?

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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