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# ERISA Update

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# DOL UPDATE



# Fiduciary Rule Transition Period

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- From 6/9/17 to 1/1/18
- Impartial Conduct Standards
  - Act in investors' best interest
  - Charge reasonable compensation
  - Avoid misleading statements
- No required disclosure during transition
  - Fiduciary status
  - Potential conflicts of interest
  - Restrictions on recommendations



# Fee Arrangements

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- Provider may still offset revenue sharing payments against its fee without PT (Adv Op 97-15A)
- TPA recommendation of RKs when revenue sharing payments exist not investment advice
- Provider charging for educational services ≠ investment advice
- Receiving referral fee for recommending 3rd party to provide investment advice = fiduciary



# State Payroll Deduction Plans

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- \*\*Regulation blocked by President Trump on May 17, 2017\*\*
- Final regs in August 2016 providing guidance on being exempt from ERISA
- CA, CT, IL, MD, MA and OR (WA, NJ)
- Employers not offering savings plan would automatically deduct a specific amount from wages unless employee elects out



# State Payroll Deduction Plans

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- Established by state law
- Implemented & administered by state
- State responsible for investment menu
- State responsible for securing assets
- State to ensure EE notification & mechanism for enforcing rights



# State Payroll Deduction Plans

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- EE participation voluntary (elect out)
- Employers not permitted to make matching or other contributions
- ER role limited to collecting/remitting payroll funds
- ER may provide state information
- ER may receive incentive from state



# State Payroll Deduction Plans

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- State may impose dist. restrictions
- No req. for funds to be timely deposited
- ER ceasing to be eligible under state law but continues deduction into program outside safe harbor = ERISA applies
- Regulations for state political divisions also blocked by President Trump on April 14, 2017





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# IRS UPDATE



# Using Forfeitures to Fund SH

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- Beginning in 2011, IRS took position that safe harbor contributions or QNECs/QMACs could not be funded by contributions subject to vesting
- Had to be nonforfeitable “when contributed to plan”
- Adverse effects on reducing employer contributions and top heavy exemption



# Using Forfeitures to Fund SH

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- Proposed amendment to reg so that only needs to be nonforfeitable “when allocated to participants”
- Discusses QNECs and QMACs in the reg, but also applicable to safe harbor contributions
- Although proposed, may be relied upon immediately (released January 18, 2017)
- But be careful for 2016 & 2017 plan years!
- Check plan document about use of forfeitures



# Using Forfeitures to Fund SH

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- Pre-approved PPA restatements were required by IRS to prohibit use of forfeitures for SH contributions
- Some documents state cannot use “unless provided otherwise under IRS guidance”
- May be able to use newly available mid-year SH amendment, but careful about allocation conditions



# Maximum Loan Amounts

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- IRS Memo to Examination Employees
- Dated April 20, 2017
- Max loan amount lesser of:
  - 50% of vested account balance; or
  - \$50,000 less highest outstanding balance within 1 year of loan request
- Prevent part from having permanent \$50,000 balance



# Maximum Loan Amounts

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- Part with \$110,000 vested balance
- Borrows \$30,000 in Feb, repays in April
- Borrows \$20,000 in May, repays in July
- Max loan if application in Dec?
- Either \$0 or \$20,000



# Hardship Withdrawals

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- IRS Memo to Examination Employees
- Dated February 23, 2017 (401(k)s)
- Dated March 7, 2017 (403(b)s)
- Support for hardships can be either:
  - Source documents; or
  - Summary of information
- Includes checklist of information to gather for each hardship event



# Hardship Withdrawals

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- Proper notification to participant
  - Hardship is taxable (early w/d?)
  - Cannot exceed immediate & heavy need
  - Exclusion from certain contributions
  - Participant must keep source documents
- Annual report to plan sponsor
- IRS may review if a participant takes more than 2 hardships in one plan year





# Medical Care

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- Who incurred the medical expenses?
- Relationship to participant (spouse, child, dependent, primary beneficiary)?
- Purpose of the medical care (diagnosis, treatment, prevention, associated transportation, long-term care)?
- Name and address of the service provider (hospital, doctor, dentist, chiropractor, other, pharmacy)
- Amount not covered by insurance



# Residential Purchase

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- Principal residence?
- Address?
- Purchase price and date of purchase
- Expected date of closing
- Types of costs and expenses covered (down-payment, closing costs, title fees)
- Name and address of the lender



# Educational Payments

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- Who incurred the educational payments?
- Relationship to participant (spouse, child, dependent, primary beneficiary)?
- Name and address of the educational institution
- Categories of post-secondary educational payments involved (tuition, related fees, room and board)
- Period covered by the educational payments (beg/end dates up to next 12 months)



# Eviction or Foreclosure

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- Principal residence?
- Address?
- Type of event (foreclosure or eviction)
- Name and address of the party that issued the foreclosure or eviction notice
- Date of the notice of foreclosure or eviction
- Due date of the payment to avoid foreclosure or eviction



# Funeral Expenses

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- Name of the deceased
- Relationship to participant (parent, spouse, child, dependent, or primary beneficiary)
- Date of death
- Name and address of the service provider (cemetery, funeral home)



# Repair to Residence

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- Principal residence?
- Address?
- Date of the casualty loss
- Describe the cause of the casualty loss (fire, flooding, weather-related damage)
- Describe the repairs, including the date(s) of repair (in process or completed)



# Mortality Table Update

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- Used in determining:
  - Minimum funding requirements
  - Minimum lump sum payments
  - 415 maximum limits
  - Benefit restriction rules under 436
  - PBGC variable rate premiums
- PPA required IRS to update mortality tables every 10 years



# Mortality Table Update

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- Proposed regs to be used beginning with 2018 plan years
- Likely to increase liabilities (3-5%)
- Lump sums should increase
- Larger amounts permitted under 415
- May reduce AFTAP below thresholds





# Mortality Table Update

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- Updated tables may affect or delay timing of:
- Potential termination of DB plan
- Fully funding the plan
- Reduction of minimum contributions
- Reduction of PBGC premiums
- Lowering administrative costs



# Cash Balance Benefit Formula

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- EP Memo dated 4/7/17
- CB pay credits definitely determinable when compensation based on limited time period (e.g., particular month), a designated bonus or pay over a certain threshold
- IF stipulated formula not subject to employer discretion



# Cash Balance Benefit Formula

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- Formula is definitely determinable regardless of employer's inherent ability to determine compensation outside the terms of the plan
- Qualification in form issue, not operational qualification issue
- Employer discretion not expressly stated in document but leads to manipulation of compensation may result in operational issue



# Example 1

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- The pay credit for Category 1 Participants is equal to ten (10) times the Participant's Special Bonus. The plan document provides that the amount of the "special bonus" is included in the participant's total annual compensation and specifically provides the employer with discretion to select the amount that will be used to determine the pay credit.



## Example 2

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- The hypothetical allocation for each participant is determined under the following schedule:
  - Owners - 10 times the amount of compensation paid to the owner for the month of March.
  - All others - 3 percent of compensation.
- The terms of the plan defines an owner's March compensation as Form W-2 compensation (or some other ascertainable amount) for March.



# (a)(4) Abusive Allocations

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- Issue 2016-5 of IRS Employee Plan News
- Anti-abuse standard
- Treas. Reg. 1.401(a)(4)-1(c)(2): interpreted in a reasonable manner consistent with the purpose of preventing discrimination in favor of HCEs
- Substance over form
- Worry over short service employees



## (a)(4) Abusive Allocations

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- Concern with allocation formulas which provide contributions to NHCEs who work few hours or receive little income AND exclude other NHCEs
- Started with IRS directive in 2004 with follow-up IRS letter in 2005
- IRS focus on designs provide allocations to just lowest paid employees with short service



# Summa Holdings v IRS

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- Domestic int'l sale corp (DISC) owned by Roth IRAs
- Turned \$3,500 contribution into \$3m account in 7 years
- IRS argued dividends improper and should be contributions
- 6th Circuit disagreed: substance over form argument unpersuasive





# EPCRS Update

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- Rev. Proc 2016-51
- Anything new from Rev Proc 2013-12?
- Repeated corrections of excessive 415 contributions will not prevent use of SCP (Rev Proc 2015-27)
- Flexibility in correcting overpayment (Rev Proc 2015-27)
- Correction methods for salary deferral failures (Rev Proc 2015-28)
- Changes re: DL program & Audit CAP



# EPCRS Update – User Fees

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- Moved out of EPCRS & into Rev Proc 2016-8
- Each year released in Rev Proc 20\_\_-4
- Anonymous submission – no longer return of 50% of fee if rescinded
- User fee for terminating orphan plan may be waived at IRS discretion
- Other fee discounts and exceptions



# EPCRS Update – User Fees

No. of Part.s	Fee		No. of Loan Fails	Fee
20 or fewer	\$ 500		13 or fewer	\$ 300
21 to 50	\$ 750		14 to 50	\$ 600
51 to 100	\$ 1,500		51 to 100	\$ 1,000
101 to 1,000	\$ 5,000		101 to 150	\$ 2,000
1,001 to 10,000	\$ 10,000		Over 150	\$ 3,000
Over 10,000	\$ 15,000			



# Elimination of DL Program

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Must use individually drafted plan if:

- DB-K plans & DB with 414(k) feature
- Multiemployer plans
- Gov't plan with DROP provisions
- Target benefit plans
- Stock bonus plans (other than ESOP)
- Union plans
- Medical plans under IRC 105
- Post-retiree medical plans (IRC 401(H))



# Required Amendments List (RAL)

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- Statutory & administrative changes in qualification requirements
- Existing plans must amend by end of 2<sup>nd</sup> calendar year after issuance
- 2016 RAL = Notice 2016-80 (December 27, 2016)
- Changes in qualification requirements requiring an amendment = NONE
- Changes in qualification requirements that may require an amendment =
  - Restrictions on union DB plan distributions in bankruptcy



# Pre-Approved Plan Documents

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- Rev Proc 2017-41 (6/30/17)
- Third restatement cycle (10/2/17)
- Pre-approved plan: no longer M&P or VS
- Still standardized and non-standardized
- Option between AA & BPD or just single document
- Allow 401(k) & MPPP or 401(k) & ESOP on same document



# Pre-Approved Plan Documents

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- Cash balance plan with interest credits based on actual rate of return on assets
- Non-electing church plans
- Trust agreement no longer reviewed
  - Trust provisions must be separate from plan doc
- Clarifies that opinion letter has no bearing on Title I issues
- Seeking comments on retention of legacy benefits in pre-approved plans



# 2016 Compliance List

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- Posted on IRS website on 2/27/17
- Hardship & loan relief for Hurricane Mathew & Louisiana Storms
- Mid-yr safe harbor amendments
- Closed DB 401(a)(4) relief & proposed regs
- Gov't NRA proposed regs
- Restrictions on union DB plan distributions in bankruptcy





# 2017 Compliance List

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- Posted on IRS website on 2/27/17
- Use of forfeitures for safe harbor contributions
- Closed DB 401(a)(4) relief
- Partial annuity distribution final regs
- Cash balance plan final regs
- Restrictions on certain DB plan benefits (cooperative or charity plan)



# 403(b) Plan Documents

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- Rev Proc 2013-22
- Establishes program for pre-approved docs
- Remedial amendment period beginning Jan. 1, 2010 (or plan effective date if later)
- Rev Proc 2017-18
- RAP ends on March 31, 2020
- Plans not in form compliance can correct by amendment or restatement & considered retroactive back to January 1, 2010 (or plan effective date if later)



# IRS Audit Procedures

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- IRS Memo to Examiners on 11/21/16
- Establishes strict timeline & process
- Up to 15 days deadline extension for responding to Information & Document Requests (IDRs)
- Second 15 day extension with manager's approval



# IRS Audit Procedures

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- Failure to completely & timely respond to IDR = delinquency notice
- Up to 10 days to respond to delinquency notice (unless manager approval)
- Up to 10 days to respond to pre-summons (unless manager approval)
- Issuance of summons



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# PBGC UPDATE



# Late Premium Penalty Reduction

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- Penalties for late premium payments cut in half
- PBGC Reg 4007.8 (Sept 23, 2016)
- Penalty is 2 ½% per month with ceiling of 50% of premium due
- Voluntary compliance penalty is ½% per month with ceiling of 25%
- \$25 floor on general penalty eliminated
- 80% waiver of penalty if:
  - Plan has 5 yr record of premium compliance; and
  - Premium is paid within 30 days after written notification by PBGC of premium delinquency



# Missing Participants

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- Redesign of missing part program
- DC plans would be eligible
- PBGC holds benefits for missing parts in terminated DC plans
- PBGC would help parts find and receive benefits being held
- May either be a “transferring” or “notifying” plan



# Missing Participants

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- Must complete diligent search in accordance with DOL regs
- Within 6 months of transfer date
- Then file information with PBGC
- Within 90 days of last distribution
- Transferred benefits will accumulate monthly interest on federal mid-term rate (2.04% as of May, 2017)





# Missing Participants

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- Less than \$5,000, part or bene will receive lump sum payment
- More than \$5,000, part has choice between annuity or lump sum
- If married, 50% QJSA unless part & spouse elect otherwise
- If part deceased, spouse has option of straight life annuity or lump sum
- If unmarried part, bene receives lump sum payment



# Missing Participants

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- Proposed fee of \$35 per part.
- Payable when amount paid to PBGC
- No continuing maintenance fee
- No charge for notification info
- Effective for plan term's after 2017



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# CASE LAW UPDATE



# Fiduciary Liability

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- Personal liability for fiduciary breaches
  - Restoration of losses
  - Other equitable or remedial relief
- Co-fiduciary liability
  - Enable a breach to occur or concealment
  - No reasonable steps to remedy breach



# Personal Liability

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- Perez v Bruister (S.D. Miss.)
- Owner accused of mismanaging ESOP
- Sale of stock found to be over-valued
- In 2014, after bench trial, owner liable for \$6.5 million in damages & interest
- In 2015, order to pay \$3 million in attorneys' fees & costs
- TRO and injunction freezing assets in 2015 during appeal



# Personal Liability

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- Appeal affirmed judgment in May, 2016
- In January, 2017, owner ordered to sell:
  - Life insurance policies
    - Provide medical information
  - 1978 truck
  - 2000 & 2004 Lexus
  - 2008 Mercedes



# Costly Repayment

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- US v Bodouva (2nd Circuit)
- COO failed to remit deferrals
- Indicted for embezzling \$127k
- Prior to trial, she restored \$126 to plan
- COO still required to forfeit the \$127k
- Court stated restitution is for the victims, forfeiture is punitive
- No legal authorization to offset



# Fiduciary Indemnification

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- Chesemore v. Fenkel (W.D. Wisc.)
- Judge order owner (fiduciary) to restore losses to ESOP
- Also ordered owner to indemnify other fiduciaries (trustees)
- Owner was “more culpable” fiduciary
- 7th Circuit affirmed





# Fiduciary Indemnification

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- U.S. Supreme Court asked DOL for its views
- Circuit split (2nd agrees with 7th, but 8th and 9th disagree)
- Plan argued that split irrelevant because prior to Amara decision
- Amara's expanded equitable remedies allows indemnification



# Tibble v Edison Intl

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- Retail vs. institutional shares
- When does 6 yr statute of limitation begin?
- Fiduciaries argued they reasonably depending upon consultant for advice
- USSC = ongoing duty to monitor investments



# Tibble v Edison Intl

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- Evaluate & put in writing specific recommendation made by consultant
  - Discussion of particular funds
  - Scope of consultant's review
  - Consideration of retail over institutional
  - Steps taken to evaluate consultant's advice
- Note factors or questions raised for each option
- Explain why decision made along with effective date



# Fee Comparison

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- Brotherston v Putnam (D. Mass.)
- Use of in-house investment option
- Use of expert's report on reasonableness of fees
- Cannot benchmark actively managed funds against passive or index funds
- Partial summary judgment granted



# Church Plan Litigation

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- Church plans exempt from ERISA
- ERISA § 3(33)(A): church plan means established and maintained by church
- ERISA § 3(33)(C): church plan includes a plan maintained by organization controlled by church
- What was Congress's intent?
- No deference given to IRS PLR's or DOL Advisory Opinions



# Advocate Health Care v. Stapleton

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- US Supreme Court - June 5, 2017
- Plan established & maintained by a church
- Plan established & maintained by a church includes a plan maintained by an organization controlled by or associated with a church = “principal-purpose organization”
- Presumption that each word Congress uses is there for a reason



# Advocate Health Care v. Stapleton

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- Added language's most natural reading is to enable a plan "maintained" by a principal-based org to substitute for a plan both "established" and "maintained" by a church
- "Established" requirement puts IRS in position to decide what constitutes a "church or convention or association of churches"



# Advocate Health Care v. Stapleton

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- Legislative materials not helpful
- ERISA treats “established” & “maintained” interchangeably for various purposes
- Amendment altering one requirement could naturally alter the other
- Plan maintained by principal-purpose org qualifies as church plan regardless of who establishes the plan





# Beneficiary Designations

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- Ruiz v Publix Super Markets (M.D. Fla.)
- Former ee wants to change designation
- Plan rep informs ee to send letter requesting change w/ new info
- Formal Beneficiary Designation Card completed but not signed
- Change invalid; substantial compliance insufficient



# SP Fiduciary Liability

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- *Patrico v Voya Financial* (S.D.N.Y.)
- Voya offers investment advice programs
- Online, self-service advice or managed accounts
- Voya contracts with Financial Engines to provide actual investment advice to participants
- Plaintiff alleges that Voya fee excessive as it doesn't provide any material service



# SP Fiduciary Liability

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- When does a service provider become a fiduciary?
  - Fees established prior to engagement as fiduciary cannot be used against fiduciary as unreasonable
- Amount of control over fees?
  - Voya fees set in service agreement
  - Voya not required to pass on fee difference due to administrative efficiency



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# Thank You!!

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