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November 2009

EMPLOYEE BENEFITS UPDATE

SELECT COMPLIANCE DEADLINES AND REMINDERS

401(k) Plan Annual Notices

As the year-end approaches, sponsors of calendar-year 401(k) plans should prepare to provide the following annual notices (if applicable):

- *Qualified Default Investment Alternative (QDIA)*. Plans that invest contributions of participants in a QDIA because the participant has failed to make an investment election must provide an annual notice at least 30 days before the beginning of the plan year.
- *Safe Harbor Notice*. Plan sponsors of safe harbor 401(k) plans must provide an annual notice to plan participants at least 30 and not more than 90 days prior to the beginning of the plan year. The safe harbor notice must describe the safe harbor contribution and other material plan features. The safe harbor notice can be combined with the QDIA notice.
- *Automatic Enrollment Notice*. 401(k) plan sponsors must provide an annual notice to all participants on whose behalf contributions may be automatically contributed to the plan at least 30 days before the beginning of the plan year. The automatic enrollment notice can be combined with the QDIA notice.

RETIREMENT PLAN DEVELOPMENTS

Final Regulations on Single Employer Pension Funding and Benefit Restrictions

The Internal Revenue Service (IRS) has issued extensive final regulations (approximately 300 pages) regarding funding balances and benefit restrictions for underfunded single employer defined benefit plans. The regulations also address the measurement of assets and liabilities for pension funding purposes. These regulations generally adopt the provisions of the proposed regulations and apply to plan years beginning on or after January 1, 2010. The final regulations, however, do not address a number of issues such as benefit restriction notices to participants, quarterly contribution elections and the determination of "plan related expenses" that must be reflected in the annual funding notices. The IRS noted that it anticipates addressing these issues in future proposed regulations.

Congress Introduces Bill to Provide Pension Funding Relief

Congress recently introduced the Preserve Benefits and Jobs Act (PBJA), which would provide additional pension funding relief for underfunded defined benefit pension plans. As reported previously, the Pension Protection Act of 2006 (PPA) transformed defined benefit funding rules and required plans to meet 100 percent of their obligations over a period of time. In its current form, the PBJA generally would allow single employer plans either to extend its amortization schedule to nine years or follow a 15-year payment schedule. With either option, these plans would be required to continue offering certain benefits and comply

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with specific conditions. The PBJA also may apply to certain multiemployer plans that meet a solvency test, allowing the repayment of recent losses over a 30-year period. The PBJA would extend the periods for rehabilitation and for funding improvement plans for certain plans in endangered and critical status.

Reinhart Comment: We will continue to monitor any developments and revisions to the PBJA as this bill works through Congress and the Senate.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Employer's Failure to Comply With Health Plan's COBRA Notice Requirements Prevents Reimbursement Under Stop Loss Policy

A district court held that an employer was not entitled to stop loss coverage when it did not follow the express terms of its health plan by failing to provide COBRA notice to employees within 30 days of their first day of a leave of absence, and compliance with the health plan was required by the terms of the stop loss policy. *Majestic Star Casino v. Trustmark*, 2009 WL 3260561 (N.D. Ill.). The employees incurred large health care expenses while on a 90-day leave of absence from the employer. The court stated that the terms of the health plan required the employer to provide COBRA notice within 30 days of the beginning of the leave, even though the actual loss of coverage did not occur immediately at the beginning of the leave. The employer's failure to send COBRA notices, in accordance with the terms of its health plan, was a breach of the stop loss policy. Therefore, due to the breach of the stop loss policy, the court held that the employer was not entitled to reimbursement under the policy.

Reinhart Comment: Insurers and stop loss carriers generally are not required to provide coverage during COBRA unless the employer contractually requires carriers to provide coverage. Stop loss policies that include provisions requiring COBRA coverage for qualified beneficiaries also may limit coverage only if employers follow the terms of its health plan.

Accordingly, employers and plan administrators should be mindful to follow the COBRA notice rules in their plan documents, as well as any other specific requirements in their stop loss policies. Also, employers should provide any plan amendments to its stop loss carrier during the course of the policy, particularly if such disclosure is required under the stop loss policy.

Congress Introduces Bill to Extend COBRA Subsidy Coverage

Congress recently introduced the Extended COBRA Continuation Protection Act of 2009 (COBRA Act), which would extend the original federal COBRA subsidy created by the American Recovery and Reinvestment Act of 2009 (ARRA). The proposed COBRA Act would extend COBRA benefits in three ways:

- Extend the total allowable time an individual could receive the COBRA subsidy by six months (from 9 to 15 months);
- Extend this assistance to individuals who are involuntarily terminated between January 1 and June 30, 2010; and
- Extend eligibility an additional six months for traditional COBRA coverage (from 18 to 24 months) for individuals who were terminated at the beginning of the recession in 2008.

HHS Establishes Online Form to Submit Notice of a PHI Breach Under HIPAA

As described in the [September 2009 EB Update](#), the 2009 HITECH Act requires health plans

and other covered entities subject to the protected health information (PHI) requirements under the Health Insurance Portability and Accountability Act (HIPAA) to report certain breaches to the Department of Health and Human Services (HHS). The HHS has now established an online form to submit these breaches.
<http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/brinstruction.html>

CMS Proposes Technical Changes to Medicare Part D Regulations

The Centers for Medicare and Medicaid Services (CMS) has proposed technical changes to the regulations relating to the Medicare Part D program that seek to improve payment rules and beneficiary protections, clarify participation requirements and implement new procedural policies. Specifically, proposed changes relate to procedures for coordination of benefits between Medicare Part D plans and other providers of prescription drug coverage.

Regulations for Mental Health Parity Act to be Further Delayed

Regulators recently missed their deadline to issue guidance on the federal Mental Health Parity and Addiction Equity Act of 2008 (Mental Health Act), which generally requires employers to provide the same coverage for mental health and substance abuse disorders as they do for other medical conditions in group health care plans. The Mental Health Act generally takes effect for plan years beginning on or after October 3, 2009, and for most calendar-year plans the effective date is January 1, 2010.

Reinhart Comment: Due to the delay in issuing regulations, group health plans may need to determine how to comply with the Mental Health Act without any regulatory guidance. The absence of formal federal guidance may leave health plans with possible compliance risks.

EEOC Publishes New Workplace Poster for "Equal Employment Opportunity"

The Equal Employment Opportunity Commission (EEOC) published a notice revising its "Equal Employment Opportunity is the Law" poster to reflect changes required by the employment provisions of the Genetic Information Nondiscrimination Act (GINA). These provisions are scheduled to become effective November 21, 2009.

Additionally, this new version reflects current federal employment discrimination law, including the Americans With Disability Act Amendments Act of 2008. This revised posting can be found at the following link on the EEOC Web site:

<http://www.eeoc.gov/posterform.html>

EEOC Issues Guidance on ADA Compliance With Pandemic Preparedness Rules

The EEOC recently issued an updated guidance providing information regarding the Americans With Disability Act (ADA) and pandemic planning in the workplace. This guidance identifies established ADA principles regarding best practices for pandemic preparation and response with respect to influenza, specifically the 2009 H1N1 virus. This EEOC guidance focuses on implementing the strategies in a manner that is consistent with the ADA.

OTHER DEVELOPMENTS

DOL Guidance on Form 5500 Service Fee Reporting Requirements for 2009

Employers and plan administrators should be preparing for the new reporting and disclosure requirements on the IRS Form 5500 and the related Schedule C for 2009, which require plan sponsors to report direct and indirect compensation received by service providers. The

Department of Labor (DOL) recently published additional guidance regarding these rules, which are effective for Forms 5500 that are filed for plan years beginning on or after January 1, 2009.

The DOL noted that the purpose of these new requirements is to require plan sponsors to review and monitor the plan's fees and expenses as part of its ongoing fiduciary duty to the plan and its participants and beneficiaries. Such disclosures include:

- The identity of all service providers that receive direct or indirect compensation of more than \$5,000 during the plan year.
- The type of services being provided, and any relationship between the service provider and the plan or another party in interest to the plan.
- The total indirect or direct compensation paid to the service provider.

Reinhart Comment: Plan sponsors and administrators should work to establish procedures necessary to comply with these new requirements for the 2009 reporting year. These new rules will require plans to work with service providers to obtain the information required in Schedule C. The plan's current contracts with service providers may also need to be reviewed to determine the providers' duties to provide such information to the plan.

Expanded FMLA Coverage for Military Families

President Obama recently signed the Fiscal Year 2010 National Defense Authorization Act (National Defense Act), which expands the exigency leave benefits to include the needs of family members of active duty service members, rather than just reservists and members of the National Guard, under the Family Medical Leave Act (FMLA). This National Defense Act also expands the caregiver leave provisions under the FMLA to now include coverage for veterans who are undergoing medical treatment, recuperation or therapy for injuries occurring any time during the preceding five years. These rules became effective immediately on October 28, 2009.

Reinhart Comment: While these changes to the FMLA military leave provisions may apply only to a small percentage of employees, the new coverage provisions may require employers to modify their FMLA policies and administrative forms to ensure full compliance with these new rules.

IRS Announces 2010 Cost of Living and Inflation-Adjusted Benefits

The IRS recently issued official guidance regarding cost of living adjustments and inflation-adjusted tax rate tables for 2010. These rates mostly remain the same as those from 2009. A few select limits are listed below.

Reinhart Comment: Employers and plan administrators may wish to review communications to plan participants to determine whether it is necessary to advise participants and employees of these limits. Additionally, plan documents may need to be reviewed to confirm whether these limits automatically apply or whether an amendment is needed to incorporate any changes.

Retirement Plan Limits:

	2009 Limits	2010 Limits
401(k) Contributions	\$16,500	\$16,500
Catch-up Contributions	\$5,500	\$5,500
Compensation Limit	\$245,000	\$245,000
Highly Compensated Employees	\$110,000	\$110,000
Key Employee Officer Compensation	\$160,000	\$160,000
Maximum Annual Contribution Defined Contribution Plan	\$49,000	\$49,000
FICA Wage Base	\$106,800	\$106,800

Health Plan Limits:

	2009 Limits	2010 Limits
Health Savings Accounts		
High deductible health plan (HDHP) - minimum annual deductible		
Individual Coverage	\$1,150	\$1,200
Family Coverage	\$2,300	\$2,300
HDHP - maximum out-of-pocket limit		
Individual Coverage	\$5,800	\$5,950
Family Coverage	\$11,600	\$11,900
HSA monthly contribution - 1/12 lesser of annual deductible or statutory limit		
Self-only coverage limit	\$3,000	\$3,050
Family coverage limit	\$5,950	\$6,150
Catch-up contributions (age 55 or older)	\$1,000	\$1,000
Medical Savings Accounts (Archer)		
Health Plan limits - annual deductible (not less than/not more than)		
Individual coverage	\$2,000/\$3,000	\$2,000/\$3,000
Family coverage	\$4,000/\$6,050	\$4,050/\$6,050
Health Plan limits - out of pocket maximum		
Individual coverage	\$4,000	\$4,050
Family coverage	\$7,350	\$7,400
Maximum contribution limits		
Individual coverage (65% of deductible)	\$1,300/\$1,950	\$1,300/\$1,950
Family coverage (75% of deductible)	\$3,000/\$4,537.50	\$3,037.50/\$4,537.50