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March 2010

## EMPLOYEE BENEFITS UPDATE

### SELECT COMPLIANCE DEADLINES AND REMINDERS

#### Employer CHIP Notice Deadline Is Approaching

As discussed in more detail below, employers must provide the Employer Children's Health Insurance Program (CHIP) Notice by the later of: (1) the first day of the first plan year beginning after February 4, 2010; or (2) May 1, 2010.

#### HSA Contribution Deadline for 2009 is April 15, 2010

The deadline for making contributions for 2009 to a health savings account (HSA) is April 15, 2010. Internal Revenue Service guidance provides that, although the dollar limit on HSA contributions is determined monthly, HSA contributions for a taxable year may be made in one or more payments, as long as the payments are not made before the beginning of the applicable tax year and not later than the original filing deadline (without extensions) for the individual's federal income tax return for that year (*i.e.*, April 15th for calendar-year taxpayers).

### RETIREMENT PLAN DEVELOPMENTS

#### DOL Issues Field Assistance Bulletin No. 2010-01 for 403(b) Plans

The Department of Labor (DOL) issued Field Assistance Bulletin (FAB) No. 2010-01 in response to both questions regarding the scope of and conditions for relief stated in FAB 2009-02 and questions regarding the safe harbor provided by 29 CFR section 2510.3-2(f). FAB 2009-02 provided relief for sponsors of Code section 403(b) plans with respect to the Form 5500 reporting requirements applicable to 403(b) plans for the 2009 plan year. In particular, as reported in [Reinhart's August 2009 Employee Benefits Update](#), if an annuity contract or custodial account satisfies specific requirements noted in FAB 2009-02, the plan sponsor does not need to report the contract or custodial account as part of the employer's plan or as plan assets. The specific requirements noted in FAB 2009-02, which must be satisfied to not report a contract or custodial account are:

- the contract or account was issued prior to January 1, 2009 and is fully vested;
- the employer ceased having any obligation to make or forward contributions to the contract or account, and in fact ceased to do so prior to January 1, 2009; and
- the employee can legally enforce all rights and benefits under the contract or account against the insurer or custodian without any involvement of the employer.

FAB No. 2010-01 includes guidance in a question-and-answer format, clarifying FAB 2009-02's requirements noted above regarding Form 5500 reporting requirements applicable to 403(b) plans. FAB No. 2010-01 states that the relief provided by FAB 2009-02 is available when an employer gives information such as the employment status of the contract owner to the 403(b) provider. This does not represent involvement of the employer greater than that allowed under FAB 2009-02. However, FAB 2009-02's relief will not apply

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if the employer has to approve enforcement of the employee's contractual rights. Notably, FAB No. 2010-01 states that the relief contained in FAB 2009-02 applies after the 2009 reporting year. Also, if a contract or account satisfies the conditions of FAB 2009-02, the plan sponsor does not need to report the contract or custodial account, even if such contract or custodial account is known by the plan administrator and is identifiable.

FAB No. 2010-01 also addressed the safe harbor provided by 29 CFR section 2510.3-2(f) relating to tax sheltered annuities. The FAB noted that to satisfy the safe harbor, employers must generally allow employees to choose from more than one investment product and more than one 403(b) contractor. However, the DOL notes that an employer can have one provider and still satisfy the safe harbor if an employee can move his or her interest in a 403(b) account to a different provider. Also, if an employer can show that because of higher administrative costs of having more than one contractor, the employer will not allow the use of its payroll system to transmit contributions via payroll deductions to a 403(b) contractor, the employer may be able to make available one contractor who offers many types of investment products.

### **DOL Publishes Final Regulations Regarding Civil Penalties Under ERISA Section 502(c)(8)**

These final regulations provide that under ERISA section 502(c)(8) the Secretary of Labor may assess civil penalties for which the plan sponsor is liable for some violations of ERISA section 305. These violations of ERISA section 305 generally relate to the failure to timely adopt a funding improvement plan or rehabilitation plan for a multiemployer plan in endangered or critical status, or a failure to reach the applicable benchmarks for a plan in endangered status by the close of the funding improvement period. The Secretary of Labor may assess a maximum penalty for each violation of \$1,100 per day.

Before the Secretary of Labor assesses a penalty, the DOL must send the plan sponsor a written notice describing the intent of assessing a penalty, the amount of the penalty, the period to which the penalty relates, the reason for assessing the penalty and the provision violated. If the plan sponsor does not respond to the DOL's notice within 30 days of being served, he or she waives the right to contest the notice. The final regulations are effective on March 29, 2010. There is also a companion tax under the Internal Revenue Code, which is not addressed by this guidance.

## **HEALTH AND WELFARE PLAN DEVELOPMENTS**

### **DOL Publishes Model Employer CHIP Notice**

On February 4, 2010, the DOL announced the availability of a model employer notice pursuant to the requirement in the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA requires that the Departments of Labor and Health and Human Services develop a model notice for employers to utilize to notify employees of group health plan premium assistance under Medicaid and under CHIP, which is available in the employee's state of residence. This model notice is referred to as the Model Employer CHIP Notice.

An employer may modify the Model Employer CHIP Notice to provide more state-specific information to its employees. However, employers must include the minimum relevant state contact information for an employee who is a resident of a state offering premium assistance.

- *Employers Who Must Provide the Employer CHIP Notice.* An employer that maintains a group health plan in a state (*i.e.*, provides benefits for medical care in a state) that offers premium assistance under Medicaid or under CHIP to purchase coverage under a group health plan is required to provide the Employer CHIP Notice.

The Department of Health and Human Services reported that 40 states have at least one program that offers premium assistance under Medicaid or under CHIP to purchase coverage under a group health plan.

- *Employees Who Are Entitled to an Employer CHIP Notice.* An employer must provide an Employer CHIP Notice to each employee. The Notice advises employees of any available premium assistance in the employee's state of residence under Medicaid and CHIP for health coverage of the employee or the employee's dependents. This employer obligation applies independent of an employee's enrollment status.
- *Timeline to Provide the Employer CHIP Notice.* Employers must provide the initial Employer CHIP Notice by the later of: (1) the first day of the first plan year beginning after February 4, 2010; or (2) May 1, 2010. Therefore, for plan years beginning February 4, 2010 to April 30, 2010, the Employer CHIP notice must be provided by May 1, 2010. For employers whose next plan year begins after April 30, 2010, the Employer CHIP notice must be provided by the first day of the next plan year (January 1, 2011 for calendar year plans). Thereafter, employers must provide the Employer CHIP Notice annually.
- *Delivery of the Notice.* To reduce administrative expenses, plans can send the Employer CHIP Notice with other information such as enrollment packets, open season materials or the plan summary plan description if: (1) the materials are sent by the deadline above; (2) the materials are sent to all employees entitled to receive the Employer CHIP Notice; and (3) the Employer CHIP Notice is included as a separate document, and in a way whereby an employee who is potentially eligible for premium assistance could reasonably be expected to appreciate its significance.
- *New Enrollment Opportunities After CHIPRA.* As reported in [Reinhart's March 2009 Employee Benefits Update](#), CHIPRA created new enrollment opportunities effective April 1, 2009. Group health plans must permit eligible employees and dependents to enroll in two additional situations: (1) if they lose eligibility for Medicaid or CHIP coverage and request enrollment within 60 days after the termination of coverage; or (2) if they become eligible to participate in a premium assistance program under Medicaid or CHIP and request enrollment within 60 days after they are determined to be eligible for premium assistance.

#### **DOL Publishes Additional Frequently Asked Questions (FAQs) for Schedule C of the 2009 Form 5500**

The DOL published two new FAQs relating to how compensation paid to pharmacy benefit managers (PBMs) is reported on Schedule C of the Form 5500. Previously, the DOL published a set of 40 FAQs regarding the 2009 Form 5500 Schedule C in July 2008 and 25 supplemental FAQs regarding the 2009 Form 5500 Schedule C in October of 2009. The DOL added the two new FAQs to the supplemental FAQs as numbers 26 and 27.

The new FAQs clarify that PBMs receive the following types of fees for their services, which are reportable as direct compensation for Schedule C purposes:

- dispensing fees paid with plan assets;
- administrative fees paid with plan assets;

- payments for ancillary administrative services by the plan or payments by the plan sponsor that are reimbursed by the plan (e.g., recordkeeping, data management and information reporting, formulary management, participant health desk service and utilization review among others).

The FAQs note that unless the DOL issues additional guidance, discount and rebate revenue from pharmaceutical companies paid to PBMs will generally not be treated as reportable indirect compensation for Schedule C purposes, even if the discount or rebate is based in part on the quantity of drugs dispensed under ERISA plans administered by the PBM. However, if an agreement exists between the plan and the PBM that the rebates or discounts are compensation to the PBM for managing the plan's prescription drug coverage, or for dispensing prescriptions or other administrative and ancillary services, those rebates or discounts are reportable indirect compensation.

### **DOL Publishes Revised Application and Instructions for Expedited Review of a COBRA Subsidy Denial**

An expedited review process is included in the COBRA subsidy rules whereby a person may ask for DOL review when a group health plan denies the individual's request to be treated as an assistance eligible individual. The DOL has revised the application to request this expedited review to incorporate recent applicable changes to the COBRA subsidy rules made by the Department of Defense Appropriations Act. These changes were reported in [Reinhart's January 2010 Employee Benefits Update](#). The COBRA premium subsidy has been extended to apply to involuntary terminations through March 31, 2010.

## **GENERAL DEVELOPMENTS**

### **DOL Publishes EFAST2 User Guides**

The DOL posted six EFAST2 user guides to help filers electronically file Forms 5500. The six user guides the DOL posted online include: EFAST2 Guide for Filers and Service Providers; EFAST2 Tutorial; EFAST2 IFile User Guide; EFAST2 Filing Search Guide; Most Common EFAST2 Filing Errors; and EFAST2 2009 & 2010 Third Party Software Test Plan & Certification Procedures. The user guides are available at [http://www.efast.dol.gov/fip/forms\\_pubs.html](http://www.efast.dol.gov/fip/forms_pubs.html).

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