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December 2010

EMPLOYEE BENEFITS UPDATE

SELECT COMPLIANCE DEADLINES AND REMINDERS

Cycle E Determination Letter Filings Due January 31, 2011

Remedial amendment period Cycle E individually designed plans must be submitted for a favorable Internal Revenue Service (IRS) determination letter no later than January 31, 2011, to rely on the extended period during which qualification amendments can be retroactively adopted. Cycle E plans include those sponsored by employers with tax identification numbers ending in a five or zero.

403(b) Plan Notice

Plan participants in a 403(b) plan who have the right to make elective deferrals should be provided a meaningful notice of that right each year under the universal availability rules for such plans. Employers who have not been providing this universal availability notice may want to contact their plan vendors for a sample notice. For additional information, see the FAQs for 403(b) plans on the IRS Web site at http://www.irs.gov/retirement/article/0,,id=172433,00.html.

RETIREMENT PLAN DEVELOPMENTS

IRS Extends Deadline for Adopting PPA Amendments on Funding-Based Benefit Restrictions Under Single-Employer Defined Benefit Plans and Vesting Under Hybrid Plans

The Small Business Jobs Act of 2010 permits 401(k) and 403(b) plans with Roth contribution programs to allow participants to make in-plan rollovers from non-Roth accounts to a designated Roth account after September 27, 2010. The IRS posted changes to the 2010 Form 1099-R on its Web site and issued Notice 2010-84 to provide guidance on in-plan Roth rollovers. The following are highlights from the IRS guidance:

Availability of In-Plan Rollovers

- In-plan rollovers can be either direct rollovers or 60-day rollovers.
- Only eligible rollover distributions can be rolled over to a Roth account.
- A plan can be amended to allow new in-service distributions from non-Roth accounts to permit in-plan rollovers.
- Participants, surviving spouse beneficiaries, and alternate payees who are current or former spouses are eligible for in-plan Roth rollovers.

Taxes and Withholding

- In-plan rollovers are not subject to the mandatory 20% withholding on eligible rollover distributions.

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22 East Mifflin Street
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8400 East Prentice Avenue
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303-843-6042

- In-plan rollovers are not subject to the 10% early withdrawal penalty under Code section 72(t).
- Generally, the taxable amount of the rollover is included in income for the year of distribution.
- Special rules apply for 2010 rollovers. The amount will be taxed half in 2011 and half in 2012, unless the participant elects to be taxed for the full amount in 2010.

Special Rules

- A description of the in-plan Roth rollovers must be included in the plan's 402(f) notice. The IRS has provided updated language for its safe harbor notice.
- Unlike a conversion or rollover to a Roth IRA, a participant cannot change his mind and recharacterize an in-plan Roth rollover.

Plan Amendments

- A 401(k) plan must be amended by the later of (a) the last day of the plan year in which the amendment is effective or (b) December 31, 2011.
- A 403(b) plan must be amended by the later of (a) the last day of the plan year in which the amendment is effective or (b) the end of the plan's remedial amendment period.

IRS Issues Guidance on Funding Relief for Multiemployer Defined Benefit Plans

On November 26, 2010, the IRS issued Notice 2010-83, providing further guidance on the funding relief added by the Preservation of Access to Care for Medicaid Beneficiaries and Pension Relief Act of 2010 (PRA 2010). As background, PRA 2010 added Code section 431(b)(8), which contains two special funding rules permitting plans that pass the solvency test to amortize investment losses and "smooth" assets over a longer period than generally allowed. The solvency test requires that the plan's actuary certify that the plan is projected to have sufficient assets to timely pay expected benefits and expenditures over the extended amortization or smoothing period. These special rules and the IRS guidance is discussed below.

Special Rules

Amortization	The special amortization rule permits net investment losses incurred in the first two plan years ending after August 31, 2008, to be amortized separately over 29 years (instead of fifteen years).
Asset Valuation	The special asset valuation rule permits a plan to spread eligible net investment losses over ten years (instead of five) and extends the actuarial value corridor to 80-130% (instead of 80-120%).

Actuarial Calculations and Net Investment Losses

The notice provides guidance on actuarial calculations for the funding relief, including the determination of eligible net investment losses under various circumstances.

Election of Funding Relief

The notice requires a plan to decide whether to apply the funding relief by the earliest of (a) the deadline for certification of the plan's funding status for the 2011 plan year, (b) the

actual date of certification, and (c) June 30, 2011. Plans that apply the funding relief will be subject to restrictions regarding benefit increases effective on or after June 25, 2010.

Recertification

If a plan decides to apply the special funding rules after certification of the plan's funding status under Code section 432, the plan sponsor can request that the actuary redetermine the plan's status, taking into account the special funding rules.

Reporting and Disclosure

A plan that uses one or more special funding rules must notify participants and beneficiaries within 30 days after the deadline for electing the funding relief. The plan must also provide notice to the Pension Benefit Guaranty Corporation (PBGC) within 30 days after the decision is made or by January 18, 2011, if later. A plan is permitted, but not required, to file an amended Form 5500 reflecting the funding relief. Alternatively, the plan sponsor must file an attachment to the Schedule MB for the subsequent year showing the difference between the previously reported amounts and the calculations required by the notice.

DOL Issues Proposed Regulations on Annual Funding Notice for Defined Benefit Plans

The PPA amended section 101(f) of the Employee Retirement Security Act of 1974 (ERISA) to require all PBGC-covered defined benefit plans to provide an annual funding notice in lieu of a summary annual report, effective for plan years beginning on or after January 1, 2008. In February 2009, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2009-01 to provide model notices and interim guidance to plan administrators on complying with the new requirements. The DOL has now issued proposed regulations implementing the annual funding notice requirement. The proposed regulations incorporate guidance from FAB 2009-01, which remains in effect until the regulations are finalized.

The annual funding notice must be provided to the PBGC, each plan participant and beneficiary, each labor organization representing participants and beneficiaries, and in the case of a multiemployer plan, each contributing employer. The notice must include information on the plan's funding percentage or funding target attainment percentage, the plan's assets and liabilities, a description of how the plan's assets are invested, and a statement of the plan's funding policy. The notice must also include a general description of benefits guaranteed by the PBGC and a summary of rules governing plan terminations for single-employer plans or governing reorganization or insolvency for multiemployer plans.

The proposed rule would exempt insolvent or terminated plans from providing the funding notice. Furthermore, in the case of a merger, only the surviving plan needs to provide a funding notice, which must include information on the merger.

Pending the adoption of a final rule, plan administrators can use the model notices in FAB 2009-01 or the proposed regulations. Use of the models is not mandatory, but will be deemed to satisfy the content requirements under ERISA section 101(f). Public comments on the proposed regulations are due no later than January 18, 2011.

PBGC Finalizes Regulation on Debt Collection Process

The DOL proposed a rule that would amend its regulations on qualified default investment alternatives and on participant-level disclosures to require more detailed information on life-cycle or target date funds. A target retirement date fund (TDF) is designed for a specific retirement date and allocates investments among different asset classes, becoming more conservative over time. Because TDFs with the same target date can have different

investment strategies, the TDFs can have very different levels of risk and investment results over time.

The proposed rule would require disclosures on TDFs to include:

- A narrative explanation of the TDF asset allocation, how it will change over time, and when the TDF will reach its most conservative asset allocation.
- A graphical illustration, such as chart or table, showing how the TDF's asset allocation will change over time.
- For a TDF that refers to a particular date (for example, Retirement 2030 Fund), the age group for which the fund is designed, an explanation of the relevance of the date, and any assumptions about a participant's or beneficiary's contribution or withdrawal intentions on or after that date.

Public comments on the proposed regulations are due no later than January 14, 2011.

IRS Provides Examples of Unforeseeable Emergencies Under Code Sections 457 and 409A

In Revenue Ruling 2010-27, the IRS provided guidance on what constitutes an unforeseeable emergency distribution under Code section 457(b) and applicable regulations. The Revenue Ruling describes three factual situations under which a participant is requesting an unforeseeable emergency distribution from a 457(b) plan. In the first situation, the distribution is requested to pay for the cost of repairing significant water damage in the participant's home because of a water leak in the basement. The second situation involves funeral expenses for the participant's adult son who is not a Code section 152(a) dependent. The third situation relates to payment of accumulated credit card debt, which is not because of extraordinary or unforeseeable circumstances.

The IRS ruled that the plan was permitted to provide unforeseeable emergency distributions under the first two factual situations because the need to pay the expenses is an extraordinary and unforeseeable circumstance that arises from events beyond the control of the participant, and the facts were substantially similar to specific examples of distributions permitted under the regulations and the plan. Under the third situation, the IRS ruled that no distribution was permitted because the facts presented did not indicate that an unforeseeable emergency circumstance resulting from events beyond the control of the participant had occurred.

Finally, the IRS held that the principles and rulings described above also apply to a nonqualified deferred compensation plan subject to Code section 409A(a) that permits distributions upon the occurrence of an unforeseeable emergency.

PBGC Finalizes Regulation on Debt Collection Process

The PBGC issued final regulations conforming its debt collection process to the Debt Collection Improvement Act of 1996, the federal claims collection standards, and other applicable legal requirements. The PBGC received no comments on its proposed regulations from July 2010, which were finalized without change. The regulations permit the PBGC to collect debts through various methods, including administrative offset, tax refund offset, salary offset, and administrative wage garnishment. The regulations apply to the PBGC collection of debts owed by employers (including unpaid premiums, penalties, and interest) and the recovery of benefit overpayments from participants.

HEALTH AND WELFARE PLAN DEVELOPMENTS

FAQs About Affordable Care Act Implementation Part IV

The Department of Health and Human Services (HHS), the DOL, and the Department of the Treasury (the Departments) continue to release additional guidance regarding the implementation of the market reform provisions of PPACA in the form of new questions and answers. The most recent FAQs address when a statement must be provided to participants and beneficiaries indicating that a plan believes it is a grandfathered health plan. The FAQs state that a grandfathered group health plan must provide the disclosure whenever a summary of benefits under the plan is provided to participants and beneficiaries. The FAQs further clarify that it is not necessary to include the disclosure statement with each plan or issuer communication to participants and beneficiaries (such as an explanation of benefits).

The FAQs also address the ability to elect a cost sharing increase under a grandfathered individual health insurance policy. Finally, the FAQs address whether a plan that reimburses expenses for special treatments and therapy provided for children with physical, mental, or developmental disabilities is subject to the lifetime limit on essential health benefits. The newest FAQs are available online at http://www.dol.gov/ebsa/faqs/faq-aca4.html.

Agencies Amend Grandfathered Plan Regulations to Permit Insurer Changes

On November 17, 2010, the Departments amended the interim final rules regarding grandfathered group health plans under PPACA. The amendment permits certain changes in insurance policies, certificates, or contracts for providing coverage under group health plans without the loss of grandfathered status. Specifically, the amendment provides that a plan does not cease to be a grandfathered plan merely because the plan or plan sponsor enters into a new policy, certificate, or contract of insurance after March 23, 2010. A permissible insurance change includes both a contract with a new insurer and a new policy issued with an existing insurer.

To maintain grandfathered status, the group health plan must provide (and the insurer must require) documentation of plan terms under the prior health coverage sufficient to determine whether a change causing the loss of grandfathered status has occurred. Such documentation should include information on benefits, cost sharing, employer contributions, and annual limits.

The amendment applies to changes effective on or after November 15, 2010, even if the plan enters into an agreement with the insurer prior to that date. Finally, the amendment only applies to insured group health plans, not to a change of insurers in the individual market.

HHS Provides Supplemental Guidance on Waiver of PPACA Restricted Annual Limit Waiver

On November 5, 2010, and December 9, 2010, HHS issued supplemental guidance (Guidance) on the process for obtaining waivers of the restricted annual limits requirement of PPACA. This new Guidance supplements the September 3, 2010, guidance described in Reinhart's October 2010 Employee Benefits Update. Most notably, the Guidance (a) describes general factors considered by HHS in determining whether compliance with PPACA's annual limits requirements will result in a significant decrease in benefits or a significant increase in cost, (b) imposes a new notice requirement and provides a notice for use following a plan's receipt of a waiver, and c) provides a form of application.

Background

PPACA generally prohibits plans from imposing annual dollar limits on essential health benefits. However, for plan years beginning before January 1, 2014, plans can implement "restricted" annual limits on essential health benefits. The restricted annual limits cannot be less than a) $750,000 for plan years beginning on or after September 23, 2010, b) $1.25 million for plan years beginning on or after September 23, 2011, and c) $2 million for plan years beginning on or after September 23, 2012, but before January 1, 2014.

The September 3, 2010, HHS guidance provided a waiver program for so-called "mini-med" or "limited benefit" plans which, according to the guidance, typically provide lower cost coverage for retirees, seasonal workers, or part-time workers. To qualify for a waiver, the mini-med or limited benefit plan had to show that compliance with the restricted annual limit would cause a "significant decrease in access to benefits" for individuals currently covered by the plan, or a "significant increase in premiums" paid by covered individuals. The September 3, 2010, guidance did not, however, provide any description of how much of a decrease or increase would be "significant."

What Constitutes "Significant"?

The November 5, 2010, Guidance describes the factors that HHS considers when analyzing a waiver application, providing some additional information on how HHS determines "significant" increases or decreases. These factors, while not providing concrete examples of what is "significant," offer guidance on the factors that plans should emphasize in their applications. HHS notes that, while each application is evaluated on a case-by-case basis, HHS may consider the following factors:

- The application's explanation of how compliance would result in a significant decrease in access to benefits.
- The policy's current annual limits.
- The change in premium in percentage terms.
- The change in premium in absolute dollar terms.
- The number and type of benefits affected by the annual limit.
- The number of enrollees under the plan seeking the waiver.

Notice of Waiver

In addition, the new Guidance states that plans that have been approved for a waiver must now provide notice to each current and eligible participant and subscribers that the plan does not meet the restricted annual limits for essential benefits set forth in the regulations because it has received a waiver of the requirement. The notice will need to include the dollar amount of the annual limit, a description of the plan benefits to which the waiver applies, and a statement that the waiver was granted for one year only. The Guidance states that the notice requirement applies to all waivers that have been granted and to all future waivers. In addition, in the future, the notice requirement will be a condition of receiving the waiver.

The December 9, 2010, Guidance provided model language and formatting requirements for the notice. Additionally, for plans that received waivers and that have plan years beginning before February 1, 2011, the Guidance requires that the notice be sent within 60 days of the date of issuance of the December 9, 2010, Guidance. For plans that received waivers and

that have plan years beginning on or after February 1, 2011, the Guidance requires that the notice must be a part of informational or educational materials, or in plan or policy documents, such as summary plan descriptions. For additional information, see http://www.hhs.gov/ociio/regulations/annual_limit_waivers.html.

Revised Application for Early Retirement Reinsurance Program Required After November 9, 2010

HHS published a revised application for the Early Retirement Reinsurance Program (ERRP) to streamline the application process. The revised application must be used for applications postmarked after November 9, 2010. The revised ERRP application, corresponding instructions and revised "dos and don'ts" checklist is available online at http://www.errp.gov/how_to_apply.shtml.

GENERAL DEVELOPMENTS

EEOC Publishes Final GINA Regulations

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) published final regulations under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Title II of GINA applies to employers and prohibits the use of genetic information in employment, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information. The final regulations are effective January 10, 2011, and generally follow the proposed regulations issued in March 2009. Previously, on October 7, 2009, the Departments of Labor, Treasury and Health and Human Services issued final interim regulations under Title I of GINA, which applies to group health plans and health insurers. The 2009 Title I regulations impose significant restrictions on wellness programs which must be reconciled with the new Title II regulations.

For additional and more detailed information, see Reinhart's December 22, 2010 e-alert GINA: Final ECOA Regulations for Title II.

This *Headlines in Employee Benefits Law E-Alert* provides general information and should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.

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