April 2009 Employee Benefits Update

POSTED:

Apr 14, 2009

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Deadline for New COBRA Notices Is April 18, 2009

The American Recovery and Reinvestment Act of 2009 (ARRA) creates two new COBRA obligations: (1) a COBRA premium subsidy; and (2) a second COBRA election period. Health plans and insurers are required to notify certain qualified beneficiaries of the COBRA premium subsidy and other rights under the ARRA, such as the second COBRA election period. ARRA COBRA notices, including notice of the second COBRA election period that must be provided to certain "Assistance Eligible Individuals," should be provided by April 18, 2009. Refer to Reinhart's April 8, 2009 e-alert for more information on the new COBRA notice requirement, including an analysis of the Department of Labor's (DOL's) model notices. Refer to Reinhart's April 8, 2009 e-alert for more information on the latest Internal Revenue Service (IRS) guidance on the new COBRA subsidy.

Recovery Act Election Deadline for Calendar-Year Multiemployer Pension Plans Is April 30, 2009

The Worker, Retiree and Employer Recovery Act of 2008 (Recovery Act) includes funding relief provisions for multiemployer pension plans. As part of this relief, a multiemployer plan sponsor may elect to temporarily freeze the plan's funded status under ERISA section 432 for the first plan year beginning on or after October 1, 2008 and not later than September 30, 2009 so that it is the same as the plan's funded status for the preceding plan year. The IRS recently clarified that this election must be made by the later of: (1) April 30, 2009; or (2) the date that is 30 days after the due date of the annual actuarial certification of funding status under ERISA section 432 for the election year. Thus, for a calendar-year multiemployer plan, this election must be made by April 30, 2009. (In addition, a 2008 plan year election to extend a funding improvement or rehabilitation plan by three years may be required by April 30, 2009.)

Medicare Secondary Payer Registration Is April 2009 for Certain Group Health Plans

As reported in Reinhart's March 2009 Employee Benefits Update, the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) added new mandatory reporting requirements for group health plans, effective January 1, 2009. The Centers for Medicare and Medicaid Services (CMS) posts guidance on its website to implement these statutory reporting requirements, including the deadlines for

responsible reporting entities (RREs) to register with CMS. Group health plan RREs, such as fiduciaries or administrators of self-insured health plans and third-party administrators, that do not currently exchange data with Medicare under a voluntary data sharing agreement or voluntary data exchange agreement must register online with CMS between April 1, 2009 and April 30, 2009.

GINA Is Effective for Plan Years Beginning On or After May 21, 2009

As described in Reinhart's July 2008 Employee Benefits Update, the Genetic Information Nondiscrimination Act's (GINA's) main purpose is to ensure that individuals do not forgo genetic testing or counseling because they fear adverse health coverage or employment consequences. To address health coverage nondiscrimination, GINA amends HIPAA's portability rules to prohibit group health plans and insurers from: (1) adjusting group premium or contribution amounts based on genetic information; (2) requesting or requiring an individual (or family member) to undergo a genetic test; and (3) requesting, requiring or purchasing genetic information for underwriting purposes, or collecting genetic information about an individual before he or she is enrolled or covered under the plan. GINA's health coverage requirements become effective for plan years beginning on or after May 21, 2009.

The IRS, DOL and Department of Health and Human Services (HHS) requested comments on GINA's health coverage nondiscrimination requirements in October 2008, but have not yet issued their guidance. In the meantime, health plan sponsors should review their plan designs and administration to determine GINA's possible impact. (As noted below, the Equal Employment Opportunity Commission (EEOC) recently issued proposed regulations addressing GINA's employment nondiscrimination requirements.)

Compliance Reminder–New Special Enrollment Rights Effective as of April 1, 2009

As discussed in Reinhart's March 2009 Employee Benefits Update, President Obama signed into law the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA contains new requirements for group health plans aimed at coordinating group health plan coverage with the Children's Health Insurance Program (CHIP) and Medicaid. Under CHIPRA, group health plans must recognize two new 60-day special enrollment rights effective April 1, 2009. If not already updated, special enrollment notices, and possibly summary plan descriptions and plan documents, need to be updated to reflect these new special

enrollment rights.

HIPAA Privacy & Security Compliance Reminder–Disposal of PHI

HHS recently entered into a well publicized agreement with CVS Pharmacy (CVS) to settle potential HIPAA Privacy violations, namely CVS's disposal of non electronic protected health information (PHI) (such as prescription drug labels) in dumpsters. Under the settlement, CVS agreed to pay $2.25 million to HHS and implement an action plan to ensure that it properly disposes of PHI in the future. Since the settlement, HHS issued answers to frequently asked questions (FAQs) about the HIPAA Privacy and Security requirements applicable to disposing of electronic and non electronic PHI. The FAQs can be found on HHS's website. In light of the HIPAA Privacy and Security Rules' strengthened enforcement provisions, covered entities should analyze whether their disposal of PHI complies with the guidance provided in the FAQs.

RETIREMENT PLAN DEVELOPMENTS

IRS Guidance on Minimum Funding Rules for Single-Employer Defined Benefit Plans

The IRS issued the following minimum funding guidance for employers sponsoring defined benefit plans:

- *Averaging Method—Plan Asset Valuation*. The Recovery Act includes technical corrections to the Pension Protection Act of 2006 (PPA) and relief provisions related to the current economic crisis. Among other PPA technical corrections, the Recovery Act amends Internal Revenue Code (Code) section 430 to specify that the averaging method for valuing assets in a single-employer defined benefit plan must take into account expected earnings in addition to contributions and distributions. This change is effective for plan years beginning after December 31, 2007. The IRS issued Notice 2009-22 to implement the Recovery Act's change to the averaging method for valuing plan assets under Code section 430. Notice 2009-22 describes the rules the IRS expects to be incorporated into future regulations for adjusting asset values for expected earnings, including limitations on the assumed rate of return used to determine expected earnings. According to the IRS, plan sponsors may rely on these rules for plan years beginning in 2008 and 2009. Notice 2009-22 also provides automatic approval for changes in permissible asset valuation methods for plan years beginning during 2009.

- *Yield Curve Guidance*. Under the minimum funding rules of Code section 430, a plan sponsor may elect to use the corporate bond yield curve instead of segment rates in determining defined benefit plan liabilities. The IRS issued a March 2009 special edition of its "Employee Plans News" newsletter to address selecting a yield curve for determining funding liability. According to the IRS, final regulations under Code section 430 are being drafted, and they generally will not be effective for plan years beginning before they are issued. In selecting a yield curve to use for determining funding obligations for a plan year beginning before the final regulations are issued, the IRS states that plan sponsors may rely on a reasonable interpretation of the funding rules. The IRS provides that determining the plan's liabilities for such a plan year using interest rates under the corporate bond yield curve (determined without 24-month averaging) for any "applicable month" is a reasonable interpretation of the PPA funding rules. Thus, for a calendar-year plan with a January 1, 2009 valuation date, the IRS states it will not challenge the use of the monthly yield curve for January 2009 or any of the four immediately preceding months.

IRS Guidance for Multiemployer Plans on Recovery Act Election and Notice Requirements

The Recovery Act includes funding relief provisions for multiemployer plans, as described in Reinhart's January 2009 Employee Benefits Update. The Recovery Act provides that, for the first plan year beginning on or after October 1, 2008 and not later than September 30, 2009, a multiemployer plan sponsor may elect to treat the plan's funded status the same as the plan's status for the preceding plan year. If a plan sponsor elects to retain the plan's endangered or critical status from the preceding plan year, the plan is not required to update its funding improvement or rehabilitation plan until the following plan year. If a plan is in neither endangered nor critical status because of an election to retain the preceding year's status, the plan sponsor must provide a special notice of the election. Also, after taking into consideration any election to treat the plan's funded status the same as the plan's status for the preceding plan year, the Recovery Act permits the sponsor of a multiemployer plan in endangered or critical status to elect for a 2008 or 2009 plan year to extend the plan's funding improvement or rehabilitation plan by three years.

The IRS issued Notice 2009-31 to provide guidance on the Recovery Act's permissible elections for multiemployer plan sponsors and on the special notice required to be provided if a plan is in neither endangered nor critical status

because of an election to retain the preceding year's funded status. Specifically, Notice 2009-31 addresses: (1) the effect of an election to retain the preceding year's funded status, including the interaction with an election to extend a funding improvement or rehabilitation plan; (2) election procedures, such as the timing and content of elections; (3) the requirements for the special notice; and (4) the effect of a Recovery Act election on Form 5500, Schedule MB and Schedule R filings.

In terms of election timing, Notice 2009-31 provides that an election to retain the preceding year's funded status must be made by the later of: (1) April 30, 2009; or (2) the date that is 30 days after the due date of the annual actuarial certification under ERISA section 432. An election to extend a plan's funding improvement or rehabilitation plan by three years must be made by the last day of the plan year as of which the election is being made, or, if earlier, by the date a funding improvement plan, rehabilitation plan, or update is adopted that takes into account the election. In no event, however, is this election required earlier than April 30, 2009.

Final PBGC Regulations on Reporting Requirements for Underfunded Plans of Controlled Groups

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations implementing changes made by the PPA to the annual reporting requirements of ERISA section 4010. ERISA section 4010 requires annual reporting of actuarial and financial information by controlled groups with pension plans that have significant funding problems. Among other changes, the PPA amended ERISA section 4010 to revise the triggers for the annual reporting requirement, effective for information years beginning on or after January 1, 2008.

To highlight some key provisions, the PBGC's final regulations: (1) reflect the changes to the annual reporting triggers under ERISA section 4010, including how to determine whether reporting is required based on the plan's funding target attainment percentage; (2) waive reporting in certain cases for controlled groups with aggregate underfunding of $15 million or less; (3) modify the standards for determining which plans are exempt from reporting actuarial information; (4) provide guidance on reporting requirements for sponsors of multiple employer plans; and (5) make other clarifications on the reporting requirements. The final regulations are applicable to information years beginning after December 31, 2007. The PBGC updated the e 4010 filing application to conform to the new rules. ERISA section 4010 filings are generally due within 105 days after the end of the

information year. For 2008 calendar-year information years, the first filings are due April 15, 2009.

PBGC Reminders of Filing Deadlines

The PBGC's website allows plan sponsors and administrators to sign up to receive monthly e-mail reminders of filing deadlines. Electronic filing reminders are sent by the third workday of each selected month. Information on premium filing due dates and related filing requirements can also be found on the PBGC's website.

Comment: In March 2008, the PBGC issued final regulations implementing PPA changes to the variable rate premium. As part of these final regulations, the PBGC made changes to the premium due dates, depending on whether a plan is small, midsized or large. For example, the variable rate premium and flat rate premium for small plans (*i.e.*, plans with fewer than 100 participants) are due by the last day of the 16th month that begins on or after the first day of the premium payment year (*i.e.*, April 30, 2009 for a 2008 calendar premium payment year).

No 2009 Automatic Reporting Waiver for Missed Quarterly Contributions

ERISA section 4043 and underlying PBGC regulations require plan administrators of single-employer defined benefit plans to notify the PBGC within 30 days after specified reportable events (*i.e.*, post event reporting). In past years, the PBGC automatically waived the reporting of missed quarterly contributions where the employer had 100 or fewer participants covered by its plans, or had between 100 and 500 participants covered by its plans and missed contributions to a plan that was well funded. The PBGC stated on its Web site that it is not granting an automatic waiver for 2009 of the requirement to notify the PBGC of missed quarterly contributions under ERISA section 4043. According to the PBGC, many plans that did not report missed quarterly contributions because of the reporting waiver later terminated with unfunded liabilities. If the reporting had been made, the PBGC states it may have been able to work with plan sponsors to avoid underfunded terminations.

DOL Postpones Effective Date of Investment Advice Regulations

The DOL issued final regulations on January 21, 2009 allowing employers to provide investment advice to 401(k) plan participants without violating ERISA's fiduciary rules. The final regulations, which are described in Reinhart's February 2009 Employee Benefits Update, specified an effective date of March 23, 2009. However, based on an Obama Administration directive on regulatory review, the

DOL proposed to postpone the effective date of the final regulations and reopened the regulations for comments. The DOL recently announced a 60-day postponement of the effective date for the final investment advice regulations until May 22, 2009. According to the DOL, this postponement will give it additional time to evaluate questions of law and policy concerning the final regulations.

District Court Rules that ERISA's Minimum Funding Standard Is the Sole Measure for Determining Proper Plan Funding

A New York district court dismissed plaintiffs' claims that fiduciaries of defined benefit plans violated their ERISA duties by failing to properly fund the plans. Cress v. Wilson, 2008 WL 5397580 (S.D.N.Y. 2008). The plaintiffs participated in defined benefit plans (collectively, the Plan) sponsored by Northwest Airlines (Northwest). According to the plaintiffs, the Plan was underfunded by approximately $5.7 billion during the period from October 1, 2000 until September 14, 2005, when Northwest filed for Chapter 11 bankruptcy (the pre-bankruptcy period). ERISA imposes specific minimum funding standards on defined benefit plans. Based on the Plan's annual reports on Form 5500, the court concluded that there was no delinquency during the pre-bankruptcy period in the contributions required to be made to the Plan under ERISA's minimum funding standards. The plaintiffs argued that satisfying ERISA's minimum funding standards was not the sole method for determining whether the Plan was properly funded. The court rejected the plaintiffs' argument and held that the "exclusive way" to determine whether the Plan was underfunded was to determine whether there was a funding deficiency under ERISA's minimum funding standards.

Fourth Circuit Awards Participant Subsidized Early Retirement Benefits Based on a Deficient 204(h) Notice

The Fourth Circuit upheld a district court's award of full retirement benefits to a terminated participant based on an egregious failure to comply with the notice requirements of ERISA section 204(h). *Brady v. Dow Chemical Company Retirement Board*, 2009 WL 394322 (9th Cir. 2009). Under ERISA section 204(h), a pension plan may not be amended to significantly reduce the rate of future benefit accrual unless the plan administrator notifies affected participants and beneficiaries of the change. This notice is called a "204(h) notice." A 204(h) notice must be written in a manner calculated to be understood by the average plan participant and it must contain sufficient information to allow participants and beneficiaries to understand the effect of the plan amendment. If there is an egregious failure to

comply with the 204(h) notice requirements, affected plan participants and beneficiaries are entitled to the greater of the preamendment or post-amendment plan benefits.

In this case, the Dow Chemical Company Retirement Board (Board) changed the benefit accrual formula under its pension plan in early 2003, but grandfathered certain prior plan benefits. Prior to the amendments, the pension plan allowed individuals whose employment was involuntarily terminated and whose age plus years of service equaled at least 83 to retire early with full pension benefits. When the Board changed the plan's benefit accrual formula, it eliminated this early retirement subsidy. The plaintiff sued the Board after his request for an unreduced early retirement benefit was denied. The plaintiff alleged that the Board's 204(h) notice was deficient, and that this deficiency amounted to an egregious failure to satisfy the requirements of ERISA section 204(h). The Fourth Circuit agreed with the plaintiff and concluded that the Board's 204(h) notice was deficient because it was misleading about whether the early retirement subsidy was maintained. The court also concluded that the Board committed an egregious violation of the ERISA section 204(h) notice requirements because the Board failed to promptly rectify its deficient notice after it became aware that participants were confused about the availability of the early retirement subsidy.

HEALTH AND WELFARE PLAN DEVELOPMENTS

San Francisco's "Fair Share" Law Is Not Preempted by ERISA

The Ninth Circuit ruled in September 2008 that the City of San Francisco's fair share law is not preempted by ERISA. *Golden Gate Restaurant Association v. City and County of San Francisco*, 2008 WL 4401387 (9th Cir. 2008). The Ninth Circuit has now denied to rehear the case, and the U.S. Supreme Court has refused to enjoin the City from enforcing the fair share law while the Supreme Court considers whether it will review the case. Among other requirements, San Francisco's fair share law requires covered employers with 20 or more employees to either pay a fee to the City or make certain health care expenditures at rates based on the size of the employer. Payments to the City go towards funding a city-run health care program. The Golden Gate Restaurant Association (and the DOL as amicus) argued that ERISA preempts the fair share law either because it creates an ERISA "plan" or because it impermissibly "relates to" employers' ERISA plans. The Ninth Circuit rejected these arguments and held that the San Francisco ordinance escapes ERISA preemption because the City payment option allows employers to comply with the ordinance without creating or altering ERISA plans.

Comment: In the latest Ninth Circuit decision on this case, the dissenting judges noted that San Francisco's fair share law and others like it across the county will potentially expose employers to a multitude of different laws obligating the employers to design and administer their ERISA plans in accordance with such laws. The dissenting judges also argued that the Ninth Circuit's decision creates a split in the circuit courts because it is at odds with a 2007 Fourth Circuit decision striking down Maryland's fair share law on ERISA preemption grounds. Although San Francisco's fair share law survived the Ninth Circuit's review, it is possible that the U.S. Supreme Court will review whether the law escapes ERISA preemption.

2010 Cost Threshold and Limit Adjustments for Medicare Part D

CMS recently announced the 2010 adjusted cost threshold and cost limit amounts that apply to group health plan sponsors who participate in the Medicare Part D Retiree Drug Subsidy program. Under this program, employers who offer retiree prescription drug coverage may qualify for a tax-free subsidy provided for allowable prescription drug costs incurred by qualified retired employees. For 2010, subsidy payments to a plan sponsor for each qualifying covered retiree will generally equal 28% of allowable retiree prescription drug costs attributable to gross prescription drug costs between $310 and $6,300, up from $295 and $6,000 in 2009. Medicare Part D benefit parameters (*e.g.*, deductible and out of pocket threshold) have also been adjusted for 2010. These parameters will help a group health plan offering prescription drug coverage to Medicare Part D eligible individuals to determine whether it is creditable or non-creditable with Medicare Part D. More information on Medicare Part D adjustments for 2010 can be found on the CMS website.

OTHER DEVELOPMENTS

Proposed EEOC Regulations on GINA's Employment Nondiscrimination Requirements

As mentioned above, GINA was enacted to prevent employers and health plans or insurers from discriminating on the basis of genetic information. GINA's employment nondiscrimination requirements cover employers with 15 or more employees, effective November 21, 2009. To briefly summarize, GINA's employment nondiscrimination requirements: (1) prohibit the use of genetic information in employment decisions; (2) restrict the deliberate acquisition of genetic information by employers; (3) impose strict confidentiality requirements on genetic information; and (4) prohibit retaliation. The EEOC issued proposed

regulations that would implement GINA's employment nondiscrimination requirements. Comments on the proposed regulations are due by May 1, 2009. Among other topics, the EEOC's proposed regulations define important terms, such as "family member" and "employee," address specific employment practices prohibited under GINA and provide guidance on GINA's interaction with other nondiscrimination laws.