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August 2009 Employee Benefits Update

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Summary Annual Report Deadline for Calendar Year Plans

Plan administrators generally have nine months after the end of a plan year to provide participants and beneficiaries with a summary annual report (SAR). The SAR summarizes the plan's latest annual report/return (Form 5500). For plan years ending December 31, 2008, the general deadline for providing the SAR is September 30, 2009. However, if the filing deadline for the plan's Form 5500 is extended, the deadline for providing the SAR is extended by two months.

For plan years beginning after December 31, 2007, administrators of defined benefit plans are generally not required to provide SARs. Instead, some of the information on the SAR is included in the new funding notice required by the Pension Protection Act of 2006 (PPA). The new PPA funding notice for defined benefit plans generally must be provided within 120 days following the end of the plan year.

Multiemployer defined benefit plans are required to provide a summary report to each union and employer contributing to the plan within 30 days of the due date of the Form 5500, including any extensions. This report must include certain information that multiemployer pension plans are also now required to report on the Form 5500, including the number of contributing employers, employers contributing more than 5% of total contributions, participants with no contributing employer, information on amortization extensions, information on the plan's funded status and the number of employers that withdrew during the plan year and related withdrawal liability.

Medicare Part D Deadlines

All group health plans that offer prescription drug coverage to Medicare-eligible employees (under either an active plan or retiree plan) must provide the annual creditable coverage disclosure notice to Medicare-eligible participants and dependents, no later than November 15, 2009. The model notice was updated again as of January 1, 2009 and can be accessed at Creditable Coverage.

Also, group health plan sponsors who wish to apply for the Medicare Part D retiree drug subsidy must do so annually no later than 90 days prior to the beginning of the plan year. The Centers for Medicare & Medicaid Services (CMS) has published a chart illustrating the applicable deadlines for all possible plan

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years, which can be accessed at Application Deadlines. A 30-day application extension is available if the extension request is filed by the original application due date. The subsidy application and extension should be submitted to CMS through the Retiree Drug Subsidy Center website.

Form 5500 Filing Deadline for Calendar Year Plans with Extensions

If a plan administrator filed a Form 5558 on or before July 31, 2009 for a calendar year plan, the plan's Form 5500 filing deadline is extended to October 15, 2009. Additionally, if the plan sponsor extended its corporate federal income tax return, the plan may be eligible for an automatic extension until September 15, 2009 if certain criteria are satisfied.

When preparing Form 5500, plan sponsors may become aware of amendments that were not timely adopted. Certain late amendments can be adopted retroactively under the Voluntary Correction Program of the Internal Revenue Service's Employee Plans Compliance Resolution System. An abbreviated correction application permits certain plan sponsors to adopt certain late amendments for the nominal fee of $375 for each year in which failure to adopt occurs.

Cycle D Determination Letter Filings Due January 31, 2010

Remedial Amendment Period Cycle D individually designed plans must be submitted for a favorable Internal Revenue Service (IRS) determination letter no later than January 31, 2010 to rely on the extended period during which qualification amendments may be retroactively adopted. Cycle D plans include those sponsored by employers with tax identification numbers (EINs) ending in a four or nine, as well as multiemployer plans.

2008 Plan Year Contributions for Defined Benefit Plans

September 15, 2009 is the last day on which a 2008 plan year contribution can be made to a calendar year defined benefit plan.

RETIREMENT PLAN DEVELOPMENTS

Limited Extension Available for FBAR Report May Impact Benefit Trusts

The IRS provided some relief for plan sponsors who only recently became aware of a foreign bank or financial account (FBAR) report that could apply to tax-exempt benefit trusts. The potential penalties for failure to file the FBAR report

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are severe, including civil penalties of up to $10,000 for each nonwillful violation and up to the greater of $100,000 or 50% of the transaction/account for willful violations, plus potential criminal penalties. Thus, it is important to determine whether any tax-exempt benefit trust maintained by a plan sponsor is, in fact, subject to the FBAR report. If an FBAR report is required, the plan sponsor has until September 23, 2009 to file any delinquent reports.

As background, the Treasury Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, commonly referred to as an FBAR report, is used to report offshore financial accounts. It is not filed as part of a tax return. In general, the FBAR report requires a "U.S. Person" to disclose a "financial interest in, or signature or other authority over, any foreign financial account(s)," if the aggregate value of the account(s) exceeded $10,000 during the year.

The reason that plan sponsors may have only recently become aware of this report is that the IRS has made informal statements in early 2009 indicating that: (a) tax-exempt benefit trusts could be considered a U.S. Person; and (b) certain investments that are not uncommon for large benefit trusts could be considered "financial accounts." The IRS appears to consider investments in foreign hedge funds, partnerships, corporations and private equity funds to be "financial accounts." Most commentators agree that it would be safest to assume, in the absence of IRS guidance to the contrary, that all offshore commingled vehicles are covered by the FBAR report.

Although the FBAR report is generally due by June 30, the IRS has extended to September 23, 2009 the deadline for investors to file the 2008 FBAR report, without penalty, under the following circumstances: (1) the taxpayer reported and paid tax on all 2008 taxable income; (2) the taxpayer only recently learned of the FBAR obligation; and (3) the taxpayer had insufficient time to gather the necessary information to complete the FBAR. The taxpayer will need to file the delinquent FBAR report along with a copy of his or her 2008 tax return and a statement explaining (2) and (3) above. In addition, the IRS has informally stated that the taxpayer will also need to file all delinquent FBAR reports for the preceding six years, along with copies of tax returns for those years and an explanation for the delinquent filings.

In the absence of additional guidance, plan sponsors should consider confirming with their plan advisors whether a FBAR report could be required for 2008 or any of the preceding six years. If so, the plan sponsor should prepare to make these delinquent filings by September 23, 2009. The IRS has asked for comments on the

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FBAR form by August 31, 2009, although additional guidance for benefit trusts may not be forthcoming.

403(b) Plan Reporting Relief Issued

The Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2009-02 to provide welcome relief for sponsors of Code section 403(b) plans with respect to the new Form 5500 reporting requirements applicable to 403(b) plans for the 2009 plan year. As you may be aware, the DOL eliminated the special limited reporting for 403(b) plans effective for the 2009 plan year and now requires 403(b) plans to file financial information that was not previously required.

Plan administrators expressed concerns that they would not be able to comply with these requirements for 403(b) plans that had historically been a collection of individual contracts over which the employer had no involvement. In response to these concerns, the DOL has provided relief with respect to a contract or custodial account if the following considerations are satisfied:

- 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.

If the contract or custodial account satisfies these requirements, the plan sponsor does not need to report the contract or custodial account as part of the employer's plan or as plan assets. In addition, the plan sponsor does not need to report the holder of such contract or account as a plan participant. The DOL will not reject a "qualified," "adverse" or "disclaimed" accountant's opinion (if such opinion is required by the Form 5500) if the accountant expressly states that the sole reason for such an opinion was because the contracts or accounts that satisfy the conditions of the FAB were excluded from the audit or the plan's financial statements.

Reimbursement Request for Auditor Fees in Delinquent Contribution Case Subject to Same Standard as Attorney Fees

The Seventh Circuit Court of Appeals denied a request for reimbursement of

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auditor fees by the trustees of a multiemployer pension plan in connection with the trustees' successful claim for recovery of delinquent contributions because the request did not satisfy the requirements established for requests for reimbursement of attorney fees. *Trustees of the Chicago Plastering Institute Pension Trust v. Cork Plastering Company* (7th Cir. 2009). The court held that auditor fees are driven by the same two factors as attorney fees: number of hours expended and the hourly billing rates of the auditors. Therefore, the court found that it was reasonable to require the same level of specificity used for awarding attorney fees to audit costs.

Consequently, auditors engaged in a delinquent contribution case should maintain detailed billing records that identify the timekeeper, the task, the date the task was performed, the amount of time billed for the task and the billing rate of the timekeeper. The auditor may also be required to show the credentials and experience of each timekeeper for whom reimbursement is sought. If this level of specificity is not already required, plan sponsors should consider adding these requirements to the engagement.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HSAs Are Subject to Tax Levy

The IRS issued CCA 200927019 concluding that an account holder's interest in an HSA is subject to IRS levy to satisfy a delinquent tax liability and the additional 10% excise tax for nonmedical distributions from an HSA could apply to the levy amount.

The IRS concludes that the right to draw funds from an HSA is a right to property that may be subject to levy to satisfy a taxpayer's delinquent tax liability. Because there is no specific exception in the law for IRS levies with respect to the 10% excise tax, the 10% excise tax for nonmedical distributions from an HSA applies to the amount of an IRS levy unless the taxpayer is disabled or has attained age 65 at the time of the levy.

EEOC Issues Employee-Friendly Severance Agreement Guidance

The Equal Employment Opportunity Commission (EEOC) published new guidance for employees regarding discrimination waivers and releases in employee severance agreements. Although the guidance is addressed to employees, it does contain a few noteworthy items for employers. This guidance can be accessed online at EEOC.gov.

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The EEOC addresses waivers under the Age Discrimination in Employment Act (ADEA) as well as other discrimination laws, such as Title VII, the Americans with Disabilities Act and the Equal Pay Act. The guidance is written in Q/A format and contains a number of examples that are intended to be easily understood by the average employee.

The guidance specifically addresses a former employee's ability to file charges with the EEOC or initiate litigation against the employer after signing the release, including whether the employee would be required to return his or her severance payments. For example, the EEOC guidance maintains that "tender-back" and "covenant not to sue" provisions will invalidate an ADEA waiver. In addition, the EEOC adopts the draconian position that an employer cannot cure a defective ADEA waiver if any of the required elements is missing, particularly after an employee has signed the agreement. The EEOC notes that other laws may have different waiver rules.

The practical impact of this guidance for an employer sponsoring a severance plan or arrangement may be to increase the likelihood that former employees will actually challenge waivers, either through the EEOC or the courts. Therefore, employers may want to consider reviewing this guidance for the purpose of identifying any contrary positions of the EEOC in advance and reviewing those positions with legal counsel.

Seventh Circuit Overturns Benefit Denial Due to Inadequate Explanation

The Seventh Circuit reversed a district court decision granting summary judgment to a welfare benefit plan because the plan's notice of denial did not adequately explain the reason for the denial. *Love v. National City Corporation Welfare Benefits Plan, No.* 08-1722 (7th Cir. 2009). The court remanded the case to the plan administrator to conduct a more thorough inquiry into whether the participant met the plan's definition of “disabled.”

Nancy Love applied for, and received, disability benefits under the National City Corporation Welfare Benefits Plan after terminating employment due to multiple sclerosis. After receiving 26 weeks of short-term disability benefits followed by 2-1/2 years of long-term disability benefits, the plan terminated her benefits on the basis that she was no longer "disabled." The plan administrator based this decision on the report of a medical consultant who concluded that her medical file did not contain any objective data supporting her assertion that she had limited functional ability, despite reports and records from Ms. Love's treating

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physicians to the contrary. The denial letter did not address why these reports were discredited.

Ms. Love appealed this decision and submitted new reports attempting to show the limitations on her functional capacity to work. This information was sent to another medical consultant for review, who also determined that Ms. Love was no longer disabled without addressing why her evidence was discredited. Ms. Love then sued, claiming that the plan did not consider all of the relevant medical evidence and did not sufficiently explain its decision to terminate her benefits.

After noting that ERISA requires the plan to provide a "reasonable explanation for its determination" and to address "any reliable contrary evidence presented by the claimant," the court concluded that the plan failed to explain why it discredited the "near-unanimous opinions of Love's treating physicians." Therefore, the court held that the plan's conclusion to deny disability benefits was arbitrary. The court remanded the case to the plan administrator (not the district court) for further administrative review.

This case highlights the importance of compliance with the content requirements of the ERISA claims procedure regulations. Plan administrators should review their benefit denial notices to ensure that, in cases where the plan's decision is contrary to medical conclusions submitted by the participant, the notice explains why the medical opinions have been dismissed. If a third-party claims administrator has been engaged to adjudicate claims and claim appeals, the plan sponsor may want to consider requesting copies of the model denial notices for review by legal counsel.

MISCELLANEOUS

Acceleration of Vesting of Stock Rights in Reorganization Is a Parachute Payment

The IRS published Chief Counsel Advice (CCA) 200923031 holding that the accelerated vesting of certain stock rights upon the closing of a corporate merger transaction would constitute a parachute payment under Code section 280G. As a result, the executives whose stock rights were accelerated could be subject to the 20% excise tax.

In this case, the company proposed numerous modifications to its deferred compensation plan that provided stock option rights to company executives as a result of a corporate merger transaction. The company asked the IRS for a private

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letter ruling that none of its proposed modifications would implicate Code section 280G. Although the IRS concluded that many of the modifications would not result in parachute payments, the IRS did conclude that accelerated vesting of the stock rights upon the closing of the transaction would be a parachute payment. As a result, the company withdrew its request. The IRS then issued the CCA to the office having audit jurisdiction over the company.

This CCA appears to be a consistent application of the regulations under Code section 280G. However, it serves as a reminder that, although some modifications to deferred compensation arrangements during a corporate transaction are not treated as parachute payments, certain other modifications may trigger the parachute payment rules. Due to the draconian penalties associated with failures under Code section 280G and also under Code section 409A, plan sponsors should consider having legal counsel review any proposed modifications to any agreement between the company and a highly compensated employee in advance.

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