

December 2009 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

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. A plan sponsor of a Cycle D plan whose first plan year beginning on or after January 1, 2009 ends after January 31, 2010, may defer submission of its plan until Cycle E (February 1, 2010 through January 31, 2011).

403(b) Plan Document

Plan sponsors of 403(b) plans must have their written plan document adopted by December 31, 2009. As discussed in the [January 2009 EB Update](#), on December 11, 2008, the IRS issued Notice 2009-3 extending the deadline for 403(b) plan sponsors to adopt written plan documents (or amend existing plans) until the end of 2009. Any 403(b) plan sponsors should contact their Reinhart attorney as soon as possible if they do not have a written plan document in place.

RETIREMENT PLAN DEVELOPMENTS

DOL Withdraws Rules on Investment Advice for Participants

The Department of Labor (DOL) has withdrawn its final rules on the provision of investment advice to participants and beneficiaries. The DOL agreed with commentators who questioned the adequacy of provisions governing a class exemption for investment adviser self-dealing in protecting the interests of participants and beneficiaries. The withdrawn rules were published on January 21, 2009 to implement a statutory prohibited transaction exemption under the Pension Protection Act of 2006 (PPA.) The DOL had recently extended the applicability and effective dates of the final rule until May 17, 2010, which extension expired with withdrawal of the final rules on November 20, 2009.

PBGC Issues Regulations on Pension Benefits of Service Members

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations to allow

POSTED:

Jan 5, 2010

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the PBGC to pay benefits to military service members who return to employment after a pension plan has been terminated. Generally, individuals who return to work following military service under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) receive credit for benefits that would have accrued if the service member had remained continuously employed. However, if a pension plan terminated prior to the individual's return to employment, the PBGC previously determined benefits to be paid as of the plan's termination date. The new rule allows that, if a service member is reemployed within the time limits set by USERRA, the service member is deemed to satisfy the reemployment requirement for purposes of the benefit guarantee even if the pension plan has been terminated. The regulations are effective December 17, 2009 and apply for purposes of any reemployment on or after December 12, 1994.

IRS Finalizes Regulations Providing Guidance for Notice of Retroactively Effective Plan Amendments and PPA Changes

The IRS issued final regulations providing guidance regarding the notice requirements for a defined benefit plan amendment that reduces benefits accrued before the plan amendment's applicable amendment date, often referred to as the 204(h) notice. The regulations also define which notices can be combined with the 204(h) notice, including ERISA sections 101(j), 4244A, 4245 and 4281, and their Code parallels, and Code section 432(b)(3)(D). The regulations amend previously issued regulations on Code section 4980F and the PPA.

IRS Grants Anti-Cutback Relief for Hybrid Pension Plans

The IRS issued Announcement 2009-82 on November 10, 2009, giving sponsors of cash balance and other hybrid pension plans additional time to bring plans into compliance with the PPA requirement that the plan's interest-crediting rate not exceed a market rate of interest. The IRS stated in the Announcement that it does not expect the final regulations to go into effect before the first plan year that begins on or after January 1, 2011. In addition, the IRS plans to provide additional anti-cutback relief for plans amended before the effective date of the final regulations, and special timing rules for 204(h) notices may apply.

Reinhart comment: Plan sponsors of hybrid plans should contact their Reinhart attorney to determine how the Announcement applies to their plans and when and whether plans should be amended.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HHS Issues Interim Final Regulations on New Penalties for HIPAA Violations

The Department of Health and Human Services (HHS) issued interim final regulations implementing the penalty provisions of the Health Information Technology for Economic and Clinical Health Act (HITECH). As described in our e-alert of [September 29, 2009](#), HITECH provided for increased enforcement activity and significantly increased penalties for noncompliance with the administrative simplification provisions of the Health Insurance Portability and Accountability Act (HIPAA.) The interim regulations provide penalties in a tiered structure, ranging from a minimum civil penalty of \$100 per violation if the covered entity was unaware or would not have known of the violation, to \$50,000 per violation if the violation is due to willful neglect and not corrected. The interim regulations also include a list of affirmative defenses not included in the original HITECH legislation. The interim regulations became effective November 30, 2009 but apply to any violations occurring on or after February 18, 2009. Even though the interim regulations are already effective, HHS is accepting comments on them through December 29, 2009.

Reinhart comment: The new penalties for HIPAA violations are significantly increased over prior penalties. Health plan sponsors should review their policies and procedures to ensure compliance with the new HITECH requirements, including breach reporting and disclosure, in order to avoid these new penalties.

The House Passes Health Care Reform Bill

The U.S. House of Representatives approved health care overhaul legislation on November 7, 2009 following months of the most recent health care reform debate. In addition to provisions extending coverage to individuals who do not currently have health insurance and preventing discrimination based on pre-existing conditions, the legislation has tax-related implications for employers and health plan sponsors. The Senate is now finalizing and voting on its version of the bill, which, if adopted, will be reconciled with the House version prior to becoming law.

Court Upholds DOL's Expedited Review of COBRA Premium Subsidy Denial

A court in the western district of Washington upheld the DOL's expedited review and denial of an individual's COBRA premium subsidy application. A multiemployer health plan first determined that the individual was not eligible for



the COBRA premium subsidy because his initial termination of employment occurred before the COBRA subsidy effective date and his subsequent reemployment did not qualify him for health plan coverage. The individual appealed the decision to the DOL, and the DOL reviewed and denied the appeal in an expedited review process. The individual then appealed the DOL's expedited review to the district court, claiming the decision was arbitrary and capricious. This case was the first court review of a DOL expedited review of a COBRA premium subsidy appeal.

Reinhart comment: Individuals who are denied a COBRA premium subsidy have the right to request expedited review by the DOL. Employers who have denied COBRA premium subsidy applications should be aware of the DOL's expedited review process and possible court action following a DOL denial.

OTHER DEVELOPMENTS

FTC Again Delays Enforcement of Red Flags Rule

The Federal Trade Commission (FTC) announced it is delaying enforcement of the identity theft Red Flags Rule until June 1, 2010. As discussed in the [September 2009 EB Update](#), the Red Flags Rule requires "financial institutions" and "creditors" with "covered accounts" to implement a written identity theft prevention program to detect the warning signs of identity theft. The Red Flags Rule does not apply to 401(k) loan programs, but Health FSAs which make debit cards available to participants to access benefits are subject to the Red Flags Rule. The FTC delayed enforcement this time to allow Congress time to consider legislation exempting small employers and certain other businesses from the rules.

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