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January 2010 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES AND REMINDERS

Deadline for Adopting and Filing EGTRRA Pre-Approved Plans Is April 30, 2010

The Internal Revenue Service (IRS) has previously issued opinion and advisory letters for pre-approved (*i.e.*, master and prototype and volume submitter) defined contribution plans that were timely filed with the IRS to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and other law changes. Employers using a preapproved plan document to restate a plan for EGTRRA, such as Reinhart's EGTRRA volume submitter document, must adopt the EGTRRA-approved plan document by April 30, 2010. Furthermore, plan sponsors seeking determination letters from the IRS must submit applications to the IRS for EGTRRA pre-approved plans no later than April 30, 2010.

Submission Period for Cycle E Individually Designed Plans Opens February 1, 2010

Effective February 1, 2010, the IRS will begin accepting determination letter applications from remedial amendment period Cycle E individually designed plans. In general, Cycle E plans must be submitted for a determination letter no later than January 31, 2011 to rely on the extended period during which qualification amendments may be retroactively adopted. Cycle E plans include those sponsored by employers with employer identification numbers (EINs) ending in a "5" or "0". In addition, plan sponsors of governmental plans and Cycle D non-calendar year plans that elected to defer submission to Cycle E must submit their plans to the IRS before February 1, 2011.

Rollover Notices Required for Non-spouse Beneficiaries Beginning January 1, 2010

Administrators of tax-qualified retirement plans, 403(b) plans and governmental 457(b) plans must provide an explanation of certain tax and rollover rules to recipients of eligible rollover distributions. Effective January 1, 2010, rollover notices must also be provided to non-spouse beneficiaries. As reported in Reinhart's November 2009 Employee Benefits Update, the IRS recently issued updated safe harbor rollover notices for distributions from Roth and non-Roth accounts. The IRS permitted plan administrators to use the 2002 IRS safe harbor rollover notice, updated for legal changes, through December 31, 2009. Beginning

January 1, 2010, however, plan administrators must use the new safe harbor notices.

First PPA Benefit Statements for Defined Benefit Pension Plans Due by February 15, 2010

The Pension Protection Act of 2006 (PPA) requires sponsors of defined benefit plans to either provide participants with a benefit statement once every three years or notify participants each year of the availability of the benefit statement. The PPA's benefit statement requirement generally applies to defined benefit plans starting with the 2007 plan year. Sponsors of defined benefit plans who elected to provide participants with a benefit statement instead of the annual notice must furnish their first PPA-complaint benefit statements for the 2009 plan year.

According to Field Assistance Bulletin No. 2006-3, furnishing benefit statements no later than 45 days following the end of a plan year will constitute good faith compliance with the pension benefit statement requirements. Therefore, plan sponsors of defined benefit pension plans should provide PPA-compliant benefit statements by February 15, 2010.

Reinhart Comment: Many of the PPA's provisions applicable to collectively bargained plans, including the benefit statement requirement, have a deferred effective date. The PPA's benefit statement requirement applies to collectively bargained plans no later than the 2009 plan year. Collectively bargained plans that are first subject to the PPA's benefit statement requirement in 2009 must provide PPA-compliant benefit statements for the 2011 plan year.

Rollovers to Roth IRAs No Longer Subject to Federal Income Limitations

Beginning January 1, 2010, the federal income and filing status requirements for rollovers or conversions to Roth IRAs have been eliminated. Prior to January 1, 2010, under federal law, an individual could convert or roll over pretax amounts to a Roth IRA only if his modified adjusted gross income was $100,000 or less, and his tax filing status was not "Married Filing Separate." For rollovers and conversions to a Roth IRA in 2010 only, individuals have the option of reporting one-half of the taxable portion of the conversion or rollover as gross income for federal tax purposes in 2011 and the other one-half in 2012.

Reinhart Comment: The new rules regarding rollovers to Roth IRAs have created a tax planning opportunity for many individuals. Participants who have attained age

59½ may be eligible for in-service distributions from qualified plans that could be rolled over to Roth IRAs. Unlike qualified plans and pretax IRAs, a Roth IRA is not required to pay minimum distributions during the owner's lifetime and earnings accumulate on a tax-free (versus tax-deferred) basis.

Mandatory 20% Withholding Applies to 2009 RMDs Paid in 2010

The Worker, Retiree and Employer Recovery Act of 2008 (WRERA) permits participants in defined contribution plans to waive required minimum distributions (RMDs) for the 2009 plan year. Any recipient of a 2009 RMD can roll over that amount to an eligible retirement plan or an IRA. 2009 RMDs paid prior to January 1, 2010 were subject to optional withholding rules. However, RMDs paid between January 1, 2010 and April 1, 2010 are subject to the mandatory 20% federal income tax withholding that applies to eligible rollover distributions.

COBRA Premium Subsidy Extended - Special Notices Required by January 29, 2010

The fiscal year 2010 Department of Defense Appropriations Act (the Act) extended the COBRA premium subsidy created by the American Recovery and Reinvestment Act of 2009 (ARRA). Under ARRA, individuals who were involuntarily terminated between September 1, 2008 and December 31, 2009 may qualify for a 65% subsidy of their COBRA premiums for up to 9 months. The Act extends eligibility for the COBRA subsidy to individuals who are involuntarily terminated on or before February 28, 2010. The Act also extends the maximum period for receiving the COBRA subsidy from 9 months to 15 months. Plan sponsors will need to take the following actions with respect to the COBRA subsidy:

- Revise the COBRA election notice and forms to reflect the COBRA subsidy extension provisions of the Act. These revisions will likely be minor.
- Identify all individuals who were eligible for the subsidy on or after October 31, 2009 or who experienced a qualifying event consisting of a termination of employment on or after October 31, 2009. These individuals are entitled to notice of the Act's provisions by February 17, 2010 or, if later, the deadline for providing the regular COBRA election notice.
- Identify all individuals who lost the subsidy due to exhaustion of the then-maximum 9-month subsidy period. These individuals will be entitled to a transition period during which they can reinstate COBRA coverage if it was dropped after the subsidy was exhausted or receive a refund if COBRA

coverage was maintained at the full premium. A special notice to this group must be provided by January 29, 2010.

- Claim the credit for the COBRA premium subsidy on Form 941. The IRS recently clarified when a plan sponsor can claim the subsidy on the Form 941 for a period of coverage in a prior year. If a plan sponsor receives an assistance eligible individual's 35% share of the COBRA premium in 2010, the plan sponsor may claim the credit for the related premium subsidy on Form 941 for either the quarter in 2010 in which it receives the individual's 35% premium payment or a later quarter in 2010 (but not for a quarter in 2009), regardless of the fact that the premium is for coverage during 2009.

Reinhart has prepared model language for the two new notices described above. The Department of Labor (DOL) has also updated its model general COBRA notice and created a premium assistance extension notice. For more information on complying with the COBRA premium subsidy requirements, please contact your Reinhart attorney.

New Group Health Plan Mandates Effective for 2010 For calendar-year plans, several new group health plan mandates become effective in 2010. These mandates include the following:

- Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). MHPAEA requires plans providing mental health or substance abuse benefits to provide such coverage at the same level as coverage for medical or surgical benefits. (Generally effective for plan years beginning after October 3, 2009.)

- Michelle's Law. Michelle's Law requires plans to continue health coverage for up to one year for college students who take a medically necessary leave of absence. (Effective for plan years beginning after October 8, 2009.)

- Health Information Technology for Economic and Clinical Health Act (HITECH). HITECH expands the privacy and security requirements applicable to covered entities under the Health Insurance Portability and Accountability Act (HIPAA). (Generally effective February 17, 2010.) Covered entities should update existing business associate agreements by February 17, 2010 for applicable HITECH provisions, including increased responsibilities for safeguarding Protected Health Information (PHI) and disclosure of instances where PHI has been accessed and shared.

- Genetic Information Nondiscrimination Act of 2008 (GINA). GINA prohibits the

use of genetic information for health insurance and employment purposes. GINA health coverage requirements are effective for plan years beginning on or after May 21, 2009. Interim final regulations issued in September 2009 are effective for plan years beginning on or after December 7, 2009.

- Health Savings Account (HSA) Comparability Requirements. Final regulations provide guidance on employer comparable contributions to HSAs. (Effective for contributions made on or after January 1, 2010.)

Employers Must Self-Report Excise Tax for Failure to Comply with Group Health Plan Requirements

Effective for plan years beginning on or after January 1, 2010, employers and plan administrators are required to self-report and pay excise taxes for their failure to comply with the group health plan mandates mentioned above, as well as COBRA, HIPAA, Benefits for Mothers and Newborns, and comparable contribution requirements for Archer Medical Savings Accounts (MSAs).

The excise tax on comparable contributions is generally 35% of the aggregated amount contributed by the employer to the HSAs or MSAs of all employees for the calendar year. The excise tax on other failures is generally $100 per day per affected beneficiary.

Employers and plan administrators must report failures on the new IRS Form 8928 and pay applicable excise taxes by the deadline for filing the employer or plan administrator's federal income tax return without extensions. For multiemployer plans, the deadline for the Form 8928 is the same as the Form 5500 (on or before the last day of the seventh month after the end of the plan year). Failure to timely report and pay the excise tax can result in late penalties and interest.

2009 Form M-1 for MEWAs Due March 1, 2010

The DOL released the 2009 Form M-1 for multiple employer welfare arrangements (MEWAs) providing health benefits and certain entities that claim they are not MEWAs due to an exception for plans maintained pursuant to a collective bargaining agreement. The 2009 Form M-1 is substantively identical to the 2008 Form M-1 and can be filed electronically over the Internet. The deadline for filing the 2009 Form M-1 is March 1, 2010, with a 60-day extension available to May 3, 2010.

Medicare Part D Creditable Coverage Disclosure to CMS Due by March 1, 2010 for Calendar-Year Plans

Under Medicare Part D regulations, most group health plans offering prescription drug coverage to Part D eligible individuals must annually disclose to the Centers for Medicare & Medicaid Services (CMS) whether the coverage is creditable or non-creditable. Group health plan sponsors comply with the CMS disclosure requirement by completing a disclosure form on the CMS website and filing the form electronically. The annual filing deadline is 60 days after the first day of the plan year (*i.e.*, March 1, 2010 for calendar-year plans). In addition, disclosure forms must be filed within 30 days after the termination of a plan's prescription drug coverage or a change in its creditable coverage status.

RETIREMENT PLAN DEVELOPMENTS

IRS 2009 Cumulative List of Changes in Plan Qualification Requirements

The IRS issued the "2009 Cumulative List of Changes in Plan Qualification Requirements" as Notice 2009-98 (the 2009 Cumulative List). The 2009 Cumulative List details the plan qualification requirements for plan sponsors of individually designed plans submitting determination letter requests during Cycle E of the remedial amendment cycle (from February 1, 2010 through January 31, 2011). Generally, a plan falls into Cycle E if it is an individually designed plan and the last digit of the plan sponsor's EIN is a "5" or "0".

The 2009 Cumulative List contains many of the qualification requirements described in previous years' cumulative lists, and updates the list for more recent guidance. For example, the 2009 Cumulative List now contains changes to qualification requirements under the Emergency Economic Stabilization Act of 2008 and WRERA. Plans submitted in Cycle E must timely comply with the amendment deadline for the Heroes Earnings Assistance and Relief Tax Act of 2008 (the HEART Act) (generally by December 31, 2010 for calendar year plans) and WRERA (generally by December 31, 2011 for calendar-year plans). However, the IRS will not consider HEART Act or WRERA provisions in issuing determination letters.

IRS Extends the Deadline for Adopting Certain PPA Amendments The IRS issued Notice 2009-97, which extends the deadline for adopting amendments to qualified plans for certain requirements added by the PPA to the last day of the first plan year beginning on or after January 1, 2010. This extension is limited to the following changes:

- Amendments to single-employer defined benefit plans relating to funding-based limits on benefits and benefit accruals.
- Amendments to cash balance and hybrid plans relating to vesting and other special rules.
- Amendments to defined contribution plans relating to diversification requirements for investments in employer securities.

The IRS has also granted anti-cutback relief for amendments relating to funding-based limitations that are adopted by the extended deadline.

IRS Grants Automatic Approval of Certain Funding Method Changes for Single Employer Defined Benefit Plans

The IRS issued Announcement 2010-3, which provides automatic approval for a change in funding method for a single-employer defined benefit plan due to (1) a change in the valuation software used to determine the liabilities under the plan; or (2) a change in the enrolled actuary and organization providing actuarial services to the plan. The automatic approval applies for plan years beginning on or after January 1, 2009, provided that all the requirements in the Announcement are satisfied. These automatic approvals are in addition to the other funding method changes approved by the IRS in the final regulations under Internal Revenue Code section 430 issued in October 2009.

IRS Announces Program for Preapproval of Prototype 403(b) Plans and Individual Determination Letters

The IRS announced its intent to issue two Revenue Procedures in the next few months for obtaining individual determination letters for 403(b) plans and for obtaining opinion letters for prototype 403(b) plans. (Announcement 2009-89.) The Announcement provides that an employer that adopted a written 403(b) plan by December 31, 2009 and who later adopts a pre-approved plan with a favorable opinion letter or applies for an individual determination letter will be able to correct any defects in the plan document retroactive to January 1, 2010.

PBGC Announces Flat Premium Rates for 2010

The Pension Benefit Guaranty Corporation (PBGC) announced that the 2010 flat premium rates will be $35 per participant for single-employer plans and $9 per participant for multiemployer plans. The PBGC also announced that future flat

premium rates will be posted on its website and no longer published in the Federal Register.

Eighth Circuit Remands Wal-Mart 401(k) Fee Case to the District Court

The Eighth Circuit Court of Appeals vacated the district court's decision to dismiss a lawsuit against Wal-Mart Stores, Inc. alleging that the employer and various executives failed to adequately evaluate the plan's investment options, which resulted in excessive fees being charged to participants' accounts. *Braden v. Wal-Mart Stores, Inc*., 2009 WL 4062105 (8th Cir. 2009). The complaint further alleged that the employer failed to disclose revenue sharing agreements that benefitted the plan's trustee to the detriment of the plan's participants.

The district court dismissed these claims for lack of injury (standing) and insufficient facts. The Eighth Circuit reversed, holding that the plaintiff had standing and had sufficiently stated his claims. The Eighth Circuit noted that if the allegations regarding excessive fees were true, the plaintiff had stated a fiduciary breach claim. Finally, the Eighth Circuit distinguished the contrary decision reached by the Seventh Circuit in *Hecker v. Deere & Co*., 556 F.3d 575 (7th Cir. 2009), noting that the 401(k) plan in the Deere case included a brokerage option that allowed participants access to over 2,500 mutual funds, whereas participants in Wal-Mart's 401(k) Plan had access to only 12 investment funds. For more information on the Deere case, see Reinhart's March 2009 and May 2009 Employee Benefits Updates.

Reinhart Comment: This case serves as a reminder to plan fiduciaries to use a prudent process to select and monitor plan investments. Because of the unsettled nature of the law in this area, we expect to see continued litigation in 2010 regarding excessive fees and revenue sharing arrangements.

WELFARE AND FRINGE BENEFIT PLAN DEVELOPMENTS

IRS Further Delays the Effective Date for Electronic Transit Cards

The IRS further delayed the effective date of Revenue Ruling 2006-57 (the Ruling), which provides guidance to employers who use smart cards or debit cards to provide qualified transportation fringe benefits to employees. The Ruling was to be effective January 1, 2008, but the IRS previously delayed the effective date until January 1, 2010. The IRS has now issued Notice 2009-95, which further delays the Ruling's effective date until January 1, 2011 to provide transit systems with additional time to modify their technology and make it compatible with the

requirements for vouchers contained in the Ruling. Employers, however, may continue to rely on the Ruling's guidance before the 2011 effective date.