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July 2008 Employee Benefits Update

POSTED:

Jul 24, 2008

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Select Compliance Deadlines

• **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, 2007, the general deadline for providing the SAR is September 30, 2008. However, if the filing deadline for the plan's Form 5500 is extended, the deadline for providing the SAR is extended for two months. For plan years beginning after December 31, 2007, administrators of defined benefit plans are not required to provide SARs. Instead, some of the information on the SAR will be included in the new funding notice required by the Pension Protection Act of 2006 (PPA).

• **Annual Funding Notice Deadline for Calendar Year Multiemployer Plans**

Plan administrators of multiemployer defined benefit plans must annually provide a written notice to participants, beneficiaries and other interested parties, including the Pension Benefit Guaranty Corporation (PBGC), about the plan's funding status. Calendar year plans must furnish the notice by September 30, 2008, or within two months after the close of the plan's extended period for filing Form 5500 (if applicable). The Department of Labor's (DOL) model notice remains available on the DOL website. The PPA replaces this notice requirement with a new funding notice that will generally need to be provided within 120 days after the end of each plan year beginning with the 2008 plan year.

• **HIPAA Security Compliance Reminder**

The deadline for complying with HIPAA's Security Rule was April 20, 2005 for large health plans and April 20, 2006 for small health plans (those with annual gross receipts of less than $5 million). The Security Rule addresses the administrative, technical and physical security measures that health plans must have in place for maintaining and transmitting electronic protected health information (or ePHI). The Security Rule requires periodic compliance assessments and ongoing alertness, such as reviewing and updating compliance documentation as needed in response to environmental or operational changes (e.g., change in service provider handling ePHI). Health plan sponsors should periodically review and document compliance with the Security Rule. The Centers for Medicare & Medicaid Services (CMS) provides insightful information on Privacy and Security Standards regarding compliance reviews and common areas of security vulnerability.

Retirement Plan Developments

• **IRS Roundtable Discussion for Government Plans**

In late April 2008, the IRS hosted a government plans roundtable as part of an initiative to better serve the government plan sector by raising awareness of the need to comply with tax qualification requirements. Although government plans are generally exempt from ERISA and a number of Internal Revenue Code (the Code) requirements, such plans must still satisfy certain Code provisions to ensure favorable tax treatment for plan participants. The IRS noted that it has not had a "meaningful presence" in the government plan sector, although one in five U.S. employees is a government employee and government plans hold $3.5 trillion in funded pension plan assets. The IRS roundtable discussion covered a number of topics, including: (1) the benefits to government plans of applying for a favorable determination letter; (2) an overview of the IRS's correction program; and (3) a review of some of the technical requirements applicable to government plans.

In addition, the IRS's new government plans webpage contains basic resources for government plans. The IRS intends to update the webpage frequently and invites members of the government plans community to submit questions, comments and suggestions to the IRS. According to the IRS, the most frequently asked questions will be posted. The IRS has indicated that once it learns more about government plans it will increase its enforcement activity.

Comment: Under the IRS's staggered determination letter process, government plans may file for a favorable determination letter during Cycle C, which opened on February 1, 2008 and remains open until January 31, 2009.

• **Prison Sentences for Misuse of ERISA Plan Assets**

The Fourth Circuit Court of Appeals upheld the prison sentences of two corporate executives who failed to timely contribute ERISA plan assets and committed theft under ERISA section 664. *U.S. v. Jackson*, 2008 WL 1903485. As highlighted by this case, severe consequences may result when ERISA plan assets are misused. Also, ERISA plan sponsors should keep in mind that amounts may constitute "plan assets" even before such funds are deposited in a plan's trust.

The Burruss Company (the Company) sponsored two retirement plans for its employees (collectively, the Plan). The Plan, by its terms, required the Company to make annual contributions to participant accounts by a certain date. Both the Company's chief executive officer (CEO) and chief financial officer (CFO) performed administrative functions for the Plan. For 1998, the Company was six months late in making the required contribution to the Plan. Before making the late contribution, the CEO signed and filed a Form 5500 stating that the 1998 contribution had been timely made. The Company never made the required contribution for 1999. The Company declared bankruptcy in 2000.

At the district court level, the CEO and CFO were convicted of numerous federal crimes, including ERISA theft, and given ten- and seven-year prison terms, respectively. On appeal, the defendants argued that the unpaid Plan contributions did not constitute "plan assets" for purposes of the ERISA theft statute and that they were not guilty of ERISA theft because they were not Plan fiduciaries. ERISA section 664 provides that any person who embezzles or steals from a covered plan or who unlawfully or willfully converts any of the plan's assets is guilty of a crime. The Fourth Circuit affirmed the district court and concluded that unpaid employer contributions become "plan assets" when they are "due and payable" to the Plan, and that the Plan's terms created a contractual obligation to make contributions at certain intervals. The court also ruled that ERISA section 664 applies to *any person* who embezzles or steals ERISA plan assets and does not require fiduciary status. (The court also noted that the CEO and CFO were acting as Plan fiduciaries due to the control they possessed over the Plan's administration.)

• **Seventh Circuit Withdrawal Liability Decision**

The Seventh Circuit Court of Appeals held that a proof of claim filed in a Chapter 7 bankruptcy proceeding constituted a statutory notice and demand and effectively cut off the employer's right to contest withdrawal liability because the employer had actual notice of the proof of claim. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. El Paso CGP Company*, 2008 WL 2024976. This case serves as a reminder of the mandatory arbitration scheme and related strict deadlines imposed under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

As background, MPPAA protects multiemployer pension plans by requiring withdrawing employers to pay their share of unfunded vested benefits (*i.e.*, withdrawal liability). When an employer withdraws, the multiemployer plan sponsor calculates the amount of withdrawal liability and sends a notice and demand to the employer. If an employer wishes to dispute a plan sponsor's assessment of withdrawal liability, it must arbitrate the issue. Upon receipt of the plan sponsor's notice and demand, an employer has 90 days to request an informal review by the plan and then roughly 120 additional days to demand arbitration. If an employer fails to demand timely arbitration, then the assessment becomes due and owing to the plan sponsor. Under MPPAA, members of a controlled group are jointly and severally liable for an employer's withdrawal. Courts have ruled that notice to one member of a controlled group is generally considered constructive notice to all other members of such group. In addition, MPPAA provides that if a principal purpose of any transaction is to evade or avoid withdrawal liability, withdrawal liability shall be determined and collected without regard to such transaction.

ANR Freight System, Inc. (ANR Freight) participated in the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund (the Plan). ANR Freight was a wholly owned subsidiary of El Paso CGP Company (El Paso). In 1995, due to a corporate merger, ANR Freight was no longer part of the El Paso controlled group. In 1998, ANR Freight withdrew from the Plan, and the Plan filed a proof of claim in ANR Freight's Chapter 7 bankruptcy proceeding. By no later than January 1, 2002, El Paso had actual knowledge of the proof of claim. The Plan subsequently alleged that El Paso was jointly and severally liable for ANR Freight's withdrawal liability under the "evade or avoid" theory and argued that El Paso waived its right to assert non-liability by failing to timely demand arbitration after the proof of claim was filed.

In its decision, the Seventh Circuit noted that a proof of claim in a Chapter 7 bankruptcy proceeding (as opposed to a Chapter 11 proceeding) may not come to the attention of the employer or controlled group member. The court also expressed concern with extending the constructive notice principle to former members of a controlled group. Nonetheless, the court held that El Paso's actual notice of the proof of claim trumped any deficiencies in the withdrawal liability notice and demand. Thus, the Seventh Circuit upheld the district court's determination that El Paso remained liable for ANR Freight's withdrawal liability under the "evade or avoid" theory.

• **Presumption of Prudence in 401(k) "Stock Drop" Case**

The Fifth Circuit Court of Appeals adopted a rebuttable presumption of prudence when 401(k) plan fiduciaries followed plan terms requiring investment in company stock. *Kirschbaum v. Reliant Energy*, 2008 WL 1838324. By its terms, the Reliant Energy Savings Plan (the Plan) required matching contributions to be made in Reliant stock and also required a Reliant stock fund to be available as an investment option for employee elective contributions. In May 2002, the price of Reliant stock dropped about 40% after a disclosure that some Reliant employees had engaged in fraudulent energy trades. Based on the Reliant stock drop, Plan participants sued, arguing that despite the Plan's express terms, Reliant and the Plan's benefit committee had an ERISA fiduciary duty to: (1) stop investing in Reliant stock; (2) sell the Reliant stock held by the Plan; and (3) terminate the Reliant stock fund.

The Fifth Circuit rejected the plaintiffs' claims and affirmed the district court's dismissal of the case. The Fifth Circuit concluded that Reliant and the benefits committee were entitled to a presumption of prudence regarding the decision to abide by the Plan's terms and invest in Reliant stock. To overcome the presumption, a plaintiff must show "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." The court held that the plaintiffs failed to overcome this presumption and noted that a fiduciary cannot be placed in the "untenable position" of having to predict an investment's future value. In such a case, the court noted that the fiduciary could be sued for failing to diversify investments and, if the stock rebounded, for failing to follow the plan's terms.

Health and Welfare Plan Developments

• **Genetic Information Nondiscrimination Act of 2008**

On May 21, 2008, the President signed the Genetic Information Nondiscrimination Act of 2008 (the Act) into law. The Act is intended to ensure that individuals do not forgo genetic testing or counseling because they fear adverse health coverage or employment consequences. The Act's health coverage requirements become effective for plan years beginning one year after the date of enactment (*i.e.*, January 1, 2010 for calendar year group health plans). The Act requires implementing regulations to be issued within the next year. The Act amends HIPAA's portability rules to prohibit group health plans and health insurance issuers from:

• Adjusting group premium or contribution amounts based on genetic information (The Act does not prohibit a group premium or contribution adjustment based on an enrolled individual's actual manifestation of a disease or disorder, but the disease or disorder cannot be used as genetic information about other group members);

• Requesting or requiring an individual (or a family member) to undergo a genetic test; and

• 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.

The Act broadly defines "genetic information" to include: (1) an individual's genetic tests; (2) a family member's genetic tests; and (3) the manifestation of a disease or disorder in a family member (*i.e.*, family medical histories).

These health coverage requirements will apply to all group health plans and health insurance issuers, including small plans otherwise excepted from the HIPAA portability rules and opted-out, non federal governmental plans.

Under the Act's penalty provisions, violations can result in penalties of $100 per day per individual for each day of noncompliance. The Act also establishes minimum and maximum penalties, and provides for the waiver of excessive penalties in certain situations.

• **HSA Limits for 2009**

The IRS issued Revenue Procedure 2008-29 providing the 2009 inflation-adjusted amounts applicable to health savings accounts (HSAs). Eligible individuals may make deductible contributions to an HSA, subject to statutory limits. Employers and other individuals may make HSA contributions on an eligible individual's behalf. A person is an "eligible individual" if he or she is covered under a high deductible health plan (HDHP) and is not covered under any other health plan that is not an HDHP, unless the other coverage is "permitted insurance."

Revenue Procedure 2008-29 makes the following changes for the 2009 calendar year:

- *Changes to Annual Contribution Limit*. The deduction limit for an individual with self-only HDHP coverage is $3,000 (up from $2,900 for 2008), and the limit for an individual with family HDHP coverage is $5,950 (up from $5,800 for 2008).

- *HDHP Changes*. An HDHP is defined as a health plan with an annual deductible that is at least $1,150 for self-only coverage (up from $1,100 for 2008) or $2,300 for family coverage (up from $2,200 for 2008). The annual out-of-pocket expenses (e.g., deductibles, copayments and other amounts, but not premiums) cannot exceed $5,800 for self-only coverage (up from $5,600 for 2008) or $11,600 for family coverage (up from $11,200 for 2008).

Also, the statutory "catch-up" contribution limit (for eligible individuals age 55 or older) is $1,000 for 2009 (up from $900 for 2008).

• New DOL "Elaw" Interactive Tool

The DOL unveiled a new elaws Employment Law Advisor to help employers determine which federal recordkeeping, reporting and notice requirements apply to them. The DOL's elaws advisors address various federal laws regulated by the DOL, including COBRA, FMLA, USERRA and HIPAA. By asking a series of questions, the elaws advisors simulate a conversation with a DOL expert and guide users to customized information explaining the general requirements of each law. The elaws advisors provide the following guidance:

- The FirstStep Employment Law Overview Advisor determines which federal laws apply to each user, and then provides information on the basic provisions of these laws;
- The new FirstStep Recordkeeping, Reports and Notices Advisor summarizes the paperwork requirements for each law; and
- The FirstStep Poster Advisor provides short descriptions of poster requirements and links to printable posters.

The DOL offers numerous other elaws advisors addressing other employment topics on the DOL website. While the advisors may provide helpful guidance, users should keep in mind that they provide very general and simplistic explanations of the law.