Reinhart

July 2010 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Annual Open Enrollment Materials for Calendar-Year Group Health Plans

The annual open enrollment period is approaching for many calendar-year group health plans. Group health plan sponsors should review open enrollment materials to confirm whether they need to be updated for any plan design changes.

As described in the June 2010 Employee Benefits Update, regulations were issued requiring that group health plans provide dependent coverage to participants' children up to age 26, which takes effect as of the first plan year beginning on or after September 23, 2010. The Department of Labor (DOL) recently published model language for this coverage mandate. If the plan conducts an annual open enrollment in advance of the beginning of the plan year to which the mandate applies, the notice and transitional enrollment period for this mandate may be conducted as part of the annual open enrollment. Please note that this transitional enrollment period must run for at least 30 days. Accordingly, calendar year plans should provide the mandate notice and begin the enrollment period by December 1, 2010.

2009 Form 5500 Deadline for Calendar-Year Plans Is July 31, 2010

Plan administrators generally have seven months after the end of a plan year to file a Form 5500. For plan years ending December 31, 2009, the deadline for filing the Form 5500 is July 31, 2010. Plan sponsors that extended their corporate federal income tax return deadline may receive an automatic extension until September 15, 2010, if certain criteria are satisfied. Otherwise, plan administrators may apply for a deadline extension until October 15, 2010 by filing Form 5558 on or before July 31, 2010 (the plan's regular filing deadline).

Remember that the 2009 Form 5500 must be filed electronically using EFAST2.

Annual Benefit Statement Deadline Is Approaching for Calendar-Year Defined Contribution Plans with Plan-Directed Investments

Administrators of defined contribution plans that do not allow participant investment direction must provide an annual benefit statement to participants

POSTED:

Jul 28, 2010

RELATED PRACTICES:

Employee Benefits
https://www.reinhartlaw.com/practices/employee-benefits

RELATED PEOPLE:

Lucas J. Pagels
https://www.reinhartlaw.com/people/lucas-pagels

and beneficiaries by the date on which the Form 5500 is filed by the plan (but in no event later than the due date, including extensions, for filing the Form 5500) for the plan year to which the benefit statement relates. For a calendar year plan, the 2009 benefit statement is due by the earlier of (i) the actual filing date of the 2009 Form 5500, or (ii) July 31, 2010 (the plan's regular filing deadline), unless a Form 5500 deadline extension applies.

Summary of Description of Material Modifications of Plan Due July 29, 2010 for Calendar-Year Plans

Plan administrators of employee pension and welfare benefit plans must furnish a summary description of any material modification to the plan and changes in the summary plan description to each participant covered under the plan and each beneficiary receiving benefits under the plan. Administrators must furnish this summary no later than 210 days after the close of the plan year in which the modification or change was adopted (*i.e.*, July 29, 2010 for calendar-year plans). However, the summary of material modification or changes in information in the summary plan description do not need to be furnished separately if the changes or modifications are described in a timely summary plan description.

RETIREMENT PLAN DEVELOPMENTS

President Obama Signs Pension Funding Relief Act

President Obama recently signed the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (Act), which includes funding relief for multiemployer defined benefit plans. The following paragraphs describe a few key items addressed in the Act.

- Extension of Amortization Schedules. The Act generally provides that solvent defined benefit pension plans may separate the portion of their experience loss attributable to the net investment losses incurred in either or both of the first two plan years ending after August 31, 2008 from other experience losses to be amortized in equal annual installments over a period of 29 years. (Note that Congress may pass a technical corrections bill that would change the 29 years to 30 years that was intended in the Act.)

- Expanded Smoothing. The Act also provides that a solvent plan, in determining the actuarial value of its assets, may change its asset valuation method in a manner that (i) spreads the difference between expected and actual returns for either or both of the first two plan years ending after August 31, 2008 over a

period of not more than ten years, and/or (ii) provides that for either or both of the first two plan years beginning after August 31, 2008, the value of plan assets shall not be less than 80% or greater than 130% (increased from the current 120% limit) of the fair market value of the assets.

- Solvency Test. A multiemployer plan will satisfy the Act's solvency test if it certifies that the plan is projected to have sufficient assets to pay expected benefits and expenses over the amortization period, taking into account the changes in the funding standard account arising out of action taken under the Act.

Reinhart Comment: We will continue to monitor for any regulatory guidance or technical corrections bills that may be issued regarding the Act.

IRS Issues Final Regulations Regarding Diversification of Investments

The Internal Revenue Service (IRS) issued final regulations under Section 401(a)(35) of the Internal Revenue Code (Code) addressing the diversification of investment opportunities required for plans holding publicly traded employer securities. (Note that stand-alone ESOPs are not subject to this rule.) These final regulations are effective for plan years beginning on or after January 1, 2011.

To satisfy the diversification requirements, a plan must permit participants, alternate payees and beneficiaries of participants to direct the portion of their defined contribution plan account holding employer securities to be invested in alternative investments. For employer securities acquired with employer contributions, the plan may require three years of service for the right to reinvest in alternative investments (except with regard to a beneficiary of a deceased participant). Participants must be able to immediately reinvest employer securities acquired with employee contributions. The regulations also provide that certain investment funds that include employer securities as part of a collective fund are not treated as holding employer securities.

DOL Issues Final Regulations for Order and Timing of QDROs

In connection with a directive under the Pension Protection Act of 2006 (PPA), the DOL issued interim final regulations in March 2007 to address the timing and order of qualified domestic relations orders (QDROs). The DOL recently finalized these regulations, which are intended to eliminate uncertainty in the process of determining if a domestic relations order (DRO) is qualified under the Code and the Employee Retirement Income Security Act (ERISA). These regulations are

effective as of August 9, 2010.

The regulations generally clarify that a QDRO will not fail to be qualified solely because it is issued after, or revises, another DRO or QDRO. The regulations also address timing issues, and examples illustrate that a QDRO will not fail to be qualified solely because it is issued after (i) the death of the participant (even if notice was not provided to the plan before the participant's death), (ii) the participant's divorce, or (iii) the participant's annuity starting date.

PBGC Clarifies Form 5500 Reporting of Multiemployer Plan Participants No Longer Receiving Employer Contributions on Their Behalf

As amended by the PPA, ERISA requires multiemployer pension plans to include in their annual Form 5500 filing the number of participants on whose behalf no contributions were made by an employer for the applicable plan year and separately for each of the two preceding plan years. The Pension Benefit Guaranty Corporation (PBGC) recently issued a Technical Update that clarifies the instructions for reporting this information and provides partial reporting relief for the 2009 plan year.

- General Clarifications. The Technical Update clarifies that if the participant's last contributing employer had withdrawn from the plan by the beginning of the relevant plan year, the participant is still counted for purposes of the Form 5500. The Technical Update further clarifies that as an alternative, a plan may count only those participants whose last contributing employer and all prior contributing employers had withdrawn from the plan by the beginning of the relevant plan year.

- Partial Relief for 2009 Form 5500 Filing. Although a plan must make a good faith effort to provide all available data required by the Form 5500, the PBGC provides partial relief for the 2009 plan year to plans that cannot obtain the data relating to these participants. The PBGC offers the following two methods:*Reasonable Approximation of Number of Participants*. If a plan is not able to obtain the participant data because of the need to modify its records systems to obtain such information, the plan instead may provide a reasonable approximation of the number of participants required to be reported. The plan determines the percentage of the sampled participants whose last contributing employer had withdrawn from the plan by the beginning of the 2009 plan year, and applies this percentage to the plan's total inactive participant population for the 2009 plan year.*Alternative Method*. A plan may make a partial report by

reporting the number of employers who withdrew from the plan beginning in the 1998 plan year through the end of the plan year preceding the relevant plan year, and the number of participants on whose behalf these employers made contributions to the plan. A plan may estimate the number of participants of each withdrawn employer by converting the highest number of contribution base units during the five prior plan years into the number of participants.

PBGC Provides Relief for Variable Rate Premium Payers

The PBGC issued a Technical Update to provide relief to plans that intended to elect to use the alternative premium funding target (APFT) to calculate the variable rate premium (VRP) but did not make the proper election on its comprehensive premium filing with the PBGC. Under PBGC regulations, a plan may elect to use the APFT to calculate its VRP for plan years commencing after 2007. If a proper election to use the APFT is not in effect, the plan must calculate its variable rate premium using the standard premium funding target (SPFT).

Under this Technical Update, a plan that intended to elect to use the APFT will be deemed to have made a valid election if certain conditions are met and the plan notifies the PBGC. Previously, the PBGC did not provide a method to correct an improper election to use the APFT.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HHS Issues Guidance and Begins Accepting Applications for the Temporary Early Retiree Reinsurance Program

As described in the June 2010 Employee Benefits Update, the Health and Human Services (HHS) previously issued interim final regulations to implement the early retiree reinsurance program. The HHS is now accepting applications for this program. The HHS has released an application, with instructions, that employers must use to apply for reimbursement of claims pursuant to this program. The HHS also issued a list of Frequently Asked Questions that provides additional guidance for employers completing the applications. More detailed information on the regulations, including a detailed initial action item list for plan sponsors, can be found in Reinhart's recent publication, Health Care Reform: Early Retiree Reinsurance Reform.

Interim Final Regulations Issued on Preexisting Conditions, Lifetime and Annual Dollar Limits on Benefits, Rescissions and Patient Protections

The Departments of Treasury, Labor and HHS jointly issued interim final regulations implementing the provisions of the Patient Protection and Affordable Care Act (PPACA) on preexisting condition exclusions, lifetime and annual dollar limits on benefits, rescissions and patient protections. For group health plans and group health insurance coverage, the regulations are effective for plan years beginning on or after September 23, 2010 (except for preexisting condition exclusion limitations for individuals 19 or older, which apply for plan years beginning on or after January 1, 2014).

DOL Clarifies and Expands Application of FMLA to "Son or Daughter"

The DOL issued an Administrator's Interpretation clarifying that the leave entitlement under the Family and Medical Leave Act (FMLA) for birth, bonding following adoption or foster care placement, or to care for a “son or daughter” with a serious health condition extends to nontraditional family arrangements (*i.e.*, same-sex couples).

The FMLA defines "son or daughter" as a 'biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* [in place of the parent], who is (i) under 18 years of age, or (ii) 18 years of age or older and incapable of self-care because of a mental or physical disability." The DOL notes that an employee who either has day-to day responsibility for care or financially supports the child stands *in loco parentis* under the FMLA. The DOL also notes that in the case of a lack of a legal or biological relationship with the child, the presence of a biological parent in the home or the existence of a biological mother and father will not necessarily defeat a finding that an employee stands in loco parentis with the child. As a result, the DOL concluded that same-sex couples who share in raising a child may stand *in loco parentis* for purposes of the FMLA. Likewise, relatives who assume ongoing responsibility of the child may be considered to stand *in loco parentis*.

Reinhart Comment: Plan sponsors should review their FMLA policies and procedures to confirm that they are consistent with this DOL Interpretation.

CMS Updates Creditable Coverage Disclosure to CMS Form

Many group health plans offering prescription drug coverage to Medicare Part D eligible individuals must disclose to the Centers for Medicare and Medicaid Services (CMS) whether the coverage is "creditable" under the Part D regulations. CMS has updated the "Disclosure to CMS Form" that group health plans must provide to CMS to disclose the creditable coverage status of their plans. Although

most of the changes are minor and not substantive, CMS also added two new examples to help plan sponsors answer the question, "Has your creditable coverage status changed from the last plan year?" The form also notes that entities claiming the retiree drug subsidy should not fill out the Disclosure to CMS Form for their retiree drug subsidy plan participants.

GENERAL DEVELOPMENTS

Second Circuit Finds that Board of Trustees of Taft-Hartley Plans Are "Inherently" Conflicted

The Second Circuit recently held that because Taft-Hartley plans are administered by trustees consisting of union and employer representatives, the plans are inherently conflicted when making benefit determinations and this conflict should be considered by federal district courts when reviewing plan determinations. *Durakovic v. Building Service*, 2010 WL 2519645 (2d Cir. 2010).

The Supreme Court previously established a two-step analysis for courts that review claims determinations by administrators that both decide and pay claims for benefits. *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008). The court first determines whether a structural conflict exists. The court then determines how much weight the conflict should be given in determining whether the administrator abused its discretion. The Glenn decision, however, did not provide any specific guidance regarding how this analysis may apply to Taft-Hartley plans.

In the present case, the plans argued that they were not conflicted within the meaning of Glenn because Taft-Hartley plans are administered by an equal number of union and employer representatives. The Second Circuit noted that a structural conflict exists for all Taft Hartley plans. The Court reasoned that while the employer representatives on the board of trustees have fiduciary interests that weigh in favor of the trusts' beneficiaries, they also have representational and other interests that weigh to the contrary. The court further noted that the conflict is not negated merely because the trustees are evenly balanced between union and employer representatives.

Reinhart Comment: The Second Circuit acknowledged that its ruling conflicts with the Ninth Circuit, which previously held that a Taft-Hartley fund is not conflicted within the meaning of *Glenn. Anderson v. Suburban Teamsters of N. Ill. Pension Fund Bd. of Trs*., 588 F.3d 641 (9th Cir. 2009). The Ninth Circuit reasoned that a Taft-Hartley trust is a not-for-profit trust in which the trustees do not have a personal interest and evaluations are made by a balanced board of trustees. The Second

Circuit's conclusion that all Taft-Hartley funds suffer from an inherent conflict does not control courts in other circuits, and district courts have discretion regarding how much weight to grant the conflict. However, *Durakovic* is important because it officially creates a conflict of law within the circuits of the U.S. Courts of Appeal. We will continue to monitor how other circuits apply the ruling in *Glenn* with respect to Taft-Hartley plans.