June 2009 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

New Optional Withholding Adjustment Procedure for Pension Plans The Internal Revenue Service (IRS) issued Notice 1036-P containing a new optional withholding adjustment procedure for 2009 pension plan payments to address potential under withholding. In February 2009, the IRS issued new withholding tables that reflect the Making Work Pay earned income tax credit adopted as part of the American Recovery and Reinvestment Act of 2009 (ARRA). Plan sponsors and employers were required to utilize the new withholding tables by April 1, 2009. However, pensioners without earned income are ineligible for the new tax credit. Therefore, the February 2009 withholding tables may result in under withholding for pensioners.

According to the IRS, the new withholding calculation procedure in Notice 1036-P will make withholding more accurate for pensioners. Pension payors are not required to apply the new withholding adjustment procedure and instead may continue to use the February 2009 withholding tables. In addition, employers may want to contact any retiree who submitted a Form W-4P (Withholding Certificate for Pension or Annuity Payments) after the February 2009 tables became effective to request additional withholding, to determine if the retiree wants to continue the additional withholding or submit a new Form W-4P.

Employers sponsoring calendar-year defined benefit plans should keep in mind important funding-related deadlines occurring later this year. Under the Pension Protection Act's (PPA's) contribution schedule, the deadline for paying a minimum required contribution for a plan year is generally 8 ½ months after the end of the plan year. If a minimum required contribution is not paid by the deadline, an excise tax applies. For plan years ending December 31, 2008, the deadline for making the minimum required contribution is September 15, 2009. (Note: The PPA requires a quarterly contribution schedule for a defined benefit plan with a funding shortfall for the preceding plan year. For calendar-year plans, quarterly contributions for a plan year are due on April 15th, July 15th, October 15th and January 15th of the next year.)

Also, if a defined benefit plan's "adjusted funding target attainment percentage" (AFTAP) is not yet certified, certain presumptions must be applied which may result in benefit restrictions. (See table page 2)

POSTED:

Jun 17, 2009

RELATED PRACTICES:

Employee Benefits

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

RELATED PEOPLE:

Denise P. Goergen

https://www.reinhartlaw.com/people/denise-goergen

Date	Presumed AFTAP	Restrictions
January 1, 2009 – March 31, 2009	9 2008 AFTAP	None, unless a plan amendment would decrease the presumed AFTAP below 80%.
April 1, 2009 – September 30, 2009	2008 AFTAP minus 10%	-Plan amendments -Half lump sums and other accelerated payments -Shutdown benefits, if the additional cost would increase the presumed AFTAP below 60%.
October 1, 2009 and later	Under 60%	All restrictions apply

If the 2009 AFTAP is certified by October 1, 2009, then that AFTAP will be used as soon as it is certified. If the 2009 AFTAP is not certified until October 2, 2009, or later, then all the benefit limitations will apply through the end of the 2009 plan year. The restrictions will continue beyond the end of the 2009 plan year until the 2009 or 2010 AFTAP is certified.

(*Note*: The Worker, Retiree and Employer Recovery Act of 2008 provides some relief for plan years beginning between October 1, 2008 and September 30, 2009 by allowing plan sponsors to use the prior year's funding percentage to avoid freezing benefit accruals.)

Qualified Retirement Plan Determination Letter Submission Deadlines The IRS is now accepting determination letter applications for Cycle D individually designed plans and pre-approved defined contribution plans. As detailed below, the deadlines for restating and submitting these plans to the IRS for a favorable determination letter are approaching.

- *Cycle D Individually Designed Plans' Submission Period Ends January 31, 2010*. Effective February 1, 2009, the IRS began accepting determination letter applications for Remedial Amendment Period Cycle D individually designed plans. In general, Cycle D plans must be submitted for a determination letter before February 1, 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 ending in a four or nine, as well as multiemployer plans. As an alternative to submitting a plan in Cycle D, the sponsor of a Cycle D individually designed plan whose 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).

- *Pre-Approved Defined Contribution Plans' Submission Period Ends April 30, 2010*. Effective May 1, 2008, the IRS began accepting determination letter applications for pre-approved defined contribution plans. Employers using a pre-approved plan document, such as Reinhart's volume submitter document, to restate a defined contribution plan for the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and other changes in qualification requirements, must adopt the EGTRRA-approved plan document and, if applicable, submit it to the IRS for a favorable determination letter by April 30, 2010.

RETIREMENT PLAN DEVELOPMENTS

IRS Proposed Relief for Employers Sponsoring 401(k) Safe Harbor Plans with Nonelective Contributions

The IRS issued proposed regulations under Internal Revenue Code (the Code) sections 401(k) and 401(m) providing employers that cannot afford to make safe harbor nonelective contributions with an alternative to terminating their 401(k) plans. The regulations are proposed to be effective for amendments adopted after May 18, 2009. Employers may rely on the proposed regulations pending the issuance of final regulations. If the final regulations are more restrictive than the proposed regulations, the IRS states that the more restrictive provisions of the final regulations will not apply retroactively.

As background, a 401(k) plan must satisfy certain nondiscrimination tests, including the actual deferral percentage (ADP) test and, if applicable, the actual contribution percentage (ACP) test. To automatically satisfy the ADP/ACP testing requirements, a 401(k) plan sponsor may opt for a safe harbor design, which requires certain employer contributions and participant notices. Employers can satisfy the safe harbor contribution requirement with either matching contributions or nonelective contributions. Subject to some exceptions, a safe harbor plan must be adopted before the beginning of a plan year and maintained throughout a full 12-month plan year. Under final IRS regulations, an employer may amend a plan during a plan year to reduce or suspend safe harbor matching

contributions on future employee elective contributions, if certain criteria are met. In addition, if certain requirements are satisfied, an employer may terminate its safe harbor plan during the plan year.

The IRS's proposed regulations allow an employer that incurs a "substantial business hardship" to amend its plan during a plan year to reduce or suspend a plan's safe harbor nonelective contributions, if certain criteria are met. For example, all eligible employees must be given a "supplemental notice" explaining the reduction or suspension of future safe harbor nonelective contributions and its consequences, the procedures for changing employee elections and the effective date of the amendment. In addition, among other requirements, the reduction or suspension can occur no earlier than 30 days after providing eligible employees with the supplemental notice and the plan amendment's adoption date, if later.

Reinhart Comment: As an exception to the general rule described above, a 401(k) plan that uses the current year ADP/ACP testing method may be amended during a plan year to adopt a safe harbor design with nonelective contributions. Plan sponsors that use this "wait and see" approach must provide a participant contingent notice prior to the plan year and a follow-up notice if the plan is amended to incorporate a safe harbor design. The "wait and see" approach provides flexibility because it gives a plan sponsor until 30 days prior to the end of the plan year to decide whether or not to make the safe harbor nonelective contribution for that year.

Supreme Court Rules Pre-PDA Maternity Leave Need Not Count in Calculating Pension Benefits

The U.S. Supreme Court ruled that the Pregnancy Discrimination Act of 1978 (PDA) does not have retroactive effect and, consequently, an employer does not necessarily violate the PDA when it pays pension benefits calculated, in part, under a pre-PDA accrual rule that gave less retirement credit for pregnancy leave than for medical leave. AT&T Corp. v. Hulteen, 2009 WL 1361539. Prior to the late 1970's, AT&T employees on disability leave received full pension service credit for the entire absence, but employees on pregnancy leave received only a limited amount of pension service credit. In 1978, Congress amended Title VII by passing the PDA to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." When the PDA became effective, AT&T started providing pension service credit for pregnancy leave on the same basis as for disability leave. However, AT&T did not make any retroactive

adjustments to the pension service credit calculations of women who had been subject to the pre-PDA leave policies. The plaintiffs, each of whom received service credit under AT&T's pre-PDA policies, sued AT&T for discriminating on the basis of pregnancy under Title VII.

The Ninth Circuit Court of Appeals found a Title VII violation where post-PDA pension calculations incorporated pre-PDA accrual rules that differentiated on the basis of pregnancy. Because the Ninth Circuit's decision conflicted with cases from the Sixth and Seventh Circuits holding that using a pre-PDA accrual rule to calculate pension benefits does not constitute a current Title VII violation, the Supreme Court decided to review the Ninth Circuit's decision. The Supreme Court reversed the Ninth Circuit and ruled that AT&T did not necessarily violate the PDA when it calculated pension benefits under a pre-PDA accrual rule that gave less pension credit for pregnancy leave than for medical leave. The Supreme Court reasoned that AT&T's pre-PDA practices regarding allocating pension service credit for pregnancy leave were not illegal at the time, and there is no indication that Congress intended for the PDA to apply retroactively.

PBGC Reporting Relief for Small Plans' Missed Quarterly Contributions

ERISA section 4043 and underlying regulations require plan administrators of single-employer defined benefit plans to notify the Pension Benefit Guaranty Corporation (PBGC) within 30 days after specified reportable events (i.e., post event reporting), including the failure to make a required contribution. In past years, the PBGC automatically waived the reporting of missed quarterly contributions where the employer had 100 or fewer participants covered by its plans, or had between 100 and 500 participants covered by its plans and missed contributions to a plan that was well funded. As reported in Reinhart's April 2009 Employee Benefits Update, the PBGC announced earlier this year that it would not grant an automatic waiver for 2009 of the requirement to notify the PBGC of missed quarterly contributions.

In response to practitioners' concerns, the PBGC issued Technical Update 09-3, waiving the reporting obligation or reducing the reporting burden for 2009 for certain small plans with missed quarterly contributions. In general, Technical Update 09-3 provides that if a required quarterly contribution for the 2009 plan year is not timely made to a plan, and the failure to make the contribution is not motivated by financial inability, the PBGC reporting requirement is waived if the plan has fewer than 25 participants for the prior plan year. If the plan has at least 25 but fewer than 100 participants for the prior plan year and the failure to make

a contribution is not motivated by financial inability, the PBGC's reporting requirement will be satisfied if a simplified notice is filed with the PBGC by the due date of the reportable event report for the first missed quarterly contribution for the 2009 plan year.

Sixth Circuit Rules Post-Retirement Benefit Increase Was Not Protected Under the Anti-Cutback Rule

The Sixth Circuit Court of Appeals ruled that a multiemployer pension plan (Plan) did not violate ERISA's anti-cutback rules by rescinding post-retirement benefit increases. Thornton v. Graphic Communications Conference, et al., 2009 WL 1323565 (6th Cir. 2009). The plaintiff retired in 1995 and began receiving a pension under the Plan. Effective February 1, 1999, the Board of Trustees (Board) amended the Plan to provide a nine percent increase in benefits for all participants. In 2002, the Board adopted a benefits reduction amendment, effective April 1, 2003, rescinding the 1999 increase for Plan participants who retired prior to February 1, 1999. The plaintiff sued alleging that the benefits reduction amendment violated ERISA's anti-cutback rule.

The Sixth Circuit began its analysis by noting that ERISA's anti-cutback rule prohibits plan amendments that decrease participants' "accrued benefits." The court followed the reasoning of the Fourth Circuit in a similar case and held that the statutory language and context of the anti-cutback rule demonstrate that Congress did not consider a postretirement increase to be a protected "accrued benefit." The court noted that IRS regulations, effective for amendments adopted on or after August 12, 2005, provide that the anti-cutback rule applies to benefits accrued after employment ends. However, because the court concluded that the IRS regulations were not in effect when the benefits reduction amendment was made, the court noted it was not obligated to analyze the IRS's interpretation of the anti-cutback statute.

District Court Addresses Trustee's Duty to Monitor and Collect Delinquent Contributions Under ERISA

A district court in Massachusetts recently agreed with the Department of Labor's (DOL's) position that the right to collect unpaid employer contributions to a retirement plan is a "plan asset" that must be held in trust. *Solis v. Plan Benefit Services*, 2009 WL 799092 (D. Mass 2009). Under the facts of this case, the Contractors and Employees Retirement Plan (Plan) was a master plan with approximately 1,100 adopting employers. Plan Benefit Services, Inc. (PBS) was the

Plan sponsor. Employers adopting the Plan were governed by a master trust agreement. The master trust had an institutional trustee that exercised discretionary authority under the trust agreement. PBS had authority to appoint and remove the trustee and power to amend the Plan and trust agreement. Significantly, the Plan and trust agreement stated that the trustee was not responsible for monitoring and collecting employer contributions. The DOL initiated a lawsuit against PBS in August 2007 alleging that PBS violated its ERISA fiduciary duties by failing to ensure the collection of employer contributions, and that the Plan provision relieving the trustee from the obligation to collect employer contributions was void as against public policy.

In its analysis, the district court noted that ERISA section 403 generally requires all assets of an employee benefit plan to be held in trust by one or more trustees. Because the right to collect unpaid employer contributions is a "plan asset" that must be held in trust, the court held that the Plan's language eliminating trustee responsibility for the collection of unpaid contributions violated ERISA section 403. Although the court did not find PBS to be acting in a fiduciary capacity, the court ultimately concluded that the Plan's language eliminating trustee responsibility for the collection of unpaid contributions was void as against public policy.

Reinhart Comment: As discussed in Reinhart's March 2008 Employee Benefits Update, the DOL previously issued Field Assistance Bulletin 2008-1 (FAB), providing guidance to ERISA plan fiduciaries on their responsibilities to monitor and collect delinquent plan contributions. The DOL issued the FAB in response to a number of pension plan investigations, such as the one detailed above, where the DOL found agreements purporting to relieve plan trustees of any responsibility to monitor and collect delinquent contributions. The FAB notes that the duty to collect delinquent plan contributions is a trustee responsibility and provides guidance for ERISA plan fiduciaries on delegating the responsibility to collect plan contributions.

DOL Further Postpones Effective Date of Investment Advice Regulations

On January 21, 2009, the DOL issued final regulations on providing investment advice to 401(k) plan participants and beneficiaries. The final regulations, which are described in Reinhart's February 2009 Employee Benefits Update, specified an effective date of March 23, 2009. However, based on an Obama Administration directive on regulatory review, the DOL announced a 60-day postponement of the final regulations' effective date until May 22, 2009. The DOL has now further

delayed the effective date for the final investment advice regulations for an additional 180 days until November 18, 2009. According to the DOL, the complexity and significance of the law and policy issues raised by the final regulations justify additional time for review.

Reinhart Comment: In late April 2009, Representative Rob Andrews (D - New Jersey) introduced the "Conflicted Investment Advice Prohibition Act" to revise the parameters for offering investment advice to participants in 401(k) plans. According to Representative Andrews, the bill is aimed at nullifying the DOL's final investment advice regulations described above and is necessary to protect 401(k) plan participants from tainted investment advice. Opponents of the legislation argue that, if enacted, fewer 401(k) plan participants would receive investment advice.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Post-Glenn Standard of Review for Benefit Claim Determinations in the Third and Eighth Circuits

The Third and Eighth Circuit Courts of Appeal recently examined the impact of the Supreme Court's ruling in *Metropolitan Life Insurance Company v. Glenn* on the standard of review for benefit claim determinations. Estate of *Schwing v. Lilly Health Plan*, 2009 WL 989114 (3rd Cir. 2009); *Chronister v. Unum Life Ins. Co. of America*, 2009 WL 1150325 (8th Cir. 2009). As background, the U.S. Supreme Court decided Glenn in 2008 to settle a dispute among the circuit courts regarding the impact of a financial conflict of interest on the standard of judicial review for benefit claim determinations. In 1989, the Supreme Court decided *Firestone Tire & Rubber Co. v. Bruch*, holding that where an employer is responsible to both decide eligibility for claims and make claims payment, the employer acts under a conflict of interest that is a relevant factor in determining whether the employer abused its discretion. In *Glenn*, the Supreme Court concluded that this rule extends to an insurer that administers the plan and pays benefits. However, the Supreme Court did not establish specific rules for how a conflict of interest should factor into the decision of whether the insurer abused its discretion. The circuit courts, such as the Third Circuit in *Schwing* and the Eighth Circuit in Chronister, have been addressing how the conflict of interest impacts review of a fiduciary's benefit denial. In some cases, including the ones described below, the *Glenn* analysis results in a change in outcome.

- *Third Circuit*. Pre-*Glenn*, the Third Circuit used a "sliding scale" approach where

the level of deference given to a benefit determination would change depending on whether conflicts of interest affected plan administration. In *Schwing*, the Third Circuit ruled that, based on the Supreme Court's *Glenn* decision, the "sliding scale" approach is no longer valid. The court held that a deferential abuse of discretion standard of review should apply and that any conflict of interest should be taken into account as one of several factors in considering whether the fiduciary abused its discretion. The Third Circuit overturned the district court and ruled that the fiduciary did not abuse its discretion when denying the plaintiff's claim for severance benefits, despite an attorney's conflict of interest and the conflict of interest inherent in a self-funded and self-administered benefit plan.

- *Eighth Circuit*. Pre-*Glenn*, the Eighth Circuit held that it was incorrect to assume that a conflict of interest existed when a plan administrator was also the insurer. The Eighth Circuit also held that a conflict of interest would not trigger a less deferential standard of review unless the claimant could show that the conflict was a cause of the benefit denial. In Chronister, the Eighth Circuit noted that, under *Glenn*, a conflict of interest exists when a plan administrator is also responsible for paying benefits. The Eighth Circuit also noted that, while a causal connection may be important in reviewing a fiduciary's benefit decision, such a connection is not required to take the conflict of interest into account. Under this new approach, the Eighth Circuit reversed the district court and concluded that several factors pointed to the fiduciary's abuse of discretion in handling the plaintiff's claim, such as the financial conflict of interest, the fiduciary's history of biased claims administration and the fiduciary's failure to follow its own claims procedures.

Reinhart Comment: The Seventh Circuit recently reviewed a fiduciary's disability benefit claim denial under an abuse of discretion standard and weighed a financial conflict of interest as a factor under the heightened standard. Jenkins v. Price Waterhouse Long Term Disability Plan, 2009 WL 1175171 (7th Cir. 2009). In a footnote, the court issued a warning about independent medical examinations. In its warning, the court stressed that an "independent" medical examination is likely to be adverse to the plan fiduciary on occasion, and that how much the physician is paid, as well as how often the physician is used, are important factors to consider when determining how much weight should be given to the physician's opinion. Based on this warning, health plans should be cautious in the continual use of one particular physician when evaluating appeals and issuing medical opinions for the health plans.

Additional COBRA Subsidy Guidance

ARRA imposes two new COBRA obligations on employers, administrators and insurers who provide COBRA coverage: (1) a COBRA premium subsidy; and (2) a second COBRA election period. These compliance requirements are generally effective for COBRA premiums charged on or after March 1, 2009. Since ARRA's enactment, the DOL and IRS have issued numerous pieces of guidance on the new COBRA compliance requirements. For example, Reinhart's April 8, 2009 E-Alert highlights the IRS's guidance regarding who is eligible for the COBRA premium subsidy. A separate Reinhart E-Alert from April 8, 2009 analyzes the DOL's model COBRA subsidy notices.

The IRS has now updated its website to include more questions and answers (Q&As) on the COBRA premium subsidy. The additional Q&As address COBRA subsidy administration and eligibility issues, including when the COBRA subsidy first applies to an assistance eligible individual (AEI) and when it ends. The IRS also added new Q&As on claiming the payroll credit for the COBRA subsidy, including a Q&A addressing how reimbursement for the COBRA subsidy is claimed by an entity that does not have any payroll tax liabilities (*e.g.*, certain multiemployer health plans without employees). Employers and health plan administrators applying the COBRA premium subsidy should review these additional Q&As.

In addition, if an individual requests eligibility for the COBRA premium subsidy based on his or her claimed AEI status and the claim is denied, the individual may request federal review of the denial by the DOL. (For individuals covered by group health plans of federal, state and local governments or group health plans subject to a COBRA-comparable state law, the federal review is provided by the Centers for Medicaid and Medicare Services (CMS). The DOL has updated its website to provide information on the appeal process, including an application for individuals to use when requesting DOL review.

Informal EEOC Guidance on Health Risk Assessments

The Equal Employment Opportunity Commission (EEOC) recently released an informal opinion letter addressing restrictions on health risk assessments under the Americans with Disabilities Act (ADA). The EEOC's letter was in response to an employer's inquiry regarding whether the ADA allows the employer to require employees to participate in a health risk assessment as a condition for participating in the employer's group health plan. According to the employer, employees refusing to participate in the assessment and their dependents are

denied coverage under the group health plan.

Under the ADA, once employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. In its opinion letter, the EEOC notes that, although it has not taken a formal position on the employer's inquiry described above, requiring all employees to take a health risk assessment as a prerequisite for obtaining health coverage appears to violate the ADA because it does not seem to be job-related and consistent with business necessity. The EEOC also notes that disability-related inquiries and medical examinations are permitted as part of a voluntary wellness program (i.e., a wellness program where employees are neither required to participate nor penalized for nonparticipation). In this situation, the EEOC states that, even if the health risk assessments could be considered part of a wellness program, the program would not be voluntary because employees who do not participate are excluded from health coverage.

Reinhart Comment: Although the letter discussed above is not an official EEOC opinion, it indicates the EEOC believes that requiring employees to complete a health risk assessment as a condition for health plan eligibility violates the ADA. Until additional EEOC guidance is issued, it is advisable for employers subject to the ADA to discontinue any practice of requiring employees to complete a health risk assessment in order to participate in the health plan. In addition, employers using health risk assessments should keep in mind that the EEOC has not indicated what amount of financial incentive, if any, is permissible under the ADA to encourage participation in the health risk assessment.

HSA Limits for 2010

The IRS issued Revenue Procedure 2009-29 providing the 2010 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 2009-29 makes the following changes for the 2010 calendar year:

- *Annual Contribution Limit*. The deduction limit for an individual with self-only HDHP coverage is $3,050 (up from $3,000 for 2009), and the limit for an

individual with family HDHP coverage is $6,150 (up from $5,950 for 2009).

- *HDHP- Minimum Deductibles and Out-of-Pocket Maximum*. An HDHP is defined as a health plan with an annual deductible that is at least $1,200 for self-only coverage (up from $1,150 for 2009) or $2,400 for family coverage (up from $2,300 for 2009). The annual out-of-pocket expenses (*e.g.*, deductibles, copayments and other amounts, but not premiums) cannot exceed $5,950 for self-only coverage (up from $5,800 for 2009) or $11,900 for family coverage (up from $11,600 for 2009). Also, the statutory "catch-up" contribution limit (for eligible individuals age 55 or older) remains at $1,000 for 2010.

IRS Guidance on Employer-Owned Life Insurance Contracts

The IRS issued Notice 2009-48, providing guidance in the form of Q&As on employer-owned life insurance contracts. The PPA added Code sections 101(j) and 6039I establishing income tax exclusion rules and reporting requirements applicable to an employer that is a direct or indirect beneficiary of a life insurance contract covering one or more of its employees. Code section 101(j)(2) provides exceptions to the income tax exclusion rules for certain employer-owned life insurance contracts when notice and consent requirements are satisfied. Those exceptions are based on either: (1) the insured's status as an employee at any time during the 12-month period before the insured's death or as a director, a highly compensated employee or highly compensated individual at the time the contract is issued; or (2) the extent to which death benefits are paid to (or used to purchase an equity interest in the applicable policyholder from) a family member, trust or estate of the insured employee. Code sections 101(j) and 6039I generally apply to life insurance contracts issued after August 17, 2006.

Among other topics, Notice 2009-48 provides guidance on the notice and consent requirements for employer-owned life insurance contracts. To satisfy the notice and consent requirements, Notice 2009-48 provides that before the policy is issued, the employee must be given written notice explaining: (1) that the employer (or other applicable policyholder) intends to insure the employee's life; (2) that the employer (or other applicable policyholder) will be a beneficiary of any proceeds payable upon the death of the employee; and (3) the maximum face amount for which the employee could be insured at the time the contract was issued. In addition, the employee must provide written consent to being insured and acknowledge that the coverage may continue after he or she ends employment.

Notice 2009-48 also provides additional guidance on IRS information reporting under Code section 6039I and Form 8925.

The IRS's guidance in Notice 2009-48 is effective as of June 15, 2009. Notice 2009-48 provides that the IRS will not challenge a taxpayer who made a good faith effort to comply with Code section 101(j) based on a reasonable interpretation before June 15, 2009.