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June 2010 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES AND REMINDERS

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 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: (1) the actual filing date of the 2009 Form 5500; or (2) July 31, 2010 (the plan's regular filing deadline), unless a Form 5500 deadline extension applies.

Summary of Description of Plan Material Modifications 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.

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RETIREMENT PLAN DEVELOPMENTS

Plan Amendment Accelerating Pension Eligibility for Employees Nearing Retirement Age Did Not Violate ERISA

The Eighth U.S. Circuit Court of Appeals, in *Schultz v. Windstream Communications, Inc*., ruled that a pension plan sponsor did not violate ERISA's fiduciary provisions when the employer amended its pension plan to accelerate unreduced pension eligibility for certain laid-off employees nearing retirement, which imputed years of service to younger employees to make them eligible for early retirement, but which did not impute any years of service to those older employees who were already eligible for early retirement at a reduced benefit when laid off. The Court held that an employer's decision to amend an employee benefit plan does not trigger the fiduciary duties that ERISA imposes on plan administration. Thus, the Court found that an employer is generally free under ERISA, for any reason or at any time, to adopt, modify, or terminate plans that provide pension benefits without being considered as functioning in a fiduciary capacity under ERISA and unconstrained by such fiduciary duties.

The employees also challenged the validity of the plan amendments, alleging that the employer violated ERISA because the employer did not properly adopt the amendments. However, the Court held that the employees did not have standing to raise these issues because they did not suffer an actual harm by the loss of a legally protected interest. The amendments did not alter the pension benefits owed to three of the four plaintiffs. The Court found that as a result they had no standing to challenge how the amendment was adopted because how it was adopted did not affect them. The fourth plaintiff had no standing because she would have received no pension benefit upon termination absent the amendment.

IRS Asking 401(k) Plan Sponsors to Answer Questionnaire

During the week of May 17, IRS Employee Plans Compliance Unit (EPCU) began sending letters and instructions to 1,200 employers sponsoring 401(k) plans asking them to complete the 401(k) Compliance Check Questionnaire. A compliance check is a review by the IRS to determine adherence to certain compliance requirements under the Internal Revenue Code (the Code). The 1,200 plans selected to receive this compliance check were selected at random from 401(k) plans that filed a Form 5500 for the 2007 plan year. The EPCU will use a secure website to collect responses on, among others, the following topics: participation, employer and employee contributions, top-heavy and nondiscrimination testing, IRS voluntary compliance and correction programs,

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and plan administration.

The IRS stated that the information gathered from the questionnaire will provide a comprehensive view of 401(k) plans and will help the EPCU maximize its resources for education, outreach, guidance and enforcement efforts while minimizing the burden to compliant plan sponsors. The information gathered from the questionnaire will ultimately result in a report published by the IRS describing the responses and identifying those areas where additional education, guidance, and outreach is needed and how the EPCU can focus its enforcement efforts to address and/or avoid noncompliance related to these plans. The IRS has indicated that an employer receiving the questionnaire is required to respond and that a failure to respond or provide complete information will result in further actions which may include an examination of a plan.

IRS News Release Clarifies Prohibition on Annual Carryover of Suspense Accounts

In the most recent addition of the *Retirement News for Employers*, a periodic newsletter with retirement plan information for employers and business owners from the IRS's Employee Plans (Tax Exempt and Government Entities) office, the IRS discusses in detail a "common plan mistake" involving improper forfeiture of suspense accounts. The newsletter notes that many defined contribution plans require participants to complete a period of service before becoming fully vested in employer contributions. If a participant leaves before becoming fully vested, his or her nonvested account may be forfeited.

Plan administrators sometimes maintain plan suspense accounts to hold these forfeited amounts, allowing them to accumulate over several years. However, the newsletter notes that the Code does not allow this practice—a plan may not carry over plan forfeitures to subsequent plan years, as doing so would defy the rule requiring all monies in a defined 3 contribution plan to be allocated annually to plan participants. The IRS stated that these forfeitures must be used or allocated in the plan year incurred. The newsletter further notes that the plan document's terms should have provisions detailing how and when a plan will exhaust plan forfeitures. Although not explicitly addressed by the IRS in the newsletter, the newsletter suggests that the IRS would take a similar position regarding the full allocation of other suspense's accounts within the plan (e.g., revenue sharing accounts). The newsletter provides tips for avoiding and fixing such mistakes.

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HEALTH AND WELFARE PLAN DEVELOPMENTS

HSA Contribution Limitations and HDHP Minimum Deductibles and Out-of-Pocket

Maximums Unchanged from 2010 Limitations

The IRS has recently issued Revenue Procedure 2010-22 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." All remain unchanged from the 2010 amounts:

- Annual Contribution Limit. The amounts for 2011 are unchanged from the amounts for 2010. Thus, for calendar year 2011, the annual limitation on deductions for an individual with self-only coverage under a high deductible health plan is $3,050 and the limit for an individual with a family HDHP coverage is $6,150.
- 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 or $2,400 for family coverage. The annual out-of-pocket expenses (e.g., deductibles, copayments and other amounts, but not premiums) cannot exceed $5,950 for self-only coverage or $11,900 for family coverage. Also, the statutory "catch-up" contribution limit (for HSA-eligible individuals age 55 or older) remains at $1,000 for 2011.

IRS Issues Additional Guidance Helping Employers Determine Whether They Qualify for Small Employer Health Insurance Tax Credit

Section 45R, added by Patient Protection and Affordable Care Act (PPACA), provides a federal income tax credit to eligible small employers, including tax-exempt organizations, that make nonelective contributions towards their employees' health insurance premiums under an arrangement that meets certain requirements, effective with tax years beginning in 2010.

As noted in our May 2010 EB Update, beginning in 2010, a small employer tax credit of 35% of premiums paid (25% for tax-exempt organizations) is available to employers with 10 or fewer full-time equivalent (FTE) employees and average annual wages of $25,000 or less that contribute at least 50% of the premium cost

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of single coverage for enrolled employees. The credit phases out for employers with 10 to 25 FTE employees and those with average annual wages between $25,000 and $50,000. This credit is available for the employer's 2010 tax return.

For taxable years beginning before 2014, the amount of the credit is based on a percentage of the lesser of: (1) the amount of nonelective contributions paid by the eligible small employer on behalf of employees under the arrangement during the taxable year, and (2) the amount of nonelective contributions the employer would have paid under the 4 arrangement if each such employee were enrolled in a plan that had a premium equal to the average premium for the small group market in the state (or in an area in the state) in which the employer is offering health insurance coverage.

On May 17, the IRS issued Notice 2010-44 providing additional guidelines to help employers determine whether they qualify for the credit and to estimate the amount of the credit they will receive. The guidance describes various steps that must be followed to determine whether an employer is eligible for the credit, how to calculate the credit, and how to claim the credit. In addition, the notice provides transition relief for taxable years beginning in 2010 with respect to the requirements for "qualifying arrangements"—an arrangement under which the employer pays premiums for each employee enrolled in health insurance coverage offered by the employer in an amount equal to a uniform percentage (not less than 50%) of the premium cost of the coverage. The Notice also provides numerous examples demonstrating how the tax credit eligibility requirements are applied. The Notice can be found on the IRS website. The National Federation of Independent Business has also posted a helpful calculator for businesses to determine their potential credit.

In addition, the IRS recently issued Revenue Ruling 2010-13 setting forth the average premium for the small group market in each state for the 2010 taxable year. The revenue ruling sets forth the average premium for the small group market referenced in the above calculation. More information about the credit, including details regarding how the credit works and how an employer becomes eligible, can be found on the IRS website.

HHS Issues Interim Final Regulations Implementing Temporary Early Retiree Reinsurance Program

PPACA directed the Secretary of Health and Human Services (HHS) to establish a temporary early retiree reinsurance program no later than 90 days after the enactment of PPACA, i.e., by June 21, 2010. On May 5, 2010, HHS issued interim

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final regulations to implement the early retiree reinsurance program. Plan sponsors should act now to be ready to file an application for the program opening on June 1. The program ends at the earlier of the exhaustion of the $5 billion appropriated or December 31, 2013. More detailed information on the regulations, including a detailed initial action item list for plan sponsors, can be found in Reinhart's recently published e-alert Health Care Reform: Early Retiree Reinsurance Program.

IRS, DOL and HHS Release Regulations Implementing Adult Child Coverage Mandate

On May 13, 2010, the IRS, the Department of Labor (DOL) and the Department of HHS jointly issued regulations implementing the requirement that group health plans provide dependent coverage to participants' children up to age 26. This coverage mandate takes effect as of the first plan year beginning on or after September 23, 2010. Reinhart's recent client alert Health Care Reform: Adult Child Coverage Mandate provides a comprehensive review and commentary regarding the newly issued regulation.

New Regulations Issued Concerning "Grandfathered" Health Plans

On June 17, 2010, the IRS, DOL and the Department of HHS jointly issued regulations that further define the scope of a "grandfathered" group health plan under the PPACA. The regulations address numerous ways a plan may maintain or lose its "grandfathered" status. Reinhart will soon be publishing a detailed summary and commentary discussing the newly issued regulation that will be posted (Health Care Reform: Preventive Care Regulations Summary).

IRS Issues Guidance on Tax Exclusion for Health Care Coverage of Adult Children

On April 27, 2010, the IRS issued Notice 2010-38, the first round of health care reform guidance. Notice 2010-38 provides guidance on the tax treatment of health care benefits provided to children under age 27. Effective as of the first plan year beginning on or after September 23, 2010, the Act requires group health plans and health insurance issuers that provide dependent coverage to children to make such coverage available for a child, whether married or unmarried, until age 26. Effective March 30, 2010, the Act also amends the Code to exclude from an employee's gross income the value of coverage provided to the employee's children who have not attained age 27 as of the end of the taxable year. Reinhart has provided a detailed summary of this new Notice in the recent e-alert IRS Issues Guidance on Tax Exclusion for Health Care Coverage of Adult

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Children.

GENERAL DEVELOPMENTS

DOL Announces New E-Signature Option for Forms 5500 and 5500-SF Electronic Filing

The U.S. Department of Labor's Employee Benefits Security Administration announced on May 13 that the EFAST2 electronic filing system for Forms 5500 and 5500-SF employee benefit plan annual reports has a new e-signature option. The new e-signature option allows authorized plan service providers to electronically submit the Form 5500 and Form 5500-SF for the plan. This e-signature option is also available in the IFILE application.

Service providers can get their own signing credentials and submit the electronic Form 5500 or 5500-SF for the plan. The service provider must confirm that it has specific written authorization from the plan administrator to submit the plan's electronic filing. Plan administrators must sign a copy of the completed filing and attach a PDF copy of the signed Form 5500 or 5500-SF as an attachment to the electronic filing submitted to EFAST2.

The DOL has also updated the current EFAST2 frequently asked questions and released a new fact sheet regarding EFAST2. In addition, the DOL has released a list of frequently asked questions on electronic filing for small businesses.

IRS Releases Paper-Only 2009 Form 5500-EZ for One-Participant Pension Plans and Foreign Plans

The IRS has issued the new paper-only 2009 Form 5500-EZ and instructions so that one-participant pension plans and foreign plans, which can no longer file annual returns electronically through DOL's EFAST, can make their annual report filings. Every "one-participant plan" that is required to file a 2009 annual return must file the 2009 Form 5500-EZ (paper format) unless the plan is eligible and decides to file its return electronically. A "one-participant plan" means a retirement plan not subject to the annual ERISA Title I reporting requirements that only covers the owner, or the owner and his or her spouse of a wholly-owned trade or business (whether or not incorporated), or partners, or partners and their spouses of a business partnership. Certain retirement plans maintained outside the U.S. must also file Form 5500-EZ for the 2009 plan year. The instructions for the 2009 Form 5500-EZ contain further information.

HIRE Act Payroll Tax Exemption Guidance Published

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On March 18, 2010, the Hiring Incentives to Restore Employment Act (the HIRE Act) became law. This law gives qualified employers an exemption for their 6.2% FICA payroll contribution on wages paid from March 19, 2010 through December 31, 2010 for every new qualified employee hired after February 3, 2010 and before January 1, 2011. In addition to the FICA tax holiday, employers are also entitled to an income tax credit in 2011, equal to the lesser of 6.2% of paid wages or $1,000 for each new qualified employee retained for at least 52 consecutive weeks.

The IRS has issued a new revised payroll tax Employer's Quarterly Federal Tax Return Form 941 for the purpose of taking the credit. All first quarter 2010 credits are to be taken in the second quarter on the revised Form 941. The form and instructions are now available for download on IRS.gov.

In addition, on May 6, 2010, the IRS posted three sets of additional frequently asked questions and answers (FAQs) on its Website regarding the payroll tax exemption HIRE provision:

- FAQs About the Payroll Tax Exemption and Qualified Employers
- FAQs About Qualified Employees
- FAQs About Claiming the Payroll Exemption

Supreme Court Decides ERISA Attorney's Fees Case

The Supreme Court in *Hardt v. Reliance Standard Life Insurance Co*., held that a court may award fees and costs to a fee claimant as long as he or she has achieved "some degree of success on the merits." The court rejected the defendant's argument that a fee claimant must be a "prevailing party" to be eligible for an attorney's fees award under ERISA Section 502(g). Section 502(g), a fee-shifting statute that applies in most ERISA lawsuits, provides that a court in its discretion may allow a reasonable attorney's fee and costs to either party. The court noted that the words "prevailing party" do not appear in the provision. In addition, nothing else in the statute purports to limit the availability of attorney's fees to a "prevailing party." Instead, ERISA section 502(g) expressly grants district courts "discretion" to award attorney's fees "to either party."

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 from June 1, 2010 to at least through December 31, 2010. As discussed in the September 2009 EB Update, the Red Flags Rule requires "financial institutions" and "creditors" with "covered accounts" to implement a

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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.

House Passes Fee Disclosure and Pension Funding Relief Bill

On May 28, 2010, the U.S. House of Representatives passed the "American Jobs, Closing Tax Loopholes and Preventing Outsourcing Act of 2010" (H.R. 4213). The bill includes, provisions intending to provide temporary relief for single and multiemployer pension plans, mainly through extended amortization periods for certain losses. In addition, among many other provisions, the bill provides disclosure rules relating to fees incurred in connection with defined contribution plans (such as 401(k) plans) to plan administrators and plan participants. Next the bill will go to the Senate.

President Signs Bill to Include Certain VA Care in Minimum Essential Health Coverage

On May 27, 2010, the President signed into law H.R. 5014, a bill clarifying that certain health care provided by the Secretary of Veterans Affairs would meet the "minimum essential coverage" requirements under PPACA. Specifically, law clarifies that coverage provided to children of Vietnam War and certain Korean War veterans receiving care and services through the Department of Veterans Affairs for spinal bifida-related medical conditions and children of women Vietnam veterans born with certain birth defects as meeting the definition of minimum essential coverage under requirements of PPACA, ensuring that such people will not be required to purchase additional coverage beyond what they currently have.

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