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May 2009 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Deadline for Making ADP/ACP Corrective Distributions Without Excise Tax Is

June 30, 2009 for Calendar-Year EACA Plans

Instead of the generally applicable 2½ month deadline, plans that include an eligible automatic contribution arrangement (EACA) may make actual deferral percentage (ADP) and/or actual contribution percentage (ACP) corrective distributions within six months after the end of the plan year without incurring the 10% excise tax. For a calendar-year EACA plan, ADP and/or ACP corrective distributions for 2008 must be made by June 30, 2009. (As highlighted in Reinhart's March 2009 Employee Benefits Update, final Internal Revenue Service (IRS) regulations effective for plan years beginning on or after January 1, 2010 provide that the extended six-month correction period is inapplicable to an EACA not covering all "eligible employees.")

Recovery Act Election Deadline for Calendar-Year Multiemployer Plans Is Extended to June 30, 2009

The Worker, Retiree and Employer Recovery Act of 2008 (Recovery Act) includes funding relief provisions for multiemployer plans. As part of this relief, a multiemployer plan sponsor may elect to temporarily freeze the plan's funded status under ERISA section 432 for the first plan year beginning on or after October 1, 2008 and not later than September 30, 2009, so that it is the same as the plan's funded status for the preceding year. As noted in Reinhart's April 2009 Employee Benefits Update, the IRS issued guidance in March 2009 indicating that this election would be due by April 30, 2009 for a calendar-year multiemployer plan. To provide multiemployer plan sponsors with additional time to make an election, the IRS recently extended the deadline to June 30, 2009. The IRS also extended the earliest deadline for multiemployer plans to elect to extend a funding improvement or rehabilitation plan to June 30, 2009.

2008 Form 5500 Deadline for Calendar-Year Plans Is July 31, 2009

Plan administrators generally have seven months after the end of a plan year to file a Form 5500 (Annual Return/Report of Employee Benefit Plan). For plan years ending December 31, 2008, the deadline for filing the Form 5500 is July 31, 2009.

POSTED:

May 19, 2009

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Plan sponsors that extended their corporate federal income tax return deadline may receive an automatic extension until September 15, 2009, if certain criteria are satisfied. Otherwise, plan administrators may apply for a deadline extension until October 15, 2009 by filing Form 5558 on or before July 31, 2009 (the plan's regular filing deadline). The 2008 Instructions for Form 5500 detail changes made to the annual return/report, including changes made to reflect the Pension Protection Act of 2006 (PPA). For example, the following new actuarial schedules replace Schedule B (Actuarial Information) and must be used for 2008 plan year filings: (1) Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information) and (2) Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information).

Reinhart Comment: Effective for plan years beginning in 2009 (*i.e.*, Form 5500 filed in 2010 for calendar-year plans), electronic filing (EFAST2) will be required for Form 5500 filings. Plan sponsors should begin evaluating how to comply with this electronic filing requirement; for example, by confirming that their Form 5500 preparer, if applicable, will be ready to comply with the electronic filing requirement by the deadline.

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

Generally effective for plan years beginning after December 31, 2006, the PPA requires administrators of defined contribution plans that do not allow participant investment direction to automatically furnish annual benefit statements to participants and beneficiaries. The safe harbor deadline for providing the annual benefit statement is 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 2008 benefit statement is due by the earlier of: (1) the actual filing date of the 2008 Form 5500; or (2) July 31, 2009 (the plan's regular filing deadline), unless a Form 5500 deadline extension applies.

Compliance Reminder for 403(b) Plans - Form 5500 Changes Effective for 2009 Plan Years

Effective for plan years beginning on or after January 1, 2009, Form 5500 regulations revise the reporting rules applicable to 403(b) plans to make them more compatible with the rules for 401(k) plans. Under the new rules, large 403(b) plans (*i.e.*, plans with 100 or more eligible employees) will be required to file a full

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annual return/report on Form 5500, including a written opinion by an independent public accountant. Small 403(b) plans (*i.e.*, plans with fewer than 100 eligible employees) will be required to file an abbreviated annual return/report on the Short Form 5500 without the audit requirement, if certain criteria are satisfied. Non-ERISA 403(b) plans are not subject to the annual reporting requirement. Although the first annual report under the new rules is not due until mid-2010 for calendar year 403(b) plans, sponsors of 403(b) plans should become familiar with the rules and, if applicable, should identify an accountant to prepare the plan's audit. As noted above, for plan years beginning on or after January 1, 2009, Form 5500 (including Short Form 5500) must be filed electronically.

RETIREMENT PLAN DEVELOPMENTS

New Regulations Exempt Certain Retirement Plan Loans From Truth in Lending Act Rules

The Federal Reserve Board (Board) issued final rules amending Regulation Z, which implements the Truth in Lending Act (TILA). TILA was enacted to: (1) require meaningful disclosure of credit terms to inform consumers about the use of credit and allow them to compare available credit terms and (2) protect consumers against inaccurate and unfair credit billing and credit card practices. For example, under TILA, lenders must disclose specific financial information to borrowers about the loan amount, finance charges and interest rate. Currently, under Regulation Z , loans from an employer-sponsored retirement plan are subject to TILA's disclosure requirements if the plan issues more than 25 loans in the current or prior year. Effective July 1, 2010, the final rules exempt from TILA's requirements loans taken from employer-sponsored retirement plans qualified under Internal Revenue Code (Code) section 401(a), tax-sheltered annuities under Code section 403(b) or government-sponsored deferred compensation arrangements under Code section 457(b). This exemption only applies if the loan complies with the Code's requirements and is comprised of fully vested funds from the participant's account.

Reinhart Comment: Although retirement plan loans may be exempt from TILA's disclosure requirements effective July 1, 2010, other loan documentation requirements will continue to apply to participant loans. For example, IRS regulations under Code section 72(p) require the terms of a plan loan (*e.g.*, amount of loan, repayment schedule, etc.) to be described to the participant in a legally enforceable agreement.

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IRS Request for Comments on 403(b) Sample Plan Language and Prototype Program

The IRS issued Announcement 2009-34 containing a draft revenue procedure proposing to establish a 403(b) prototype plan program and provide a remedial amendment period for 403(b) plans. The IRS also issued sample language for 403(b) prototype plans. A key feature of the IRS's proposed 403(b) prototype plan is that the plan cannot apply a vesting schedule of any kind to employer contributions. The IRS requests comments on both pieces of 403(b) guidance by June 1, 2009. After the prototype program is established, the IRS intends to establish a determination letter program for individually designed 403(b) plans.

As background, the IRS published final regulations under Code section 403(b) in 2007 implementing numerous changes for 403(b) plans. The IRS's final 403(b) regulations generally apply for tax years beginning on or after January 1, 2009. One of the most significant changes made by the final regulations is that all 403(b) plan sponsors must maintain a written plan document that satisfies the final regulations in both form and operation. In December 2008, the IRS extended the deadline for 403(b) plan sponsors to adopt written plan documents (or amend existing plans) until the end of 2009. Reinhart has prepared a model 403(b) plan document that can be tailored to meet each client's individual needs. To learn more about the new requirements for 403(b) plans or our model plan document, please contact your Reinhart attorney or any member of our Employee Benefits team.

Second Circuit Concludes PBGC Termination Premiums Are Not Dischargeable Claims in Bankruptcy

The Second Circuit Court of Appeals reversed the bankruptcy court and held that termination premiums due to the Pension Benefit Guaranty Corporation (PBGC) as a result of an employer's termination of a pension plan while in reorganization bankruptcy proceedings were not dischargeable in bankruptcy. *Pension Benefit Guaranty Corp. v. Oneida, Ltd.*, 2009 WL 929528 (2nd Cir. 2009). ERISA and underlying PBGC regulations require the sponsor of a single-employer defined benefit plan that terminates in a distress or involuntary termination to pay a premium to the PBGC annually for three years after the termination. The termination premium is due on the 30th day of each of three consecutive 12-month periods. In general, the first 12-month period begins with the first calendar month following the calendar month containing the plan's termination date. Under a special rule, if a plan is terminated during a bankruptcy reorganization

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proceeding, the first 12-month period does not begin until after the bankruptcy discharge or dismissal.

In May 2006, Oneida, Ltd. (Oneida) terminated one of its pension plans during bankruptcy reorganization proceedings. Oneida argued that the PBGC's termination premium was a contingent prepetition claim dischargeable in bankruptcy. The bankruptcy court agreed with Oneida and concluded that the termination premium fell under the broad definition of "claim" in the bankruptcy context. The Second Circuit rejected Oneida's argument and held that the termination premium payment obligation did not arise until after the bankruptcy ended under the special rule described above. The court stated that "[n]o matter how broadly the term 'claim' is construed, it cannot extend to a right of payment that does not yet exist under federal law."

District Court Holds that ERISA Section 404(c) Protection Does Not Apply to Plan Sponsor's Investment Fund Selection

A New Hampshire district court held that ERISA section 404(c) protection is a defense unavailable to plan fiduciaries who are sued based on their selection of investment options available to plan participants. *In re Tyco Inter'l Ltd. Multidistrict Litig.*, 2009 WL 921147 (D.N.H. 2009). For plans that allow participant-directed investments, ERISA section 404(c) provides that if certain requirements are satisfied, no plan fiduciary is liable to a participant for any loss which is the direct and necessary result of the participant's exercise of investment control. In this case, the plaintiffs participated in retirement plans sponsored by Tyco International (US) Inc. (Tyco). The retirement plans allowed participants to direct the investment of their accounts among several different investment options, including a Tyco stock fund. The plaintiffs brought ERISA breach of fiduciary duty claims against Tyco and other entities and individuals involved with the plans concerning the Tyco stock fund. For example, the plaintiffs alleged that the defendants were negligent in designating the Tyco stock fund as an investment option under the plans and allowing participants to invest in the fund. The defendants responded by denying the plaintiffs' claims and asserting an affirmative defense under ERISA section 404(c).

The district court relied on the Department of Labor's (DOL's) preamble to final regulations under ERISA section 404(c), which indicates that designating plan investment options is a fiduciary function that is not a direct or necessary result of participants' investment decisions. The district court concluded that ERISA section 404(c) does not provide a defense to claims based on a fiduciary's designation of

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investment options available to plan participants.

Reinhart Comment: In delivering its holding, the district court rejected the analysis applied by the Fifth Circuit in a similar case, *Langbecker v. Elec. Data Sys. Corp.* 476 F.3d 299 (5th Cir. 2007). In the Fifth Circuit case, the court held that the DOL's interpretation of ERISA section 404(c)'s scope was unreasonable, and that fiduciaries may use ERISA section 404(c) as a defense to claims based on a fiduciary's selection of investment options. Also, as noted in Reinhart's March 2009 Employee Benefits Update, the Seventh Circuit recently ruled against 401(k) plan participants in an excessive fee case and recognized that even if ERISA section 404(c) "does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined," it protects a fiduciary that satisfies the criteria of ERISA section 404(c) and includes a sufficient range of investment options. *Hecker v. Deer & Co.*, 2009 WL 331285 (7th Cir. 2009). However, given the DOL's position, plan fiduciaries should be prepared to justify their investment selection/monitoring decisions without relying on an ERISA section 404(c) defense.

Seventh Circuit Concludes Plan Violated ERISA's Nonforfeiture Rule by Failing to Start Pension at Retirement or Increase Monthly Benefit

The Seventh Circuit Court of Appeals ruled that a pension plan violated ERISA's nonforfeiture rule by failing to start a participant's pension at his retirement date or increase his monthly benefit. *Contilli v. Local 705 Inter'l Brotherhood of Teamsters Pension Fund*, 559 F.3d 720 (7th Cir. 2009). The plaintiff participated in the Teamsters Local 705 Pension Fund (the Plan). In August 1995, the plaintiff reached "normal retirement age" under the Plan. The plaintiff retired in October 1997 and applied for retirement benefits in January 1998. The Plan approved the plaintiff's pension application and began paying him monthly benefits effective February 1998. The Plan did not pay the plaintiff benefits for November and December 1997 and January 1998, and the Plan did not increase his monthly benefit so that it had the same actuarial value as a pension starting in November 1997. The plaintiff asserted that the Plan violated ERISA's nonforfeiture rule by not making up the skipped payments. The district court held that no forfeiture occurred because the Plan was entitled to adopt and enforce a rule requiring retirees to apply for their pensions.

On appeal, the Seventh Circuit reversed the district court. The court held that an application requirement is acceptable, but payments skipped as a result of a payment deferral must be made up either by payments (with interest) once the

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deferral ends or by an actuarial adjustment to benefit payments. The court also noted that, since there is an exception to the actuarial adjustment requirement for a participant who puts off retirement while continuing to work, the Plan was entitled to start the plaintiff's pension as of November 1997, rather than September 1995.

HEALTH AND WELFARE PLAN DEVELOPMENTS

HHS Guidance on Securing Protected Health Information

The Department of Health and Human Services (HHS) published guidance and a request for comments regarding the technologies and methodologies necessary to secure protected health information (PHI) by rendering PHI unusable, unreadable or indecipherable to unauthorized persons. As summarized in Reinhart's March 2009 Employee Benefits Update, President Obama signed the Health Information Technology for Economic and Clinical Health Act (HITECH) into law as part of the American Recovery and Reinvestment Act of 2009 (ARRA). HITECH significantly expands HIPAA's Privacy and Security requirements. For example, HITECH requires covered entities to notify affected individuals, and requires business associates to notify covered entities, following the discovery of a breach of unsecured PHI. HITECH defines "unsecured PHI" as PHI that is not secured through the use of a technology or methodology specified by HHS.

HHS's guidance provides that PHI will be unsecured unless it is secured through a technology or methodology identified by HHS as rendering it unusable, unreadable or indecipherable to unauthorized individuals. HHS's guidance is intended to be exhaustive rather than merely illustrative, and identifies encryption and destruction as the two main methods for securing PHI. Although covered entities are not required to implement the technologies and methodologies specified by HHS in its guidance, HHS notes that, if used, the technologies and methodologies will create a safe harbor. HHS's guidance is effective as of April 17, 2009, and will apply to breaches 30 days after the publication of final regulations. (Under HITECH, interim final regulations are due by mid-August 2009.) Comments on HHS's guidance must be submitted by May 21, 2009.

Reinhart Comment: HITECH directed the Federal Trade Commission (FTC) to issue regulations requiring certain non-HIPAA entities to notify individuals regarding security breaches involving health information. The FTC recently issued regulations proposing to require vendors personal health records (PHRs) and

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related entities to notify affected individuals and the FTC upon discovery of a security breach. The FTC's regulations are proposed to be effective for breaches discovered on or after September 18, 2009. Comments on the proposed rule are due by June 1, 2009.

Requests for Comments on New Mental Health Parity Act

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) was signed into law in October 2008. The Mental Health Parity Act of 1996 (MHPA) prohibits group health plans from imposing a lower annual or lifetime dollar limit on mental health benefits than the limit it imposes on medical or surgical benefits. MHPA does not restrict other types of limits on mental health benefits, such as outpatient visit limits. MHPAEA makes MHPA's parity requirements permanent, and amends ERISA, the Code and the Public Health Service Act to require group health plans providing mental health or substance abuse benefits to provide such coverage at the same level as the coverage for medical or surgical benefits. With respect to group health plans' mental health or substance abuse benefits, MHPAEA's expanded parity rules prohibit inequity in financial requirements (*e.g.*, deductibles, copayments, coinsurance and out-of-pocket expenses), treatment limits (*e.g.*, limits on frequency or number of visits) and out-of-network coverage. MHPAEA exempts small employers (*i.e.*, employers with 50 or less employees) from its requirements and allows qualifying group health plans to elect to be exempt from the new law under a technical cost exemption. MHPAEA is generally effective for plan years beginning after October 3, 2009 (January 1, 2010 for calendar-year plans). A delayed effective date applies to collectively bargained plans.

The IRS, DOL and HHS are requesting comments to aid in the development of MHPAEA regulations. For example, the agencies are looking for guidance on how health plans currently apply financial or treatment limits to medical or surgical benefits and mental health or substance abuse benefits. Comments are due by May 28, 2009.

Same-Sex Marriage Developments

A number of states have recently taken action to expand the rights of same-sex couples. In connection with these changes, employers may receive more questions from employees regarding domestic partner benefits. Most significantly, Maine, Vermont and Iowa recently joined Massachusetts and Connecticut by legalizing same-sex marriage. The Iowa Supreme Court

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unanimously ruled that a 1998 state law limiting marriage to a union between a man and a woman violated the equal protection clause of the Iowa Constitution. *Varnum v. Brien*, 2009 WL 874044 (Iowa). As a remedy, the court ruled that the law limiting marriage to opposite-sex partners be stricken and stated that Iowa's laws should be interpreted and applied to provide gays and lesbians with full access to the institution of civil marriage. Vermont's legislature voted to override the governor's veto of a bill legalizing same-sex marriage in Vermont. The bill permits same-sex marriages to be performed in Vermont effective September 1, 2009. Maine's governor signed legislation legalizing same-sex marriage in Maine effective mid-September 2009.

In addition, New Hampshire's legislature passed a bill legalizing same-sex marriage, although Governor Lynch has not indicated whether he will sign the bill. A bill to legalize same-sex marriage is currently before lawmakers in New York. (*Note:* Although California became the second state (after Massachusetts) to allow same-sex marriage in mid-2008, voters passed Proposition 8 banning same-sex marriage later in 2008.)

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