Reinhart

May 2010 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Quarterly Benefit Statement Due for Calendar Year Defined Contribution Plans With Participant-Directed Investments

Administrators of defined contribution plans that permit participant direction of investments must provide quarterly benefit statements to plan participants and beneficiaries no later than 45 days following the end of each plan year quarter. For calendar year plans, the first quarter benefit statement should be distributed no later than May 14, 2010.

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.

Deadline for Making ADP/ACP Corrective Distributions Without Excise Tax Is June 30, 2010 for Calendar Year EACA Plans

Instead of the generally applicable 2½ month deadline, plans that include an eligible automatic contribution arrangement may make actual deferral percentage and/or actual contribution percentage corrective distributions within six months after the end of the plan year without incurring the 10% excise tax. These corrective distributions for 2009 must be made by June 30, 2010 for calendar year plans.

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

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administrators may apply for a deadline extension to 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.

FBAR Filing Further Extended for Certain Investments

"U.S. persons" who have a financial interest in, or signature or other authority over, foreign financial accounts are generally required to report on the Treasury Department Form TD F 90-22.1 (the FBAR) by June 30 of each year. Due to uncertainty regarding application of the FBAR reporting requirement to pension plan investors, the deadline to file the FBAR for 2009 and prior years was extended to June 30, 2010 for persons with signatory authority over, but no financial interest in, a foreign financial account or with a financial interest in a foreign commingled fund. Reinhart described these FBAR reporting requirements last fall. (Please see August 2009 and September 2009 Employee Benefits Update.)

The Internal Revenue Service (IRS) has now provided additional relief with regard to FBAR filings that would have been required by June 30, 2010 in Notice 2010-23. The June 30, 2010 deadline has been extended to June 30, 2011 for persons with signature or other authority over, but no financial interest in, a foreign financial account. Additionally, relief has been provided for 2009 and all prior years for reporting investments in certain foreign commingled funds. While Notice 2010-23 specifically notes that foreign hedge funds and private equity funds are covered by this suspension, investments in foreign mutual funds are not. Investments in foreign mutual funds and actual accounts in foreign jurisdictions will still need to be reported on the FBAR by June 30, 2010. Plan sponsors should consult with tax and legal counsel to determine possible FBAR filings required by June 30, 2010.

RETIREMENT PLAN DEVELOPMENTS

Supreme Court Gives Plan Administrators Second Chance to Interpret the Plan after Honest Mistake

On April 21, 2010, the Supreme Court of the United States confirmed the authority of the plan administrator to interpret the terms of the plan even after the lower courts had found that the plan administrator's first interpretation was unreasonable. *Conkright v. Frommert* (No. 08-810). This case is an extension of the authority granted by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in which the Court held that an ERISA plan administrator's decisions will be reviewed under the arbitrary and capricious standard if the plan document grants discretion to the plan administrator to determine eligibility for benefits and to

construe the terms of the plan.

The plaintiffs in *Conkright* are 100 employees who left Xerox in the 1980s, received a lump sum distribution of their retirement plan benefits and were later rehired and again began earning retirement benefits under the plan. To avoid a windfall to these rehired employees, the plan provided that a rehired employee's benefit would be offset by the prior distribution. Even though the method for calculating the offset was not in the plan document, the plan administrator used the "phantom account" method. This method calculated the hypothetical growth that a participant's past distributions would have experienced if the money had remained in Xerox's investment funds, and the plan administrator reduced the present benefits accordingly. The plan document contained the appropriate Firestone language granting the plan administrator discretion to interpret the plan's terms.

The plaintiffs argued successfully at the lower courts that the plan administrator's interpretation was unreasonable and that the plan administrator no longer had authority to interpret the plan. The Supreme Court disagreed, holding that nothing in *Firestone* suggests that the grant of authority is limited to first efforts to construe the Plan. The "one strike and you're out" approach used by the lower courts would undermine the guiding principles of ERISA by subjecting the plan administrator to rules that vary by jurisdiction and to judicial decision-making, which may not take into account the best interests of all plan participants. The Court confirmed that one honest mistake will not cause the plan administrator to lose its authority to interpret the terms of the plan.

Supreme Court Addresses Mutual Fund Fees Under Investment Company Act: A Parallel to ERISA Fee Cases?

On March 30, 2010, the Supreme Court decided *Jones v. Harris Associates* (No. 08-586), a case from the Seventh Circuit regarding whether an investment advisor charged appropriate fees to a mutual fund pursuant to the Investment Company Act of 1940 (the ICA). Although the case does not involve an employee benefit plan, the Supreme Court's rationale may be helpful for plan administrators when defending ERISA excessive fee cases.

Although the Court was interpreting a particular provision of the ICA, the Court's rationale could be appropriate in the ERISA context. The Court warned lower courts to give comparisons of fees charged to different types of clients "the weight they merit in light of the similarities and differences between the services that the clients in question require" while being wary of comparing fees in

dissimilar cases. The Court then stated that courts should "assess any disparity in light of the different markets for advisory services."

Although it is unclear if, or how, these arguments will translate to ERISA cases, the Court's discussion reveals at least some acceptance of the notion that fees should be reviewed in context, taking into account all of the factors influencing the fees charged in each case.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Health Care Reform: What's Next?

As reported last month in the April 2010 Employee Benefits Update, the Patient Protection and Affordable Health Care Act (the PPACA) became law on March 23, 2010 and was subsequently amended by the Health Care and Education Affordability Reconciliation Act on March 30, 2010. Together, these two pieces of complex and comprehensive legislation have significant long-term implications of health care reform for group health plans. Reinhart has recently published four client alerts that begin to describe many of these long-term impacts: (Health Care Reform: A Brave New World?, Health Care Reform: What Employers Need to Know for 2010 and 2011, IRS Issues Guidance on Tax Exclusion for Health Care Coverage of Adult Children and Health Care Reform: Early Retiree Reinsurance Program). Reinhart anticipates publishing additional client alerts as the agencies publish guidance.

The following highlights several provisions of PPACA that have a short-term impact or impact smaller groups of employees. These provisions may not be addressed in more detail by other Reinhart client alerts:

- Impact on Executive Compensation. Effective on or after January 1, 2011, the nondiscrimination rules of Internal Revenue Code (the Code) section 105(h) will begin to apply to nongrandfathered insured health plans. Code section 105(h) generally prohibits discrimination in favor of highly compensated employees. Employers that add a post-retirement medical arrangement for executives after March 23, 2010 that is funded through a separate insurance policy must comply with the nondiscrimination testing requirements of Code section 105(h). However, the plan designs most often used for these arrangements will not pass these requirements. Alternative plan designs for these arrangements will need to be analyzed to avoid the negative tax consequences resulting from a failure to comply with Code section 105(h).

- Work Breaks for Nursing Mothers. Effective as of March 23, 2010, PPACA

amended the Fair Labor Standards Act to impose new requirements on employers with respect to nursing mothers. Any state laws providing greater protections to nursing mothers still apply.Employers must provide reasonable break time for a nursing mother to express milk until the nursing child is one year old. These breaks must be long enough for the employee to express milk and must be provided each time that the employee has a need to express milk. We note that this amendment was added to a section of the Fair Labor Standards Act that does not apply to salaried exempt employees, although employers could extend this opportunity to all employees.A private place other than a bathroom must be provided for the breaks. The employer is not required to compensate an employee for these breaks.Employers with fewer than 50 employees are not required to comply with the new law if providing reasonable break time or providing a private place would impose an "undue hardship." Undue hardship means causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business.

- Elimination of Tax Deduction for Medicare Part D Subsidy Has Immediate Impact on Financial Statements. Employers who receive the Medicare Part D subsidy will no longer be permitted to deduct the amount of the subsidy beginning in 2013. Pursuant to accounting rules, this change in the tax law must be immediately recognized in the employer's income statement for the period that includes the enactment date (March 23, 2010). Therefore, this change will have an immediate impact for employers that receive the Part D subsidy and have deferred tax assets on their balance sheet for the future tax deduction of retiree medical expenses. Several large employers have tried to lobby Congress to repeal this provision. To date, Congress has not taken any such action. Employers who carry this deferred tax asset on their financial statements and have not yet adjusted their first quarter financial statements should do so as soon as practicable.

- Small Business Tax Credit. PPACA added a small employer tax credit for small businesses and tax-exempt organizations that provide health coverage to their employees. 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 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. 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 at Questions & Answers.

Additional resources that may provide helpful information on PPACA are:

- The Fact Sheets published by the White House on Statements & Releases; and
- The Department of Health and Human Resources website, Health Reform.

COBRA Subsidy Program Extended—Again

On April 15, 2010, the COBRA subsidy program was extended for a third time. The COBRA subsidy eligibility period, which previously expired on March 31, 2010, has been extended through May 31, 2010. Individuals who experienced a termination of employment from April 1, 2010 through April 14, 2010 may be retroactively entitled to premium subsidy rights. The Department of Labor (DOL) has again updated its model COBRA notices to reflect these most recent changes to the COBRA subsidy program. The revised notices, and who should receive them, are described below:

- Model General Notice. The Model General Notice has been updated to reflect the recent extension. This notice is for qualified beneficiaries who experienced any qualifying event (regardless of type) at any time from September 1, 2008 through May 31, 2010 and who have not yet been provided an election notice. Please note that individuals who experienced a termination of employment on or after April 1, 2010 and before April 15, 2010 and who already received a general notice that did not reflect the recent extension do not need to receive another general notice. Instead, these individuals should receive either a Model Supplemental Information Notice or a Model Notice of Extended Election Period, as appropriate, which are described below.
- Model Supplemental Information Notice. This notice should be provided to individuals who are receiving COBRA coverage and either:Experienced a termination of employment from March 1, 2010 through April 14, 2010 but did not receive notice of the recent extensions of the COBRA subsidy program; orExperienced a reduction in hours on or after September 1, 2008 and subsequently experience a termination of employment on or after March 2, 2010 and before May 31, 2010.

- Model Notice of Extended Election Period. This notice is intended for individuals who experienced a termination of employment on or after April 1, 2010 and before April 15, 2010, had already received a general notice that did not reflect the recent extension and have not yet elected COBRA coverage.
- Model Notice of New Election Period. This notice is for individuals who are not currently enrolled in COBRA who previously experienced a qualifying event that was a reduction in hours between September 1, 2008 and May 31, 2010 and who subsequently experienced a termination of employment between March 2, 2010 and May 31, 2010.

Plan sponsors are not required to use the DOL model notices. If a plan sponsor does not use the model notices, the plan sponsor must revise its COBRA notices to reflect the extension of the COBRA subsidy program and ensure that the groups identified above receive the appropriate, updated materials.

TRICARE Incentive Prohibition Regulations Published

On April 9, 2010, the Department of Defense issued final regulations on the TRICARE incentive prohibition, which was enacted in 2007 to prevent employers from shifting costs to the TRICARE program by offering TRICARE beneficiaries (essentially military retirees and their family members) an alternative to enrollment in a group health plan that would be primary to TRICARE. The prohibition applies in the same manner as the prohibition against offering incentives to Medicare-eligible employees and applies to all employers with 20 or more employees.

The final regulations are effective on June 18, 2010 and provide that an employer may not offer TRICARE beneficiaries an alternative to the employer's primary plan unless certain criteria are satisfied. Unlike the proposed regulations, the final regulations do allow employers to provide TRICARE beneficiaries the opportunity to purchase a TRICARE supplement through the cafeteria plan with pretax dollars, provided the employer does not endorse or pay for any part of the supplement.

2011 Cost Threshold and Limit Adjustments for Medicare Part D

The Centers for Medicare and Medicaid Services (CMS) recently announced the 2011 adjusted parameters for the standard Medicare Part D drug benefit.

CMS also published the updated cost threshold and cost limit for the tax-free subsidy provided for allowable prescription drug costs incurred by qualified retired employees for employers that participate in the Retiree Drug Subsidy

program. The 2011 cost threshold is $310 and the 2011 cost limit is $6,300. These amounts are unchanged from 2010.

Medicare Part D Standard Benefit for 2011		
	2010	2011
Deductible	$310	$310
Initial Coverage Limit	$2,830	$2,840
Out of Pocket Threshold	$4,550	$4,550

GENERAL DEVELOPMENTS

HIRE Act Payroll Tax Exemption Guidance Published

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 issued a new Form W-11 Employee Affidavit, by which an employee can certify that he or she has not been employed for more than 40 hours during the 60-day period that precedes the new employment. The IRS has also published revised Forms W-2 and W-3 to reflect changes made by the HIRE Act. The IRS is in the process of finalizing a revised 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.

FASB to Propose Additional Disclosures for Multiemployer Plans

The Financial Accounting Standards Board (FASB) intends to issue enhanced disclosure requirements relating to an employer's participation in a multiemployer plan. The proposed amendment (to FASB Accounting Standards

Subtopic 715-80) would be effective for fiscal years ending after December 15 2010 (for public entities) and for the first annual period after December 15, 2010 (for non-public entities).

Reinhart recently reviewed the DOL regulations regarding the obligation of multiemployer plan administrators to disclose certain information upon request (see April 2010 Employee Benefits Update.) Participating employers are likely to make additional requests for documents that may be necessary to comply with this proposed FASB amendment. As we previously reported, a plan administrator must furnish the requested documents no later than 30 days after the date the written request is received and withdrawal liability estimates (for withdrawals occurring in the plan year preceding the plan year in which the written request is made) within 180 days of the written request. However, the plan administrator is not required to furnish the requestor more than one copy of the same document or more than one withdrawal liability estimate within a 12-month period.