May 2011 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES AND REMINDERS

Annual Benefit Statement 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 Form 5500 is filed by the plan (but no later than the due date, including extensions, for filing Form 5500) for the plan year to which the benefit statement relates. For a calendar year plan, the 2010 benefit statement is due by the earlier of (1) the actual filing date of the 2010 Form 5500 or (2) August 1, 2011 (the plan's regular filing deadline), unless a Form 5500 deadline extension applies.

2010 Form 5500 for Calendar-Year Plans

Plan administrators generally have seven months after the end of a plan year to file a Form 5500. For plan years ending December 31, 2010, the deadline for filing the Form 5500 is August 1, 2011. Plan sponsors that extended their corporate federal income tax return deadline can receive an automatic extension until September 15, 2011, if certain criteria are satisfied. Otherwise, plan administrators can apply for a deadline extension until October 15, 2011, by filing Form 5558 on or before August 1, 2011 (the plan's regular filing deadline).

Summary of Description of Material Modifications for Calendar-Year Plans

Plan administrators of employee pension and welfare benefit plans must provide 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 provide this summary no later than 210 days after the close of the plan year in which the modification or change was adopted (for example, July 29, 2011, for calendar-year plans). However, the summary of material modifications or changes in information in the summary plan description do not need to be provided separately if the changes or modifications are described in a timely summary plan description.

FBAR Filing for Certain Foreign Investments

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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. While foreign hedge funds and private equity funds are not required to be reported on the FBAR, many other accounts in foreign jurisdictions might. Plan sponsors should consult with tax and legal counsel to determine possible FBAR filings required by June 30, 2011.

RETIREMENT PLAN DEVELOPMENTS

Seventh Circuit Court of Appeals Addresses Sale of Assets Exception to Withdrawal Liability

In a case of first impression, the Seventh Circuit Court of Appeals in *Central States, Southeast and Southwest Areas Pension Fund v. Georgia-Pacific LLC*, No. 10-2489 (7th Cir. 2011) addressed the "sale of assets" exception to withdrawal liability (set forth in ERISA section 4204). The court held that when a sale transfers an ongoing business to a new firm that is willing and able to make all pension contributions, and when this sale is not part of a plan to withdraw by stages, ERISA's sale of asset exception shields the selling employer from withdrawal liability. At the beginning of 1994, three divisions within Georgia-Pacific had employees on whose behalf the firm contributed to Central States, Southeast and Southwest Areas Pension Fund (Central States). However, from 1994 to 1997, Georgia- Pacific's contributions to Central States decreased through a serious of closed facilities, worker layoffs, and outsourcing of work. These events resulted in Central States assessing Georgia-Pacific with a partial withdrawal in 1997. In 2004, seven years after the partial withdrawal, Georgia-Pacific sold its last division in an asset sale intended to qualify for the "sale of assets" exception to withdrawal liability under ERISA section 4204.

ERISA section 4204 describes an exception to the general rule imposing withdrawal liability, providing that a withdrawal will not occur "solely because" of a bona fide, arm's-length sale of assets to an unrelated party if (a) the buyer has an obligation to contribute substantially similar to that of the seller, (b) the buyer posts a bond or escrow, and (c) the sales contract provides for secondary liability of the seller to the plan if the buyer withdraws from the plan within five years from the sale of assets. While the sale apparently met these three conditions, Central States contended that the sale was not "solely" responsible for the fact that Georgia-Pacific no longer contributed to the fund. Central States argued that the court must consider events that preceded the asset sale, including Georgia-

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Pacific's layoffs, closures, and outsourcing of work from 1994 to 1997. Thus, according to Central States, the withdrawal was not "solely" because of the Georgia-Pacific's sale of assets.

The court rejected Central States' argument, stating that the best understanding of the phrase "solely because" in ERISA section 4204 is one that concentrates on the transaction at issue. If the sale had not occurred, and everything else had remained the same and no withdrawal liability had accrued, then the sale to a buyer that continues the pension contributions does not entail withdrawal liability. The court noted that nothing is ever a "sole" cause in the sense that it is the only event in a causal chain of events. Every event, the court argued, has a chain of causes stretching back in time. The court qualified its holding, however, stating that if an employer crafts a plan to withdraw by stages and uses a sale only for the last stage, then all transactions may be consolidated and withdrawal liability assessed for the plan.

Technical Revisions to Actuarial Information on Form 5500 Annual Report for Pension Plans Electing Funding Alternatives Under the Pension Relief Act of 2010

The Employee Benefits Security Administration announced certain technical revisions to Schedule MB and Schedule SB of the Form 5500 annual return to reflect funding relief alternatives retroactively available to defined benefit pension plans under the Pension Relief Act of 2010. Actuarial information on defined benefit pension plans is required to be reported as part of Schedule MB or Schedule SB of the Form 5500 Annual Return. Certain technical revisions to Form 5500 Schedules MB and SB were necessary to conform the actuarial reporting requirements for defined benefit pension plans to the application of funding relief under the Pension Relief Act of 2010. The announcement of the technical revisions and further detail on the revisions can be found in the Federal Register.

Department of Labor Releases Final Amendment to Prohibited Transaction Exemption 96-23

The Department of Labor (DOL) has issued final amendments to Prohibited Transaction Exemption (PTE) 96–23, a class exemption that permits various transactions involving employee benefit plans whose assets are managed by in-house asset managers (INHAMs), provided the conditions of the exemption are met. The INHAM exemption generally allows that portion of a plan managed by an INHAM to engage in all transactions described in ERISA section 406(a)(1)(A) - (D)

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(sales or exchanges of property, lending of money, furnishing of goods or services, and transfers of plan assets) with virtually all party-interest service providers except the INHAM or a person related to the INHAM. The amendment, published April 1, 2011, amends PTE 96-23 in several respects, including:

- Expanding the definition of INHAM to include a subsidiary that is 80% or more owned by the employer or parent company
- Broadening the scope of the class exemption to permit certain transactions with a "co-joint venturer" if the joint venture relationship is the entity's sole relationship to the employer (or if the co-joint venturer is both a joint venturer and a service provider)
- Extending relief to certain existing leases with an employer or an affiliate resulting from the plan’s acquisition of the underlying office or commercial space

The amendment to PTE 96-23 also increased the 5% ownership threshold for related persons (the so-called "related to test”) to 10%, and increases the amount of assets that must be managed in order to qualify as an INHAM from $50 million to $85 million. Amended PTE 96-23 can be found in the Federal Register.

HEALTH AND WELFARE PLAN DEVELOPMENTS

FAQ About Affordable Care Act Implementation Part VI

The Department of Health and Human Services (HHS), the DOL, and the Department of the Treasury (the Departments) continue to release additional guidance regarding the implementation of the market reform provisions of the Patient Protection and Affordable Care Act (PPACA) in the form of new questions and answers to help people understand the new law. The most recent FAQs address questions about grandfathered health plans. The new FAQs note that the interim final regulations relating to status as a grandfathered health plan generally state that transferring employees from one grandfathered plan or benefit package to another will cause the transferee plan to lose grandfathered status if amending the transferor plan to replicate the terms of the transferee plan would have caused the transferor plan to relinquish grandfathered status. However, the transferor plan will not lose its grandfathered status if there is a "bona fide employment-based reason" to transfer the employees. The FAQs provide a number of examples of "bona fide employment-based reasons," including:

- The elimination of a benefit package because the issuer is exiting the market or

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is no longer offering the product to the employer (for example, because the employer no longer satisfies the issuer's minimum participation requirement)
- Low or declining participation by plan participants in the benefit package makes it impracticable for the plan sponsor to continue to offer the benefit package
- The benefit package is eliminated from a multiemployer plan as agreed upon as part of the collective bargaining process
- When a benefit package is eliminated for any reason and multiple benefit packages covering a significant portion of other employees remain available to the employees being transferred

The FAQs note that there may be many other circumstances in which a benefit package is considered to be eliminated for a bona fide employment-based reason. The FAQs further discuss the effect of reclassifying drugs for plans that maintain different levels of cost sharing for prescription drugs. The FAQs clarify the movement of a brand name drug into a higher cost-sharing tier does not cause a plan to lose grandfathered status.

The FAQs also address the timing of when a grandfathered health plan will lose its grandfathered status as a result of an amendment to a plan. According to the FAQs, a plan will relinquish its grandfathered status on the date a plan amendment becomes effective, not when the plan adopts the amendment.

PPACA's Free Choice Vouchers System Repealed

The recently passed Continuing Appropriations Act (the bill that funds the government through the end of fiscal year 2011) repealed the Free Choice Voucher provisions of PPACA that were to have started January 1, 2014. The Free Choice Voucher program would have required employers to offer vouchers to employees whose household income was less than 400% of the federal poverty level and whose premium contribution to the employer’s coverage plan would constitute between 8% and 9.8% of the employee's household income. The amount of the voucher would have been equal to the employer’s share of the premium in the employer plan. The voucher could then have been used by the employee to purchase health insurance through a state health insurance exchange instead of participating in the health insurance plan offered by the employer. The penalties imposed under PPACA on employers who do not offer group health plan coverage or do not offer coverage that meets certain thresholds (commonly referred to as the "free-rider penalty") are not affected by the repeal of the Free Choice Voucher program.

CMS Issues Final Rules Revising Medicare Advantage and Prescription Drug

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Benefit Program to Implement Provisions Specified In PPACA

The Centers for Medicare & Medicaid Services (CMS) released final rules making revisions to the Medicare Advantage program (Part C) and Prescription Drug Benefit Program (Part D) in part to implement provisions specified in PPACA. Most of the provisions in the final rule will be effective on June 6, 2011. PPACA included significant reforms to both the private health insurance industry and the Medicare and Medicaid programs. Provisions in PPACA concerning the Part C and Part D programs largely focus on beneficiary protections, Medicare Advantage payments, and simplification of Medicare Advantage and Part D program processes. The preamble to the final rule notes that the rules are intended to:

- Implement provisions of the PPACA
- Clarify the various program participation requirements
- Strengthen beneficiary protections
- Strengthen the ability to distinguish stronger applicants for Part C and Part D program participation and remove consistently poor performers
- Implement other clarifications and technical changes

GENERAL DEVELOPMENTS

Repeal of Form 1099 Tax Reporting Requirement in PPACA

A bill repealing expanded Form 1099 tax reporting requirements that were included in PPACA was signed into law by President Obama on April 14. The reporting requirement, included in PPACA as a funding measure to reduce underreporting of income, required businesses to file Form 1099 reporting payments for all goods and services to corporations that totaled over $600 in a year. Such payments to corporations were previously generally exempt from this reporting requirement. Many people had voiced concerns that the measure would have been a large burden on small businesses. The repeal maintains the status quo for these reporting requirements."

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