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November 2005 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES

Medicare Part D Notices of Creditable Coverage

Reminder: Group health plans that cover Medicare Part D eligible individuals (whether active or retired individuals) were required to provide a Notice of Creditable Coverage to participants by November 15, 2005. This notice should have indicated whether the plan's prescription drug coverage is deemed to be creditable. Plans that have not yet provided a Notice of Creditable Coverage to participants should do so as soon as possible.

Relative Value Disclosures

The delayed effective date of the final relative value rules applies to qualified joint and survivor annuity ("QJSA") notices provided for distributions with annuity starting dates of February 1, 2006 or later. As of November 2, 2005, any QJSA notices provided to participants must comply with the final relative value rules. The delayed effective date applies to defined contribution plans that offer a QJSA and to most defined benefit plans.

Safe Harbor 401(k) Notices

The safe harbor 401(k) notices are due 30 days before the beginning of the plan year. For calendar year plans, these notices must be sent no later than December 1, 2005.

EGTRRA Minimum Distribution Amendments

The deadline for defined benefit plan sponsors to amend calendar year plans to reflect the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") minimum distribution requirements is December 31, 2005.

409A Compliance

Although the regulations extended the December 31, 2005 deadline for many 409A transition rules, the December 31, 2005 deadline still applies to the following amendments or actions:

- Most participant initial deferral elections with respect to compensation for services performed during 2006 (certain performance-based compensation may have a later election deadline);

- Any amendment necessary to permit deferral elections made before March 15, 2005;
- Participant elections to terminate participation in a deferred compensation plan or to cancel outstanding deferral elections with regard to amounts subject to 409A (the deferred compensation subject to these elections must be included in the participant's income in 2005);
- Termination of nonqualified deferred compensation plans or stock options and SARs to avoid compliance with Code section 409A (all amounts paid under these arrangements must be included in the participant's income in 2005);
- "Make whole payments" to participants in connection with cancellation of a discounted option or a stock appreciation right must generally be included in the participant's income in 2005;
- Participant new payment elections as to the time or form of payment of amounts subject to 409A that are payable in 2006; and
- Any amendments necessary to provide for new payment elections.

Cafeteria Plan Grace Period

Plan sponsors have until December 31, 2005 to adopt the new 2 month grace period for health Flexible Spending Accounts and Dependent Care Assistance Programs.

Automatic Rollover Rules Qualified retirement plan sponsors must adopt the automatic rollover rules by the end of the first plan year ending on or after March 28, 2005. For calendar year plans, the deadline is December 31, 2005.

Roth 401(k) Accounts

A 401(k) plan may provide for "Roth 401(k)" contributions effective January 1, 2006. If a plan sponsor intends to allow Roth 401(k) contributions, the plan sponsor must distribute participant notices and election forms and implement the necessary recordkeeping systems prior to accepting such contributions to the plan. However, plan sponsors need to amend the plan to permit Roth 401(k) contributions by the end of the plan year in which the plan first accepts such contributions. For calendar year plans accepting Roth 401(k) contributions in 2006, the deadline is December 31, 2006.

RETIREMENT PLAN DEVELOPMENTS

IRS Announces Pension Plan Limitations for 2006

On October 14, 2005 the IRS announced the 2006 tax year cost-of-living and statutory adjustments applicable to dollar limitations for retirement plans. The cost-of-living increases reflect the Internal Revenue Code (the "Code") section 415 increases and the statutory increases relate to EGTRRA. Increases include, but are not limited to, the following:

- The limit for the maximum annual benefit for a defined benefit plan will increase from $170,000 to $175,000;
- The limit for the maximum annual benefit for a defined contribution plan will increase from $42,000 to $44,000;
- The limit for a 401(k) deferral will increase from $14,000 to $15,000;
- The limit for annual compensation will increase from $210,000 to $220,000;
- The limit used in the definition of highly compensated employees will increase from $95,000 to $100,000 and
- The limit for catch-up contributions will increase from $4,000 to $5,000.

SSA Announces 2006 Wage Base and Earnings Limits

On October 14, 2005, the Social Security Administration (the "SSA") announced that the 2006 wage base for computing Social Security tax will increase from $90,000 to $94,200. This increase is due to an increase in total wages and is double the $2,100 increase from 2004 to 2005.

The SSA also announced the 2006 annual maximum amount that an individual may earn in a calendar year without incurring a reduction in benefits. An individual may earn $1,040 monthly ($12,480 annually) before reaching Social Security normal retirement age and $2,770 monthly ($33,240 annually) after reaching Social Security retirement age. In calendar years prior to an individual's normal retirement age, the SSA will withhold $1.00 in benefits for every $2.00 in earnings in excess of the earnings threshold, while the SSA will withhold only

$1.00 in benefits for every $3.00 in earnings in excess of the earnings threshold for calendar years after an individual attains Social Security normal retirement age.

PBGC Provides Updated Guidance on Participant Funding Notice

The Pension Benefit Guaranty Corporation (the "PBGC") recently released Technical Update 05-1, which updates this year's underfunded plan participant notice. Employers with qualified defined benefit plans that are required to pay PBGC variable rate premiums must provide participants with an underfunded plan notice unless the employers are eligible for certain exceptions. Governmental plans, non-electing church plans and multiemployer plans are exempted from the rule.

The PBGC Technical Update addresses, among other issues, which plans must provide the notice, who must receive the notice, when the notice must be provided, what information the notice must contain, how the notice must be provided and the penalties for not providing the notice.

Pension Funding Legislative Update

On November 3, 2005, the Senate approved a budget measure that will increase PBGC premiums. The budget measure would:

- Increase the single-employer flat rate premium from $19 to $46.75 per participant;
- Increase the multiemployer premium from $2.60 to $8.00 per participant;
- Index the single-employer flat rate and multiemployer premiums for inflation beginning in 2007; and
- Impose a $1,250 per-participant fee on employers that terminate their plans due to bankruptcy.

On October 26, 2005, the House Education and the Workforce Committee approved its own package of PBGC premium increases. The House is expected to vote on the package sometime in November. The House package would:

- Increase the single-employer flat rate premium from $19 to $30 per participant and index it for inflation in 2007;

- Give the PBGC discretion to increase single-employer flat rate premium by up to 20 percent per year beginning in 2007 (but give Congress the power to adopt a joint resolution "disapproving" the increase); and
- Impose a $1,250 per participant fee on employers that terminate their plans due to bankruptcy.

If the House and Senate agreed on increases, the increases would take effect January 1, 2006. However, the increases would not go into effect if Congress passes comprehensive pension funding reform legislation this year. The prospect of increasing PBGC premiums may encourage action in Congress on comprehensive pension reform before the year's end.

HEALTH CARE DEVELOPMENTS

IRS Announces 2006 HSA Limits

The IRS announced the 2006 Health Savings Account ("HSA") limitations for contributions and deductibles, as well as out-of-pocket numbers for HSA High Deductible Health Plans ("HDHP"). The limitation increases include, but are not limited to, the increases noted in the following chart:

	2005	2006
HSA Statutory Contribution Maximum		
Individual	$2,650	$2,700
Family	$5,250	$5,500
HDHP Minimum Deductible Amount		
Individual	$1,000	$1,050
Family	$2,000	$2,100
HDHP Maximum Out-of-Pocket Amount		
Individual	$5,100	$5,250
Family	$10,200	$10,500
Catch-Up Contributions (age 55 or older)	$600	$700

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EEOC Posts Q&As Regarding ADA Association Provision

On October 17, 2005, the Equal Employment Opportunity Commission ("EEOC") posted questions and answers about the association provision under the Americans with Disabilities Act ("ADA"). The association provision of the ADA protects applicants and employees from discrimination based on their relationship or association with an individual who has a disability, whether or not the applicant or employee has a disability.

The EEOC guidance explains that employers cannot deny health coverage for disabled dependents when coverage is available to others and that employers must provide equal access to health insurance for disabled dependents, but need not provide additional health insurance.

FMLA Only Applies to "New" Placement

In a recent Opinion Letter, the Department of Labor's ("DOL") Wage and Hour Division said that the Family and Medical Leave Act ("FMLA") leave for placement of a foster or adopted child only applies to a "new" placement. According to the Opinion Letter, if an employee is adopting a child who is already in his or her home, that adoption would not be a qualifying event under FMLA. Therefore, an employee who has custody of a child through foster care, or other means, may not take an FMLA leave if he or she subsequently adopts that child.

Update in AARP Challenge to EEOC Authority to Issue ADEA Exemption

On September 27, 2005, a federal district court reversed its previous decision and found that the EEOC has the authority to issue a proposed Age Discrimination in Employment Act ("ADEA") exemption for retiree medical plans that coordinate with Medicare eligibility (see October 2005 Employee Benefits Update).

The American Association of Retired Persons ("AARP") officially filed a Notice of Appeal in this case. The AARP's appeal will be heard by the Third Circuit Court of Appeals. The exemption is on hold until the appeals process is complete.

CMS Provides Guidance on Retiree Drug Subsidy Payment Process

The Centers for Medicare & Medicaid Services ("CMS") recently issued a form for submitting a retiree drug subsidy ("RDS") payment request, along with instructions. The CMS guidance addressed the following key topics in the RDS payment process: payment frequency, cost data as protected health information, cost reporter and payment requestor roles in the payment process, the three different cost reporting methods, errors in reported data and the reconciliation process.

HHS Releases Final Regulations for Electronic Prescriptions of Part D Drugs

On November 1, 2005, the Department of Health and Human Services ("HHS") released final regulations that establish a set of standards for electronic prescribing or "e-prescribing" of drugs covered by Medicare Part D. E-prescribing enables a physician to transmit a prescription electronically to a patient's pharmacy. Although e-prescribing will be optional for physicians and pharmacies, Medicare will require drug plans participating in the new prescription benefit to support e-prescribing. Compliance with these standards will be required on January 1, 2006, making the standards ready for immediate use when Medicare Part D begins.

CMS and HHS Release Proposed Regulations to Promote E-Prescribing and EMR

On October 11, 2005, both the CMS and the HHS Office of the Inspector General ("OIG") released proposed regulations that contain protections from the fraud and abuse laws to promote the use of electronic prescriptions ("e-prescriptions") and electronic medical records ("EMR").

Generally, the cost of implementing e-prescribing and EMR has deterred physicians from converting to these systems. In the past, efforts to share the conversion costs among health care providers could result in penalties under federal fraud and abuse laws because this sharing of costs could constitute remuneration in exchange for referrals. The proposed regulations provide safe harbors and exceptions to the fraud and abuse laws.

The proposed regulations are subject to a comment period that ends on December 12, 2005.

INTERNAL REVENUE SERVICE DEVELOPMENT

IRS Announces Settlement Initiative

In IRS Announcement 2005-80, the IRS described a settlement initiative for taxpayers to resolve their tax disputes with the IRS over certain abusive tax avoidance transactions. Announcement 2005-80 provides a one time opportunity for taxpayers to voluntarily come forward and resolve their tax disputes for 21 eligible transactions. The eligible transactions include 16 abusive transactions listed by the IRS and 5 transactions that the IRS is concerned about, but have not been formally listed as abusive transactions. Several of these transactions relate to benefit issues, including, but not limited to, transactions which violate the requirements in code sections 412(i), 419A(f)(5), 106 and 409(p).

To participate in the settlement initiative, a taxpayer must concede 100% of the transaction's tax benefits. The IRS will then allow the taxpayer to treat the full transaction costs claimed on the tax return as an ordinary loss, and the taxpayer must generally pay a penalty equal to a quarter or half of the maximum penalty, depending on the transactions. Announcement 2005-80 contains some exceptions to the penalty requirement.

The initiative is available until January 23, 2006.