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November 2011 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Wisconsin Legislature Passes Bill to Conform to Tax Law

Retroactive to January 1, 2011, group health plan sponsors do not have to impute income and withhold taxes on employer-paid health coverage for adult dependent children through December 31 of the year in which the child turns age 26.

However, if the plan covers an adult child who will be age 27 or older by December 31 (generally insured plans), you may still have to impute income and withhold both federal and Wisconsin income taxes on the value of their employer-paid coverage.

A full article describing the bill and its effects is included below under Health and Welfare Plan Developments.

Cycle A Determination Letter Filings Due January 31, 2012

Remedial Amendment Period Cycle A individually designed plans must be submitted for a favorable IRS determination letter no later than January 31, 2012. Cycle A plans include those sponsored by employers with tax identification numbers (EINs) ending in a one or a six, as well as any controlled group or affiliated service group plans that have elected Cycle A.

Annual Limit Waiver Notices

As a condition of receiving a waiver from the annual limits requirements under section 2711 of the Public Health Services Act, a group health plan or health insurance issuer must provide a notice informing current and eligible participants and subscribers that the plan or policy does not meet the minimum annual limits for essential benefits and has received a waiver of the requirement.

The guidance is not clear regarding when plans must send the waiver notices. For the initial waiver application, plans had to send the notice within 60 days of receiving approval of the waiver. In contrast, the waiver extension guidance does not have a specific deadline for sending the notice. Therefore, plans should consider sending the annual notice with the first mailing that occurs around the beginning of the plan year to which the waiver extension applies (*i.e.*, the plan

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year beginning on or after 9/23/2011).

RETIREMENT PLAN DEVELOPMENTS

IRS Issues Effective Dates for Hybrid Pension Plans

On October 11, 2011, the IRS issued Notice 2011-85, which delays the effective and amendment dates for hybrid plans (*e.g.*, cash balance plans) to comply with certain interest crediting rules under the Pension Protection Act of 2006 (PPA) provisions. Originally, the majority of the final regulations on these provisions were effective in 2011, with the exception of three provisions dealing with market rates of return. The recently issued notice provides that the effective date of the proposed 2010 hybrid regulations are extended to a date that will be specified in the regulations that is not earlier than January 1, 2013, and also extends the effective date of the related final 2010 hybrid plan regulations from January 1, 2012 to the same date that the 2010 proposed regulations are effective. Hybrid plans must be amended by the last day of the plan year preceding the date that the proposed regulations, when finalized, will apply to the plan.

Notice 2011-85 also provides 204(h) notice timing relief in certain situations for amendments that modify the plan's interest credit rate.

IRS Issues Changes to Retirement Plans 2012 Dollar Limits

On October 20, 2011, the IRS announced the 2012 cost of living adjustments affecting dollar limitations for qualified retirement plans. The highlights are as follows:

- Annual Benefit Limit. The limitation on the annual benefit under a defined benefit plan under IRC section 415(b)(1)(A) is increased from $195,000 to $200,000.
- Annual Additions Limit. The annual additions limitation for a defined contribution plan under IRC section 415(c)(1)(A) is increased in 2012 from $49,000 to $50,000.
- Annual Compensation Limit. The annual compensation limit under IRC sections 401(a)(17), 404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii) is increased from $245,000 to $250,000.
- Elective Deferrals. The limitation under IRC section 402(g)(1) on the exclusion for elective deferrals described in IRC section 402(g)(3) is increased from

$16,500 to $17,000.

- Definition of Highly Compensated Employee. The limitation used in the definition of highly compensated employee under IRC section 414(q)(1)(B) is increased from $110,000 to $115,000.

- Catch-Up Contributions. The catch-up contribution limit for 401(k) participants age 50 and older remains unchanged at $5,500.

The entire list of changes can be found at IRS.gov.

Social Security Wage Base Increases to $110,100 for 2012

On October 19, 2011, the Social Security Administration announced that the wage base for computing the Social Security tax (OASDI) in 2012 increased to $110,100 from $106,800, which was the wage base for 2009 through 2011.

DOL Issues Final Regulations Regarding Application of ERISA to Investment Advice Provided on Level-Fee Basis or Using a Computer Model

On October 25, 2011, the Department of Labor (DOL) issued final regulations implementing a prohibited transaction exemption (PTE) for "fiduciary advisors," providing investment advice to participants and beneficiaries pursuant to an "eligible investment advice arrangement." The final regulations were issued as a result of the PPA, which established a PTE under ERISA permitting fiduciaries to provide investment advice to participants and beneficiaries in individual account plans (*e.g.*, 401(k) plans), subject to certain conditions.

A fiduciary advisor is generally defined as a plan fiduciary by virtue of providing investment advice and is a registered investment advisor, bank or similar institution, insurance company, registered broker-dealer, an affiliate of one of these groups or an employee, agent, registered representative or affiliate of one of these entities. An eligible investment advice arrangement is an arrangement that meets the level-fee requirements of the new regulations, uses an acceptable computer-driven advice model, or uses both. Eligible investment advice arrangements must also be authorized by a plan fiduciary, be subject to annual audits and disclosed to plan participants. Along with the final regulations, the DOL has issued a voluntary model Fiduciary Advisor Disclosure that plans may provide to participants and beneficiaries for the disclosure of fees, compensation and services.

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DOL Issues Final Regulations Revising Labor Organization Office and Employee Reports

Pursuant to Labor Management Relations Act (LMRA) section 202, labor organization officers and employees are required to file a Form LM-30, publicly disclosing possible conflicts between their personal financial interests and their duty to the labor union and its members. For example, a union officer or employee must report payments or benefits with monetary value from, or interests in, an employer whose employees the filer's union represents. On October 27, 2011, the DOL issued final regulations revising Form LM-30.

Although many of the aspects of the 2007 Form LM-30 were left unchanged, the DOL made several revisions in response to issues raised about the complexity of and reporting burden under the 2007 form. The principal revisions to LM-30 are:

- Union leave and no docking payments are not required to be reported on the form. This is a return to the historical practice whereby union officers and employees are not required to report compensation received under union leave and no docking policies established under collective bargaining agreements (CBAs). The requirement in the 2007 form that such compensation be reported was criticized as unduly burdensome.

- Union stewards and others representing the union in similar positions are not covered by the Form LM-30 reporting requirements. This is a return to the historical practice.

- The requirement to report certain bona fide loans is limited. The 2007 form required more extensive reporting and made complex and confusing distinctions among different relationships and credit institutions. The revised form clarifies that union officials are generally not required to report on savings accounts, certificates of deposit, etc., where such instruments contain the same terms offered to other customers.

- Payments from certain trusts and unions are not required to be reported and payments from employers in competition with employers whose employees are represented by an official's union are required to be reported only if they represent an actual or likely conflict.

- The scope of reporting required of officers and employees of international, national and intermediate body unions is revised (*i.e.*, the top-down reporting). Higher-level union employees who have significant authority or influence with

respect to affiliates will need to report payments they receive from employers and businesses with relationships with lower levels of their union. However, higher-level union employees without such significant authority or influence over affiliates or officials of affiliates are not subject to these top-down reporting obligations. The revised form eliminates several confusing exceptions to the "top-down" reporting obligations that were established under the 2007 form.

Overall, the revised Form LM-30 will reduce the complications associated with compliance.

The regulations are effective November 25 and apply to all reports with fiscal years beginning on or after January 1, 2012. For earlier fiscal years, the DOL will accept the new form, the 2007 form or the pre-2007 form. Revised forms are available at GPEA Forms

DOL & SEC Coordinate on 401(k) Plan Fee Disclosure Rules

Subsequent to a request from the DOL, the Securities & Exchange Commission (SEC) released a No-Action letter agreeing to treat information provided by a plan administrator to plan participants or beneficiaries that is required by and complies with ERISA section 404(a) and corresponding regulations as satisfying the requirements of SEC Rule 482. Beginning May 31, 2012, ERISA section 404(a) requires fiduciaries of participant-directed plans to provide certain disclosures to participants primarily addressing fees and expenses.

This is good news for plan sponsors since the disclosures required under ERISA section 404(a) may provide investment fund information that is less current than what is required under Rule 482 and utilize mandated formats that differ from Rule 482's requirements.

PBGC Releases Proposed Regulations on Determining Benefits in Hybrid Plan Terminations

On October 31, 2011, the Pension Benefit Guaranty Corporation (PBGC) released proposed regulations implementing provisions of the PPA that change the rules for determining benefits upon the termination of a statutory hybrid plan, such as a cash balance plan.

The PPA provides that if the hybrid plan uses a variable rate of interest (*e.g.*, a rate that changes based on changes to an underlying index), when such a plan

terminates, the rate used under the plan to determine accrued benefits must be the average of the rates of interest used under the plan during the five-year period ending on the termination date. This same rule applies if a variable interest rate is used to determine the amount payable as an annuity at normal retirement age. For a plan terminated and trusteed by the PBGC, the proposed rule amends the PBGC's regulations to conform the rules for determining the allocation of assets and the amount of benefits payable under ERISA to the PPA changes in the benefit determination rules for statutory hybrid plans. The proposed rule also implements a PPA change for determining the present value of the accrued benefit under a statutory hybrid plan. Finally, the proposed rule provides guidance on benefits payable under a statutory hybrid plan that terminates in a standard termination. Comments must be submitted on or before December 30, 2011.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Adult Child Health Coverage – Wisconsin Legislature Passes Bills to Conform Tax Law

Background. Wisconsin was the only state that had not conformed to federal tax treatment of adult child health coverage. Under Wisconsin law, employers were required to impute income and withhold taxes on the fair market value of employer-paid health coverage for children who were not a "qualifying child" or "qualifying relative" under Internal Revenue Code rules for dependents effective prior to March 30, 2010. The law applied to both insured and self-funded plans; no ERISA preemption applied.

Legislation to conform Wisconsin law to federal law was passed by the Wisconsin Senate 33-0 on October 18, 2011 and the Wisconsin Assembly 93-3 on October 20, 2011. Governor Walker signed the legislation on November 4, 2011. As explained in our E-Alert dated September 20, 2011, Reinhart attorneys Gail M. Olsen and Don M. Millis were instrumental in efforts to get this legislation enacted. Importantly, this legislation is retroactive to January 1, 2011.

Practical Implications. If you have not acted: Plan sponsors who have not been imputing income or withholding taxes on employer-paid health coverage for children who will be under age 27 as of December 31, 2011 are not required to take any action. The new legislation retroactively eliminates the requirement to impute income and withhold taxes on the coverage.

If you have been imputing and withholding: The Wisconsin Department of Revenue

issued a press release on November 7, 2011, WDR. The instructions to employers are essentially as follows with respect to health coverage for children who will be younger than age 27 on December 31, 2011:

- Cease imputing income and withholding immediately with respect to health coverage for such children.
- In preparing the 2011 W-2, do not report any income previously imputed for employer-paid health coverage for such children.
- Do not adjust the taxes already withheld. Employees will get credit for these when filing their Wisconsin tax returns for 2011.

Coverage of Adult Child(ren) Age 27 or Older: Through December 31, 2011, Wisconsin law requires that insured plans and self-funded public plans allow for coverage of adult children up to age 27. As of January 1, 2012, Wisconsin law will follow federal law in requiring that coverage be made available only up to age 26. For 2011 and later years, if a plan covers an adult child who is age 27 or older, the fair market value of the cost of coverage should be imputed in the employee's income and income taxes should be withheld on this amount. This means that starting in 2012, Wisconsin law will follow federal law in all aspects except for children who are called to active military duty while full-time students and who resume being full-time students when discharged from military duty. Coverage under a Wisconsin insured plan for these adult children must be available to any age and the cost of this coverage must be included in the employee's income and subject to income tax withholding for any calendar year in which the child is age 27 or older.

CLASS Program Suspended

On October 14, 2011, Secretary of Health and Human Services Kathleen Sebelius announced that, despite its efforts, her department has been unable to find a way to make the Community Living Assistance Services and Supports (CLASS) Program self-sustaining, affordable to consumers and financially sound for 75 years. The CLASS program was intended to allow individuals to pay a monthly premium and after a number of years be eligible for a daily benefit intended to help pay for long-term care services if they become necessary.

The department prepared a report and letter to Congress regarding this issue. The cover letter from Secretary Sebelius is available at HHS.gov.

2012 Limits for Welfare Benefit Tax Code Provisions

The IRS issued Rev. Proc. 2011-52, which provides inflation-adjusted figures for 2012. The monthly limit on the value of qualified transportation benefits exclusion for qualified parking provided by an employer to its employees for 2012 rises to $240, up $10 from the limit in 2011. However, the temporary increase in the monthly limit on the value of the qualified transportation benefits exclusion for transportation in a commuter highway vehicle and transit pass provided by an employer to its employees expires and reverts to $125 for 2012. For Archer medical savings accounts (MSA) a high deductible health plan will be a health plan with an annual deductible for self-only coverage of at least $2,100 ($4,200 for family coverage) and not more than $3,150 ($6,300 for family coverage), with an out-of-pocket maximum of $4,200 ($7,650 for family coverage).

GENERAL DEVELOPMENTS

DOL Issues FAQs to Avoid Prohibited Transactions Resulting from Common Leasing Arrangements for Multiemployer Plans

The DOL issued eight Frequently Asked Questions (FAQs) to assist multiemployer plans in avoiding prohibited transactions that occur in leasing arrangements. The FAQs do not add a lot of new information but provide a review of the prohibited transactions that commonly occur in leasing arrangements and available exemptions.

Questions 1-3 provide basic information about the two types of prohibited transactions that can arise in lease arrangements, the exemptions that apply in certain cases, and the steps that fiduciaries can take to avoid nonexempt prohibited transactions. For example, the FAQs note that for leases of office space from a party in interest to a multiemployer plan, that involves a trustee conflict of interest, plan fiduciaries should comply with any applicable exemption, and the trustee faced with the conflict of interest should recuse himself or herself from any involvement in the decision-making process.

Questions 4-6 describe prohibited transactions that commonly arise in the leasing of classroom space by multiemployer apprenticeship plans, the exemptions available to provide relief and the steps that plan fiduciaries can take to avoid nonexempt prohibited transactions.

Question 7 discusses common problems observed by the DOL in these types of leasing arrangements, including the failure to meet the reasonable compensation

requirements in the applicable exemptions due to out-of-date appraisals, the absence of a formal written lease at the time of commencement, and the failure of trustees to recuse themselves when necessary.

Question 8 addresses the consequences that a fiduciary could face for violating ERISA section 406, including reversal of the transaction and personal liability for any losses to the plan.