



November 2012 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Cycle B Determination Letter Filings Due January 31, 2013

Remedial Amendment Period Cycle B individually designed plans must be submitted for a favorable Internal Revenue Service (IRS) determination letter no later than January 31, 2013. Cycle B plans include those sponsored by employers with tax identification numbers (EINs) ending in a two or a seven, as well as any multiple employer plans.

Summary of Benefits and Coverage

Starting with plan years beginning on or after September 23, 2012, group health plans are required to issue a summary of benefits and coverage (SBC) to participants and beneficiaries covered under the plan. For plans that do not require annual enrollment, the SBC must be provided no later than 30 days prior to the first day of the new plan year. Therefore, calendar-year plans without open enrollment should issue their SBCs by Friday, November 30, 2012.

Internal Revenue Code Section 436 Amendments

Internal Revenue Code (Code) section 436 as added by the Pension Protection Act of 2006 sets limits on benefit payments and pension accruals for defined benefit plans that are "underfunded." As discussed in the [December 2011 Employee Benefits Update](#), the IRS issued Notice 2011-96 extending both the deadline to amend a plan to satisfy Code section 436 and the period during which such an amendment is eligible for relief from the anti-cutback requirements of Code section 411(d)(6). The IRS has not issued an additional extension on the amendment deadline. Accordingly, calendar-year plans subject to Code section 436 should ensure that their plan amendments have been adopted by December 31, 2012.

Internal Revenue Code Section 409A Payment Timing Correction

Code section 409A does not allow the payment timing of deferred compensation to be contingent upon the execution of a release (including execution of non-solicitation agreements and non-competes) because it gives the employee partial control over the payment timing. From the perspective of the IRS, the ability to

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delay signing the release during the 90-day period could allow the employee to effectively choose the year in which taxation occurs—in violation of Code section 409A. The IRS considers this a Code section 409A violation if it is supported by the written plan document, regardless of whether the situation actually occurs. The problematic language is often found in employment and severance agreements, but can also arise in traditional deferred compensation plans.

Existing arrangements that were in effect as of December 31, 2010 may be corrected if they are amended by December 31, 2012. In addition, if payments were made between March 31, 2011 and December 31, 2012 and could have been, but were not, paid in the later of two taxable years, the payments should be corrected as operational failures. Correction also requires an attachment to the employer's tax return detailing the correction.

REINHART COMMENT: If a plan fails to comply with the requirements of Code section 409A, that plan and all plans that are required to be aggregated with it for an individual, are subject to three consequences. First, the amounts are subject to an additional 20% income tax payable by the individual. Second, the amounts are subject to normal income taxes payable by the individual at the time the amounts are first no longer subject to a substantial risk of forfeiture (or upon the failure, if later). Third, the individual must pay a "premium interest tax" determined as the amount of interest at the IRS underpayment rate plus one percentage point on the underpayments that would have occurred had the deferred compensation been includible in income at the time the amounts were first no longer subject to a substantial risk of forfeiture (vested). It is important to note that in an employment situation, these consequences are primarily borne by the employee (although the plan sponsor will have certain reporting and withholding obligations).

To check for a potential problem, employers can look for payment timing language under a plan, employment agreement or severance arrangement that allows for payment to occur "within" 30, 60 or 90 days, and provisions that require execution of a release, noncompete, non-solicitation, or any other contractual arrangement.

Annual Limit Waiver Update and Notice Any plan that has received a waiver from the annual limits requirements from the Department of Health and Human Services (HHS) under section 2711 of the Public Health Services Act is required to advise HHS that it wants to extend its waiver for the 2013 plan year. Plan sponsors should provide HHS with their update by December 31, 2012.



A plan sponsor must also provide an annual notice to its eligible participants and subscribers if its plan or policy does not meet the minimum annual limits for essential benefits and has received a waiver of the requirement. This notice must be sent after the beginning of the plan year, or after January 1, 2013 for calendar-year plans.

401(k) Plan Annual Notices

Sponsors of calendar-year 401(k) plans should prepare to provide the following annual notices (if applicable):

- Qualified Default Investment Alternative (QDIA). Plans that invest participant contributions in a QDIA because the participant failed to make an investment election must provide an annual notice at least 30 days before the beginning of the plan year.
- Automatic Enrollment Notice. Plan sponsors of 401(k) plans with an Eligible Automatic Contribution Arrangement (EACA) or a Qualified Automatic Contribution Arrangement (QACA) must provide an annual notice at least 30 days and not more than 90 days before the beginning of the plan year. The notice must be sent to all participants on whose behalf contributions may be automatically contributed to the plan. The IRS has posted a sample notice for these two types of automatic contribution arrangements that can be tailored to each plan. The automatic enrollment notice can be combined with the QDIA notice.
- Safe Harbor Notice. Plan sponsors of safe harbor 401(k) plans must provide an annual notice to plan participants at least 30 and not more than 90 days prior to the beginning of the plan year. The safe harbor notice must describe the safe harbor contribution and other material plan features. The safe harbor notice can be combined with the QDIA notice.

RETIREMENT PLAN DEVELOPMENTS

IRS Issues Changes to Retirement Plans' 2013 Dollar Limits

On October 18, 2012, the IRS announced the 2013 cost of living adjustments affecting dollar limitations for qualified retirement plans. The highlights are as follows:

- **Elective Deferrals**. The elective deferral (contribution) limit for employees who



participate in 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan is increased from \$17,000 to \$17,500.

- Catch-Up Contributions. The catch-up contribution limit for employees aged 50 and over who participate in 401(k), 403(b), most 457 plans and the federal government's Thrift Savings Plan remains at \$5,500.
- Annual Compensation Limit. The annual compensation limit under Code sections 401(a)(17), 404(l), 408(k)(3)(C) and 408(k)(6)(D)(ii) is increased from \$250,000 to \$255,000.
- Annual Additions Limit. The annual additions limitation for a defined contribution plan under Code section 415(c)(1)(A) is increased in 2013 from \$50,000 to \$51,000.
- Annual Benefit Limit. The limitation on the annual benefit under a defined benefit plan under Code section 415(b)(1)(A) is increased from \$200,000 to \$205,000.
- Definition of Highly Compensated Employee. The limitation used in the definition of highly compensated employee under Code section 414(q)(1)(B) remains unchanged at \$115,000.

The entire list of changes can be found on the [IRS website](#).

PBGC Announces 2013 Premium Changes

The Pension Benefit Guaranty Corporation (PBGC) issued a notice outlining premium changes for 2013. The flat premium rate for the PBGC's single-employer plan termination insurance program will be \$42 per participant in 2013 and \$49 per participant in 2014, up from \$35 in 2012. The premium rate for multiemployer plans will increase to \$12 per participant in 2013, up from \$9 in 2012. The rates are increased in accordance with the Moving Ahead for Progress in the 21st Century Act (MAP-21), and rates will be inflation adjusted in future years. The variable-rate premium will likely remain at \$9 per \$1,000 of unfunded vested benefits (before reflecting the \$400 per participant cap) despite the addition of an indexing feature under MAP-21. The PBGC will confirm that rate before the end of the year.

HEALTH AND WELFARE PLAN DEVELOPMENTS

2013 Limits for Archer MSA HDHPs



The IRS issued Revenue Procedure 2012-41, providing inflation-adjusted figures for welfare benefits in 2013. For Archer medical savings accounts (MSA), a high deductible health plan (HDHP) will include a health plan with an annual deductible for self-only coverage of at least \$2,150 (\$4,300 for family coverage) and not more than \$3,200 (\$6,450 for family coverage), with an out-of-pocket maximum of \$4,300 (\$7,850 for family coverage).

GENERAL DEVELOPMENTS

Social Security Wage Base Increases to \$113,700 for 2013

The Social Security Administration announced that the wage base for computing the Social Security tax (OASDI) in 2013 increased to \$113,700. The wage base for 2012 was \$110,100.

Form 5500 Publication

The Department of Labor (DOL) posts Forms 5500s in a database available on its website. The DOL has stated that electronically filed Form 5500s will be posted within 90 days after the date the Form 5500 is filed with the DOL. Filed forms can be searched on the [DOL's website](#).

Second Circuit Court of Appeals Rules DOMA Unconstitutional

The Second Circuit Court of Appeals ruled that the Defense of Marriage Act (DOMA) is unconstitutional in *Windsor v. U.S.*, 109 AFTR 2d 2012-2475 (2nd Cir. 2012). The plaintiff in *Windsor* contested the constitutionality of DOMA based on her payment of \$350,000 in federal estate taxes because her deceased partner was not recognized as a spouse for federal tax purposes. The court applied a heightened level of scrutiny to determine that DOMA is discriminatory against homosexuals.

REINHART COMMENT: The First Circuit Court of Appeals previously held DOMA unconstitutional in *Gill et al. v. Office of Personnel Management*, 682 F.3d 1 (1st Cir. 2012). Following these circuit court decisions, the Supreme Court may grant certiorari on these cases in order to consider the validity of DOMA. Plan sponsors should be aware that a change in the validity of DOMA could affect various aspects of employee benefits, including the federal tax treatment of benefits, COBRA rights and qualified domestic relations orders.

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