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# October 2007 Employee Benefits Update

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## SELECT COMPLIANCE DEADLINES

### PBGC Announces Deadline Relief for Recent Disaster Victims

The PBGC extended certain filing deadlines for victims of severe storms and flooding or tornadoes in Illinois, Minnesota, New York, Ohio, Oklahoma and Wisconsin. The PBGC extended deadlines for making premium payments, filing plan termination reports, sending participant notices, reportable event notices, annual employer reports, requests for reconsideration of appeals and various multiemployer plan reporting requirements that originally had deadlines between August 18, 2007 and November 15, 2007. Persons or entities whose principal place of business is located in the covered disaster areas or who are unable to obtain required information or assistance from its service providers due to the disasters are eligible for relief.

### SIMPLE IRA and SIMPLE 401(k) Deadlines

Employers with SIMPLE IRA or SIMPLE 401(k) plans must notify eligible employees of their 2008 salary reduction rights by November 1, 2007, and must also indicate whether the employer's required contributions will be matching or nonelective contributions.

### Medicare Part D Deadlines for Calendar Year Plans

All group health plans that offer prescription drug coverage to Medicare-eligible employees (under either an active plan or retiree plan) must provide the annual creditable coverage disclosure to Medicare-eligible participants and dependents no later than November 15, 2007.

PLEASE NOTE: It was recently discovered that the Model Prescription Drug Notice provided on Centers for Medicare and Medicaid Services ("CMS") Web site contains an error. The corrected notice should state that if a person with non-creditable coverage does not sign up for Medicare Part D during their initial enrollment period, they will be assessed a higher premium. The current notice can be interpreted to mean that a person who enrolls late does not need to pay a higher premium. CMS is working on correcting the notice. The Medicare Part D annual enrollment period for people to enroll or change their enrollment begins November 15 and ends December 31, 2007. The Medicare Part D notices that

have been prepared by Reinhart are correct.

## RETIREMENT PLAN DEVELOPMENTS

### Multiemployer Plans Must Disclose Certain Information Upon Request

On September 14, 2007, the Department of Labor ("DOL"), Employee Benefits Security Administration issued proposed regulations mandated by the Pension Protection Act of 2006 that require multiemployer plan administrators to provide certain actuarial, financial and funding documents to eligible individuals upon request. 72 Fed. Reg. 72, 178. The proposed regulations state that the plan administrator must disclose the information listed below within 30 days after the receipt of the written request for information made by a plan participant, beneficiary, employee representative or any employer that has an obligation to contribute to the plan. If specifically requested, the plan administrator must furnish (1) a copy of any periodic actuarial report, including sensitivity testing, that has been in the plan's possession for 30 days; (2) a copy of any quarterly, semiannual or annual financial report that has been prepared for the plan by a plan investment manager or advisor, regardless of whether the report was prepared by a fiduciary, that the plan has possessed for at least 30 days; and (3) a copy of any application filed with the Secretary of the Treasury requesting an extension under ERISA section 304 or Internal Revenue Code ("Code") section 431(d) and the applicable IRS response. Any proprietary or individual information does not need to be disclosed.

The requestor can only request a specific document once within a 12-month period, but the requestor can request different documents on multiple occasions. The plan can charge the requester a reasonable fee, not to exceed $.25 per page and the actual shipping costs; however, the DOL encourages electronic delivery and any information delivery must comply with the general information furnishing requirements. The DOL plans on publishing regulations regarding the civil penalty for violating the disclosure requirements, which can be up to $1,000 per day.

### Determination Letter Process for Preapproved Defined Contribution Plans Temporarily Halted

In Announcement 2007-90, the IRS stated that it would stop accepting applications for determination letters for preapproved defined contribution plans that are filed on Form 5307, Application for Adopters of Master or Prototype or Volume Submitter Plans, after December 18, 2007. The IRS is halting the

determination letter process for preapproved defined contribution plans because all of these plans will need to be restated and submitted to comply with EGTRRA within a two-year period that the IRS will announce in early 2008. There is an exception for sponsors of preapproved defined contribution plans that are submitting Form 5307 for amendments related to voluntary correction program or correction on audit program submissions. Defined benefit plan sponsors planning to apply for a determination letter on Form 5307 are unaffected by the temporary halt.

**Safest Available Annuity Standard Inapplicable to Individual Account Plans**

On September 12, 2007, the DOL issued proposed regulations regarding the fiduciary duties relating to the selection of an annuity as a form of distribution from an individual account plan. 72 Fed. Reg. 72, 176. Effective November 13, 2007, the "safest available annuity" standard described in Interpretive Bulletin 95-1 applies solely to defined benefit plans. The proposed regulations specify that general fiduciary standards of ERISA section 404(a)(1) apply when an annuity is chosen as the form of distribution in a defined contribution plan. The proposed regulations create a fiduciary safe harbor for choosing annuities for an individual account. The fiduciary is deemed to have acted prudently if he or she follows the safe harbor's requirements, which, among other things, includes engaging in a thorough, objective, analytical search to identify potential annuity providers and assessing whether the annuity provider will be able to make all of the required payments.

**Supreme Court Will Hear Two Pension Cases**

The Supreme Court recently granted cert in *Kentucky Equal Employment Opportunity Commission v. Jefferson County Sheriff's Dept.*, 467 F.3d 571 (6th Cir. 2006). For a summary of this case, please see Reinhart's March Employee Benefits Update. The Court will be deciding whether the use of age as a factor in determining if a participant is eligible for normal retirement and disability benefits is arbitrary, which would cause the plan to be facially discriminatory and in violation of the Age Discrimination in Employment Act. The plan in question does not allow a participant working past normal retirement age to receive a disability pension. The calculation of disability benefits under the plan also gives a younger participant a greater benefit when compared to a similarly situated older worker.

The Supreme Court will also hear arguments in *LaRue v. DeWolff, Boberg & Assoc.*, 450 F.3d 570 (4th Cir. 2006). In this case, the Court will decide whether a plan

participant is able to sue a plan fiduciary for not following the participant's investment directions to recover pension losses. The participant claims that DeWolff, Boberg & Associates, the plan administrator and fiduciary, did not switch his investments as he directed, which he alleges caused him to lose $150,000. The lower courts held that the participant could not sue the fiduciary because ERISA section 502 only provides relief for entire plans and not individuals. The lower courts also held that he could not sue the fiduciary because section 502 does not provide the equitable relief the participant is looking for and the participant did not allege unjust enrichment, self-dealing or unlawful possession by DeWolff. The Supreme Court denied the plan fiduciary's motion to dismiss, which claimed the participant did not have standing because he had cashed out his account. The Supreme Court held the participant had standing because the value of his account would have been greater but for the alleged breach of fiduciary duty.

### Plan Has Rights in Documents Given to TPA

In a recent case, a district court held that El Paso Corp., the plan sponsor, had a legal right to obtain documents from its recordkeeper. Tomlinson v. El Paso Corp., 2007 WL 2521806 (D. Colo. 2007). In this case, the plan participants requested documents from the plan sponsor. The plan sponsor responded that it was unable to provide some of the documents because it had given the documents to its service providers. The service provider refused to turn over the documents because it claimed its database was proprietary. The court looked at whether the plan sponsor had a legal right to the documents. The court held that the plan sponsor had a right to the documents under ERISA section 209, which requires employers to retain records that are able to help determine pension benefits. The court stated that DOL regulations mandate that employers must keep electronic records available to be inspected and examined. The court held that an employer could not delegate away these record keeping duties and ruled that the plan sponsor must provide the documents to the plan participants.

## WELFARE AND FRINGE BENEFIT PLAN DEVELOPMENTS

### General Motors and the United Auto Workers Agree on Transferring Health Benefits to a VEBA

General Motors Corp. ("GM") and the United Auto Workers ("UAW") agreed to transfer GM's retiree health care benefits to a voluntary employee benefits association ("VEBA"). A VEBA is an independently managed trust that is set up with an initial contribution, where the money is able to grow tax-free and where the

benefit distributions are also untaxed. The VEBA, as opposed to the plan sponsor, is the entity that bears the financial risk. Transferring the benefits to the VEBA will allow GM to remove the retiree health care liability of approximately $50 billion from its balance sheet. GM will contribute roughly $35 billion to the VEBA through cash, stock and the diversion of cost-of-living increases. Goodyear Tire and Dana Corp. are two companies that have also recently shifted their retiree health care benefit liabilities to VEBAs, and several other large companies are reported to be considering using VEBAs to fund their benefits.

**DOL Provides Informal Guidance on COBRA Election Notices**

The employee benefits division of the American Bar Association recently released the contents of its informal discussion with the DOL that took placed on May 7, 2007. In a discussion involving COBRA, the DOL officials stated that sending an election notice prior to the occurrence of a qualifying event may not be prudent, because information required by the notice may only be known after the qualifying event has occurred. When asked what to do in the situation where a COBRA election notice was returned undeliverable, the DOL representatives noted that the notice must be delivered in a way that is "reasonably calculated to ensure receipt." The representatives noted that the method's reasonableness is determined by the facts and circumstances, and discussed a Fifth Circuit opinion where sending the notice by certified mail, return receipt requested met COBRA's notice requirements. Reinhart advises against using certified mail to send COBRA election notices. Please contact your Reinhart attorney if you need assistance in making sure that your plan's method of sending COBRA election notices meets the applicable standard.

**Permanent Mental Health Parity Bill Introduced in Senate and House of Representatives**

The Senate has approved a bill, and the House Ways and Means Committee voted favorably on a similar bill that, if passed, would make permanent the mental health parity requirements applicable to group health plans. The Senate bill requires that employers with 80 or more employees, who offer mental health coverage, cannot place more financial limitations or treatment restrictions on mental health coverage than are in place for medical or surgical coverage. The Senate version does not mandate mental health coverage. The House version is similar, but requires plans that offer mental health coverage to cover the same mental health and substance-related afflictions that Congress members' plan covers. The bill would also extend the mental health parity requirements to

substance-related disorders.