Reinhart

October 2011 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES AND REMINDERS

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 Internal Revenue Service (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.

Form 8955-SSA

The due date for the 2009 and 2010 plan year Forms 8955-SSA is the later of: (1) the due date that applies for the 2010 plan year or (2) January 17, 2012. For calendar-year plans, the 2009 and 2010 Forms 8955-SSA would be due by January 17, 2012. The Form 8955-SSA replaces Schedule SSA of the Form 5500. Plans are required to file the Form 8955-SSA with the IRS beginning with the 2009 plan year. For plans on a calendar year, the 2011 Form 8955-SSA will be due July 31, 2012.

RETIREMENT PLAN DEVELOPMENTS

PBGC Premium Penalty Relief

The Pension Benefit Guarantee Corporation (PBGC) announced three areas of premium penalty relief in connection with President Obama's executive order for regulatory review. For plan years beginning after 2010, the PBGC will apply an automatic grace period of seven days for delinquent payment of regular PBGC premiums. Interest will accrue until the premium is paid, but the 1% per month penalty for self-reported delinquencies and the 5% per month penalty for delinquencies discovered by the PBGC will not apply if the premium is paid within seven days after the due date. Previously, the penalty for an entire month was applied for each month or part of a month that the penalty was late, resulting in a full month penalty for payments made only a few days late.

The second area of relief relates to plans electing the alternative method to calculate their variable-rate premium. Generally, a plan electing the alternative method must check both boxes 5 and 7 on the electronic premium form. Under the relief, for plan years beginning after 2009, if a plan used the alternative method and failed to make a valid election for the applicable plan year or a prior plan year, or if the plan used the standard method but inadvertently elected the alternative method, the PBGC will determine the method used based solely on the information reported on line 7d(1) of Part III of the electronic premium form.

Also, the PBGC will waive the late-payment penalty previously assessed for 2008 or 2009 plan year submissions for plan sponsors who erroneously marked box 5 but used the standard method, or who failed to mark box 5 but used the alternative method. However, the PBGC will not allow a plan that made an error to use the method it intended rather than the method it elected. Therefore, any additional premium that may have been required under the method the plan did not intend will still be owed by the plan and will not be refunded.

The PBGC is contacting premium payers that are eligible for relief based on election of the standard or alternative methods.

DOL Releases Interim Guidance on Electronic Delivery of Participant-Directed Retirement Plan Disclosures

The Department of Labor (DOL) published Technical Release 2011-03, announcing an interim policy on electronic distribution of the new participant-level fee and investment disclosure requirements that generally take effect May 31, 2012. As discussed in the November 2010 EB Update, the DOL previously issued final regulations requiring the fiduciaries of participant-directed individual account plans to disclose specific plan-related and investment-related information to plan participants. In these regulations, the DOL did not make a final determination regarding whether the disclosures could be delivered in electronic form, allowing for public comment on the issue. In its interim policy, the DOL provides two approaches for interim relief for electronic delivery of disclosures.

Plan-Related Information. The first approach applies to disclosures that are included in a pension benefit statement, which would include plan-related information such as general investment information, administrative expenses and individual expenses. These disclosures may be furnished electronically to individuals in accordance with access outlined in Field Assistance Bulletin 2006-03 or in accordance with the IRS's electronic delivery standards in Treasury Regulation section 1.401(a)-21. Providing participants with continuous access to benefit statement information through one or more secure websites would constitute good faith compliance under Field Assistance Bulletin 2006-03 as long as the notification requirements are met, and participants have the right to request and obtain, free of charge, a paper version of the required information.

Investment-Related Information. A second approach is available for disclosures that are not included in a pension benefit statement, including investment-related information such as specific investment information and performance and benchmark data. The DOL provides two options for this approach.

A plan can use the DOL's existing safe harbor rule detailed in Labor Regulation section 2520.104b-1(c). This safe harbor rule generally permits electronic disclosure to participants who have the ability to effectively access electronic documents in their workplaces and who use the electronic medium as an integral part of their duties, or individuals who have affirmatively consented to receipt of electronic disclosure. Alternatively, a plan can use an interim email method outlined by the DOL in Technical Release 2011-03. The following conditions must be met in order for a fiduciary to use the email method.

1. The recipients entitled to the disclosure must "voluntarily" provide an email address in response to an initial notice. In order for it to be considered "voluntary," providing an email cannot be a condition of employment or participation in the plan. However, it would be considered voluntary if the participant is required to provide an email address electronically in order to access a secure continuous website that houses the required disclosures.
2. A "clear and conspicuous" initial notice that satisfies specific content requirements must be provided with the request for the email address. The notice must include the following information: a description of the voluntary nature of providing an email address, identification of the

disclosures to be provided electronically, the participant's ability to request a free paper copy, the participant's ability to opt out of electronic delivery at any time, and the procedure for updating an email address.

3. An annual notice satisfying most of the initial notice content requirements must be provided yearly thereafter.
4. The electronic delivery method must be "reasonably calculated" to result in actual receipt by the individual. The sufficiency of an electronic delivery method may be demonstrated through the use of return receipts, notice of undelivered electronic mail or periodic surveys.
5. The electronic delivery method must protect the confidentiality of personal information.
6. The notice must be written in a manner calculated to be understood by the average plan participant.

The initial notice is due the later of May 31, 2012 or, if later, 60 days after the first day of the plan year beginning on or after November 1, 2011. The initial notice must be in paper form unless the recipient is part of a transition group that has an email address on file with the plan, and the plan has evidence that the recipient used the address to electronically interact with it during the 12-month period preceding the date of the initial notice.

DOL Will Re-Propose Amendments to Its Definition of Fiduciary Regulation

In September, the DOL announced its intention to re-propose amendments to its regulations defining who is a fiduciary. As discussed in the November 2010 EB Update, the DOL previously proposed amendments to its regulations governing the definition of fiduciary. In light of substantial debate since the 2010 proposal and President Obama's executive order to review regulation, the DOL will re-propose its amendment to the definition of fiduciary.

The new proposed rule is expected in early 2012. The DOL stated in its press release that it anticipates addressing many of the concerns raised regarding the prior proposed amendment, including clarifying that fiduciary advice is limited to individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals, clarifying the limits of the rule's application to arm's-length commercial transactions, and allowing exemptions for the current fee practices of brokers and advisors.

HEALTH AND WELFARE PLAN DEVELOPMENTS

CMS Changes Medicare Secondary Payer Reporting Threshold for HRA

Coverage

The Centers for Medicare and Medicaid Services (CMS) issued an alert on September 27, 2011 changing two reporting rules for Health Reimbursement Accounts (HRA) under the Medicare Secondary Payer (MSP) mandatory reporting requirements. Under the new guidance, CMS raised the reporting threshold for HRAs under the MSP reporting requirements from $1,000 to $5,000. Effective for new or renewing coverage on or after October 3, 2011, only HRAs with an annual benefit amount of $5,000 or more must be reported to CMS under the MSP reporting requirements. Plan sponsors should continue to use the old $1,000 reporting threshold for existing coverage until the employer's HRA benefit period is renewed.

CMS added a new requirement as part of the guidance, now requiring that a notice of termination be submitted to the Coordination of Benefits Contractor (COBC) when an HRA participant's benefit is exhausted if no additional HRA benefits will accrue for the remainder of the coverage term. This change is effective immediately. If a notice is submitted to the COBC for a termination and the benefit period is renewed for an HRA annual benefit of $5,000 or greater, the employer must then submit a new add record reflecting the start date of the new coverage period.

PPACA Constitutional Challenges Update

The Justice Department announced that it will forgo an appeal to the full Eleventh Circuit Court of Appeals on the August ruling by a panel of the court. Previously, a panel of the court ruled that the individual mandate portion of the Patient Protection and Affordable Care Act (PPACA) is unconstitutional, as discussed in the September 2011 EB Update. The panel ruled that, while the individual mandate was unconstitutional, it could be severed from the remainder of PPACA, leaving the remainder of PPACA intact.

The Justice Department's decision not to appeal to the full 11-member court means that it can appeal directly to the U.S. Supreme Court for consideration. The Justice Department is expected to do so, allowing for Supreme Court consideration of the appeal during its October 2011-June 2012 term.

IRS Requests Comments on Proposed Affordability Safe Harbor Under PPACA

The IRS has requested comments on a proposed safe harbor to aid employers in determining whether they offer affordable health coverage in accordance with

PPACA requirements. In Notice 2011-73, the IRS has requested comments on its proposed safe harbor, which would permit employers that offer coverage to their employees to measure the affordability of that coverage using wages that the employer paid to an employee instead of the employee's household income. Under PPACA, employers with 50 or more full-time employees that do not offer "affordable" health coverage to their full-time employees may be required to make a shared responsibility payment beginning in 2014.

Comments are due by December 13, 2011 and may be submitted to the IRS via email, mail or hand delivery.

GENERAL DEVELOPMENTS

FASB Updates Multiemployer Plan Disclosure Requirements

The Financial Accounting Standards Board (FASB) released Accounting Standards Update No. 2011-09 requiring significant additional financial statement disclosures by employers contributing to multiemployer plans. As discussed in the May 2010 EB Update, FASB's original proposal would have resulted in employers making additional requests of multiemployer plans in order to comply with FASB's new reporting requirements.

While the Update retains many reporting requirements, FASB has changed its original proposal in ways that should reduce the burden on multiemployer plans. Namely, the Update removes the required disclosure of an employer's estimated withdrawal liability; does not require enhanced disclosures from multiemployer health and welfare plans in the same manner as multiemployer pension plans; and does not require disclosure of expected contributions for the next annual period.

The disclosures required by this Update are effective for fiscal years ending after December 15, 2011 for public entities, and for fiscal years ending after December 15, 2012 for nonpublic entities.

IRS Updates List of Approved Nonbank Trustees and Custodians

The IRS issued Announcement 2011-59, amending its list of entities approved to serve as nonbank trustees or custodians for certain tax-exempt accounts. Custodial accounts for qualified plans, individual retirement accounts (IRA) and Roth IRAs, 457(b) plans, Coverdell educational savings accounts, Archer MSAs, and HSAs are not considered tax-exempt unless the trustee or custodian of the account is a bank or an approved nonbank trustee or custodian. An entity that is not a bank must receive approval from the IRS.

The updated list includes all entities approved to serve as a nonbank trustee or custodian as of September 1, 2011. It includes the name, address and approval date of each entity, and replaces the prior list released in 2007.

IRS Provides Updated Guidance on Employer-Provided Cell Phones as Fringe Benefits

The IRS recently issued updated guidance on the tax treatment of employer-provided cell phones. Under the updated guidance, if an employer provides an employee with a cell phone primarily for "non-compensatory business purposes," the cell phone will be treated as a working condition fringe benefit with the value of the cell phone usage excluded from the employee's wages. Also, the IRS will treat the value of any personal use of a business cell phone as a nontaxable de minimis fringe benefit.

Previously, the value of employer-provided cell phones was subject to inclusion in an employee's wages unless a specific exclusion applied. The new guidance is applicable for periods beginning January 1, 2010 and applies to both employer-provided cell phones and an employer's reimbursement of employee-owned cell phones.

IRS Establishes New Settlement Offer for Workers Misclassified as Independent Contractors; Enters Related Information Sharing Agreement With the DOL

The IRS recently initiated two related programs regarding workers misclassified as independent contractors. In general, businesses are not required to withhold or pay any taxes on payments to independent contractors that they would normally have to pay on employees, including income taxes, Social Security and Medicare taxes, and unemployment taxes. Independent contractors are independently liable for any applicable tax liabilities.

The IRS has created a new program that allows employers to voluntarily reclassify workers as employees outside of an IRS audit context and without the need to go through normal correction procedures. The new program is available to all taxpayers who are currently treating their workers (or group of workers) as independent contractors or other nonemployees and want to prospectively treat the workers as employees. In order to qualify, the taxpayer must have consistently treated the workers as nonemployees, must have filed all required

Forms 1099 for the workers for the previous three years, and cannot currently be under IRS audit or a DOL or state agency audit concerning the classification of workers.

In addition to prospectively treating the class of workers as employees for future tax periods, the following will apply to the employer:

- Pay 10% of the employment tax liability that may have been due on compensation paid to the workers for the most recent tax year;
- Will not be liable for any interest and penalties on the liability;
- Will not be subject to an employment tax audit for the worker classification of the workers for prior years; and
- Will agree to extend the period of limitations on assessment of employment taxes for three years for the first, second and third calendar years beginning after the date on which the taxpayer has agreed under the closing agreement to begin treating the workers as employees.

Previously, reclassifying individuals as employees would result in a full employment tax assessment for one year on the employer unless the employer could meet a three-prong test related to its classification of that individual. Taxpayers can initiate participation by filing the Form 8952 with the IRS and provide the name of a contact or an authorized representative with a valid Form 2848 power of attorney.

In related guidance, the IRS has initiated a new information sharing agreement with the DOL. Under the agreement, the DOL will, within its discretion, refer to the IRS information and other data that the DOL believes may raise IRS tax compliance issues related to worker misclassification. The IRS will then review the shared information, and may conduct examinations to determine compliance with employment tax laws. The IRS may also share the information with state and municipal taxing authorities, and it may provide the DOL with information evidencing a violation of any federal criminal laws that the DOL enforces.

Reinhart Comment: In light of the IRS's increased ability to review worker classifications and its new program with reduced reclassification costs, employers may want to review their worker classifications to ensure that all independent contractors are correctly classified. Employers with misclassified employees may want to take advantage of the IRS's new reclassification program to avoid higher costs of reclassification under an audit."