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October 2013 Employee Benefits Update

DEPARTMENTS EXPLAIN IMPACT OF AFFORDABLE CARE ACT (ACA) HEALTH REIMBURSEMENT ARRANGEMENTS (HRAS)

The IRS, DOL and HHS (collectively, Departments) issued guidance addressing the impact of the ACA on HRAs.

Integrating HRAs with Individual Coverage. This guidance codifies the prior position of the Departments that HRAs and other types of group health plans cannot be used to purchase coverage on the individual market. Under this guidance, an employer payment plan pursuant to which an employer reimburses or directly pays employee premiums for individual health insurance policies and excludes those amounts from taxable income (such as an HRA) will fail to satisfy the ACA's prohibition on annual dollar limits.

This guidance also states that an employer plan that offers the employee the choice between cash and an after tax amount could be used to purchase individual health insurance without violating the ACA.

The guidance would also permit a stand-alone HRA offered as a retiree-only plan. The guidance confirms that a stand-alone HRA for retirees is still considered minimum essential coverage. Consequently, retirees who have not yet reached age 65 may use an HRA to satisfy the individual mandate under the ACA, but those retirees will not be eligible to receive a premium tax credit if they purchase insurance on the exchanges.

Integrating HRAs with a Group Health Plan. This guidance also clarifies when an HRA will be considered "integrated" with a group health plan such that the HRA does not violate the ACA's prohibition on annual limits. Different requirements apply, depending on whether the group health plan provides minimum value.

If the HRA is paired with a group health plan that does not provide minimum value, the HRA will be considered integrated with the group health plan if:

- The employer offers (does not need to sponsor) a group health plan that does not solely consist of excepted benefits (the Group Plan).
- The employee receiving the HRA is actually enrolled in the Group Plan.
- The HRA is only available to employees enrolled in the Group Plan.
- The HRA is limited to reimbursing one or more of the following:

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    - co-payments;
    - co-insurance;
    - deductibles; and
    - premiums under the Group Plan or medical care that does not constitute essential health benefits.
- The employee is permitted at least annually to permanently opt out of, and waive, future reimbursements from the HRA.

If the HRA is paired with a group health plan offered (not necessarily sponsored) by the employer that provides minimum value, the HRA will be considered integrated with the group health plan if:

- The employee receiving the HRA is offered and is actually enrolled in a group health plan.
- The HRA is only available to employees enrolled in that group health plan.
- The employee is permitted at least annually to permanently opt out of, and waive, future reimbursements from the HRA.

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 no later than December 1 (if applicable). If a plan sponsor must provide more than one notice, the notices can be combined.

- 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 prior to 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.
- Safe Harbor Notice. Plan sponsors of safe harbor 401(k) plans must provide an annual notice to plan participants at least 30 days and not more than 90 days prior to the beginning of the plan year. The safe harbor notice must describe

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the safe harbor contribution and other material plan features.

RETIREMENT PLAN DEVELOPMENTS

IRS Issues Special Administrative Procedures To Correct Overpayments of Employment Taxes With Respect to Certain Same-Sex Spouse Benefits

The IRS recently issued Notice 2013-61 to provide the procedures for employers to make claims for refunds or adjustments of overpayments of FICA and federal income tax withholding for certain benefits provided to same-sex spouses after the Supreme Court's decision in US v. Windsor.

Prior to the Supreme Court's decision in *US v. Windsor*, a same-sex spouse was not recognized as a spouse under federal tax law, which meant that for certain employee benefits offered to a same sex spouse were not treated as excludable from the employee's gross income for federal income tax purposes. As a result, employers withheld income tax and paid employment taxes from an employee's wages for the benefits provided to the same-sex spouse of the employee. In Revenue Ruling 2013-17, the IRS concluded that same-sex couples legally married in jurisdictions that recognize such marriages will be treated as married for federal tax purposes, regardless of their state of residence, and that taxpayers may rely on the Ruling (subject to limitation periods) retroactively for purposes of filing original returns, amended returns, adjusted returns or claims for credits or refunds of overpayments of taxes with respect to employer-provided health coverage or fringe benefits that were excludable from income based on an individual's marital status. Notice 2013-61 provides two alternative special administrative procedures for adjustments and claims for these refunds or credits for 2013.

- Under the first alternative, an employer can repay its employees for the overpayment of FICA and income taxes with respect to same-sex spouse benefits by December 31, 2013 and use the fourth quarter 2013 Form 941 (Employer's QUARTERLY Federal Tax Return) to correct overpayments paid in the first three quarters of 2013.
- Under the second alternative, an employer that does not repay its employees for the overpayment of FICA and income taxes with respect to same-sex spouse benefits by December 31, 2013 can file a Form 941-X (Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund) for the fourth quarter of 2013 to correct the overpayment of FICA taxes for all quarters of 2013.

For overpayments of FICA taxes for years before 2013, employers can make a

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claim or adjustment for all four quarters of a calendar year on a Form 941-X filed for the fourth quarter of such year, assuming the refund period remains open.

The administrative procedures in Notice 2013-61 are optional, and an employer may still use the regular procedures for correcting employment tax overpayments to correct the overpayment of taxes for benefits provided to same-sex spouses.

Employer Withdrawal Liability Dischargeable in Bankruptcy

In a recent Ninth Circuit case, *Carpenters Pension Trust Fund for Northern California v. Moxley*, 2013 WL 4417594 (9th Cir. 2013), the court held that an employer's withdrawal liability was dischargeable in bankruptcy. In this case, the employer filed for bankruptcy protection after the Pension Fund assessed withdrawal liability. The Pension Fund objected to the discharge of the withdrawal liability, arguing that the employer was a fiduciary under the Bankruptcy Code and that the debt should not be discharged under an exception in the Bankruptcy Code applicable in cases of fraud or "defalcation" (misappropriation of funds). The Pension Fund argued that money owed to the Pension Fund under the terms of the collective bargaining agreement (CBA) constituted plan assets and, because the employer had control over the amounts to be contributed, it was a fiduciary to the Fund.

The court held that the employer was not a fiduciary with respect to uncontributed amounts, and the Bankruptcy Code exception did not apply.

SEC Issues Proposed Regulations for CEO Pay Ratio Disclosure

On September 18, 2013, the SEC issued proposed regulations under the 2010 Dodd-Frank Act requiring public companies to disclose median annual compensation of all employees and the ratio of that median to the total annual compensation of the CEO. Companies would be required to comply with the new regulations in the first fiscal year beginning on or after the effective date of the final rules. Thus, if the final regulations are adopted in 2014, the proposed compliance timeline would require companies to disclose the pay ratio in their proxy statements for their 2016 shareholder meetings, based on 2015 compensation. The proposed regulations include alternative methods for calculating employees' annual compensation and determining the median. After identifying the median employee's annual compensation, companies would be required to recalculate that employee's annual compensation according to proxy statement pay calculation rules. The proposed regulations require that the CEO's total annual compensation also be calculated according to proxy statement

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calculation rules. The disclosure is then required to be presented as a ratio of total annual compensation of all employees as a multiple of CEO pay. For example, if the median employee's annual compensation is $50,000 and the CEO's total annual compensation is $1 million, the ratio would be disclosed as "1 to 20," or as a narrative, such as "the CEO's total annual compensation is 20 times that of the total median annual compensation of all employees."

Settlement Reached in Participants' Lawsuit Against 401(k) Plan

International Paper recently agreed to pay $30 million to participants in its 401(k) plan to settle a lawsuit originally brought in 2006. Plan participants claimed that the plan paid excessive fees for recordkeeping and investment management services, fraudulently reported performance histories for the plan's funds and that the sponsor improperly delayed contributions to the plans and retained interest earned on those contributions.

REINHART COMMENT: Although it is unclear why International Paper agreed to the settlement, this case illustrates that plan sponsors should continue to document regular, periodic due diligence with respect to the performance of, and fees paid to, plan service providers.

HEALTH AND WELFARE PLAN DEVELOPMENTS

IRS Issues Proposed Regulations on Information Reporting under the ACA

The IRS recently issued two proposed rules addressing the information reporting requirements for certain employers and insurers under the ACA.

Reporting Requirements for Providers of Minimum Essential Coverage. Beginning with the 2014 tax year, Code section 6055 will require certain entities that provide minimum essential health coverage, including health insurance issuers, sponsors of self-insured health plans, and government agencies that administer government sponsored health insurance programs, to file annual reports providing a list of covered individuals and the months they were covered. This reporting requirement is designed to aid the IRS in determining whether individuals are complying with the ACA's individual mandate and also their eligibility for premium tax credits.

Under the proposed regulations, entities required to report under Code section 6055 must provide the name and taxpayer identification number (TIN) of each individual enrolled in minimum essential coverage. If, after reasonable effort, an entity is unable to obtain an individual's TIN, the entity may report the individual's

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birthdate instead. Entities must also provide individuals with a written statement showing the information reported to the IRS. Information returns may be filed in the year following the calendar year in which the coverage was provided on Form 1095-B or another form designated by the IRS. The first returns must be filed by February 28 (March 31, if filed electronically).

Reporting Requirements for Applicable Large Employers (ALEs). Code section 6056 requires ALEs (generally, employers with 50 or more full-time employees) to provide certain information regarding the health insurance offered to its full-time employees. Employers must also report certain information to employees so that the employees may determine whether they are eligible for premium tax credits.

The proposed regulations require ALEs to file a report describing the health care coverage provided to their full-time employees, including identifying the full-time employees, the coverage offered to each full-time employee and the months for which coverage was available. ALEs will report the information on Form 1094-C, which is to be filed by February 28 (March 31, if filed electronically) of the year following the calendar year in which coverage was provided. Due to the one-year delay in implementing the employer mandate under the ACA, the proposed regulations would not take effect until January 1, 2015.

DOL Confirms No Penalty for Failure to Provide Notice of Exchanges

The Department of Labor (DOL) has issued a new “frequently asked question” confirming that no penalties or fines are associated with failing to provide the employer exchange notice, which was due by October 1, 2013.

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