September 2010 Employee Benefits Update

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SELECT COMPLIANCE DEADLINES AND REMINDERS

Cycle E Determination Letter Filings

Remedial Amendment Period Cycle E individually designed plans must be submitted for a favorable Internal Revenue Service (IRS) determination letter no later than January 31, 2011, to rely on the extended period during which qualification amendments can be retroactively adopted. Cycle E plans include those sponsored by employers with tax identification numbers (EINs) ending in a five or zero, as well as any governmental plans that did not file in Cycle C.

RETIREMENT PLAN DEVELOPMENTS

PBGC Issues Proposed Rules Clarifying Cessation of Operations Resulting in 20% Reduction in Plan Participants for Single-Employer Plans

On August 9, 2010, the Pension Benefit Guarantee Corporation (PBGC) issued proposed rules to clarify when an employer who maintains a single-employer defined benefit plan has a cessation of operations triggering the application of ERISA section 4062(e). Under ERISA section 4062(e), if an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of employees who are participants in the employer's defined benefit plan separate from service, then the employer is subject to liability requirements with regard to the plan.

The proposed rules intend to help employers identify when an event triggering ERISA section 4062(e) occurs by providing definitions and examples of what constitutes an operation, a facility, and a cessation. The proposed rules also provide guidance in calculating the liability and discuss notice requirements, including employer notice to the PBGC of an event triggering ERISA section 4062(e) within 60 days following the later of the cessation date or the date that the number of active participant separations exceeds 20 percent of the active participant base.

PBGC Proposes Regulation Conforming Debt Collection Process

The PBGC issued proposed regulations to conform its debt collection process to federal standards. Under the proposed regulations, the PBGC would adopt the

federal claims collection standards. It would also collect debts through various methods, including salary offset and administrative wage garnishment. The PBGC would continue to collect employer debts, including unpaid premiums, penalties, and interest from individuals who received benefit overpayments.

DOL Issues Proposed Regulations on Prohibited Transaction Exemption Procedures

The Department of Labor (DOL) published a proposed rule to govern the filing and processing of applications for prohibited transaction exemptions. If finalized, these rules would supersede the existing DOL process for applying for a prohibited transaction exemption from the DOL. The proposed rules would not become effective until 60 days following publication of a final rule.

Reinhart Comment: Anyone considering filing a prohibited transaction exemption with the DOL should review the proposed regulations to determine the effects of filing under the current and proposed process.

Court Determines Prototype Plan Sponsor Not Liable as ERISA Fiduciary in Revenue Sharing Dispute

The U.S. District Court for the Western District of New York dismissed a complaint filed by Steven Zang against Paychex Inc. alleging ERISA violations by Paychex in accepting revenue sharing money from mutual funds Paychex chose for its prototype plans. Zang v. Paychex Inc., W.D.N.Y., No. 08-CV-6046L. Paychex sponsors prototype retirement plans and provides access to different mutual funds as investment options for those plans. Some of those mutual funds make revenue sharing payments to Paychex. Zang is the fiduciary and plan administrator of a 401(k) plan sponsored by his company, Luxon & Zang P.C., that is based on a Paychex prototype plan.

Zang alleged that Paychex breached fiduciary duties in receiving revenue sharing payments because it chose the mutual funds offered through its prototype plans. The Court ruled that Paychex is not an ERISA fiduciary because the plan sponsor ultimately chooses the mutual fund from the options supplied by Paychex, and the administrative services agreement stated that Paychex was not a plan fiduciary. The Court noted that even if Paychex played a role in Zang's decision by offering a set of options, the ultimate decision is made by the plan sponsor.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Guidance Issued on External Review Procedures for Self-Insured Plans

Under the Patient Protection and Affordable Care Act (PPACA), group health plans and health insurance issuers that are not grandfathered health plans, or that lose their grandfathered health plan status, are required to comply with specific internal claims and appeals procedures and external review processes, effective as of the first day of the first plan year beginning on or after September 23, 2010. The DOL, the Department of Health and Human Services, and the Treasury (the Departments) previously issued an interim final regulation regarding the internal claims and appeals procedure providing that additional guidance on the external review process would be forthcoming.

On July 23, 2010, the Departments jointly issued interim procedures and model notices for the new Federal external review process. An enforcement safe harbor was established for self-funded plans that comply either with the external review process included in Technical Release 2010-01 or with a state external review process available in a state where the state chooses to expand access for self-funded plans to participate in its external review process. The federal process included in Technical Release 2010-01 includes procedures for standard and expedited external reviews.

Under the "standard external review," a participant has four months to request external review following receipt of notice of an adverse benefit determination or final internal adverse benefit determination. The plan must then complete a preliminary review of the external request within five days to determine eligibility for external review. Plans must contract with at least three accredited independent review organizations (IROs) and then, when eligibility of a claim is established, rotate those claim assignments among the IROs (the Technical Release includes additional requirements for an agreement between an IRO and a plan). The IRO review is completed on a de novo basis. IROs must provide written notice of the final external review decision to the plan and the participant within 45 days of receiving the request. The plan must immediately provide coverage or payment for a claim if the IRO decision reverses the prior adverse benefit determination.

Plans must allow participants an "expedited external review" if the timeframe for either the internal review process or standard external review process would seriously jeopardize the life or health of the claimant, or the claim concerns an admission, availability of care, continued stay, or health care item or service for

which the claimant received emergency services, but was not discharged from the facility. Plans must immediately complete a preliminary review of an expedited external review request, and if eligible, refer to an IRO. The IRO again reviews the claim de novo, and must provide a decision as expeditiously as the claimant's medical condition requires, but in no event more than 72 hours after receipt by the IRO.

Reinhart Comment: Self-funded plans that have lost or lose grandfathered status are subject to these requirements the first day of the plan year beginning on or after September 23, 2010. These plans will need to move quickly to establish contracts with three IROs. Additional questions still exist regarding the potential fiduciary status of IROs and whether plans can challenge an IRO determination.

Updates to COBRA Premium Subsidy Informal Guidance

The DOL and IRS updated online guidance regarding the COBRA premium subsidy. The COBRA premium subsidy was not extended for new terminations after May 31, 2010, and questions remain for individuals terminated before and after that date.

The DOL issued a fact sheet and updated FAQs with guidance following the end of premium subsidy coverage.

The IRS updated questions and answers regarding extension of the COBRA premium subsidy to individuals terminated on or before May 31, 2010. The IRS guidance addresses the eligibility extensions as well as clarifies previous answers based on changes made to the subsidy program since its inception.

IRS Issues Informational Letters on Herbs and Service Animals as Medical Care Expenses

The IRS issued two information letters to assist participants and plan sponsors in determining whether herbs for treating a medical condition and service animals for individuals with mental health disabilities may be reimbursed from a health FSA as a medical expense. The letter provides the following:

- An herb may qualify as a medical care expense if the individual can substantiate that he or she has a medical condition, purchased the herb to treat or alleviate the medical condition, and would not have purchased the herb but for the medical condition.
- Expenses related to buying, training, and maintaining a service animal to assist

individuals with mental health disabilities may qualify as medical care expenses if the individual shows that he or she is using the service animal primarily for medical care to alleviate a mental defect or illness and would not have paid the expenses but for that defect or illness.

GENERAL DEVELOPMENTS

IRS Issues Informational Letter on Qualified Transit and Parking Benefits

The IRS issued an informal letter summarizing issues employers encounter in providing transit passes and qualified parking benefits for employees. Transportation benefits provided through debit cards, credit cards, or smartcards qualify as transit passes only if the value stored on the cards is usable only as fare media for a mass transit system, and the amount allocated to the cards each month does not exceed the maximum excludable amount, or $230 in 2010. Qualified parking benefits may be offered by employers as cash reimbursements for actual parking located on or near the employer's place of business. Reimbursements can be credited to employee smartcards. Employers may provide employees transportation benefits as a salary supplement or salary reduction. Any unused employee salary reduction at the end of a month can be rolled over to the next month, but it cannot be refunded to the employee as cash.