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September 2013 Employee Benefits Update

PLAN ADMINISTRATORS MUST COMPLY WITH NEW SAME-SEX SPOUSE RULES EFFECTIVE SEPTEMBER 16, 2013

On June 26, 2013, the United States Supreme Court held that section 3 of the Defense of Marriage Act (DOMA) (the section defining marriage as between one man and one woman) is unconstitutional (see our discussion in the July Employee Benefits Update). On August 29, 2013, the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17 (the Ruling) and Frequently Asked Questions (FAQs) explaining how same-sex marriages would be treated for federal tax purposes. Any same-sex couple that is legally married in a jurisdiction (including any of the 50 states, U.S. territories and foreign countries) that recognizes same-sex marriage will be treated as married for federal tax purposes, regardless of whether the couple lives in a jurisdiction that authorizes same-sex marriage. Essentially, if a couple is married in a jurisdiction that authorizes their marriage, the couple is treated as married regardless of where the couple resides. The Ruling does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law.

Retirement Plans

Retirement plans must comply with this Ruling as of September 16, 2013. To comply with the Ruling, retirement plans must treat a same-sex spouse as a "spouse" for any purpose under the plan, such as qualified joint and survivor annuities, spousal consent requirements and implementation of qualified domestic relations orders.

Health and Welfare Plans

The Ruling does not explicitly mandate that a health plan change its coverage to include same sex spouses. However, we caution employers who are considering designing their health plans to continue to exclude same-sex spouses, while continuing to cover opposite-sex spouses, to consult legal counsel.

For plans that currently cover, or will cover, same-sex spouses, employers do not need to impute income to the employee equal to the fair market value of health coverage provided to the same-sex spouse for federal tax purposes. This rule does not extend to state taxes, which may be required depending on the state

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where the participant resides and how that state taxes same-sex couples. Additionally, if an employer provided health coverage for a same-sex spouse or sponsored a cafeteria plan that allowed employees to pay premiums for health coverage on a pre-tax basis, the employer may claim a refund of, or make an adjustment for, any excess Social Security taxes and Medicare taxes paid if the period of limitations for filing a claim for refund remains open.

SELECT COMPLIANCE DEADLINES AND REMINDERS

Notice to Employees of Coverage Options

Employers subject to the Fair Labors Standards Act (FLSA) must provide a notice of coverage options to all current employees no later than October 1, 2013 and to new employees within 14 days of hire beginning on and after October 1, 2013. Additionally, as further discussed below, insurers, third-party administrators (TPAs) and multiemployer plans may send the notice to participants on behalf of employers. The notice describes coverage options and premium tax credits available through the Patient Protection and Affordable Care Act (ACA) marketplaces, due to open October 1, 2013. The Department of Labor (DOL) has provided model notices on the DOL website that employers can use to satisfy this obligation.

Medicare Part D Deadlines

All group health plans that offer prescription drug coverage to Medicare eligible employees (under either an active plan or retiree plan) must provide an annual creditable coverage disclosure notice to Medicare eligible participants and dependents no later than October 15, 2013. Group health plans must also provide notices to each new participant who may be Medicare eligible.

Centers for Medicare and Medicaid Services (CMS) provides a model notice that can be accessed through the CMS website. Plan sponsors should review the model notice to ensure that it accurately reflects the nature of the coverage and the rights that individuals have if they lose coverage.

Cycle C Determination Letter Filings

Remedial Amendment Period Cycle C individually designed plans must be submitted for a favorable IRS determination letter no later than January 31, 2014. Cycle C plans include those sponsored by employers with tax identification numbers ending in a three or an eight, as well as governmental plans.

Reminder: Summary of Benefits and Coverage Required for Open Enrollment

Plan sponsors are required to issue a new summary of benefits and coverage (SBC) to participants and beneficiaries covered under the plan with each open enrollment. Group health plans without open enrollment must issue the SBC 30 days in advance of the plan year (December 2, 2013 for calendar year plans). We note that the SBC template has been updated since the SBC was first required so all plan administrators should carefully review the SBC to ensure compliance.

RETIREMENT PLAN DEVELOPMENTS

IRS Issues Proposed Regulations on Electronic Filing of Plan Returns

The IRS has issued proposed regulations that will require plan administrators (or, in some instances, an employer maintaining a plan) that must file 250 or more returns during the year to use "magnetic media" to file statements, returns and reports required under Internal Revenue Code (Code) sections 6057 (Form 8955), 6058 (Form 5500) and 6059 (actuarial reports). Magnetic media is defined as electronic filing or other media specifically permitted under the applicable regulations. The determination of whether a filer must file at least 250 returns is made by aggregating all returns, regardless of type, that the filer is required to file, including income tax returns, returns under Code section 6033 (Form 990), information returns, excise tax returns and employment tax returns. Additionally, controlled group rules apply to determine whether a plan administrator is required to file 250 or more returns. Failure to file the returns on magnetic media will result in the filer being deemed to have failed to file the required statement, return or report, which can result in penalties. The proposed effective date is plan years beginning on and after January 1, 2014, but only for filings with a filing deadline (not including extensions) after December 31, 2014.

REINHART COMMENT: Employers should carefully review whether they may be subject to this new guidance, as the IRS has clarified that failure to file electronically is deemed a failure to file. While electronic filing of the Form 5500 and corresponding Schedules and reports has been required for the plans since 2010, this new guidance could impact filers of the Form 5500 EZ and filers of the Form 8955, as filing the Form 8955 electronically has been optional to this point.

HEALTH AND WELFARE PLAN DEVELOPMENTS

Departments Issue FAQs on Exchange Notices and Waiting Periods

The Departments of Labor and Health and Human Services and the Internal

Revenue Service (collectively, the Departments) have issued another set of FAQs to address the ACA's requirements on the employer exchange notice and the prohibition of waiting periods in excess of 90 days.

Employer Exchange Notice. The Departments clarified that an insurer, a multiemployer plan or a TPA can send the employer exchange notice on behalf of the employer. Pursuant to new section 18B of the FLSA, employers must provide employees with a notice of exchange availability no later than October 1, 2013 and must provide the notice to new employees beginning on and after October 1, 2013. The FAQs provide that an employer will have satisfied its obligation to provide the notice to a specific employee if another party (i.e., the insurer, the multiemployer plan or the TPA) timely provides a complete notice. The employer still has an obligation to provide the notice to the non-enrolled employees. Employers will also likely have to provide the notice to new employees because the notice must be provided within 14 days of the new employee's date of hire and the issuer, multiemployer plan or TPA may not have knowledge of the new employee in that timeframe. Separately, the DOL has issued an FAQ confirming that there are no penalties or fines under the law for failing to provide the exchange notice, though the DOL has cautioned that failure to provide the notice could trigger an audit or other enforcement activity.

90-Day Waiting Periods. The Departments reiterated that plans and issuers may continue to rely on the proposed regulations on the 90-day waiting period requirement through 2014 and confirmed that, if the final regulations are more restrictive, plans and issuers will be given sufficient time to comply.

Additionally, the FAQs provide that eligibility conditions in a multiemployer plan operating pursuant to a collective bargaining agreement (CBA) that require employees to accumulate hours of covered employment, that may occur across multiple contributing employers, are not considered to be designed to avoid compliance with the 90-day waiting period rules. Although this is a welcome confirmation for multiemployer plans, CBAs should still be reviewed to ensure that the language fits within this exception.

IRS Issues Final Regulations on Individual Shared Responsibility Payment

The IRS has issued final regulations on Internal Revenue Code (Code) section 5000A, the individual shared responsibility provision. Pursuant to Code section 5000A, generally all individuals are required to maintain "minimum essential coverage" or pay a penalty. The final regulations largely finalize the proposed

regulations issued in February with a few clarifications. For example, the final regulations clarify that an individual eligible for continuation or retiree coverage because of a relationship to a former employee is treated in the same manner as the former employee. That is, the individual is considered eligible for the continuation or retiree coverage only if the individual enrolls in the coverage. Additionally, the final regulations provide that a plan offered to an employee on behalf of an employer (such as a plan offered by multiemployer plan, professional employer organization or leasing company) is an eligible employer-sponsored plan.

HHS Issues Final Regulations on Employer Appeal Process for Employee Tax Credit Eligibility

The Department of Health and Human Services (HHS) has issued final regulations setting forth standards for employers to appeal an exchange's determination that a full-time employee is eligible for a premium tax credit. Full-time employees determined by the exchange to be eligible for premium tax credits will eventually trigger employer shared responsibility penalties. Accordingly, employers will want to ensure that they are prepared to challenge an incorrect eligibility determination.

REINHART COMMENT: Employers may want to consider challenging incorrect eligibility determinations in 2014, even though such determination will not trigger penalties, to avoid setting a precedent for 2015.

The final regulations generally finalize the proposed regulations published in January 2013 and describe the process by which employers may appeal an exchange's determination of an individual's eligibility for premium tax credits or cost sharing reductions. Additionally, the final regulations clarify that employers may receive notice of employee eligibility for premium tax credits on an employee-by-employee basis or for groups of employees. For notices issued for 2014, HHS notes that the exchanges should clarify in these notices that employers will not be liable for any penalties under Code section 4980H (the employer shared responsibility provision).

IRS Issues Proposed Regulations on Small Business Health Care Credit

The IRS has issued proposed regulations to implement the tax credit available to small employers that provide health coverage to their employees. The proposed regulations incorporate the guidance previously provided in Notice 2010-44 and Notice 2010-82. Generally, employers with 25 or fewer full-time employees,

whose employees have average annual wages of less than $50,000 per full-time employee, can receive a tax credit of up to 50% of the premiums paid if they purchase qualified health plans purchased through the Small Business Health Options Program (SHOP.) These tax credits will not be available to employers who purchase coverage outside of the SHOP. The amount of the tax credit phases out for employers with more than ten employees or if the average annual wages for the full-time employees exceed $25,000. The proposed regulations provide guidance on how to determine whether an employer qualifies for the credit and how to calculate the credit.