BENEFITS INSIDER
A Member Exclusive Publication

Volume 28, May 2007

WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides much of its core content, and is edited by Corinne M. Tyler, Employee Benefits attorney in the Cleveland Office of Baker & Hostetler LLP; ctyler@bakerlaw.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY 2

House Approves Genetic Nondiscrimination Bill 2
Lawmakers Drop Nonqualified Deferred Compensation Provision from Iraq Supplemental Spending Bill in the 110th Congress 3
House Approves Legislation on Shareholder Votes and Executive Compensation 3
Medicare Noninterference Bill Fails to Gain Support in Senate Vote 4

RECENT REGULATORY ACTIVITY 4

Treasury/IRS Release Final Roth 401(k) Distribution Regulations 4
DOL Seeks Comments on Fee Disclosure to Participants 4
Treasury/IRS Releases Section 409A Regulations 5
IRS/Treasury Release Final Section 415 Regulations 5
CMS Issues Updated Guidance on Creditable Coverage Disclosure Notices 5

RECENT JUDICIAL ACTIVITY 6

Maryland Will Not Challenge Court Ruling on "Fair-Share" Act 6

RECENT LEGISLATIVE ACTIVITY

House Approves Genetic Nondiscrimination Bill

On April 25, the Genetic Information Nondiscrimination Act of 2007 (H.R. 493) was approved by the full House of Representatives by a vote of 420-3. A summary of the bill is currently posted on the American Benefits Council's (Council) website.

Title I of the bill amends ERISA and the Public Health Service Act to prohibit employer-sponsored group health plans and health insurers providing group and individual health insurance from restricting enrollment or adjusting premiums based on genetic information and prohibits such entities from requiring or requesting genetic testing. Title II of the bill relates to employment practices and prohibits employers from using genetic information to discriminate against an individual in hiring or other employment opportunities.

The House-passed bill deleted a provision approved earlier by the House Energy and Commerce Committee, which would have clarified that the more limited remedies available under ERISA and the Public Health Services Act apply to employer-sponsors of group health plans and health insurers rather than the broad compensatory and punitive damages available under the Civil Rights Act, and apply for any actions related to the misuse of genetic information for employment practice purposes that are governed under Title II of the bill. Also, in a statement on the House floor just prior to the bill being approved, Representative Rob Andrews (D-NJ), who chairs the subcommittee with jurisdiction over ERISA for the House Education and Labor Committee, said that "the bill is intended to provide two comparable but distinct causes of action for violations of the Act with respect to genetic information. Health plans and insurers generally are subject to the requirements of Title I. *Employers, including to the extent employers control or direct health benefit plans, are subject to the requirements of Title II of the bill (emphasis added).*" This statement by Andrews increases the likelihood that employers will be subject to suits for compensatory and punitive claims under title II at the very same time their group health plan and plan fiduciaries are subject to suit under title I.

The Bush Administration, in an official statement of administrative policy, voiced general support for the House legislation, although also left the door open for further improvements. According to a White House statement issued on the day of the House vote, "the Administration wants to work with Congress to further perfect this legislation and to make genetic discrimination illegal and provide individuals with fair, reasonable protections against improper use of their genetic information."

The Senate is being urged to restore the clarification that the genetic nondiscrimination bill intends that ERISA and the Public Health Services Act provide the exclusive remedies for the enforcement of any provisions that apply to employer sponsors of group health plans and health insurers and not the broader remedies under the Civil Rights Act that apply to an employment discrimination claim under Title II of the genetic bill.

The Senate companion bill was approved by the Senate Health, Education, Labor and Pensions Committee on January 31, 2007, and now has 32 cosponsors along with lead sponsor Olympia Snowe (R-ME). A full Senate vote has not yet been scheduled but could occur very soon.

Lawmakers Drop Nonqualified Deferred Compensation Provision from Iraq Supplemental Spending Bill in the 110th Congress

The nonqualified deferred compensation provisions contained in the first supplemental spending bill for the Iraq war during the 100th Congress have been dropped from the legislation.

In March, the Senate passed the Small Business and Work Opportunity Act of 2007 (H.R. 2), which contained the nonqualified deferred compensation provisions as revenue raisers, and then later attached this language to the Iraq supplemental spending bill. Throughout this spring, House Ways and Means Chairman Charles Rangel (D-NY) has consistently stated his opposition to this legislative language being included in the minimum wage bill that was incorporated in the Iraq measure. The proposal would limit nonqualified deferred compensation by:

- amending Internal Revenue Code (IRC) Section 409A to impose a dollar cap on the annual accrual of nonqualified deferred compensation equal to the lesser of $1 million or the individual's average annual compensation determined over five years. Failure to satisfy the cap would trigger ordinary income tax plus the 20-percent additional tax under section 409A.

- amending IRC Section 162(m) ("million dollar deduction" limit) to treat any former employees (and their beneficiaries) as continuing to be covered by the section 162(m) limits in the future (e.g, after termination of employment).

In removing the nonqualified deferred compensation language from the Iraq legislation, lawmakers acknowledged that the measure was overbroad. The Iraq war supplemental bill was then vetoed by President Bush. A second supplemental appropriations bill is making its way to the President. It is likely that a similar tax package will be added to that legislation. Lawmakers have indicated they will return to the disparity issue again and are also likely to consider limits on nonqualified deferred compensation in the future.

House Approves Legislation on Shareholder Votes and Executive Compensation

On April 20, the House of Representatives approved the Shareholder Votes on Executive Pay Act (H.R. 1257), sponsored by House Financial Services Committee Chairman Barney Frank (D-MA), by a vote of 269-134, including 55 Republicans supporting the bill and five Democrats opposing it. This legislation would not set limits on executive pay, but would require public companies to include in their annual proxies a non-binding advisory shareholder vote on the executive compensation disclosed in the annual proxy statement and a separate shareholder vote on "golden parachutes."

Chairman Frank has repeatedly stated that he proposed the legislation because the SEC does not believe it has the statutory authority to require such nonbinding, advisory shareholder votes. Republican members have generally expressed a desire to allow the new SEC executive compensation disclosure rules to function prior to considering any additional legislation involving executive compensation, and questioned whether this legislation would be the first step in requiring shareholder votes on other matters of corporate governance. There does not yet appear to be a sponsor for the legislation in the Senate.

Medicare Noninterference Bill Fails to Gain Support in Senate Vote

In a procedural vote on April 18, Senate Democrats failed to achieve enough support for the Medicare Prescription Drug Price Negotiation Act of 2007 (S. 3) to end debate on the bill, thereby rejecting it. S. 3 would have modified the "noninterference" provision of the Medicare Modernization Act (MMA) and allowed the Secretary of Health and Human Services (HHS) to negotiate over drug prices on behalf of those enrolled in the Medicare Part D program.

In advance of the vote, organizations expressed concern to Senate Finance Committee Chairman Max Baucus (D-MT) and the committee's ranking Republican member Charles Grassley (R-IA) that if the government negotiates drug prices it could undermine the competitive dynamic central to cost containment and result in shifting the cost of prescription drugs to employers and other purchasers. Medicare's current approach, which relies on vigorous competition in the marketplace, has resulted in more covered beneficiaries and lower premiums than had been expected when the legislation creating Medicare Part D was enacted.

On January 12, the House of Representatives approved the Medicare Prescription Drug Price Negotiation Act (H.R. 4), a stricter measure that would have required HHS to negotiate drug prices with pharmaceutical companies. Senate Democrats such as Ron Wyden (D-OR) intend to keep pursuing the issue, perhaps by offering amendments to future health and Medicare legislation.

RECENT REGULATORY ACTIVITY

Treasury/IRS Release Final Roth 401(k) Distribution Regulations

On April 27, the U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) released final regulations on distributions from designated Roth accounts under sections 401(k), 402(g), 402A and 408A of the Internal Revenue Code. The final regulations, effective April 30, 2007, will affect participants and sponsors of section 401(k) plans.

DOL Seeks Comments on Fee Disclosure to Participants

On April 24, the Department of Labor (DOL) released a request for information to help them determine the extent to which rules should be adopted or modified to ensure that participants and beneficiaries have the information they need to make informed investment decisions when managing their accounts in participant-directed individual account plans such as 401(k) plans. The release, was published in the Federal Register on April 25, seeks comments from plan participants, plan sponsors and plan service providers. Comments are due by July 24, 2007.

The release indicates the DOL would like to receive information concerning (1) what participants should consider, (2) the manner in which that information should be provided or made available to participants, and (3) who should be responsible for providing that information. The background information includes excerpts from ERISA Section 404(c) (the section that provides some fiduciary relief for participant-directed investments if certain requirements are met), a description of the U.S. Government Accountability Office (GAO) report on Changes Needed to Provide 401(k) Plan Participants and DOL

with Better Information on Fees published in the fall of 2006, and a description of an ERISA Advisory Council report on the same subject. The release contains 19 specific questions for which the DOL is seeking input but encouraged comments on other subjects as well.

Treasury/IRS Releases Section 409A Regulations
On April 10, the U.S. Treasury and the IRS released long-awaited regulations on Internal Revenue Code Section 409A, the section of the tax code governing nonqualified deferred compensation. Section 409A was added to the tax code as part of the American Jobs Creation Act of 2004.

IRS/Treasury Release Final Section 415 Regulations
On April 4, the IRS and the U.S. Treasury released final regulations under Internal Revenue Code (Code) Section 415, which contains limitations on benefits and contributions under qualified retirement plans. Comprehensive Code Section 415 regulations were last issued in 1981 and the final regulations incorporate much of the interim guidance, usually provided in the form of IRS Notices, issued since 1981. The final regulations closely follow the proposed regulations released in May 2005 with some modifications, including additions made due to the passage of the Pension Protection Act of 2006 (PPA).

The final regulations are effective April 5, 2007, but apply to limitation years beginning on or after July 1, 2007. Generally, the regulatory changes will be applied starting January 1, 2008 to plans with a calendar year limitation year (most plans). The regulations do permit some changes to be applied earlier.

The proposed regulations make significant changes in a number of areas including:

- Automatic increases
- High-3 active participation requirement
- High-3 and compensation limit
- Post-termination pay
- Multiple annuity starting dates
- Restorative payments
- Amounts includible under Code Section 409A
- Employer aggregation rules

CMS Issues Updated Guidance on Creditable Coverage Disclosure Notices
The Centers for Medicare and Medicaid Services (CMS) has released updated guidance on creditable coverage disclosure. Disclosure is required under regulations implementing Medicare prescription drug coverage, originally published in January 2005. Under these rules, most entities that currently provide prescription drug coverage to Medicare Part D beneficiaries must disclose whether the entity's coverage is "creditable prescription drug coverage." The new guidance supersedes previous guidance and makes changes to the required data elements in the Model Personalized Disclosure Notice/Statement.

Prior guidance from CMS included model notices that employers and health plans may use to notify individuals regarding their creditable coverage status. The model notices merely provide sample language. Employers and others are not required to use the same language as in the CMS models, providing the disclosure notices meet content standards set out in the guidance.

RECENT JUDICIAL ACTIVITY

Maryland Will Not Challenge Court Ruling on "Fair-Share" Act

Maryland District Attorney Doug Gansler has said that the state will not challenge the recent Fourth Circuit U.S. Court of Appeals ruling that ERISA preempts Maryland's "Fair Share Act," which would require employers with 10,000 or more employees to spend at least 8 percent of total payroll in the state on health care costs. The Fourth Circuit appeals court decision in Retail Industry Leaders Association (RILA) v. Maryland affirmed a lower court ruling. Gansler reportedly concluded that further appeals would be unsuccessful. An amicus (friend of the court) brief supporting RILA was jointly submitted by the American Benefits Council, HR Policy Association and the Society of Human Resource Management in the Fourth Circuit appeal.

With the defeat of the "Fair Share" law, Maryland lawmakers are expected to pursue alternative comprehensive health insurance measures. According to press reports, state officials are already considering a plan like the one enacted in Massachusetts, which includes creation of a private insurance exchange, a requirement that individuals be insured, government assistance for those who are unable to afford coverage and a requirement that businesses help pay for the system. Maryland Labor, Licensing and Regulation Secretary Thomas E. Perez was quoted in the Baltimore Sun as saying, "Massachusetts is certainly a state we will look at very, very closely."

009900, 000023, 101726000.1