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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

Iraq Supplemental Bill Includes Some PPA Technical Corrections

A handful of technical corrections to the Pension Protection Act (PPA) were included in the recently enacted Iraq war supplemental spending bill. During its floor vote, the House divided the bill into two parts to encourage: (1) Republicans to vote for the Iraq funding proposal and (2) some Democrats to vote for other spending measures and an increase in the minimum wage to $7.25 (phased in over two years). The first part (containing the pension-related items listed below) passed by a vote of 280 to 142, while the second part passed by a vote of 348 to 73.

The House then sent the bill on to the Senate, which passed the legislation in one piece by a vote of 80 to 14. During debate prior to the Senate's vote, Senator Michael Enzi (R-WY), ranking member of the Health, Education, Labor and Pensions (HELP) Committee, made a statement in which he objected to the inclusion of PPA "technical corrections" in the Iraq supplemental bill. Enzi contended that the proposals are not technical corrections. Instead, he argued, in a piecemeal fashion they undo the PPA -- particularly reducing defined benefit plan funding and PBGC premiums for some plans and, in some cases, even requiring the PBGC to refund premiums already paid. Enzi added that he and HELP Committee Chairman Senator Edward Kennedy (D-MA) sent a letter to Senate leadership outlining their objections. President Bush signed the bill on May 25.

The legislation includes the following technical corrections to the Pension Protection Act:

- Changes to Internal Revenue Code Section 420 to address retiree health benefit rules and collectively bargained retiree health transfers;
- Amendment to the PPA rules that allow certain plans to elect back into multiemployer status;
- An adjustment to the PPA's deficit reduction contribution relief, extending for one year the amount of time certain airline plans have to contribute to their defined benefit plans; and
- A provision allowing certain airline plans to use an interest rate of 8.25 percent (rather than the corporate bond yield curve) to determine the funding target (amortizing any shortfall over 10 years as permitted in the PPA) without freezing the plan.

House Education and Labor Subcommittee Holds Hearing on State Health Initiatives

The House Education and Labor Committee's Subcommittee on Health, Employment, Labor and Pensions recently held a hearing entitled Health Care Reform: Recommendations to Improve Coordination of Federal and State Initiatives. It was the second in a series examining proposals to cover individuals without health insurance.

Subcommittee Chairman Rob Andrews (D-NJ) said in his opening remarks that the purpose of the hearing was to consider mechanisms to decrease the number of uninsured individuals at the state level and the possibility toward integrating them into the federal system. He also sought to answer questions about the right balance between innovative state programs and the federal standards set forth by ERISA. In Andrews' written statement, he raised "the question of whether the federal government should provide states with waivers from the federal law in order to meaningfully implement their state health care initiatives."

The subcommittee first heard from a panel of their colleagues composed of Representatives Tammy Baldwin (D-WI), Tom Price (R-GA) and John Tierney (D-MA), who have sponsored the Health Partnership Through Creative Federalism Act (H.R. 506). This legislation would establish a bipartisan "State Health Innovation Commission" that would authorize grants to states, regions or municipalities to carry out a broad range of strategies to increase health care coverage, perhaps requiring ERISA waivers. The results of these programs would then be reported to Congress and serve as options for overall health care reform. The bill currently has 66 cosponsors but has not yet been taken up by the House Energy and Commerce Health Subcommittee.

Appearing on the second panel were:

- Kevin Covert, vice-president and deputy general counsel for human resources, Honeywell;
- Mila Kofman, associate research professor at the Health Policy Institute at Georgetown University;
- John Colmers, secretary of the Maryland Department of Health and Mental Hygiene (MDHMH);
- Steven Goldman, commissioner of the New Jersey Department of Banking and Insurance;
- John Morrison, auditor and commissioner of insurance and securities for the state of Montana; and
- Amy Moore, partner, Covington & Burling, LLP

Kofman spoke as a proponent of allowing expanding state-based health care initiatives. Colmers, Goldman and Morrison provided first-hand testimony as state officials where health care initiatives have been proposed. Covert and Moore provided the perspective of employer health care plan sponsors.

Covert strongly urged the subcommittee to avoid ERISA waivers for state health reform initiatives. "Simply put, ERISA preemption is vital to the voluntary sponsorship of health plans. Employers depend on ERISA preemption to ensure that coverage can be offered uniformly across the country while attempting to keep costs as low as possible for workers. A number of the elements of state reform are laudable, including expanding subsidies to purchase private insurance, helping consumers make better health care decisions, using reliable information to compare health care costs and quality and giving states more flexibility over their use of federal funds to meet their health care needs. But employers are very concerned about proposals that subject them to a patchwork of state-by-state regulation. Even modest variations in requirements will impose significant costs and burdens."

The hearing was delayed and interrupted by lengthy votes on the House floor, so questions to the panelists were limited. However, Representative Charles Boustany (R-LA) voiced his strong support of ERISA preemption and skepticism of the various state programs' unintended consequences. Andrews closed the hearing by saying that he believed the National Association of Insurance Commissioners recommendations for federal actions to encourage state innovation (contained in Goldman's testimony) seemed like "a good place to start."

An archived Webcast of the proceedings and statements of subcommittee leaders and hearing witnesses are available on the hearing Web site.

Congressional Republicans Make Recommendations for Hybrid Plan Regulations
A group of Republican lawmakers recently sent a letter to U.S. Treasury Secretary Henry M. Paulson Jr. highlighting several guidance issues relating to hybrid pension plans and describing Congressional intent with respect to those issues. Treasury is currently in the process of developing regulations and guidance relating to last year's PPA and final guidance on the hybrid provisions of the new law are expected later in the year.

Specifically, the letter emphasizes that guidance should accommodate a broad array of interest crediting mechanisms, provide flexibility in plan conversion approaches, and clarify the application of the PPA provision that eliminates the potential for hybrid plans to pay out distributions that are greater than the account balance ("whipsaw").

Waxman to Probe Executive Compensation Consulting Firms
Representative Henry Waxman (D-CA), chairman of the House of Representatives Committee on Oversight and Government Reform, has requested information from six leading executive compensation consulting firms about the services they provide to U.S. corporations. Waxman requested the information in connection with an inquiry the committee is conducting into executive compensation practices, including the role of compensation consultants and the potential for conflicts of interest.

In letters recently sent to the six firms, Waxman indicated that concerns have been raised about the independence of advice company directors receive from executive compensation consultants who also perform other types of services (e.g., benefit plan and pension consulting) for corporate management. To learn more about current practices, Waxman asked each firm to respond to specific questions about the executive compensation consulting and other services provided to the largest 250 companies measured by revenue in the 2007 Fortune 500 list during the 2002 through 2006 period.

Waxman's inquiry indicates further Congressional scrutiny of nonqualified deferred compensation arrangements is likely.

Women's Retirement Bill Introduced in Senate

Senator Gordon Smith (R-OR) recently introduced the Women's Retirement Security Act (S. 1288) along with cosponsors Kent Conrad (D-ND), Jeff Bingaman (D-NM), John Kerry (D-MA) and Olympia Snowe (R-ME). The bill would, among other provisions:

- Require employers to allow part-time employees who meet age and service requirements over three consecutive 12-month periods to make elective deferrals to their 401(k) plans;
- Require employers that currently do not sponsor a retirement plan to allow employees to contribute a portion of their pay to an IRA;
- Permit the rollover of up to $500 unused benefits under flexible spending arrangements to a qualified retirement plan or to an eligible deferred compensation plan as defined in Internal Revenue Code Section 457(b);
- Establish that taxation under constructive receipt rules does not apply to qualified retirement planning services under Code Section 132(m) simply because the participant can choose between such services and additional compensation; and
- Provide tax incentives and simplification of plan requirements intended to encourage small employers to maintain retirement plans.

The bill sponsors also released an official summary of S. 1288. An identical bill was introduced in the previous Congress but was never acted upon.

Pension Reform Hearing Held by House Education and Labor Subcommittee

The House Education and Labor Committee's Health, Employment, Labor and Pensions Subcommittee recently held a hearing on Retirement Security: Strengthening Pension Protections. Testimony was heard, which recommended modifications in a number of key areas:

- **Effective Date of the PPA Funding Provisions.** The testimony strongly recommends a delay in the implementation of the new funding provisions in light of the absence of advance administrative guidance as to how these provisions will work.
- **Phase-in of the Funding Target.** To achieve the objectives of the PPA and facilitate an orderly transition to the new funding rules, the funding target transition rule should be modified so that the funding target for all non-DRC plans is phased in.
- **Asset Smoothing.** Since unpredictability is a key reason for pension plan freezes and terminations, Congress preserved 24-month asset smoothing. A technical correction is necessary to clarify Congress' intent in this regard.
- **Lump sums.** The testimony suggests a reasonable formula for restricting lump sum distributions, which would avoid the "rush to retire" that would be caused by the current provision.

In opening statements by subcommittee members, it was emphasized that the panel did not want to reexamine or disturb the major policies set forth in the PPA, citing the delicate fundamental balance central to the bill's original passage. Instead, the hearing was to focus on technical issues, such as problems with syntax or typography, and anomalies, in which policy goals are being subverted by conflicts, deadlines or ambiguities.

The subcommittee was generally very receptive to all the witnesses' testimony. In response to a question from Subcommittee Chairman Rob Andrews (D-NJ), it was noted that some of the important funding issues involved could affect asset and liability calculations, but for which there has been no guidance yet released. Many existing threats also can lead to fewer defined benefit plans. Subcommittee members also expressed a desire for more information on the potential impact the effective date and lump-sum provisions have on potential PBGC liability.

RECENT REGULATORY ACTIVITY

PBGC Proposes Variable-Rate Premium Guidance

The Pension Benefit Guaranty Corporation (PBGC) recently published proposed regulations to change the variable-rate premium (VRP) for plan years beginning on or after January 1, 2008, as required under the PPA. The PBGC noted that additional rulemaking projects will focus on the small plan cap, the new termination premium, and PBGC's payment of interest on refunds of overpaid premiums. The proposal would require plans to use a date in the premium payment year (rather than a date in the prior plan year) as the valuation date for VRP calculations, and would give small plans more time to file. Larger plans would be allowed to make estimated filings followed by adjusted final filings without penalty.

The due date for payment of premiums would depend on the size of the plan.

- For small plans with fewer than 100 participants, both the flat-rate premium and the VRP would be due by the end of the 16th month following the first day of the premium payment year (April 30 for calendar year plans).
- For mid-sized plans with 100 or more participants but fewer than 500 participants, the flat-rate premium and VRP would be due by the 15th day of the 10th month following the first day of the premium plan year (October 15 for calendar year plans) but the VRP could be based on estimates with a penalty-free "true-up" period to correct an erroneous estimate. The penalty would be waived for the period from the original due date to the small-plan due date or, if earlier, the date the final VRP is filed. Interest is not suspended.
- The due date for large plans of 500 or more participants would be the same as for mid-sized plans (including the estimated filing and true-up period) for the VRP. Large plans would continue to file the flat-rate premium by the last day of the second month of the premium payment year (February 28/29 for calendar year plans).

The proposed rule would also eliminate three special regulatory rules (reflecting a change in the balance between need and burden) in addition to the full-funding limit exemption eliminated by the PPA. The proposed rule would add two new "relief" rules – a new alternative premium funding target provision and an exemption for small plans that qualify for the variable-rate premium cap. Comments on the proposed regulations are due to the PBGC by July 30, 2007.

Treasury/IRS Propose Mortality Table Regulations

The Treasury Department and the Internal Revenue Service (collectively referred to as Treasury) published proposed regulations on the mortality assumptions that a defined benefit plan must use in funding calculations for plan years beginning on or after January 1, 2008. The mortality assumptions will be used to determine funding liability under the funding rules created by the PPA. The proposed regulations, like the final regulations issued for 2007 plan year calculations issued February 1, include a mortality table based on the RP-2000 Mortality Table. The proposed regulations also generally require a plan to measure liability using separate rates for annuitant and nonannuitant periods, with the exception of small plans.

The regulations also provide the framework for the development and use of a substitute mortality table based on the plan's own mortality experience. For example, if a substitute is used, separate mortality tables must be established for each gender under the plan, and a substitute table is permitted only if the plan has credible mortality experience with respect to that gender (based on at least 1,000 deaths within a two-, three-, or four-consecutive year period). If one plan uses a substitute mortality table, then all plans of the plan sponsor must use a substitute mortality table (using that plan's mortality experience) with some limited exceptions (e.g., situations where creditable mortality experience is not available or the plan is a newly acquired plan).

Generally, a request to use substitute mortality tables must be made to Treasury at least seven months before the first day of the first plan year for which the substitute mortality tables are to apply. However, the proposed regulation recognizes that plan sponsors would have insufficient time to analyze the proposed guidance before submitting a request for plan years beginning early in 2008, and will allow such submissions to be made by October 1, 2007.

Treasury subsequently issued a revenue procedure that set forth the requirements for requests to use substitute mortality tables. Generally, the Commissioner will have a 180-day period to review such requests. Comments on these regulations are due by August 27.

Treasury Releases Final Phased Retirement Distribution Regulations

The Treasury recently released final phased retirement regulations that: (1) modify the proposed definition of normal retirement age, (2) clarify that a pension plan is permitted to commence payment of retirement benefits to a participant who has attained normal retirement age even if he or she has not left employment, and (3) specify that conforming amendments can be made during a transition period. The regulations no longer include provisions that address reductions in hours worked.

Under the final regulations, normal retirement age (NRA) may not be “earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.” The definition affects all retirement plans not just those that adopt phased retirement programs.

The final regulations set forth a safe harbor for plans with a normal retirement age of 62 or later. For plans with a normal retirement age between age 55 and 62, the regulations establish a facts and circumstances test, although the preamble provides that Treasury expects that a “good faith determination of the typical retirement age for the industry in which the covered workforce is employed...will be given deference, assuming that the determination is reasonable under the facts and circumstances.” Plans with normal retirement ages below 55, will be presumed to be below the earliest age that is reasonably representative of the typical retirement age absent a showing to the contrary.

The final regulations require plan amendments to increase the plan's NRA if it does not meet the new regulatory requirement and provides an exception to the anti-cutback rules for both the increased NRA and the elimination of in-service distributions prior to the new NRA. However, no anti-cutback relief is allowed for changes in the vesting schedule or other changes that might normally be considered in conjunction with a change to the NRA (an example is provided in the regulations for clarification).

The final regulations, effective May 22, 2007, do not provide any guidance on the ability to pay, and proper characterization of, early retirement subsidies prior to termination of employment, nor do they permit in-service payment prior to attaining normal retirement age due to a reduction in hours as contained in the proposed regulations.

Plan amendments are required by the last day of the plan's remedial amendment period for a disqualifying provision and the regulation makes it clear that the extension of time for amendments required for the PPA related regulations does not apply here. Therefore, a calendar-year plan maintained by an employer with a calendar taxable year (and not a governmental plan or plan maintained pursuant to a collective bargaining agreement) must be amended by the due date of the employer's tax return (including extensions) for the 2007 taxable year.

IRS Releases New Indexed Amounts for HDHPs, HSAs, IRAs

The Treasury recently released Revenue Procedure 2007-36, which lists the new indexed amounts, adjusted for inflation, for high-deductible health plans (HDHPs) and health savings accounts (HSAs). Under prior law, the maximum annual HSA contribution was the lesser of the deductible of the HDHP or the indexed statutory amount. Section 303 of the Health Opportunity Patient Empowerment Act of 2006 changes the maximum contribution for HSAs to allow the indexed statutory amount, without reference to the HDHP deductible.

The new law also amends the rules for calculating cost-of-living adjustments for HSA amounts so that adjusted amounts will be published no later than June 1 of the preceding calendar year, rather than in the fall as mandated by prior law.

The following table lists the 2007 amounts and the new 2008 amounts:

	Calendar	Calendar

	Year 2007		2008	
	Self-only	Family	Self-only	Family
Annual Contribution Limit	$2,850	$5,650	$2,900	$5,800
HDHP Minimum Deductible	$1,100	$2,200	$1,100	$2,200
HDHP Out-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	$5,500	$11,000	$5,600	$11,200

President Bush to Nominate New EBSA Head, PBGC Executive Director

On May 3, the White House announced that President Bush will soon name new appointees to key positions in the Department of Labor (DOL) and the PBGC.

Bradford P. Campbell will be tapped to assume the position of Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA), the division within the DOL with jurisdiction over ERISA issues. Campbell currently serves as Acting Assistant Secretary and Deputy Assistant Secretary at the EBSA. Prior to this, he served as Senior Legislative Officer in the Office of Congressional Affairs at the Department of Labor. If confirmed by the Senate, he would succeed Ann L. Combs who recently left the DOL to join Vanguard Group.

Charles E. F. Millard will be nominated as the new Director of the PBGC, the government agency that insures private-sector defined benefit pension plans. Millard currently serves as managing director at Broadway Partners, LLC, and previously served as a managing director at Lehman Brothers. From 1995 to 1999 he served as president of the New York City Economic Development Corporation. He also served as group head and managing director at Prudential Securities, Inc., and was twice elected to the New York City Council. Under the terms of the Pension Protection Act, enacted last year, the appointee to PBGC director is subject to confirmation by the Senate Committee on Finance and Senate Committee on Health, Education, Labor and Pensions. If approved, he would succeed Acting Executive Director Vincent K. Snowbarger, who has held the position since the resignation of Bradley D. Belt.

Additional Detail on Final Roth 401(k) Regulations

The Treasury released final regulations under IRS Section 402A, the Code section that governs taxation of distributions from Roth 401(k) accounts. These final regulations provide few modifications to those proposed in January 2006, including eliminating the provisions related to Roth 403(b) plans. Treasury noted that the Roth 403(b) guidance would be included in the final regulations under section 403(b). Some other significant changes are outlined below.

- **Automatic IRA Rollovers:** The final regulations provide that a Roth account and a non-Roth account may be treated as separate plans for purposes of determining whether the automatic rollover rules apply. As a result, for example, if the balance in a participant's Roth account is $1,000 or less, the automatic IRA rollover rules will generally not apply to the Roth account even though the combined balance in the participant's Roth and pre-tax accounts may be greater than $1,000.

- **Five-Taxable-Year Period:** The final regulations provide several clarifications on the beginning and end of the five-taxable-year period. For example, the regulations indicate the determination of whether a payment is a qualified distribution is determined based on the actual year of the payment from the account and does not take into account whether the payment is part of a series of distributions (later payments can be tax-free even if the first payments are made before the end of the five-taxable-year period) or whether the payment is attributable to a prior calendar year (e.g., the first required minimum distribution). The final regulations also provide that designated Roth contributions made by a reemployed veteran are treated as made in the taxable year with respect to which the contributions relate.

- **Hardship Distributions:** The final regulations clarify that a hardship distribution may be a qualified distribution, if it otherwise satisfies the applicable requirements.

- **Roth Rollovers:** The proposed regulations contained a requirement that rollovers of designated Roth contributions be accounted for separately from other Roth amounts. In response to comments received, the final regulations do not require a separate Roth rollover account but rather permit use of a single Roth account that includes both rollover and non-rollover amounts. The final regulations also clarify that a distribution from a designated Roth account may only be rolled over to a section 401(k) plan or section 403(b) plan if that plan has a designated Roth program.