



**BENEFITS INSIDER**  
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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 its core content, and is edited by Corinne M. Tyler, Employee Benefits attorney and Partner in the Cleveland Office of Baker & Hostetler LLP; [ctyler@bakerlaw.com](mailto:ctyler@bakerlaw.com).

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## RECENT LEGISLATIVE ACTIVITY

### PPA Technical Corrections Legislation Introduced

Representative Rob Andrews (D-NJ), chairman of the House of Representatives Education and Workforce Committee Health, Employment, Labor and Pensions Subcommittee, recently introduced the [Pension Protection Act ERISA Amendments](#) (no bill number is available yet). The bill would amend the Pension Protection Act of 2006 (PPA) to “correct a number of anomalies in PPA, which in many cases, subvert the policy goal of a particular provision,” as Andrews said in his [introductory floor statement](#).

The legislation is substantially different from the [Pension Protection Technical Corrections Act \(H.R. 3361\)](#), passed by the House in March, and the [Pension Protection Technical Corrections Act \(S. 1974\)](#), passed by the Senate in December 2007. As of this writing, the differences between these two bills had not been reconciled in a conference committee.

The legislation includes a provision clarifying the allowance of asset smoothing, and a number of “worker protection modifications” that could pose challenges to employer plan sponsors. Most notably, Section 105 of the bill institutes a prohibition against post-retirement reductions of retiree health benefits by group health plans. The provision also includes “maintenance of effort” language that would prevent retiree health plan sponsors from modifying future benefits as may be necessary.

The bill will be referred to the Education and Labor committee for additional consideration.

### Wide-Ranging Entitlement Reform Legislation Introduced

Representative Paul Ryan (R-WI), a member of the House of Representatives Ways and Means Committee, recently introduced the [Roadmap for America's Future Act \(H.R. 6110\)](#), a broad tax reform bill intended to address entitlement programs such as Medicare, Medicaid and Social Security. According to [an official summary released by Ryan](#), the key provisions of the bill would:

- Ensure universal access to affordable health insurance by providing a refundable and portable tax credit, establishing transparency in health care cost and quality data and modernizing Medicaid through high-risk pools and state flexibility;
- Reform Medicare, allowing beneficiaries to choose their own coverage and establishing fully funded medical savings accounts; and
- Preserve Social Security by offering workers under 55 the option of investing over one-third of their current Social Security taxes into personal retirement accounts, along with a guarantee that total benefits from the personal accounts will not be less than they would have been under the current system.

H.R. 6110 would also implement dramatic tax reform, providing simplified individual and corporate tax rates and eliminating the alternative minimum tax, as well as taxes on interest, capital gains, dividends and estates.

The bill has been referred to the Ways and Means Committee, but is unlikely to be considered this year. However, it may represent the Republican tax agenda for the next session of Congress.

## **President Bush Approves Military Tax Relief Bill**

On June 17, 2008, President Bush signed the Heroes Earnings Assistance and Relief Tax (HEART) Act (H.R. 6081) into law. HEART provides tax and savings assistance for military Veterans and their families, as well as a number of other provisions affecting employee-sponsored benefit plans. The provisions affecting benefit plans generally:

- Alter treatment of differential military pay (employer payments of the difference between the employee's military pay and their civilian pay) to include such payments in the calculation of wages for retirement plan purposes. The provision will allow employers to report the differential military pay on a W-2 (and therefore treat the pay as wages, so tax can be withheld);
- Modify the Uniformed Services Employment and Reemployment Rights Act (USERRA) to require the day prior to the date of death to be treated as the date the employee returned to work for purposes of triggering payment of benefits under a qualified plan (The effect of this provision – which would be a new tax-qualification requirement (but not a USERRA change) retroactive to January 1, 2007 – would be to require plans that provide accelerated vesting, pre-retirement death benefits or other survivor benefits to participants who die in service under the plan to provide the same benefits to survivors of persons who die while on military duty. In addition, plans would have the option to grant benefit accruals for the period of absence as if the deceased person had been retired, as long as the plan did so for all similarly situated participants on a reasonably equivalent basis);
- Permit an employer to make certain contributions to a qualified plan on behalf of an employee who was killed or disabled in combat;
- Make permanent the expiring Internal Revenue Code provision that permits active duty reservists to make penalty-free withdrawals from retirement plans;
- Permit recipients of military death benefit gratuities to roll over the amounts received, tax-free, to a Roth IRA or an Education Savings Account; and
- Provide for a one-year extension of existing mental health parity law. (This provision would be superceded by subsequently enacted mental health parity legislation such as [H.R. 1424](#) or [S. 558](#), if action is ultimately completed on those measures.)

As one of the revenue raisers used to offset any federal revenue losses created by the bill, H.R. 6081 includes the so-called "expatriation" provision, which applies to U.S. citizens who expatriate and certain long-term permanent residents who give up their U.S. residence status. In general, the bill's "mark-to-market" regime would require covered expatriates to recognize income tax on any net gain on deemed sales of the individual's property to the extent it exceeds \$600,000 (indexed). In addition to the general "mark-to-market" requirements, a covered expatriate's tax-deferred amounts in an IRA, Coverdell education savings account, 529, HSA and MSA would become immediately taxable as if the amounts were distributed the day before the date of expatriation. "Eligible deferred compensation items" that are payable by a U.S. employer to a covered expatriate generally would not be subject to immediate taxation, but would be subject to 30-percent federal income tax withholding at the time that payments are made. For these purposes, deferred compensation items include both qualified and other tax-favored retirement plans (401(a), 403(b), SEP, and SIMPLE IRA) and nonqualified deferred compensation plans of a U.S. employer. It appears that the 30-percent withholding obligation on these eligible deferred compensation items would be mandatory for the U.S. employer once the expatriate notifies the employer of his status as a covered expatriate and waives his rights to claim a tax reduction under any treaty.

## **House Approves, and President Bush Signs Genetic Information Nondiscrimination Act**

On May 1, the U.S. House of Representatives approved the [Genetic Information Nondiscrimination Act \(GINA\) of 2007 \(H.R. 493\)](#) by a vote of 414-1. The House considered the same legislative language that had previously passed in the Senate.

Title I of H.R. 493 prohibits employer-sponsored group health plans and health insurers providing group and individual health insurance from restricting enrollment or adjusting premiums based on genetic information or requiring or requesting genetic testing. Title I also includes civil penalties added to ERISA and the Public Health Service Act for violations of the new rules, in addition to remedies available under current law. Title II of the bill prohibits employers from using genetic information to discriminate against an individual in hiring or other employment opportunities, subject to civil rights remedies under the Civil Rights Act, including compensatory and punitive damages.

The approved version of H.R. 493 includes a clarification that employer organizations sought which strengthens a “firewall” to preclude remedies under both titles for alleged violations of the bill’s Title I rules for group health plans and insurance.

President Bush subsequently signed H.R. 493 into law at a recent White House ceremony. President Bush stated that the new law “protects our citizens from having genetic information misused, and does so without undermining the basic premise of the insurance industry.” His comments refer to a clarification sought by employer organizations to strengthen the measure’s “firewall” precluding remedies for alleged violations of the measure’s rules for group health plans and insurance.

The Department of Labor (DOL) is required to issue final regulations not later than 12 months after enactment. New GINA requirements apply with respect to group health plans for plan years beginning after the first anniversary of the date of enactment -- May 21, 2009.

## **Employer Coalition Underscores the Importance of Employer-Sponsored Benefits and ERISA in Letter to Senate Panel**

The National Coalition on Benefits (NCB) recently sent [a letter to members of the Senate Finance Committee](#) underscoring the importance of protecting the framework established by ERISA as the panel begins to consider health reform proposals. The coalition represents over 150 employers, trade associations and other organizations that support maintaining ERISA and its preemption standard so that employers are able to offer uniform benefits to employees and retirees without being subject to costly and conflicting state regulatory requirements.

The coalition letter welcomed the leadership of Senate Finance Committee Chairman Max Baucus (D-MT) and the panel’s ranking Republican member Senator Charles Grassley (R-IA) in seeking health care reform solutions and urged that “sensible health care reform start with the recognition of the value of our voluntary employer-based health care system and not undermine or eliminate the federal ERISA standard that makes it possible.” The coalition letter also included a short description of the coalition’s core principles on the importance of ERISA and employer-sponsored benefits that cover 132 million Americans. The NCB is encouraging sponsors of health reform proposals to embrace these principles and intends to use the principles as its yardstick to evaluate health reform proposals as they are introduced in Congress.

Additional information on the NCB, including a list of its current members or to sign-up as a member, is located at [www.coalitiononbenefits.org](http://www.coalitiononbenefits.org)

## **House Committee Approves Tax Bill with Nonqualified Deferred Compensation, Stock Option Provisions**

The House recently passed by a vote of 263-160 the [Energy and Tax Extenders Act \(H.R. 6049\)](#), which was earlier approved by the House Ways and Means Committee. The measure includes provisions affecting nonqualified deferred compensation in order to offset the revenue costs of the tax breaks included in the legislation. Just prior to the House vote, the Bush Administration released a [Statement of Administration Policy \(SAP\)](#) stating that President Bush will veto the legislation should Congress enact it in the form approved by the House. The Senate will next take up consideration of the bill.

The Administration's SAP stated that its primary objection to H.R. 6049 is the "provision in the bill that would subject U.S. companies to continued double taxation by delaying the effect of new rules for allocating worldwide interest for foreign tax credit purposes. The Administration also strongly opposes the provision in the bill treating U.S. citizens with deferred compensation from certain employers, in all industries, more unfavorably than other U.S. citizens. Together, these provisions would increase tax burdens, undermine the competitiveness of U.S. workers and businesses, and could have adverse effects on the U.S. economy." Additionally, the SAP noted that the failure by the House to cap, for the 2008 tax year, the number of individual taxpayers subject to the alternative minimum tax (AMT) also triggered the veto threat.

More recently, the House of Representatives Committee on Ways and Means voted to approve an updated version of H.R. 6049 by a vote of 25 to 12. The bill's primary objectives are the extension of expiring tax provisions as well as the provision of tax incentives for investment in renewable energy. [A Joint Tax Committee summary](#) and [revenue estimate](#) of the chairman's version of the bill are now available.

In order to offset the approximately \$57 billion federal revenue cost, the legislation would revise the tax treatment of offshore nonqualified deferred compensation, aimed primarily at hedge fund managers. Under this provision, nonqualified deferred compensation paid by certain types of foreign corporations and partnerships will become taxable as soon as the amounts are no longer subject to substantial risk of forfeiture. A new section (457A) would be added to the Internal Revenue Code (Code), closely mirroring the treatment of deferred compensation from tax-exempt employers. The proposal is estimated to raise more than \$24 billion over ten years. There has been opposition to this measure, as discussed in [talking points on the provision](#), noting the impact of the proposal would be much broader than just hedge fund managers, affecting equity compensation, performance-based compensation and other compensation practices as well.

During debate, an amendment to strike all offsets included in the bill that increase taxes was introduced, and later was rejected by a vote of 12 to 23.

H.R. 6049 also includes an extension and modification of the alternative minimum tax (AMT) credit for incentive stock options (ISO). This provision, identical to the AMT Credit Fairness and Relief Act ([H.R.3861/S. 2389](#)), would resolve the unintended application of the AMT tax as applied to ISOs. In addition, the bill includes a one-year extension of existing mental health parity law addressing application of certain limits to mental health benefits parity. This provision would be superseded by subsequently enacted mental health parity legislation such as H.R. 1424 or S. 558 if action is ultimately completed on those measures.

## **House Subcommittee Hears Testimony on Consumer-Directed Health Care**

The House of Representatives Committee on Ways and Means Health Subcommittee recently held a hearing, [Health Savings Accounts \(HSAs\) and Consumer Driven Health Care: Cost Containment or Cost-Shift?](#) The hearing was intended to examine the usefulness of HSAs, as created through the Medicare Modernization Act of 2003 (MMA), which allow individuals and/or

their employers to make tax-preferred contributions toward qualified medical expenses, provided they have high-deductible health plans with deductibles of at least \$1,100 for individuals and \$2,200 for families for 2008.

Part of the HSA Working Group coalition submitted [a letter to Subcommittee Chairman Pete Stark \(D-CA\) and Ranking Member Dave Camp \(R-MI\)](#) expressing strong support for HSAs as representing “effective financial incentives that are aligned with the best interests of patients, consumers, and employers alike.”

The committee heard testimony from academic experts, patient advocates and health plans, as well as from [John E. Dicken](#), health care director for the U.S. Government Accountability Office (GAO), which released [a report on HSAs](#) finding that the number of individuals participating in HSA-eligible high-deductible health plans and HSAs increased significantly since 2004, and tax filers who reported HSA activity and enrollees in certain HSA-eligible plans had higher incomes on average than other tax filers. The HSA Working Group letter challenges the conclusions of the GAO report, noting that the 2005 data analysis is a very thin slice of the lifespan of HSAs, as it was only the second year of the HSA program. Moreover, the data of HSA participants in 2005 needs to be viewed in context, as they reflect a high number of former holders of Medical Savings Accounts (MSAs), who converted their accounts into HSAs upon their creation in early 2004. These individuals and families were largely self-employed individuals and small business owners who typically have higher annual earnings than the general population.

Democrats have generally opposed the creation and expansion of HSAs. In announcing the hearing, Subcommittee Chairman Pete Stark (D-CA) said, “HSAs and high deductible plans are a flawed policy approach to making health care more affordable. They make things worse, not better. Instead of using the tax code to encourage people to purchase coverage that may be woefully inadequate, we should focus on providing comprehensive health care coverage to those most in need in the most cost-efficient way possible.”

The House previously approved a legislative provision that would provide that distributions from an HSA for qualified medical expenses would be excludable from income only if they are substantiated in a manner similar to the requirements that apply to flexible spending arrangements (FSAs). This provision has been argued to unnecessarily increase administrative costs and complexity for plan sponsors and adversely affect individuals who depend on high deductible health plans, coupled with HSAs, for health coverage.

### **Employer Groups Urge Congress to Preserve Medicare Advantage Plans**

Members of the Employers Coalition on Medicare recently sent [a letter to all congressional offices](#) regarding funding for Medicare Advantage (MA) plans. There is concern that Congress may seek to reduce funding for the program. MA helps to protect employer-sponsored retiree health benefits for seniors by allowing employers to integrate medical and prescription drug coverage, care coordination and chronic care initiatives.

The letter urges lawmakers to preserve all MA options, including coordinated care and private-fee-for-service alternatives. The letter also cites a recent survey that notes that retirees are very satisfied with their current health plan and they value the role employers play in sponsoring coverage.

Cuts in funding to MA plans were considered as part of broader Medicare legislation that was considered in 2007 but never enacted.

## RECENT REGULATORY ACTIVITY

### Memo Sets Deadline for Releasing Regulations Prior to End of Bush Administration

Bush Administration Chief of Staff Joshua B. Bolten recently sent the heads of all executive departments and agencies [a memo](#) stating that “except in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008.” It appears that this memo will apply to issuances planned by the DOL, Treasury Department (Treasury), Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC), along with other agencies with relevant jurisdiction over employee benefit plans.

Classification of the exact meaning of “extraordinary circumstances” and the possible impact of this memo upon guidance and rules previously designated as priority items by these agencies, such as those addressing backloading issues for defined benefit pension plans and the disclosure of plan fee information to participants of all types of benefit plans is being sought, as well as the likelihood that specific regulations of interest will be proposed prior to June 1 and finalized by November 1 rather than postponed into 2009 and the next Administration.

### IRS Releases New Indexed Amounts for HDHPs, HSAs, IRAs

The Treasury and IRS recently released [Revenue Procedure 2008-29](#), which lists the new indexed amounts, adjusted for inflation, for high-deductible health plans (HDHPs) and HSAs. The following table lists the 2008 amounts and the new 2009 amounts:

	Calendar Year 2008		Calendar Year 2009	
	Self-only	Self-only	Self-only	Family
Annual Contribution Limit	\$2,900	\$5,800	\$3,000	\$5,950
HDHP Minimum Deductible	\$1,100	\$2,200	\$1,150	\$2,300
HDHP Out-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	\$5,600	\$11,200	\$5,800	\$11,600

### ERISA Advisory Council Releases Recommendations to DOL

The [ERISA Advisory Council](#), a group of benefits experts established by the DOL to identify emerging benefits issues and advise the secretary of labor on health and retirement policy, has released its recommendations stemming from its 2007 working group topics.

The [report](#) on participant benefit statements addresses changes made by PPA to the reporting and disclosure requirements applicable to all pension plans, specifically requiring benefit statements to be furnished to plan participants in all defined benefit and defined contribution plans. Recommendations include:

- DOL should provide longer due dates for defined benefit plan benefit statements, dates that recognize the time it takes to accumulate details of participant data necessary to calculate all participants' accrued benefits, and that recognize differences in accumulating data.
- DOL should convene a Task Force of benefit statement stakeholders to develop the content of a model statement.
- DOL should promulgate regulations that preserve the multi-document option for the benefit statement, including an update addressing electronic communication.

The [report](#) on fiduciary responsibilities and revenue sharing practices studied fiduciary issues arising from PPA as well as the practice of revenue sharing, which has become a common practice used to offset plan expenses with respect to defined contribution 401(k) plans. Recommendations include:

- DOL should propose regulations clarifying the difference between fiduciary functions and settlor functions in the context of payments from multiemployer plan assets for professional services rendered to the multiemployer plan trustees.
- DOL should issue guidance with respect to what procedures should be followed by trustees in the development of funding improvement or rehabilitation plans to provide some degree of protection or "safe harbor" from breach of fiduciary duty challenges, including litigation from groups that may be disadvantaged by such decisions.
- DOL should issue suggested "best practices" to assist multiemployer plan trustees and other multiemployer plan fiduciaries in considering the use and monitoring of various asset allocation strategies to meet the funding requirements of the PPA.
- DOL should develop definitions of revenue sharing-related terms designed to assist benefit plan sponsors, fiduciaries, service providers, and participants.
- DOL should issue guidance clarifying that revenue sharing is not a plan asset under ERISA unless and until it is credited to the plan in accordance with the documents governing the revenue sharing.
- DOL should issue guidance regarding the treatment of revenue sharing received by a plan.

The [report](#) on financial literacy of plan participants and the role of the employer examined strategies for increasing the financial decision-making skills of plan participants and enhancing the ability of plan participants to manage their financial assets. Recommendations include:

- Make "best practices" available to plan sponsors, including core literacy skills needed for a successful retirement.
- Draw attention to publications already in existence that provides information regarding the unique needs and requirements for managing finances in retirement.
- Update, expand and amend DOL Interpretive Bulletin 96-1, which needs to address information, education, and advice in the de-accumulation stage as well as the accumulation phase.
- Coordinate and bring together government agencies, private sector, and the academic world for the purpose of creating "partnerships" of common understanding, materials and resources.
- Encourage and allow the use of income replacement formulas and final pay multiples, which would encourage participants to have a numerical goal for retirement savings.