BENEFITS INSIDER
A Member Exclusive Publication

Volume 44, December 2008

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 Christopher M. Smith, Employee Benefits attorney and Principal of Flexible Benefits Systems, Inc., csmith@fbsi.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY 2

Senate Approves Technical Correction of Mental Health Parity Effective Date for Collectively Bargained Plans 2
Senate and House Leaders Reach Agreement on Pension Funding Relief 2
Baucus Unveils Comprehensive Health Reform Proposal 3
Andrews Proposes Legislation to Narrow ERISA Preemption for Employer Plans Not Meeting New Health Coverage Standards 4

RECENT REGULATORY ACTIVITY 5

Regulatory Agencies Working to Finalize Numerous Issues 5
PBGC Issues Final Regulations on Disclosure to Participants of Distress Terminations 6
PBGC Issues Additional Disaster Relief 6
IRS Issues Multiemployer Plan Amortization Extension Procedure 7
Massachusetts Connector Issues Guidance on Minimum Creditable Coverage for Health Plans 7

RECENT JUDICIAL ACTIVITY – Nothing to Report This Month

RECENT LEGISLATIVE ACTIVITY

Senate Approves Technical Correction of Mental Health Parity Effective Date for Collectively Bargained Plans

The U.S. Senate and House of Representatives have each approved a technical correction clarifying that the new federal mental health parity requirements are effective for health plans pursuant to collectively-bargained agreements no earlier than January 1, 2010. The bill will now be presented to the President, who is expected to sign the measure.

The technical correction, S.3712, amends the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("MHP act") to clarify that such plans would not be subject to an effective date earlier than that applied to group health plans that are not pursuant to collectively-bargained agreements.

The technical correction is needed because the effective date provision of the MHP act, Section 512(e), could be interpreted to require compliance by collectively bargained agreements as early as January 1, 2009. Section 512(e) includes a general rule that applies the new requirements to group health plans "for plan years beginning after the date that is one year after the date of enactment…" For plans on a calendar year, the new requirements would be effective January 1, 2010. Section 512(e) also includes a "special rule" for collectively bargained plans. Although a reasonable interpretation of 512 (e) is that the special rule for collectively bargained plans applies in addition to the general rule, the current effective date provision is confusing, and it is possible to read the special rule as applying instead of the general rule. Such a reading could subject some CBA-related plans to a January 1, 2009 effective date.

Key members of the benefits community has worked closely with the House and Senate sponsors of the mental health parity legislation, the U.S. Department of Labor and other key stakeholder groups to obtain the needed clarification of the effective date for plans subject to collective bargaining agreements. Imposing an effective date prior to January 1, 2010, would be unworkable, given the changes to benefit designs and contracting arrangements that would have to be implemented in order to comply with the new requirements. The clarification is also consistent with the Senate and House sponsors' intent that group health plans be permitted at least one year to come into compliance with the new MHP requirements.

Senate and House Leaders Reach Agreement on Pension Funding Relief

After extensive negotiations over several months, the U.S. House of Representatives and Senate each approved The Worker, Retiree, and Employer Recovery Act (H.R. 7327), legislation to provide defined benefit plan funding relief and other technical corrections to the Pension Protection Act of 2006.

The measure, sponsored by Representatives Charles Rangel (D-NY) and Jim McCrery (R-LA) (chairman and ranking member of the House Ways and Means Committee), and Representatives George Miller (D-CA) and Buck McKeon (R-CA) (chairman and ranking member of the House Education and Labor Committee), was approved by unanimous consent in the House on December 10 and in the Senate on December 11.

H.R. 7327 would:

- Permit pension plans to smooth out unexpected asset losses: In the Pension Protection Act, Congress permitted pension plans to recognize unexpected asset gains and losses over 24 months. However, the U.S. Treasury Department misinterpreted Congress' intent and effectively applied a mark-to-market rule to pension plans. The relief measure would clarify that plans can use smoothing to take unexpected gains and losses into

account over 24 months. This would not include widening the "corridor," i.e., the requirement that the smoothed value of assets must be within 10% of fair market value.

- Provide a gentle transition to the new funding rules: Plans at and below the phased-in funding threshold (92 percent for 2008, 94 percent for 2009) would be eligible for transition relief. (The so-called "cliff" effect, under which the transition relief is only available to plans at or above the phase-in level, would be eliminated.)

- Provide multiemployer plan relief: The measure would permit plan sponsors to elect to temporarily freeze the status of an endangered or critical multiemployer plan at the same funding status held in the immediately preceding plan year.

- Provide "look back" on benefit restrictions: A plan's funded status as of January 1, 2008 would be used for purposes of the application of the rule requiring plans that are less than 60% funded to be frozen.

- Extend minimum required distribution relief: Minimum required distribution (MRD) rules would be temporarily waived during 2009 for qualified plans and IRAs. It is noteworthy that the Treasury Department and Internal Revenue Service intend to issue MRD relief for 2008 in the next few weeks.

A Joint Tax Committee Technical Explanation of H.R. 7327 is available.

The bill will now be presented to President Bush for his signature. The Bush Administration has recently opposed pension funding relief, but has not issued a statement of administration policy predicting a veto.

Baucus Unveils Comprehensive Health Reform Proposal

Senate Finance Committee Chairman Max Baucus (D-MT) unveiled "Call to Action," a sweeping health care reform proposal [96 pages] with the goal of "guaranteeing all Americans affordable, quality coverage no matter what their age, health status or medical history." Baucus lists the three principles guiding his proposal as universal coverage, containing costs and shared responsibility. A four-page executive summary of the plan is also available; additional details will be posted on the Senate Finance Committee's "Call to Action" Web site.

The plan itself is divided into three sections:

- *Ensuring health coverage for all Americans*: this includes strengthening the employer-based system, bolstering public programs and shifting the focus from illness and treatment to wellness and prevention. Baucus' proposal would establish a Health Insurance Exchange (similar to the Massachusetts state "connector") that would connect individuals and small employers to insurance offered at local, state, regional, or national levels. Insurers offering coverage through the Exchange would need to meet certain requirements established by a new Independent Health Coverage Council. The proposal also includes a "pay-or-play" feature, under which larger employers who do not provide a minimum level of coverage would have to contribute to a national fund that would help to cover those who remained uninsured. Individuals who are between ages 55 and 64 would be allowed a "temporary" opportunity to buy in to coverage under Medicare. This authority would expire after the Health Insurance Exchange program is fully implemented.

- *Improving health care quality and value*: Baucus' plan would seek to modify payment incentives to encourage greater quality of care. Other provisions of the plan would

attempt to improve health care infrastructure by investing in comparative effectiveness research and health information technology.

- *Achieving greater efficiency and sustainable financing*: to address the significant problem of health care costs, Baucus' plan aims to eliminate wasteful and inefficient spending. To do so, the plan would scrutinize fraud and abuse in public programs, address what are characterized as "overpayments" to private insurers in the Medicare Advantage program, increase perceived transparency of cost and quality information, reexamine long-term care options and implement "careful" medical malpractice reform. Baucus also expresses an interest in exploring "targeted reforms of the tax code to make incentives more efficient, distribute benefits more fairly and promote smarter spending of health care dollars," including limits on the value of employer-sponsored health coverage that could be excluded for tax purposes.

Baucus is encouraging President-Elect Barack Obama to pursue health care reform early in 2009 and intends to collaborate soon with other congressional leaders to reach a consensus reform measure. Though Obama's policy staff and other lawmakers are currently focused on general economic recovery, Baucus has stressed that "the link between health care costs and the economy is undeniable. Reforming the health care system is essential to restoring America's overall economy and the financial security of our working families."

Andrews Proposes Legislation to Narrow ERISA Preemption for Employer Plans Not Meeting New Health Coverage Standards

Representative Rob Andrews (D-NJ), who chairs the Health, Employment, Labor and Pensions Subcommittee of the House Committee on Education and Labor with jurisdiction over ERISA, recently introduced the Several Approaches to Reduce the Uninsured Act (H.R. 7129). The bill would narrow ERISA preemption and permit state regulation of any employer-sponsored group health plan if the plan failed to meet a new federal health benefit threshold.

The federal benefit standard would be established by a 15-member commission that would be authorized to hold hearings and community meetings to develop the minimum benefit package. Only those states with a "comprehensive health care program" – including a requirement that residents of the state obtain and maintain health coverage that at least meets the federal benefit standard – would be permitted to directly regulate employer plans. The legislation would also authorize the Secretary of Labor to waive the authority for states to regulate group health plans for any employers experiencing "substantial business hardship" under a four-factor test. In addition, the state regulatory authority would not apply to small employers with fewer than 100 employees.

Other provisions of the legislation would amend ERISA to permit states to impose an assessment against an employer, or a credit against an otherwise applicable assessment, based on whether an employer contributes to a group health plan. This provision is intended to authorize assessments under state "pay-or-play" laws. The United States Court of Appeals in the Fourth Circuit recently found Maryland's "Fair Share" law to be preempted by ERISA and a similar arrangement is under review by the Ninth Circuit in the case involving employer spending requirements under San Francisco's health care ordinance. The Council has filed an amicus ("friend of the court") brief in the pending Ninth Circuit case, as has the U.S. Department of Labor, arguing that such state laws and local ordinances are preempted by ERISA.

Under Andrews' bill, a third proposed change to ERISA would permit states to require group health plans to report information relating to cost, coverage and "access of individuals to such coverage". Information reporting requirements by employer-sponsored health plans have commonly accompanied state and local "pay or play" mandates.

The legislation by Rep. Andrews also contains several other provisions, including:

- The establishment of a Health Coverage Innovation Commission by the Secretary of Health and Human Services to review a wide range of state health reform initiatives and provide federal grants to assist approved state efforts as well as relief from federal laws, regulations, and policies – except for ERISA – that states identify as impediments to their health reform programs;

- Authority for states and small employers to enter into "buy-in" arrangements with employer group health plans for coverage of individuals who would not otherwise be eligible participants under the plan;

- A demonstration program to permit up to 10 states to allow employers with predominantly low-income employees to buy-in to coverage for qualified children under a State Children's Health Insurance Program (SCHIP);

- A demonstration program authorizing regional state arrangements to offer three to five standard health benefit plans with modified community rated premiums to which individuals could be automatically enrolled and would be responsible for premium payments and could apply premium subsidies that would also be authorized. Employers would be permitted to offer coverage to their employees under the regional standard benefit plans participating in the demonstration. Health plan and health care provider comparative information would also be made available for coverage under the regional state arrangements; and

- The "look-back period" for health plans that consider pre-existing health conditions would be reduced from six months to 30 days and the coverage waiting period from applicable pre-existing conditions would be reduced from 12 months to three months.

The legislation will not be considered until next year and therefore would have to be reintroduced at the start of the new 111th Congress. However, it is a strong indication that changes to ERISA are likely to be addressed by the House Committee on Education and Labor as part of broader health reform legislation.

RECENT REGULATORY ACTIVITY

Regulatory Agencies Working to Finalize Numerous Issues

Federal regulatory agencies are now moving swiftly to finalize regulations and guidance prior to the end of the year and before the new presidential administration takes over. The following issues may be addressed before the end of the year:

Department of Labor (DOL):

- 408(b)(2) regulations regarding defined contribution plan fee disclosure from service providers to plan fiduciaries (the Council submitted official comments to DOL on February 11)

- Defined contribution plan participant fee disclosure final regulations (the Council submitted formal comments to DOL on September 8. However, this project is increasingly unlikely to be finalized before year end, since the regulations have not yet been sent to the Office of Management and Budget, which must review them before they can be issued)

- Investment advice (the Council submitted a comment letter to the DOL Employee Benefits Security Administration (EBSA) regarding the new prohibited transaction exemption for providing investment advice to plan participants)

Department of Treasury/Internal Revenue Service (IRS):

- Hybrid pension plans (a formal comment letter to Treasury and IRS on the proposed regulations and guidance on changes to hybrid defined benefit plans)
- Automatic enrollment (the Council submitted an official comment letter regarding proposed regulations designed to implement the automatic enrollment provisions (Section 902) in the Pension Protection Act of 2006 (PPA))
- PPA pension funding guidance
- Cafeteria plan regulations

PBGC Issues Final Regulations on Disclosure to Participants of Distress Terminations

The Pension Benefit Guaranty Corporation (PBGC) released final regulations on November 19 governing the disclosure of plan termination information upon the request of an affected party. ("Affected party" is defined to include each participant in the plan, each beneficiary under the plan, each employee organization representing plan participants and PBGC).

In accordance with Section 506 of the Pension Protection Act of 2006 (PPA), the regulations would require that a plan administrator disclose information it has submitted to PBGC in connection with a distress termination filing, and requires that a plan administrator or plan sponsor disclose information it has submitted to PBGC in connection with a PBGC-initiated termination. The new provisions also mandate that PBGC disclose the administrative record in any PBGC-initiated termination.

The final regulation is mostly unchanged from the proposed regulations, issued in December 2007. The one difference is that the final regulation states explicitly, with reference to the applicable statutory provisions, that plan administrators in distress and PBGC-initiated terminations and plan sponsors in PBGC-initiated terminations may charge a reasonable fee for any information provided in other than electronic form.

PBGC Issues Additional Disaster Relief

The Pension Benefit Guaranty Corporation (PBGC), the government insurer of employer-sponsored defined benefit plans, has issued an announcement providing relief from certain penalties and filing deadlines for plan sponsors in regional disaster areas.

- Disaster Relief Announcement 08-29 addresses PBGC deadlines for companies affected by severe storms and flooding in Indiana on September 12.
- Disaster Relief Announcement 08-30 waives certain penalties and extends certain deadlines for companies affected by Hurricane Gustav in Mississippi on August 28.
- Disaster Relief Announcement 08-31 waives certain penalties and extends certain deadlines for companies affected by the severe storms and flooding in Puerto Rico on October 1

- Disaster Relief Announcement 08-32 waives certain penalties and extends certain deadlines for companies affected by the severe storms and flooding in Illinois on September 13.

IRS Issues Multiemployer Plan Amortization Extension Procedure

On November 12, the Internal Revenue Service (IRS) released Rev. Proc. 2008-67, setting forth the procedure by which the sponsor of a multiemployer defined benefit plan may request and obtain approval of an extension of a funding amortization period as revised by the Pension Protection Act of 2006 (PPA). The revenue procedure is expected to be formally published on December 1.

Prior to PPA, sponsors of multiemployer plans could apply for automatic extensions of the funding amortization period for a period of up to 10 years. Under the PPA provision, automatic extension applications are limited to 5 years but multiemployer plan sponsors can seek alternative extensions of up to 10 years total (both requests can be in the same application). In order to be considered for the additional extension, the applicant must furnish appropriate evidence that the extension would carry out the purposes of ERISA and the PPA and would provide adequate protection for the participants and their beneficiaries, and that failure to permit the extension would (1) result in substantial risk to the voluntary continuation of the plan, or a substantial curtailment of pension benefit levels or employee compensation, and (2) would be adverse to the interests of the plan participants in the aggregate.

The revenue procedure specifies the information necessary for both types of applications and provides a model notice (used for both types of applications) and a checklist for the alternative extension application. The deadline for requesting an extension generally is the last day of the first plan year for which the extension is intended to take effect. In addition, an application will not be considered received until all of the applicable information is received and can be closed without a ruling if information is not timely received. The revenue procedure applies to all ruling requests received with respect to plan years starting after December 31, 2007. The revenue procedure also points out that effective for plan years starting after December 31, 2007, there is no provision for single-employer plans to receive an extension of the amortization period for any unfunded liability.

Multiemployer plans continue to seek additional relief from the defined benefit funding challenges. The recent group letter to Congress (see story above), noted that multiemployer defined benefit plans are subject to a separate set of funding rules. Similar temporary relief designed to mitigate the effects of the aggressive funding targets contained in the PPA is essential to avert devastating burdens and inevitable job losses arising from massive contribution increases and unavoidable benefit reductions that will be required to comply with those rules.

Massachusetts Connector Issues Guidance on Minimum Creditable Coverage for Health Plans

The Massachusetts Commonwealth Connector, the independent state agency that helps individuals obtain health care coverage, recently provided guidance on the minimum creditable coverage (MCC) certification process and an application for MCC certification.

In accordance with the state's health care system, Massachusetts residents are subject to an individual mandate that requires them to have coverage that satisfies the Minimum Creditable Coverage (MCC) regulations. MCC certification is a new compliance option for health benefit plans that are actuarially equivalent to at least a CommChoice "Bronze level" plan but fail to

meet MCC standards due to a modest deviation from the MCC standards set forth in previous regulations.

On October 17, the Massachusetts Health Connector board adopted final Minimum Creditable Coverage (MCC) regulations that include a new safe harbor allowing plan sponsors and carriers to request a determination that a health benefit plan is compliant based on actuarial equivalence. The final regulation also makes a number of other changes to current MCC requirements related to preventive care, provision of a "broad range of medical benefits", high deductible health plans and use of health savings accounts, and rules applicable to collectively bargained plans. The safe harbor provisions become effective January 1, 2009.