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RECENT LEGISLATIVE ACTIVITY

Congress Approves Stimulus Bill Agreement, President Signs

President Obama signed the American Recovery and Reinvestment Act (H.R. 1, commonly known as the "stimulus package") into law on February 17, after the U.S. House of Representatives and Senate approved a final conference agreement. The new law includes numerous provisions addressing health care coverage:

- A temporary subsidy for COBRA coverage would be available to eligible persons who have been involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009. The subsidy for eligible workers would be 65 percent of the premium for nine months. The employer would receive a credit for the subsidy against payroll taxes. Under the law, recipients would be entitled to a subsequent nine months of unsubsidized coverage for a total of 18 months (in most cases). Eligibility would be restricted to those with same-year annual income below $125,000 for individuals and $250,000 for families.
    - The conference agreement eliminated the House-passed provision that would have established a permanent, long-term expansion of COBRA coverage for those 55 or older or with 10 or more years of service (until eligible for Medicare or other private insurance). The Council, along with others in the employer community, vigorously opposed this provision and sent a letter to the conferees opposing inclusion of the "55-or-10" provision in the final measure.
- The conference agreement also expand the Health Coverage Tax Credit (HCTC) under the Trade Adjustment Assistance Act of 2002 (TAA) from 65 percent to 80 percent of the premium for qualified health coverage. These provisions, which had not been included in either the House or the Senate-approved bills, are effective for coverage months beginning on or after the first day of the first month beginning 60 days after the date of enactment of the stimulus bill and extends through December 31, 2010. For individuals who are eligible for benefits under the TAA program – including Pension Benefit Guaranty Corporation (PBGC) pension recipients, the health care premium credit may be applied to a wide range of qualified sources for health coverage including COBRA continuation coverage, state high-risk pool coverage, spousal coverage, coverage under certain state-based programs and arrangements between states and group health plan sponsors. The HCTC provisions in the economic stimulus bill also provide continued qualification for the credit by family members for 24 months if the individual entitled to the credit becomes entitled to coverage under Medicare or in the case of the death or divorce of the eligible individual.
- The legislation would devote $1.1 billion to comparative effectiveness research, designed to evaluate and compare the clinical outcomes, effectiveness, risk, and benefits of various medical treatments. The conference report makes clear that the comparative effectiveness research is not intended to be used to mandate coverage, reimbursement, or other policies for any public or private payer. The conferees explicitly note that "a 'one-size-fits-all' approach to patient treatment is not the most medically appropriate solution to treating various conditions.
- The legislation would also dedicate $19 billion to accelerate adoption of health information technology (Health IT) systems by doctors and hospitals while amending the

HIPAA privacy standard to strengthen federal privacy and security law intended to protect personally identifiable health information.

The legislation also includes a number of other benefits-related provisions:

- The agreement does impose caps on executive compensation for top executives of companies participating in the Troubled Asset Relief Program (TARP), though the provision is not as far-reaching as the Senate version of the stimulus bill. The final legislation would institute executive pay limits on a sliding scale based on the amount of TARP assistance received and direct the U.S. Secretary of the Treasury to review past compensation and possibly negotiate for reimbursements. The language would also prohibit "golden parachute" payments to a TARP company's top six highly compensated workers and institute an annual "say-on-pay" vote for shareholders to determine executive compensation.
- The agreement creates parity of transportation fringe benefits, mandating the same allowable dollar amounts for public transportation as it does for private or personal transportation.

Congress Passes SCHIP Legislation, President Signs

On January 14, the U.S. House of Representatives passed the Children's Health Insurance Program Reauthorization Act (H.R. 2) to renew and amend the State Children's Health Insurance Program (SCHIP), and on January 29 the Senate approved similar legislation. After the House agreed to the slightly amended Senate bill, President Obama signed the legislation into law on February 4.

The final agreement contained provisions intended to reduce barriers to allow states to provide premium assistance subsidies for employer coverage for SCHIP-eligible children and families. These provisions were originally included in the Children's Health Insurance Program Reauthorization Act of 2007, vetoed by President Bush. Under the legislation, states may offer premium assistance subsidies for qualified employer coverage where the employer contributes at least 40 percent towards the cost of coverage and satisfy other requirements. The premium assistance provisions include new enrollment, notice and disclosure requirements that directly impact employers who sponsor health benefits coverage.

RECENT REGULATORY ACTIVITY

President Obama Delays Regulations for Further Review

On January 20, President Barack Obama's new Chief of Staff, Rahm Emanuel, issued a memorandum to the various executive departments and agencies essentially delaying or stopping Bush-era regulatory projects. The memorandum created three categories of projects, based on whether the regulations (or other guidance) have been published in the Federal Register but are not yet effective, not yet sent to the Federal Register, or sent to the Federal Register but not yet published. Essentially, the memorandum (1) urges agency heads to consider a 60-day extension of the effective date (and a reopening of the comment period) for regulations that have been published but are not yet effective (2) prohibits publication of new proposed or final regulations without approval of an Obama official, and (3) requires withdrawal from the Office of Federal Register of any unpublished proposed or final regulations.

The Department of Labor (DOL) issued final investment advice regulations on January 16 that were scheduled to be published in the Federal Register on January 21 (the next business day for the federal government). Publication did occur on January 21, indicating that they were sent to the Federal Register prior to the DOL's receipt of the Emanuel memorandum. Therefore, the

regulations will be subject to (1) above instead of (3), indicating that the Obama DOL is instructed to consider a delay in the effective date (now scheduled for March 23) and a reopening of the comment period. Since there has been considerable Democratic opposition to elements of the final regulations and some Democrats have expressed interest in changing the underlying provisions of the Pension Protection Act (PPA) to prevent what they label as "conflicted" advice, it appears highly unlikely that the investment advice regulation will go into effect as scheduled or be retained in its current form.

Another regulatory project that could be delayed pending an Obama official review is the published final regulations on withdrawing employers from multiemployer plans, currently scheduled to be effective January 29. Other regulatory projects that will likely face increased scrutiny under (2) or (3) above (regulations not yet published) include:

- Fee disclosure between service providers and the plan's fiduciaries under ERISA Section 408(b)(2)
- Participant fee disclosure
- Funding notice guidance (with a model notice)
- Various PPA defined benefit plan funding issues
- Cash balance plans regulations
- Automatic enrollment
- Cafeteria plans
- HEART Act

Treasury Issues Guidance on Executive Compensation under TARP-CPP

The U.S. Treasury Department issued guidance on executive compensation limitations for participants in the capital purchase program (CPP) under the troubled asset relief program (TARP), as provided by the Emergency Economic Stabilization Act of 2008 (EESA). This guidance, along with other regulatory projects, appears to be on hold until review by the Obama administration as discussed in the previous article. Treasury has provided initial executive compensation rules under EESA and issued Notice 2008-94 relating to tax code Sections 162(m)(5) and 280G(e).

This new guidance provides one technical amendment and two clarifications to the initial executive compensation rules. Specifically, the new guidance would change the location of certification reporting for public companies (to be provided in the Compensation Committee Report instead of the Compensation Discussion and Analysis). It would also clarify the "clawback" provision (the return of any bonus or incentive compensation based on materially inaccurate financial statements or performance criteria). That provision would apply not only to bonus or incentive compensation actually paid during the Treasury holding period (when Treasury holds an equity or debt position in the company acquired under the CPP) but also to bonuses or incentives to which a senior executive obtains a legally binding right to that payment during the Treasury holding period. The guidance also details the timing of new reporting and recordkeeping requirements.

IRS Issues Interim Guidance on "Foreign" Nonqualified Deferred Compensation

The Internal Revenue Service (IRS) issued Notice 2009-08, providing interim guidance on the new Internal Revenue Code Section 457A. This section, enacted as a provision of the Tax

Extenders and Alternative Minimum Tax Relief Act of 2008 and effective as of January 1, 2009, generally provides that compensation deferred under a nonqualified deferred compensation plan of a nonqualified entity is includible in gross income when there is no substantial risk of forfeiture of the right to such compensation. The term "nonqualified entities" generally relates to foreign corporations, or partnerships that allocate some portion of their income to foreign entities (or exempt organizations).

The guidance, offered in a question-and-answer format, provides interim guidance for a number of issues arising under 457A such as how and when to determine whether an entity is a nonqualified entity (including guidance on determining whether an entity is a foreign corporation or partnership), whether 457A applies to income on deferred compensation subject to 457A, determining the amount includible in income under 457A and other matters.

IRS Considering Automatic Approval for Changes in Pension Plan Funding Methods

In the Winter 2009 Internal Revenue Service (IRS) newsletter for employee retirement plans, the agency addressed the issue of plan sponsors seeking to change their method for funding defined benefit pension plans. IRS said in the newsletter it is aware that some plan sponsors want to change their funding methods, especially their methods of determining the value of plan assets, to mitigate the full effect of the financial and economic crisis on their plan valuations. However, the IRS asked that sponsors not flood the agency with requests to change their funding methods.

"The IRS is considering possible automatic approval of certain changes in funding methods for the 2009 plan year, pending the issuance of final regulations," according to the newsletter, "[but the IRS does] not anticipate acting upon requests for changes in funding method for 2009 until the regulations are final. Accordingly, plan sponsors should defer any requests for changes until after they see the extent of automatic approval in the final regulations." The reference is to proposed regulations under tax code Sections 430 and 436, which establish minimum funding standards and limitations on pension benefits for single-employer defined benefit plans.

Several employee benefit industry groups have indicated that they will attempt to advance these proposals as part of any legislative vehicle considered early in 2009.

Treasury Issues Temporary Regulations on Cost-Sharing Arrangements

The U.S. Treasury Department issued temporary regulations providing further guidance and clarification regarding methods (under Tax Code Section 482) for determining taxable income in connection with a cost sharing arrangement. The regulations address comments on the valuation of stock options and other stock-based compensation in response to a request in Notice 2005-99.

The department will continue to consider the technical changes and issues described in Notice 2005-99 and intends to address those changes in a future regulations project.

DOL Issues Final Regulations on Civil Penalties for Certain Disclosure Failures

The U.S. Department of Labor (DOL) released final regulations on civil penalties under ERISA Section 503(c)(4) – as amended by the Pension Protection Act of 2006 (PPA) – which addresses the failure to disclose requested plan information.

According to a DOL news release, the final regulation formalizes DOL authority to assess civil penalties against plan administrators who fail to meet these disclosure requirements. As amended by PPA, new disclosure provisions cover information related to:

- funding-based limits on benefit accruals and certain forms of benefit distributions (such as lump sums);

- plan actuarial and financial reports;
- multiemployer plan withdrawal liability of contributing employers; and
- participants' rights and obligations under automatic contribution arrangements.

With expected losses from the volatile 2008 market, more defined benefit plans may face disclosure obligations in 2009 with regard to funding-based limitations on lump sum distributions (but not on benefit accruals, due to the recent enactment of the Worker, Retiree, and Employer Recovery Act (H.R. 7327).

The PPA gave the department authority to assess civil monetary penalties of up to $1,000 per day per violation against plan administrators for violations of the new disclosure requirements. The final regulation sets forth the administrative procedures for assessing and contesting such penalties and does not address the substantive provisions of the new disclosure requirements.

PBGC Finalizes Regulations Regarding Withdrawing Employers from Multiemployer Plans

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations addressing mass withdrawal from a multiemployer defined benefit pension plan. The final regulation:

- amends existing law in accordance with the Pension Protection Act of 2006 (PPA) to provide for changes in the allocation of unfunded vested benefits in such cases as well as the adjustments in determining an employer's withdrawal liability when a multiemployer plan is in critical status;
- provides additional modifications to the statutory methods for determining an employer's allocable share of unfunded vested benefits;
- amends prior PBGC regulations on Notice, Collection, and Redetermination of Withdrawal Liability to improve the process of fully allocating a plan's total unfunded vested benefits among all liable employers in a mass withdrawal; and
- updates prior PBGC regulations on Terminology to reflect the definition of a "multiemployer plan" added by PPA.

The final regulations are effective January 29, 2009.

RECENT JUDICIAL ACTIVITY

U.S. Supreme Court Rules for Employer in ERISA Case

The U.S. Supreme Court handed down a decision in the case of Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, ruling in favor of the plan administrator. At issue in the case was whether ERISA's Qualified Domestic Relations Order (QDRO) provision is the only valid way a divorcing spouse can waive the right to receive the former spouse's pension benefits under ERISA. The U.S. Supreme Court affirmed a Fifth Circuit Court of Appeals decision in favor of the plan administrator, finding, that the ultimate question of whether the ex-spouse was entitled to the benefits should be dictated by the specific terms of the plan documents.

The case is significant for plan sponsors because any requirement that a plan be administered based on extrinsic documents not referenced in the plan documents would make ERISA plans extremely difficult to administer. Additionally, any requirement based on outside documents would be inconsistent with ERISA and undermine the congressional goals of nationally uniform

plan administration and minimal administrative and financial burdens on ERISA plan administrators

Sixth Circuit Rules for Employer in Vesting of Retiree Health Benefits Case

On January 27, the U.S. Court of Appeals for the Sixth Circuit issued a decision in *Winnett v. Caterpillar*, ruling in favor of the defendant employer. The issue on appeal was whether the lower court could properly entertain a claim for retirement medical benefits based on a labor contract that expired before the plaintiffs who claimed such benefits actually retired. The Sixth Circuit has recognized an "inference" that retiree medical benefits are intended to vest upon the employee's retirement.

The Sixth Circuit reversed a lower court ruling which extended the controversial *Yardman* inference to conclude that active employees could claim vested retiree health benefits under prior expired labor contracts. Still, under the appeals court decision, a particular collectively bargained agreement could vest health care benefits before actual retirement absent any inference of vesting, if the plan language so compelled that conclusion. Employee benefit groups have argued that the lower court decision was contrary to federal employee benefit policy and federal labor principles and created a disincentive for employers to offer retiree health benefits.