



BENEFITS INSIDER
A Member Exclusive Publication

Volume 52, August 2009

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.

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RECENT LEGISLATIVE ACTIVITY

PLEASE NOTE: The legislative stories below were accurate as of press time but may have been subsequently changed or updated as a result of ongoing congressional action. The WEB Benefits Insider will follow up on these issues and provide a comprehensive update in the September Issue.

Health Care Update: Three House Committees Approve Legislation

Ways and Means Committee

Late on July 16, the Ways & Means Committee approved a [revised version of H.R. 3200](#) by a vote of 23 to 18, with all Republicans and three Democrats (John Tanner (D-TN), Earl Pomeroy (D-ND), and Ron Kind (D-WI)) voting against the bill. (Tanner and Pomeroy are members of the Democratic fiscally moderate and conservative "Blue Dog" Coalition who have indicated that they will not vote for the House health care reform bill unless significant changes are made in the measure to reduce federal spending. Kind is a member of the moderate New Democrat Coalition that sent [a letter to House leadership](#) on July 13.)

[A section-by-section description of the bill](#) and [a summary of revisions](#) are available, as well as a Joint Committee on Taxation [description of H.R. 3200](#) and [estimated revenue effects of the revised bill](#).

While many Republican amendments were debated and defeated, no new amendments were added to the bill. During the session, committee leaders agreed to strike Section 1620, regarding enforcement of Medicare Secondary Payer (MSP) provisions. This section, which had been included in the revised bill at the request of Rep. Lloyd Doggett (D-TX), would have clarified that any person may bring an action on behalf of Medicare to enforce the secondary payer statute, that the Department of Justice may choose to intervene in the case and that the person bringing suit may receive twenty to thirty percent of the recovery of a successful case.

Education and Labor Committee

The House Education and Labor Committee approved [its own revised version of the bill](#) early on July 17 by a vote of 26 to 22, with all Republicans and three Democrats (Jason Altmire (D-PA), Jared Polis (D-CO) and Dina Titus (D-NV)) voting against the measure. (Altmire is a member of the "Blue Dog" Coalition as well as the New Democrat Coalition.) The Education and Labor version of H.R. 3200 includes a provision amending ERISA to prohibit post-retirement reductions in retiree health benefits by group health plans.

During debate, the committee approved a number of other amendments with implications for employers, most notably an amendment by Rep. Dennis Kucinich (D-OH), to provide states with waivers from ERISA for the purposes of establishing a single-payer health care system. The Kucinich amendment was approved by a vote of 25 to 19, with two members abstaining.

Energy and Commerce Committee

Late on July 31, the House of Representatives Energy and Commerce Committee approved a [revised version of the America's Affordable Health Choices Act \(H.R. 3200\)](#), comprehensive health care reform legislation, by a vote of 31-28. No Republicans voted for the bill, while five Democrats voted against the bill (Representatives Rick Boucher (D-VA), Bart Stupak (D-MI), Jim Matheson (D-UT), Charlie Melancon (D-LA) and John Barrow (D-GA)). This is the closest vote on the House health legislation thus far, with notable Democrat opposition. No Republican has yet voted in favor of the versions of health reform legislation developed by the four committees in the House and Senate that have thus far approved a bill.

As expected, the final bill as approved included an ["omnibus" amendment offered by several conservative "Blue Dog" Democrats](#), with a number of moderate reforms, including:

- More than \$100 billion in Medicare reductions;
- Exemption from the employer mandate for small businesses with payrolls totaling less than \$500,000 (phasing up to total payrolls of \$750,000);
- Affirmation that the public plan option is entirely optional;
- A requirement that the public insurance option negotiate reimbursement rates directly with providers, rather than basing payment rates on Medicare;
- Provision of state-based cooperatives to complement the public plan option; and
- Adjustment of the subsidies for low-income individuals.

The committee also approved an [omnibus amendment offered by members of the Congressional Progressive Caucus](#), implementing additional cost cuts in exchange for increased subsidies for families at higher income levels. All of the amendments considered are posted on the [Committee Web site](#).

The three House committee bills will now proceed to the House Rules Committee, where, with substantial input from the House Democratic Leadership, they will be merged and considered by the full House at some point after lawmakers return from recess on September 8.

Senate HELP Committee Approves Health Bill

On July 15, the Senate Health, Education, Labor and Pensions (HELP) Committee voted to approve the Affordable Health Choices Act, the committee's comprehensive health care reform proposal, by a party-line vote of 13 to 10. During the course of the nearly two-week "mark-up" session, the HELP committee approved nearly 200 amendments to the bill, many of them technical in nature. The committee's Democratic staff has issued [a news release and detailed summary of the bill](#).

The Affordable Health Choices Act includes:

- a national health insurance exchange offering private health insurance choices and a government-sponsored "Community Health Insurance Option," run by the Department of Health and Human Services (HHS) and offered as a choice within the exchange;
- An individual mandate;
- A "pay-or-play" mandate, under which employers (with 25 employees or more) who do not offer adequate coverage will be assessed an annual fee of \$750 for each uncovered full-time employee and \$375 for each uncovered part-time employee.
- Individual insurance market reforms including guaranteed issue and coverage of pre-existing conditions;
- A voluntary long-term care program (previously introduced in the Senate as the [Community Living Assistance Services and Supports \(CLASS\) Act \(S. 697\)](#)) that would provide disabled adults with a minimum of \$50 per day for living, educational and employment expenses in exchange for an upfront monthly premium of \$65 (this provision raises revenue within the window of the ten-year budget estimate but the long-term costs outside of that window have yet to be examined);

- Protection for biologic drug manufacturers from generic competition for 12 years (added as an amendment); and
- Numerous provisions addressing health care quality improvement, combating fraud and abuse, promoting wellness and development of the health care workforce.

The Affordable Health Choices Act must now be reconciled with the legislation to be introduced by the Senate Finance Committee, which continues to engage in bipartisan negotiations. The Senate Finance Committee leaders announced on July 30 that the committee will not release or consider health care reform legislation before the Senate begins its month-long recess on August 7. A small bipartisan group of committee members -- Chairman Max Baucus (D-MT), ranking Republican Charles Grassley (R-IA), and Senators Jeff Bingaman (D-NM), Kent Conrad (D-ND), Olympia Snowe (R-ME), and Michael Enzi (R-WY) – will continue negotiations this week and through the Senate recess. Baucus recently announced a new deadline of September 15 to complete negotiations, though Enzi – who is also the ranking Republican member of the Senate Health, Education, Labor and Pensions (HELP) Committee – has reportedly rejected this deadline. Once finalized, the Finance Committee measure will need to be merged with the already-approved HELP Committee bill prior to a vote by the full Senate.

PBGC Restructuring Legislation Introduced

On July 31, Senators Herb Kohl (D-WI), Michael Bennet (D-CO), Claire McCaskill (D-MO), and Russ Feingold (D-WI) introduced The Pension Benefit Guaranty Corporation (PBGC) Governance Improvement Act, a bill to change the governance and oversight structure of the PBGC – the quasi-government agency that insures single-employer and multi-employer defined benefit pension plans. The PBGC insures the pensions of nearly 44 million individuals.

The sponsors are all members of the Senate Special Committee on Aging, which held a May 20 hearing, [No Guarantees: As Pension Plans Crumble, Can PBGC Deliver?](#)

Bill text is not yet available, but a committee summary indicates that the measure would:

- Expand the PBGC board of directors from three to seven members;
- Stagger the terms of board members in an effort to enhance continuity and experience;
- Require the board to meet at least four times a year;
- Require the PBGC advisory committee to meet with the board at least once a year and gives the advisory committee the authority to examine and advise on issues independent from the PBGC executive director;
- Requires the PBGC Inspector General and General Counsel to report to the board;
- Requires recusal from potential conflicts of interest by the PBGC board and executive director.

The Brookings Institution, a nonpartisan think-tank, recently published [a paper recommending many of these initiatives](#).

Employer Groups Urge Congress to Pass Additional Defined Benefit Pension Funding Relief

Over 35 employers, organizations and trade groups sent [a letter to all members of Congress](#), urging the swift consideration and passage of "temporary provisions that would ease cash flow

constraints and make [pension] contributions more predictable and manageable." Copies were also sent to key officials at the U.S. Departments of Labor and Treasury.

As we have previously reported, the accelerated funding requirements included in the Pension Protection Act and the market-driven declines in pension asset values have resulted in extreme and unanticipated jumps in upcoming pension obligations. While some legislative and regulatory relief has been provided, 2009 obligations still present a challenge for many employers and companies are now preparing for large 2010 obligations as well.

RECENT REGULATORY ACTIVITY

FTC Delays 'Red Flags' Rule, Issues Q&A

The Federal Trade Commission (FTC) has delayed the implementation of the "Red Flags Rule," which requires many businesses and organizations to implement a written identity theft prevention program to detect warning signs of identity theft in their day-to-day operations. Enforcement of the rule has been postponed until November 1, 2009, to allow the FTC to issue additional guidance for employers.

The FTC has already released a primer, [Fighting Fraud with the Red Flags Rule: A How-To Guide for Business](#), indicating the application and recommended procedures for the rule. On July 29, the agency issued new [questions and answers](#) for complying with the rule. Four of these questions relate to employee benefit plans:

- Our company offers individual retirement plans that allow participants to get loans from their own plan account. Does that make us or the plan a creditor under the Rule? (Though the language in the answer is imprecise, the FTC indicates that this does not make the plan a creditor for purposes of the rule.)
- If our company meets the definition of a "financial institution" or "creditor," are the individual retirement accounts we make available to our employees considered "covered accounts" that must be included in our written Identity Theft Prevention Program? (Individual retirement accounts generally qualify as "covered accounts." However, in certain cases – for example, 401(k) plans – the account that a participant establishes isn't with the employer or plan sponsor. Instead, the participant establishes an account with the plan itself, which is a separate legal entity. Under those circumstances, the employer would not need to include the retirement plan accounts in a written Identity Theft Prevention Program.)
- Am I a creditor if I offer my employees health care flexible spending accounts that reimburse them for elected amounts that are more than they've contributed to date? Am I a creditor if I serve as a third-party administrator that maintains those accounts for employees of other companies? (No, neither offering your employees health care flexible spending accounts nor maintaining those accounts for other companies makes your business a "creditor" under the rule.)
- Are we a "financial institution" under the Red Flags Rule if we have accounts for our clients and offer a way for them to make payments or transfers to third parties with a debit card, check, or wire transfer? (Yes. The definition of "financial institution" includes businesses that have accounts a customer can use to make payments or transfers to third parties. For example, a university may hold student funds in an account and give students a card they can use to make purchases at local stores. This type of arrangement would make the university a financial institution under the Rule. If you provide government benefits or administer flexible spending accounts and give your customers a debit card to access benefits, you would be considered a financial institution.)

DOL Provides Reporting Relief for Pre-2009 403(b) Accounting

On July 20, the Department of Labor (DOL) Employee Benefit Security Administration issued [Field Assistance Bulletin \(FAB\) 2009-02](#), providing guidance on Form 5500 Annual Return/Report requirements for certain tax-sheltered annuity programs under Section 403(b) of the Internal Revenue Code.

Under FAB 2009-02, the administrator of a 403(b) plan does not need to treat annuity contracts and custodial accounts as part of the employer's plan under Title 1 of ERISA or as plan assets for purposes of ERISA's annual reporting requirements provided that:

1. the contract or account was issued to a current or former employee before January 1, 2009;
2. the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account before January 1, 2009;
3. all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and
4. the individual owner of the contract is fully vested in the contract or account.

The guidance in this Bulletin relates solely to Form 5500 reporting obligations and does not address any other issue under Title I of ERISA or any obligations under the tax code.

Prior to the release of this guidance, employers had expressed concern that extensive reporting, recordkeeping and maintaining of old contractual agreements would be necessary to comply with the final regulations issued by the Internal Revenue Service in July 2007 [[Section 1](#) | [Section 2](#) | [Section 3](#)]. Under the new guidance, if a plan sponsor's old contract meets all of the prescribed requirements above, they need not include it in reporting for their plan.

Treasury Proposes SEC Investor Protection Legislation

On July 10, the U.S. Treasury Department released [proposed legislative language](#) to enhance investor protections under the authority of the Securities and Exchange Commission (SEC). The legislation would:

- establish standards for investment advice, including rules for broker-dealers and investment advisors and restrictions on mandatory arbitration;
- address the timing and the nature of disclosure statements, including required notices prior to fund purchases and consumer testing of disclosure rules;
- require increased accountability from securities professionals, including whistleblower protections, coordinated liability standards and harsher penalties for adviser misconduct; and
- make the current "Investor Advisory Committee" permanent, with responsibility for representing investors at the SEC and advising on regulatory priorities.

A Treasury Department [fact sheet](#) accompanied the release of the legislation.

PBGC Relaxes Deadlines for Certain Natural Disaster Areas

The Pension Benefit Guaranty Corporation (PBGC) is waiving certain penalties and extending certain deadlines in response to various natural disasters within the last several months.

Disaster Relief Announcements 9-16, 9-17 and 9-18 provide such relief as a result of [severe storms, tornadoes, flooding and straight line winds in Alabama](#); [wildfires in Oklahoma](#) and [severe storms, tornadoes and flooding in Missouri](#). Please consult these announcements to determine whether your company's reporting procedures are affected.

SEC Proposes Corporate Governance, Compensation Measures

On July 1, the Securities and Exchange Commission (SEC) voted to [propose new rules](#) governing disclosure of a company's leadership and compensation practices. SEC chair Mary Schapiro previewed these proposals in [testimony](#) before the Senate Appropriations Committee's Financial Services and General Government Subcommittee on June 2.

The proposals include:

- [Proposed regulations](#) requiring public companies receiving money from the Troubled Asset Relief Program (TARP) to provide a shareholder vote on executive pay in their proxy solicitations;
- Expanding disclosure of executive compensation at public companies in their proxy statements; and
- Approval of a New York Stock Exchange rule change to prohibit brokers from voting proxies in corporate elections without instructions from their customers (applicable to shareholder meetings held on or after Jan. 1, 2010).

The SEC is seeking public comment on the first two proposals within 60 days after their publication in the Federal Register.