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

Articles in this Edition

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 October Issue.

Health Care Update

In the U.S. Senate, Finance Committee members continue to work toward the release and consideration of bipartisan legislation after the August recess, though the actual timing is still very much uncertain. Senate Finance Committee Chairman Max Baucus released a framework for comprehensive health reform for consideration by the committee's bipartisan group of six senators: Baucus, 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). Once approved by the committee, any Senate Finance Committee measure will need to be merged with the legislation previously approved by the Senate Health, Education, Labor and Pensions (HELP) Committee prior to a vote by the full Senate.

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. 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 Energy and Commerce Committee bill will now proceed to the House Rules Committee, where, with substantial input from the House Democratic Leadership, it will be merged with the versions of H.R. 3200 approved by the House Education and Labor Committee and the House Ways and Means Committee.

GAO Report Examines Retirement Savings Security

On August 24, the Government Accountability Office (GAO) issued the report Private Pensions: Alternative Approaches Could Address Retirement Risks Faced by Workers But Pose Trade-Offs, requested by House of Representatives Education and Labor Committee Chairman George Miller (D-CA).

Miller had asked GAO to study three topics:

- *The risks that U.S. workers face in accumulating and preserving retirement benefits:* GAO reviewed risks related to accumulation (lack of coverage, insufficient contributions, poor investment returns), preservation (lack of portability, leakage, high fees) and drawdown of benefits in retirement.

- *Foreign retirement systems and how they address such risks:* GAO studied programs in the Netherlands, Switzerland and the United Kingdom, discussing how each system or proposal addresses participant risks but the GAO does not endorse one particular system over others.

- *Recent U.S. proposals to expand coverage and address retirement risks:* GAO provides a detailed analysis of four domestic coverage proposals: (1) the Urban Institute's Super Simple Savings Plan, (2) the ERISA Industry Committee's New Benefit Platform for Life Security, (3) the New America Foundation's Universal 401(k), and (4) the Ghilarducci/Economic Policy Institute Guaranteed Retirement Account proposal. The report also reviews two annuitization proposals – the Automatic Trial Income proposal from the Retirement Security Project and the Security Plus Annuity proposal from the Aspen Institute. Like the foreign retirement systems, the report discusses how each proposal addresses participant risks but does not endorse any particular proposals.

The report concludes by modeling the effects of requiring all employers to offer defined contribution plans. Under the first modeled approach, employers would be required to offer plans but participation would be voluntary, under the second approach employees would be automatically enrolled and under the third approach participation would be mandatory. Each successive approach results in successively larger increases in the share of workers with defined contribution plan savings at retirement, and the report notes that these mandatory approaches would particularly benefit savings accumulation by low-income workers.

Discussion Draft of Defined Benefit Pension Funding Relief Unveiled

Representative Earl Pomeroy (D-ND), a member of the House of Representatives Ways and Means Committee, unveiled a discussion draft of defined benefit pension funding relief legislation on August 27. (An official section-by-section summary of the bill is also available.)

As 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 obligations in 2010 and beyond. Significant concern has also been reported by companies indirectly affected by the increased obligations, such as suppliers and buyers of products or services rendered by affected companies.

Relief provisions relating to single-employer plans (Title I of the bill) include:

- An extended period for single-employer defined benefit plans to amortize certain funding shortfalls. Specifically, one alternative would extend the period for nine years, delaying the seven amortization payments for two years with employers making interest payments in the first two years (the so-called "2+7 rule"). The second alternative would fund 2008 losses over a 15-year amortization period. Employers electing the funding relief would have to meet one of three self-selecting maintenance-of-effort options:

    - continuing to provide benefit accruals under the defined benefit plan;
    - making a 3 percent nonelective contribution to a defined contribution plan for employees frozen out of the defined benefit plan; or
    - freezing all nonqualified deferred compensation plans and subjecting them to the restrictions that apply to the defined benefit plans that cover rank and file employees.

    These requirements would apply for different periods depending on the extended amortization schedule chosen by the employer.

- Expansion of the smoothing "corridor," within which single-employer defined benefit plans are allowed to average asset values, from the current 10 percent to 20 percent of fair market value for 2009 and 2010.

- Allowing employers that use the spot yield curve for 2009 to use the segment rates for 2010.

- Allowing plan sponsors to "look back" to the plan’s 2008 funded status to determine if the benefit restriction (freezing benefit accruals for plans that are less than 60 percent funded) will apply in 2009 and 2010.

- Allowing plan sponsors to "look back" to the plan’s 2008 funded status for the use of credit balances (with respect to a plan that was under 80 percent funded in the prior year) for both 2009 and 2010.

- Clarification that technical corrections to the PPA did not require plan investment expenses to become a current-year cost, which would be a major new burden on employers.

- Repeal of the PPA rule requiring reporting with respect to plans that are less than 80 percent funded, replacing this rule with a new trigger for reporting. The new trigger would take effect when a plan has aggregate unfunded vested benefits of more than $100 million and would disregard plans that are at least 90 percent funded. Additionally, rules regarding the confidentiality of the reported information would be tightened.

- Delay of the benefit restriction effective date for collectively bargained plans until plan years beginning after December 31, 2011.

- Exclusion of Social Security level-income options from the benefit restriction limiting lump sums and other prohibited payments.

- A change in the determination of the amount of the Pension Benefit Guaranty Corporation (PBGC) guarantee by using the date of plan termination, rather than the date that the plan sponsor enters bankruptcy.

- Comparable funding relief and maintenance of effort rules for plans not yet subject to the PPA rules, limited to the deficit reduction contribution (DRC) rules under the pre-PPA funding rules.

- Prohibition of ad hoc benefit enhancements or "early retirement window" arrangements, under which benefits are payable in a lump sum unless the plan is at least 120 funded (after taking into account the additional benefits). Alternatively, the company could fund the full cost of the additional benefits, in which case all benefits under the plan would be required to be 100 percent vested.

- Revision of the treatment of PBGC reportable events based on a specified reduction in the number of active participants in a plan.

Multiemployer pension provisions (Title II) include:

- Allowing certain multiemployer plans to elect one of two approaches to fund recent losses over a 30-year period (available for 2009 and 2010).

- Extension of the rehabilitation period and the funding improvement period by 5 years.

- Facilitation of the merger of multiemployer pension funds through the creation of multiemployer pension “alliances”.

- Updating the level of PBGC guarantees for multiemployer plans that become insolvent, while modifying existing provisions for multiemployer plans so that eligible plans that have suffered substantial reductions in contributions due to employer bankruptcies and terminations may in some cases transfer liabilities attributable to those employers to the PBGC.

Pomeroy continues to reach out to Republicans and fellow Democrats to obtain broad support for relief legislation. The House Ways & Means Committee is one of the two committees in the House of Representatives with jurisdiction over pension issues and could schedule hearings on the topic soon.

House Approves "Say on Pay" Legislation with Implications for Employee Benefit Plans

Prior to recess adjournment on July 31, the House of Representatives approved the Corporate and Financial Institution Compensation Fairness Act (H.R. 3269) by a vote of 237-185. This measure, originally introduced by House Financial Services Committee Chairman Barney Frank (D-MA), is a legislative response to perceived irregularities in corporate compensation practices.

H.R. 3269 would require public companies to include in their annual proxy statements a non-binding advisory shareholder vote on the executive compensation disclosed in the annual proxy statement and a separate shareholder vote on "golden parachutes" (arrangements in connection with a change in control of a company.) The bill specifically requires institutional investment managers to report at least annually on how they voted unless their votes are otherwise required to be reported publicly.

H.R. 3269 includes new rules governing the independence of compensation committees that set the compensation of executive officers, including independence standards for compensation consultants. The bill would also direct regulators to issue new rules under which "covered financial institutions" would be required to disclose incentive-based compensation arrangements (including, but not limited to, stock options) to regulators. This disclosure must be sufficient to determine if such arrangements encourage risky behavior that could threaten the soundness of the financial institution or have a serious adverse effect on general economic or financial conditions. Regulators (including the Federal Reserve Board, the Office for the Comptroller of the Currency, the Board of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Securities and Exchange Commission and the Federal Housing Finance Agency) would then be directed to jointly prohibit any such arrangements.

Under the bill, the definition of "covered financial institution" is very broad and would allow regulators to identify institutions to be covered in the future.

H.R. 3269 will now be referred to the Senate Banking, Housing and Urban Affairs Committee for its consideration. In May 2009, Senator and Banking Committee member Charles Schumer (D-NY) introduced the Shareholder Bill of Rights Act, which includes a provision for required, binding annual votes by stockholders on executive compensation.

The Obama Administration has already demonstrated strong support for Congressional "say on pay" legislation. The American Recovery and Reinvestment Act (ARRA, the "stimulus bill") included an annual non-binding "say-on-pay" vote for shareholders of companies participating in the Troubled Asset Relief Program (TARP) to approve executive compensation. The Obama administration also recently issued a fact sheet on "say-on-pay" measures.

RECENT REGULATORY ACTIVITY

FTC, HHS Formally Issue HITECH Breach Notification Regulations

On August 24, the U.S. Department of Health and Human Services (HHS) published in the Federal Register its interim final regulations on protected health information and breach notification under the Health Information Technology for Economic and Clinical Health (HITECH) Act (passed as part of the American Recovery and Reinvestment Act of 2009). The Federal Trade Commission's (FTC) final regulation was published on August 25 and applies to vendors of personal health records (PHRs) and entities that offer third-party applications for personal records. Officially, these regulations become effective 30 days from date of publication in the Federal Register (September 23, 2009 for the HHS regulations and September 24, 2009 for the FTC regulations)

Significantly, the agencies have acknowledged that it will take regulated entities time to implement the processes and procedures necessary to comply. As a result, the agencies will use their enforcement discretion and not impose sanctions for noncompliance until February 22, 2010.

IRS Employer Plan Newsletter Includes Guidance on Required Minimum Distributions

The Summer 2009 edition of the Internal Revenue Service (IRS) "Retirement News for Employers" newsletter includes, among other items, limited guidance on the 2009 minimum distribution waiver.

On Page 12 of the newsletter, IRS confirms that "since defined benefit plans are not individual account plans, they must make the 2009 required minimum distributions," and links to frequently asked questions regarding required minimum distributions on the IRS Web site. The last four questions relate to the 2009 waiver of required minimum distributions.

The Worker, Retiree, and Employer Recovery Act of 2008 waived 2009 required minimum distributions from individual account plans (such as IRAs, 401(k) plans, profit-sharing plans, etc.). The provision was enacted to help participants weather the current economic crisis by deferring these distributions from accounts depleted by the steep declines in the equity markets. Defined benefit plans do not qualify for this relief.

The IRS newsletter also provides information on such issues as hardships and loans and fixing automatic enrollment failures.

IRS Requests Comments on Eligible Combined Plans

On August 12, the Internal Revenue Service (IRS) issued Notice 2008-71, requesting comments on issues presented by Section 414(x) of the Internal Revenue Code. Section 414(x), established within the Pension Protection Act of 2006 (PPA) and amended by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) provides special rules for "eligible combined plans" (commonly referred to as DB-K plans), which provide a vehicle through which an employer can maintain both a defined contribution plan and a defined benefit plan on a combined basis, thus reducing the administrative burdens and costs of maintaining separate plans.

The notice defines an “eligible combined plan” as a plan:

1. maintained by an employer that is a small employer at the time the plan is established (based on the average number of employees it is reasonably expected the employer will employ on business days in the current calendar year);

2. consisting of a defined benefit plan and an applicable defined contribution plan;

3. where assets are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of the Code; and

4. that meets certain benefit, contribution, vesting, and nondiscrimination requirements.

IRS seeks comments on these definitions as well as issues surrounding the application of qualified plan requirements to eligible combined plans, minimum benefits and vesting under a defined benefit plan; minimum contributions and vesting under an applicable defined contribution plan, nondiscrimination and top-heavy requirements, automatic contribution and notice requirements, reporting and other requirements. Written comments should be submitted by October 15, 2009.

New Materials Available on Foreign Financial Accounts and Retirement Plans

On August 7, the Internal Revenue Service (IRS) issued Notice 2009-62, providing an additional extension for filing Foreign Bank and Financial Accounts (FBAR) by some plan sponsors and service providers who otherwise might be required to file the FBAR by September 23 because of retirement plan investments in foreign account(s).

It is important to note that these filing requirements could also fall on individuals who do not normally have actual, direct "signatory authority" over foreign financial accounts. For example, the revised definition of "signatory authority" could include members of qualified plan investment committees who could, individually or as a group, issue an oral or written communication that would cause a foreign account to be set up or closed, or could cause a transaction to be made against a foreign account. Previously, it was generally believed that this reporting requirement extended only to those individuals with actual signatory authority.

FBAR reports are compiled for use in governmental criminal, tax or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities to protect against international terrorism. Notice 2009-62 follows questions-and-answers guidance issued over the past several months.

Plan sponsors argue that the application of these requirements to employer plan sponsors is unclear, and have expressed concern that FBAR filing would be unduly burdensome, considering that employee benefit plans are unlikely to be used for such purposes.

Notice 2009-62 provides critical immediate relief in two areas:

- The guidance extends the filing due date to June 30, 2010, for (1) persons with signature authority over, but no financial interest in, a foreign financial account, and (2) persons with a financial interest in, or signature authority over, a foreign commingled fund. As discussed above, the definition of "signature authority" for this purpose has been broadened to include individuals who can influence transactions against a foreign account.

- The extended due date applies to all prior calendar years, compared with the earlier IRS notice that extended the due date solely with respect to calendar year 2008.

Groom Law Group has prepared an analysis of the IRS notice. Comments on this issue are due to IRS by October 6, 2009.