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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 Health Care Update is updated through October 13, 2009 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 November Issue.

Health Care Update

On October 13, the Senate Finance Committee approved the America's Healthy Future Act by a mostly party-line vote of 14-9 (with Senator Olympia Snowe (R-ME) the only Republican voting in favor of the bill. Snowe indicated that her vote in committee does not necessarily mean that she will vote for the bill on the Senate floor. The vote was preceded by extensive remarks by committee members, many focused on the Congressional Budget Office's (CBO) budget score of the bill. CBO estimates that the bill would reduce federal budget deficits by $81 billion over the ten-year budget window of 2010 to 2019 while increasing the share of legal nonelderly residents with insurance coverage from about 83 percent currently to approximately 94 percent.

The measure will now be merged with the Affordable Health Choices Act (S. 1679), as approved by Senate Health, Education, Labor and Pensions Committee. At that point it will be scored once again by CBO, to account for any changes resulting from merging the two measures, before consideration by the full Senate. There is not yet a timeline for consideration by the full Senate, though Senate Majority Leader Harry Reid (D-NV) has indicated that the process could begin before the end of October.

Numerous amendments are expected to be offered on the Senate floor. Notably, during the Senate Finance Committee debate, Senator John Kerry (D-MA) announced his intention to introduce an amendment to include an employer mandate if the final negotiated package does not include one. In addition, Senators Jay Rockefeller (D-WV) and Charles Schumer (D-NY) have indicated that they intend to offer amendments on the Senate floor to include a public health insurance plan option in the new health insurance exchanges.

In the House of Representatives, lawmakers are reconciling the different versions of the America's Affordable Health Choices Act (H.R. 3200, the "tri-committee" bill separately approved by the House Energy and Commerce Committee, the House Education and Labor Committee and the House Ways and Means Committee). The House is not expected to act until the Senate has completed its work.

Congress at Work on Defined Benefit Funding Relief Legislation

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.

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. Both the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), as approved by the House Education and Labor Committee, and the Savings Recovery Act introduced by House Minority Leader John Boehner (R-OH), each contain some limited defined benefit funding relief.

Some officials from the Education and Labor Committee have indicated their interest in moving quickly on a relief measure. However, there also continues to be interest by committee Chairman George Miller (D-CA) in tying relief to fee disclosure and investment advice legislation, which could slow the process. Officials from the House Ways and Means committee have expressed interest in acting on this issue as well, but timing for that committee has been even less certain.

In the Senate, several lawmakers are discussing the issue in an effort to see if a bipartisan effort can be achieved. Members and staff of both committees of jurisdiction – the Senate Health, Education, Labor and Pensions (HELP) Committee and the Senate Finance Committee – have indicated a desire to find a bipartisan solution that is narrow in scope. The timing, content and breadth of the Senate legislation are still unclear, as are the possible preconditions for companies wishing to utilize funding relief.

Lawmakers in both the House and the Senate have expressed the need to narrowly target the relief to companies that need significant help. The Obama Administration continues to indicate varying opinions on the appropriateness of funding relief, with some officials expressing concern about continued underfunding and possible implications for the Pension Benefit Guaranty Corporation. Administration officials have requested specific information regarding anticipated funding obligations given concerns expressed by some administration officials that the need for relief suggested by the business community must be supported with actuarial and economic data.

GAO Study Recommends Changes to Hardship Withdrawal Rules

In an August report, the Government Accountability Office (GAO) recommended that Congress consider changing or eliminating the required 6-month suspension of contributions for participants following a hardship withdrawal from a defined contribution plan. In addition, GAO recommended that the Secretary of Labor promote greater participant education on the importance of preserving retirement savings, and that the Secretary of the Treasury clarify and enhance loan exhaustion provisions to ensure that participants do not initiate unnecessary "leakage" — the depletion of retirement assets prior to retirement age – through hardship withdrawals. Both agencies have already agreed to take actions consistent with GAO's recommendations.

The report was requested by Senator Herb Kohl (D-WI), chairman of the Senate Special Committee on Aging. In a public statement responding to the release of the report, Kohl announced that he would hold an October 21 hearing on "strengthening the 401(k) system" and introduce legislation to address some of the leakage challenges outlined in the report.

RECENT REGULATORY ACTIVITY

Treasury, IRS Issues Interest Rate Guidance

The Treasury Department (Treasury) and the Internal Revenue Service (IRS) announced that defined benefit pension plans will receive automatic approval to select a new choice of interest rates for the first plan year beginning in 2010, regardless of the choices made for earlier plan years. This will allow plans to use the spot yield curve for 2009 (as allowed by guidance earlier this year) and "switch back" to the smoothed rate of valuation for 2010. Under the regulations, plan sponsors may choose to use either a spot yield curve (the "full yield curve" based on the average of rates during a specified month) or smoothed yield curve (the "segment rate" based on an average over 24 months). However, for 2010, plans using the spot rate would be limited to the spot rate for the month before the month of their valuation date.

The IRS published final regulations governing defined benefit plan funding and benefit restrictions on October 15 but decided to provide additional information from the final regulations to assist actuaries in issuing the certified funding status for 2009 (called the "adjusted funding target attainment percentage," or AFTAP).

Under proposed regulations, a plan that fails to receive an AFTAP certification before October 1 is deemed to be less than 60 percent funding and subject to significant restrictions including no further benefit accruals and no payments of lump sum distributions. Some plan sponsors were waiting to make the spot rate election for 2009 because they were unsure whether they would be permitted to switch back. Plan sponsors had until Tuesday, September 30, 2009 to make their choice and obtain their AFTAP certification.

The March 2009 Employee Plans Newsletter Special Edition allowed plans to use the spot yield curve for plan years prior to the effective date of the final regulations and stated that plan sponsors could use an applicable "lookback" month (instead of only December for calendar year plans, as stated in the proposed regulations) for the interest rate choice. For calendar year plans, plan sponsors could use the corporate bond yield curve for September 2008, October 2008, November 2008, December 2008 or January 2009. Since interest rates declined considerably below October and November rates by December of 2008, this flexibility made a significant difference in funding obligations and provided some relief for plan sponsors. However, using the “spot rate” or full yield curve instead of the smoothed yield curve would likely lead to considerably more volatility because previous rules required IRS approval to switch back. Although the new guidance announces that plans will be allowed to switch back, it also eliminates the ability to use the "lookback" month for the spot rate or full yield curve for plan years beginning after 2009.

Despite the provision of some regulatory and legislative relief, 2009 funding obligations still present a challenge for many employers and companies are now preparing for large obligations in 2010 and beyond. Although the permitted interest rate "switchback" helps address some plan sponsors’ concerns, others still face very significant obligations, but leading organizations are continuing to advocate for additional legislative and regulatory relief.

IRS Issues Retirement Plan Guidance, Including Rollover Distribution Safe Harbors

The U.S. Treasury Department (Treasury) and the Internal Revenue Service (IRS) published substantial retirement plan guidance in the Internal Revenue Bulletin 2009-39 on September 28. Most significantly, this guidance includes long-awaited safe harbors for the provision of rollover distributions under Section 402(f) of the Internal Revenue Code and new guidance relating to automatic enrollment in employer-sponsored plans.

In connection with the release, both President Barack Obama and Treasury Secretary Tim Geithner announced the new automatic enrollment initiatives that will complement the president’s major legislative proposals to boost participation in IRAs and match retirement savings.

Notice 2009-68 specifically contains two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy Section 402(f) of the tax code, under which plan administrators are required to provide a written explanation to any recipient of such an eligible rollover distribution. The first of these safe harbor explanations applies to a distribution not from a designated Roth account, as described in Section 402A of the tax code. The second explanation applies to a distribution from a designated Roth account. These safe harbor explanations update the safe harbor explanations that were published in Notice 2002-3, 2002-1 C.B. 289, to reflect changes in the law.

Other guidance intended to facilitate use of automatic enrollment include:

- Revenue Ruling 2009-30, guidance on how automatic enrollment in a 401(k) plan can work when there is an escalator feature (periodic automatic increases) included.

- Revenue Ruling 2009-31, guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit annual contributions of an employee's unused paid time off under the employer's paid time off plan, and Revenue Ruling 2009-32, guidance on the tax consequences of an amendment to a tax-qualified retirement plan to permit contributions for an employee's accumulated and unused paid time off under the employer's paid time off plan at a participant's termination of employment.

- Notice 2009-65, providing two sample amendments that sponsors of 401(k) plans can use to add automatic enrollment features to their plans.

- Notice 2009-66, guidance to facilitate automatic enrollment in SIMPLE IRA plans, including questions and answers relating to the inclusion in a SIMPLE IRA plan of an automatic contribution arrangement. This notice also requests comments on whether the U.S. Department of the Treasury and the IRS should issue guidance regarding SIMPLE IRA plans that include eligible automatic contribution arrangements under tax code Section 414(w).

- Notice 2009-67, a sample amendment that can be used by a sponsor of a SIMPLE IRA Plan (as described in Section 408(p) of the tax code) to add an automatic contribution arrangement to the plan.

IRS Issues Guidance on Required Minimum Distributions

On September 24, the Internal Revenue Service (IRS) released Notice 2009-82, providing guidance on the waiver of 2009 required minimum distributions (RMDs) from defined contribution plans and IRAs under The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA).

WRERA, enacted in December 2008 and effective beginning in 2009, temporarily waived RMD rules during 2009 for qualified plans and IRAs and allowed certain amounts distributed as 2009 RMDs to be rolled over into an IRA or another retirement plan. 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, as clarified in the Summer 2009 edition of the Internal Revenue Service (IRS) "Retirement News for Employers" newsletter.

The notice provides two sample amendments that plan sponsors may use to amend their plans to reflect the WRERA waiver of 2009 RMDs. The first sample amendment indicates participants will receive those distributions for 2009 unless the participant or beneficiary chooses not to receive them. The second sample amendment provides that participants will not receive the distributions unless the participant or beneficiary chooses to receive them. Both sample amendments also allow the employer to offer direct rollover options of some or all 2009 RMDs. Plan sponsors may need to tailor the sample amendment to their plan's particular terms and administration procedures and must adopt the amendment no later than the last day of the first plan year beginning on or after Jan. 1, 2011 (Jan. 1, 2012 for governmental plans).

Notice 2009-82 provides relief for people who have already received a 2009 required minimum distribution this year. Individuals generally have until the later of Nov. 30, 2009, or 60 days after the date the distribution was received, to roll over the distribution. The distributed amounts generally can be rolled over back into the same plan if the plan permits the rollovers. However, the notice does not provide relief from the one-rollover-per-year limitation on IRAs (not applicable to qualified plans). Therefore, no more than one distribution from an IRA in 2009 will be eligible for the rollover relief. The notice also provides transition relief through November 30, 2009, for a plan that is not operated in accordance with its terms with respect to RMDs and certain related payments.

The notice provides additional guidance in the form of questions and answers. For example, the notice extended the deadline for electing whether the five-year rule or life expectancy rule will apply to the benefits of a deceased participant (effectively to the end of 2010 if the deadline, without regard to the RMD changes in WRERA, would be the end of 2009), and allows the nonspouse beneficiary until the end of 2010 to make a direct rollover and use the life expectancy rule (modifying the special rule in Notice 2007-7). However, the guidance notes that there are several deadlines not extended, such as the deadline of September 30 following the year of death for determining designated beneficiaries; the October 31 deadline for the trustee of a trust that is a plan's designated beneficiary to provide certain information to the plan administrator; and the last-day-of-the-year deadline for establishing separate accounts.

The notice also:

- indicates when spousal consent will be required to suspend distributions in 2009 and restart them in 2010;
- provides that the first distributions in 2009 are 2009 RMDs (unless there are prior year undistributed RMDs);
- gives guidance on withholding obligations; and
- clarifies that WRERA did not affect the income inclusion rules under Code Section 72(t) for substantially equal periodic payments if they are stopped prior to age 59-1/2 or prior to 5 years from the date of the first payment.

Regulators Provide Multiemployer Defined Benefit Funding Guidance

The Internal Revenue Service (IRS) and the Department of Labor (DOL) Employee Benefit Security Administration (EBSA) have each issued rules guiding multiemployer pension plan administration.

IRS Revenue Procedure 2009-43, issued on September 10, sets forth circumstances and procedures under which IRS will automatically approve a request to revoke a Section 204 election. This revenue procedure acts with IRS Notice 2009-42, which provides an extension for multiemployer plans to make a defined benefit plan funding election under sections 204 and 205 of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). Section 204 of WRERA provided multiemployer plan relief by permitting 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. Similar relief for single-employer plans has not yet been issued.

The DOL/EBSA proposed regulations on September 4 that establish procedures for the assessment of civil penalties under ERISA Section 502(c)(8) against multiemployer plan sponsors for certain plans that are endangered or in critical status. Under Section 502(c)(8) of ERISA, added by the Pension Protection Act of 2006 (PPA), the Secretary of Labor is granted authority to assess civil penalties against any plan sponsor of a multiemployer plan for certain violations of ERISA notification and certification requirements for multiemployer plans that are in either endangered or critical status. The proposed regulations set these penalties at as much as $1,100 a day for each violation.

IRS Launches Retirement Plans Web Site

The Internal Revenue Service (IRS) recently launched http://www.retirementplans.irs.gov, a Web site intended "to help employers navigate through tax-favored retirement plan options and to make it easier for their employees to save for the future." It is designed to encourage small business owners to establish retirement plans by helping them choose the right plan for their business, while also promoting compliance with tax law by providing information and resources on maintaining plans and correcting plan errors.

The Web site's "About the Navigator" page also directs employer plan sponsors with technical and procedural questions to the Retirement Plans Frequently Asked Questions (FAQs) or the Employer Plan Customer Account Services on IRS.gov.

DOL Issues Guidance on ERISA 404(c) Requirements

The Department of Labor (DOL) Employee Benefit Security Administration (EBSA) issued Field Assistance Bulletin 2009-3 on September 8, describing the circumstances under which a participant-directed individual account plan may satisfy the prospectus delivery requirements of ERISA Section 404(c) by furnishing a “Summary Prospectus.”

ERISA Section 404(c), provides a set of guidelines that a plan sponsor can follow to avoid potential fiduciary liability for the investment decisions made by plan participants (assuming the plan fiduciaries prudently select and monitor the investment options available to the participant).

The FAB allows plans to take advantage of updated prospectus disclosure changes adopted by the Securities and Exchange Commission (SEC). According to a DOL news release, "The Summary Prospectus is a short-form document, written in plain English and user-friendly format. The document’s contents provide a summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. In addition, if a participant or beneficiary wishes additional information, the Summary Prospectus provides an Internet address that leads directly to the broader statutory prospectus as well as a telephone number and e-mail address for obtaining free of charge in paper or by email the statutory prospectus and other information."

IRS Notice Provides Guidance on Rollovers from Employer Plans to Roth IRAs

On September 8, the Internal Revenue Service (IRS) released Notice 2009-75, which describes the federal income tax consequences of rolling over an eligible rollover distribution from a qualified plan (described under 401(a), 403(b) or 457(b) of the tax code) to a Roth IRA. Specifically, the guidance indicates what amount is included in gross income as a consequence of a rollover to a Roth IRA from an eligible employer plan: For amounts rolled over from a designated Roth account in an eligible employer plan, none of the rolled-over amount will be included in the distributee's gross income. For amounts rolled over from accounts other than a designated Roth account, the amount that would normally be taxable if not rolled over will be included in the distributee’s gross income for the year of the distribution.

The guidance also clarified that rollovers from designated Roth accounts to Roth IRAs are permitted during 2009 regardless of income. However, rollovers from accounts other than designated Roth accounts will not be permitted during 2009 unless the distributee's modified adjusted gross income does not exceed $100,000 (married or single) and the distributee files a joint federal income tax return with his or her spouse. This income limitation has been eliminated for distributions (or conversions) on or after January 1, 2010.

IRS Issues Final Regulations on Excise Taxes for HSA Contributions, COBRA Plans

On September 8, the Internal Revenue Service (IRS) published final regulations providing guidance on employer comparable contributions to Health Savings Accounts (HSAs) under Section 4980G of the Internal Revenue Code. Under Section 4980G, an excise tax is imposed on an employer that fails to make comparable contributions to the HSAs of its employees. In general, the comparability regulations require that employers make the same contribution to all individuals who are in the same category of employee and have the same level of high deductible health plan coverage.

The final regulations also provide guidance relating to the manner and method of reporting and paying the excise tax imposed under COBRA continuation coverage and HIPAA requirements. In general, group health plans maintained by an employer with 20 or more employees must comply with federal continuation coverage requirements. If a plan does not satisfy these requirements, an excise tax is imposed of $100 per day per affected individual. The final regulations provide that these excise taxes must be reported on new Form 8928.

DOL, IRS Post Reminders for COBRA Premium Payments

The IRS issued a reminder that COBRA subsidy recipients who later become eligible for other health coverage notify their former employer to avoid a penalty. Under the Internal Revenue Code, if an individual continues to receive the subsidy after they are eligible for other group health coverage, such as coverage from a new job or Medicare eligibility, the individual may be subject to a penalty of 110 percent of the subsidy provided after they became eligible for the new coverage.

As we have reported in a number of communications and membership-wide conference calls, the American Recovery and Reinvestment Act (ARRA) included a temporary subsidy of COBRA coverage for individuals (within certain income limits) who have been involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009. The U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) also linked the IRS reminder on its dedicated Web site for the COBRA subsidy program

RECENT JUDICIAL ACTIVITY

District Court Reverses Ruling in 401(k) Stock-Drop Case

The U.S. District Court for the Southern District of New York ruled in favor of Citigroup in class-action litigation regarding the drop in value of company stock in a 401(k) plan.

In re Citigroup ERISA Litigation centers on a claim that defendants breached their fiduciary duties by offering company stock as an investment option in two retirement plans. U.S. District Judge Sidney H. Stein dismissed each of the claims, writing that the plaintiffs:

- failed to state a claim that defendants breached their fiduciary duties by offering Citigroup stock as an investment option;
- failed to state a claim that defendants breached their fiduciary duties by failing to provide "complete and accurate" information to plan participants;
- failed to state a claim that Citigroup and its directors breached their fiduciary duties by failing to monitor Plan fiduciaries;
- failed to state a claim that Citigroup and its directors breached any duty to disclose information to Plan fiduciaries;

- failed to state a claim that defendants breached their fiduciary duties by performing their Plan duties while they had conflicts of interest; and

- failed to state a claim based on the theory of co-fiduciary liability.

It is not yet known whether the plaintiffs will file an appeal.

District Court Reverses Judgment in Pension Discrimination Case

The U.S. District Court for the District of Colorado issued an opinion in the case of *Tomlinson v. El Paso Corporation*, reversing a previous judgment for the defendants. The reversal was based on the Lilly Ledbetter Fair Pay Act (S. 181), which allows the statute of limitations to begin again each time a discriminatory payment of wages or other compensation is made.

(This legislation was a response to the U.S. Supreme Court decision in Ledbetter v. Goodyear, under which employees were required to sue for pay discrimination within a specific statutory period of time. President Obama signed the Lilly Ledbetter Fair Pay Act into law on January 28.)

In the case of *Tomlinson v. El Paso Corporation*, an age discrimination claim was based on the existence of a "wear-away" period, under which an employee may not accumulate additional pension benefits for some period of time following a plan amendment. Originally, the district court had dismissed the case for a lack of timeliness, based on the Supreme Court's decision in Ledbetter, concluding that the discriminatory act was the cash balance conversion amendment, which was completed far more than 300 days before the filing of the suit (the statute of limitations). Moreover, the court originally observed that it "was undisputed that Mr. Tomlinson understood before 2001 that the wear away effect would occur in his case and that he received notification in September 1999 which clearly showed, in bar graph form, the time it would take for his cash balance account to catch up to his frozen pre-conversion benefit."

In the new decision, the court holds that the Ledbetter legislation requires a reversal of the original decision that the court case was not timely filed. While the court's latest decision acknowledged that the Ledbetter act preserves the existing law that payments from the plan would not extend the statute of limitations, the court noted that, under the Ledbetter statute, the allegedly discriminatory act was the accrual of benefits that did not increase Tomlinson's benefit due to the wear-away period. Thus, this case applies the Ledbetter legislation to open up the statute of limitations with respect to the filing of cash balance discrimination cases, such as wear-away cases.