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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

<u>PLEASE NOTE</u>: The Health Care Update is updated through December 24, 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 January Issue.

Health Care Reform Update: Senate Approves Final Legislation

On the morning of December 24, the Senate officially approved the Patient Protection and Affordable Care Act (H.R. 3590) on a narrow 60-39 party-line vote (with Senator Jim Bunning (R-KY) not voting). The final bill incorporates the changes included in the "manager's amendment" introduced on December 19 by Senate Majority Leader Harry Reid (D-NV)

The House of Representatives approved its health reform bill, the Affordable Health Care for America Act (H.R. 3962), on November 7. To resolve the many differences between these two measures (including tax policy, employer responsibilities and the public plan option), Congress will have a number of options:

- The House and Senate may enter into a "conference," in which a compromise measure is negotiated from the House and Senate bills. The conference report would then need to be ratified again by both houses of Congress. (Once again, 60 votes would be needed in the Senate to proceed to a vote on the conference agreement.) During the conference process, additional changes could be made to the bill, including changes that had not been previously included in either the House or Senate bill. However, the narrow margin of victory in the Senate underscores both the lack of bipartisan support and the very delicate balance struck by Senate leadership in crafting its bill. Even slight changes on any of a number of controversial issues – such as the public plan option, tax policy or abortion language – could jeopardize final passage in that chamber.
- The House could choose to consider the Senate bill directly, without any changes, obviating the need for any further Senate action. Instead of negotiating between House and Senate versions, this approach would require the President and the House Democratic leadership to use their influence to persuade House Democrats to agree. This strategy would require the more liberal members of the House to concede a number of closely-held issues. However, it also would likely mean that a number of the 39 "blue dog" moderate to conservative Democrats who voted against the House bill would be more inclined to support the Senate measure if it is brought to the House for a vote.
- The House could also take up the Senate bill, amend it as desired and approve it – and then send it back to the Senate, which could change the measure further and send it back to the House. This process, colloquially known as "ping-ponging," would continue until identical legislation passed both chambers. If this approach is adopted, it would seem unlikely that substantial changes would be made since it could drag out the process considerably.

While President Obama has publicly requested that legislation be ready for his signature by the State of the Union address (typically given during the last week of January), this is an artificial deadline and there are already reports on Capitol Hill that completion could slip into February 2010. With recent polling data suggesting that public opinion is beginning to oppose the legislation, Congress and the President are likely to push for as swift a resolution as possible.

DOL Further Delays Investment Advice Regulations

The U.S. Department of Labor (DOL) will once again delay the applicability and effective dates of the final investment advice regulations under the Pension Protection Act of 2006 (PPA) from November 18, 2009, to May 17, 2010, according to an issuance that will be published in the November 17 Federal Register. This is the third such delay in the effective date since the final regulations were initially published on January 21.

The final regulations (which incorporate the class exemption) allow investment advice to be provided in two ways: (1) through the use of a computer model certified as unbiased, or (2) through an adviser compensated on a "level-fee" basis.

DOL is also preparing to re-propose regulations on the investment advice prohibited transaction exemption related to providing investment advice to participants in individual account plans. Recent agency activity suggests that the DOL has withdrawn and re-submitted new proposed regulations for procedural review by the U.S. Office of Management and Budget. The content of the new proposed regulations is still unknown.

The House of Representatives Education and Labor Committee has already approved the Fair Disclosure and Pension Security Act (H.R. 2989), which would replace the ERISA investment advice provisions enacted through PPA.

Ways and Means Democrats Introduce Retirement Plan Nondiscrimination Legislation

Representative Lloyd Doggett (D-TX), a Member of the U.S. House of Representatives Ways and Means Committee, introduced the Retirement Fairness Act (H.R. 4126) on November 19.

H.R. 4126 would amend the Internal Revenue Code to modify the nondiscrimination rules in qualified retirement plans. Initial analysis of H.R. 4126 indicates that:

- Under the bill, only vested benefits of non-highly compensated employees may be taken into account for nondiscrimination testing purposes, but all benefits of highly compensated employees would be taken into account. This rule is likely to cause plans with a vesting schedule to have more difficulty satisfying the nondiscrimination rules. In some cases, such as new plans, such plans may almost automatically fail the nondiscrimination tests even though all employees are benefiting under the same benefit formula.
- The bill includes a rule under which employers would only receive partial credit for covering a non-highly compensated part-time worker, which could hurt an employer's ability to satisfy the coverage tests. It also appears that employers would be required to count hours in order to apply this rule, which would be a very significant administrative burden. The bill establishes one fixed definition of full-time: 2,080 hours during a year.
- The bill would prohibit "cross-testing". This would mean that defined contribution plans must be tested for discrimination based on the contributions made, rather than based on the benefits that would be generated by those contributions. This would affect defined contribution plans that provide nonelective contributions that are not a uniform percentage of pay or structured to fit within the permitted disparity rules. The prohibition on cross-testing would make a number of alternative plan designs problematic.

- The bill would require cash balance plans to be tested for discrimination based on contributions, rather than based on benefits. (It appears, though not clearly, that this rule would not apply to pension equity plans.) This could create testing issues for the majority of cash balance plans, which increase pay credits based on age and/or service. This would also create significant problems for plans that provide additional transition pay credits for older workers to make up for the loss of the traditional defined benefit plan formula. In addition, it is unclear how the rule would apply where some defined benefit plan participants (such as new hires) are covered by the cash balance formula and some are covered by the traditional formula.
- Technically, the bill provides Treasury with the authority to permit defined contribution plans and cash balance plans to be tested on the basis of benefits. However, the bill also severely limits this authority. In general, under the bill, such authority may only apply where the contribution or benefit under the plan, of any participant, expressed as an annuity beginning at normal retirement age, is not less than a similarly expressed benefit of any younger participant.
- All of these rules would apply to plan years beginning after the date of enactment, which would obviously be problematic in light of the scope of the changes that would be required and the guidance from Treasury that would be necessary.

Doggett's bill was introduced with seven fellow Democratic Ways and Means Members as co-sponsors – Pete Stark (CA), Jim McDermott (WA), John Lewis (GA), Bill Pascrell (NJ), Linda Sanchez (CA), John Yarmuth (KY), and Earl Blumenauer (OR) – and referred to the committee for its consideration. The number of cosponsors is significant since it increases the likelihood that there will be support for consideration of the bill within the committee.

Congress Enacts, President Signs Extension of COBRA Subsidy Program

On December 16, the U.S. House of Representatives approved the Department of Defense Appropriations Act for Fiscal Year 2010 (a House Amendment to the Senate Amendment to H.R. 3326). The legislation was approved by the Senate on December 19 and signed by President Obama on December 21. Section 1010 of the bill (beginning on Page 154) extends the COBRA continuation coverage premium assistance program established under the American Recovery and Reinvestment Act of 2009 (ARRA). The premium assistance program expires on December 31, 2010.

ARRA provided a nine-month subsidy for COBRA coverage to individuals involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009, and who lose employer-sponsored coverage during that period. The appropriations bill approved today provides:

- a two-month extension of eligibility for COBRA coverage, from December 31, 2009, to February 28, 2010; and
- a six-month extension of the duration of the premium subsidy period, from 9 months to 15 months.

Under the notice provisions of Section 1010, individuals who are assistance-eligible at any time on or after October 31, 2009, or experience a qualifying event (consisting of termination of employment) on or after that date, must be provided additional notification with information regarding the extended premium assistance within 60 days after the date of enactment. In the case of qualifying events after date of enactment, notice must be provided consistent with ARRA's timing of notification requirements.

Additional provisions related to the ARRA COBRA premium subsidy are included in the Jobs for Main Street Act (a House Amendment to the Senate Amendment to H.R. 2847). The House approved this "jobs bill" prior to adjournment this year, though the Senate is not expected to consider the legislation until early next year. Section 3302 of the bill (beginning on Page 100) includes:

- a six-month extension of premium assistance eligibility, from December 31, 2009, to June 30, 2010;
- a six-month extension of the duration of the premium subsidy period, from 9 to 15 months; and
- a clarification that eligibility includes those who lose coverage due to reduction in hours and who subsequently experience an involuntary termination. These individuals would be eligible for premium assistance prospectively.

The jobs legislation also includes several clarifications related to the ARRA premium subsidy program, including clarification that eligibility for retiree health benefits does not disqualify eligibility for COBRA premium assistance, codification of existing regulatory guidance that provides a “reasonable interpretation” standard for employer determinations of “involuntary termination” and application of COBRA enforcement provisions to the premium assistance program.

Republican Alternative 401(k) Fee Disclosure Bill Introduced

On November 20, Representative John Kline (R-MN), ranking Republican member on the House of Representatives Education and Labor Committee, introduced the Sensible Transparency for Retirement Plans Act (H.R. 4146), a measure to reform 401(k) fee disclosure practices among service providers, plan sponsors and plan participants. The measure will not likely be taken up by the House Education and Labor Committee which has already passed the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), introduced by Committee Chairman George Miller (D-CA) (which also includes provisions on investment advice and defined benefit pension funding relief).

Chairman Miller's bill, H.R. 2989, has been referred to the House Ways and Means Committee, which is expected to consider fee disclosure legislation in the coming months. Although the Kline fee disclosure bill is unlikely to move forward as a stand-alone bill, it is intended to influence the debate by demonstrating an alternative approach. The Ways & Means Committee will also seriously consider the Defined Contribution Plan Fee Transparency Act (H.R. 2779), introduced by Ways and Means Committee member Richard Neal (D-MA).

Separately, on November 23 Kline and the Education and Labor Committee's Health, Employment, Labor and Pensions Subcommittee Ranking Member Tom Price (R-OH) sent a letter to U.S. Secretary of Labor Hilda Solis requesting the public and online disclosure of pension information based on Form 5500 filings. In a public statement issued on behalf of Education and Labor Committee Republicans, Kline said that the release of this information would "help workers better understand the health and viability of their defined benefit retirement plans … Unfortunately, congressional Democrats are focused on adding layers of new red tape and federal mandates even as workers are denied access to the most basic information about their retirement plans.”

GAO Issues Report on Executive Compensation and Defined Benefit Plan Terminations

The Government Accountability Office (GAO) released the November 19 report, Private Pensions: Sponsors of 10 Underfunded Plans Paid Executives Approximately $350 Million in Compensation Shortly Before Termination.

GAO had been asked by House of Representatives Chairman George Miller (D-CA) to determine what pay and other compensation executives received in the years preceding their company's termination of an underfunded defined benefit pension plan. The report analyzes 10 single-employer pension plans that were underfunded by a total of $11 billion and assumed by the Pension Benefit Guaranty Corporation. According to GAO, 40 executives for the 10 companies received a total of approximately $340 million in compensation in the years leading up to the termination of the plans. The report also focused on four case studies: two airlines, an electronics company and an insurance company.

This report is likely to be used to promote a link between executive compensation and employee pension plans. Under the Preserve Benefits and Jobs Act (H.R. 3936), extended amortization schedules would be available under one of three self-selecting maintenance-of-effort options, including 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. Lawmakers also expressed interest in aligning executive compensation and pension requirements at a recent Senate Health, Education, Labor and Pensions hearing.

H1N1 Leave Bill Introduced in House; House Committee Hears Testimony on H1N1 and Employee Paid Leave

On November 3, House of Representatives Education and Labor Committee Chairman George Miller (D-CA) led a number of his committee's fellow Democrats in introducing the Emergency Influenza Containment Act (H.R. 3991), a bill to provide guaranteed paid sick leave to employees who are directed or advised to stay home during the flu season. The House Education and Labor Committee will hold a hearing on the legislation the week of November 16.

Specifically, the bill temporarily guarantees up to five paid sick days for any worker sent home or directed to stay home by their employer for a contagious illness, such as the H1N1 flu virus. The measure applies to both full-time and part-time workers (on a prorated basis) at businesses with 15 or more workers. Employers that already provide at least five days' paid sick leave are exempt.

Under the terms of the bill, an employer can end paid sick leave at any time by informing the employee that the employer believes the employee is well enough to return to work. Employees may continue on unpaid leave under the Family Medical Leave Act or other existing sick leave policies. Employees who follow their employer's direction to stay home because of contagious illness cannot be fired, disciplined or made subject to retaliation for doing so. If enacted, the provisions would take effect 15 days after being signed into law and would expire after two years.

On November 10, the Senate Committee on Health, Education, Labor and Pensions (HELP) Subcommittee on Children and Families held a hearing on paid sick leave and the H1N1 flu. Subcommittee chairman Christopher Dodd (D-CT) announced that he was introducing emergency legislation on paid sick leave and H1N1.

On November 17, the House of Representatives Education and Labor Committee held a hearing on Protecting Employees, Employers and the Public: H1N1 and Sick Leave Policies. The hearing focused on Committee Chairman George Miller's (D-CA) Emergency Influenza Containment Act (H.R. 3991), which would provide guaranteed paid sick leave to employees who are directed or advised to stay home during the flu season.

H.R. 3991 bill temporarily guarantees up to five paid sick days for any worker sent home or directed to stay home by their employer for a contagious illness, such as the H1N1 flu virus. The Senate Committee on Health, Education, Labor and Pensions (HELP) Subcommittee on Children and Families recently held a similar hearing on paid sick leave and the H1N1 flu, with Subcommittee chairman Christopher Dodd (D-CT) announcing that he too would soon introduce emergency legislation on paid sick leave and H1N1.

In his opening statement to the hearing, Miller asserted that "the lack of paid sick leave encourages workers who may have H1N1 to hide their symptoms and come to work sick – spreading infection to coworkers, customers and the public." He encouraged the passage of his legislation to "slow the advance of H1N1 being spread through the workplace and encourage open communications between employees and their employers on sick leave policies."

The following individuals provided testimony for the committee:

- Dr. Georges Benjamin, executive director of the American Public Health Association;
- Bruce Clarke, president and CEO of Capital Associated Industries (a non-profit employers organization);
- Debra Ness, president of the National Partnership for Women and Families; and
- Dr. Anne Schuchat, assistant U.S. Surgeon General and the Director of National Center for Immunization and Respiratory Diseases at the Centers for Disease Control and Prevention.

Ness expressed strong support for H.R. 3991 and similar legislation such as the Healthy Families Act (H.R. 2460), with Benjamin and Schuchat offering mild support for the measure as part of an overall disease containment strategy. Clarke, as the sole employer representative on the witness panel, expressed opposition to H.R. 3991 and H.R. 2460, warning of the effect of a mandate on employers in the current economy. In response to questions from the committee, Clarke repeatedly argued that the working population was already well protected and that individual employer flexibility is necessary to tailor paid-leave programs to the specific workforce.

Pension Funding Relief Postponed Until Next Year

After exhaustive efforts by employers to obtain funding relief for sponsors of defined benefit pension plans, legislation was not approved before the end of the 2009 congressional session – though a narrow, temporary measure could be considered as early as January 2010.

For much of this year, employers have expressed concerns to Congressional representatives about job loss resulting from a lack of defined benefit plan funding relief. Despite a recent push for a unanimous consent agreement for temporary relief in both the House of Representatives and the Senate, the lack of time remaining in the year and other legislative priorities prevented lawmakers from reaching an agreement.

However, this does provide some momentum for legislation early in the new year. Efforts continue at the Congressional staff level to move forward with legislation in the House, where the Preserve Benefits and Jobs Act of 2009 (H.R. 3936) and the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989) each contain funding relief provisions. Any legislation to be considered in 2010 is likely to incorporate an extended period for single-employer defined benefit plans to amortize funding shortfalls over 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"). An alternative provision could allow the funding of plan losses over a 15-year amortization period. Questions remain about the required conditions for employers taking this relief, including executive compensation limitations. Companies taking advantage of the 15-year amortization could also be required to maintain an ongoing, active plan for the duration of the relief period.

The Senate process is lagging behind, with efforts underway to provide temporary, narrow relief to companies with serious concerns about the 2010 plan year, or those companies not helped by previous legislation or regulatory guidance. Broader bipartisan legislation will likely take more time to develop among leaders of the Senate Finance Committee and the Senate Health, Education, Labor and Pensions (HELP) Committee. We continue to urge the chairmen and ranking members of these committees to make public statements regarding their intent to address funding early next year.

Ways and Means Subcommittee Discusses FBAR Issues

The House of Representatives Ways and Means Committee Select Revenue Measures Subcommittee held a hearing on Foreign Bank Account Reporting (FBAR) and Tax Compliance, with a focus on non-compliance by U.S. taxpayers with foreign bank accounts, rules regarding foreign trusts with U.S. beneficiaries and certain U.S. dividend equivalent payments to foreign persons to avoid U.S. taxes.

The hearing specifically covered the recently introduced Foreign Account Tax Compliance Act (H.R. 3933). H.R. 3933 contains, among other proposals, many of the initiatives from the Administration's budget, including a mandatory 30 percent withholding on payments to foreign financial institutions unless they disclose information to the IRS on accounts owned by U.S. individuals or close the accounts, and a requirement on individuals and entities to report offshore accounts with values of $50,000 or more on their tax returns. A Joint Committee on Taxation technical explanation is now available.

During 2009, the Select Revenue Measures Subcommittee affirmed its position that offshore tax evasion should be aggressively pursued and punished. In a statement announcing the November 5 hearing, Subcommittee Chairman Richard Neal (D-MA) expressed his hope that the hearing "marks the beginning of a vigorous campaign by Congress and the Obama administration to end the practice of offshore tax avoidance by U.S. citizens."

Ranking Republican Member Pat Tiberi (R-OH), in his opening statement, expressed his desire that "efforts in this area would remain focused on compliance; that the line between illegal tax evasion and legal tax practices used by U.S. taxpayers around the world is distinct, and to blur that line may only make our compliance efforts more difficult."

Congress and the Internal Revenue Service (IRS) are concerned that significant tax evasion may be occurring by illegal use of foreign bank accounts. In particular, the IRS believes that significant tax evasion occurs through illegal use of foreign trusts. Late last year, the IRS stepped up its FBAR rules, by requiring disclosure from any U.S. person with signature or other authority over a foreign account. This broadened definition could be read to require that FBAR disclosure be filed by every U.S.-based retirement plan trustee and every other employee who has oversight authority over plan assets, provided any of the plan's assets are invested outside the United States. In addition, the expanded reporting requirement could be read to include employees of U.S. parent companies who have oversight or other authority over employee benefits plans of foreign subsidiaries.

RECENT REGULATORY ACTIVITY

Treasury, IRS Issue Priority Guidance Plan for 2009-2010

On November 24, the U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) released the 2009-2010 Priority Guidance Plan, listing those issues that will be the subject of formal guidance during the next year. The plan contains 315 projects to be completed by June 2010, including 42 items addressing retirement benefits (Pages 4-8 of the document) and 30 items addressing executive compensation, health care and other benefits (Pages 8-10). A number of these items have already been completed, as indicated in the plan. An appendix also lists additional routine guidance that is published each year.

Other areas addressed in the plan include consolidated returns; corporations and their shareholders; excise taxes; exempt organizations; financial institutions and products; gifts, estates and trusts; insurance companies and products; international issues; partnerships; subchapter S corporations; tax accounting; tax administration; tax-exempt bonds and other general tax issues.

The agencies issued a joint statement with the plan requesting feedback from the public, saying "The published guidance process can be fully successful only if we have the benefit of the insight and experience of taxpayers and practitioners who must apply the rules."

PBGC Issues Additional Guidance on Maximum Guarantees, Reportable Events

The Pension Benefit Guaranty Corporation (PBGC) continues to provide guidance with respect to defined benefit pension plans.

On November 23, the agency published the maximum guarantee tables for 2010, indicating the maximum pension benefit that may be paid by the PBGC with respect to a plan participant in a single-employer pension plan that terminates during the year. Under the benefit restrictions enacted by the Pension Protection Act of 2006 (PPA), single-employer plans that are between 60 and 80 percent funded may not pay lump sums or other accelerated distribution forms with values in excess of: (1) 50 percent of the amount that would be paid absent the restriction or, if smaller, (2) the present value of PBGC's maximum guarantee. The maximum guarantee amount changes each year, based on the methodology provided in Technical Update 07-4.

Also, in conjunction with the proposed regulations modifying reportable event requirements, PBGC has issued Technical Update 09-4, which provides guidance for plan years beginning in 2010 on compliance with the current reportable events requirements of Section 4043 of ERISA and PBGC's regulation on Reportable Events and Certain Other Notification Requirements. Specifically, the technical update addresses two topics: (1) Funding-related determinations for purposes of waivers, extensions, and the advance reporting threshold test; and (2) missed quarterly contributions.

PBGC is expected to issue more regulations in the coming weeks, including the notice of 2010 flat rate premiums

In other PBGC news, President Obama has announced that he will soon nominate Joshua Gotbaum as director of the agency. Gotbaum is currently an operating partner at Blue Wolf Capital. He previously served the Clinton Administration as executive associate director and controller in the Office of Management and Budget; as assistant secretary of Treasury for economic policy and as assistant Secretary of Defense. He previously served as an investment banker with Lazard Frères in New York and London. During the Carter administration, he served on the White House staff and in the Department of Energy. No timetable has yet been set for his confirmation by the U.S. Senate. Vincent K. Snowbarger will continue to serve as acting PBGC director until Gotbaum's confirmation.

IRS Issues Final Regulations on 204(h) Notices

The Internal Revenue Service (IRS) released final regulations on required notices under Section 204(h) of ERISA (Tax Code Section 4980F) addressing advance notice requirements for amendments that are permitted to reduce benefits accrued before the amendment's applicable amendment date. The regulations also reflect certain amendments made to the 204(h) notice requirements by the 2006 Pension Protection Act (PPA). This portion of the Internal Revenue Code and ERISA sets forth the requirements for providing notice – often referred to as a "Section 204(h) notice" – to certain affected persons when a plan significantly reduces future benefit accruals.

The final regulations have only a few changes and clarifications from the proposed regulations issued in March. Like the proposed regulations, the final regulations indicate plans will be treated as having complied with the 204(h) notice requirements if they meet the separate notice requirements with respect to the following:

- notice of retroactive amendments reducing accrued benefits described in Code Section 412(d)(2);
- benefit limitation notice with respect to benefit restrictions under Code Section 436;
- notice required for a reorganized multiemployer plan;
- notice of the effects of the insolvency status of a multiemployer plan; or
- notice of amendment reducing benefits under a multiemployer plan as permitted under the PPA.

One important clarification relates to whether a 204(h) notice is required to be provided when adding PPA's potential benefit restrictions under Code Section 436 (when a plan's funded status is less than 80 percent or 60 percent). This notice is under 101(j) of ERISA and providing the 101(j) notice meets the 204(h) notice requirements as described above (second bullet point). Questions have been raised as to whether a 204(h) notice is required when a notice is never required under Section 101(j) of ERISA (because the plan never becomes subject to the 436 restrictions), or is not required for a considerable period of time. The IRS answer is not perfectly clear but appears to indicate that no 204(h) notice is required when it appears at the time of the amendment that no reduction will occur. If an unforeseen reduction does occur in the future, issuing the 101(j) notice (within 30 days after the benefit restrictions take effect) would also meet the 204(h) notice requirements. However, failing to provide the 101(j) notice, when applicable, would be a violation of both sections.

Other significant changes include

- clarification that a 204(h) notice does not need to be provided to the employer in a single-employer plan;
- adding Section 1107 of PPA (relating to retroactive amendments generally made during the plan year beginning in 2009) was added as a statutory exception to the general anti-cutback rule in Code Section 411(d)(6) (which generally prohibits amendments cutting previously accrued benefits; and
- language indicating the IRS would issue guidance in the near future which would address the special notice time period (30 days after) permitted for certain hybrid plan amendments done in 2009 as described in Announcement 2009-82.

DOL/EBSA Withdraws Final Investment Advice Regulations

On November 19, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) formally withdrew its final regulations interpreting the investment advice provisions of the Pension Protection Act of 2006 (PPA) and the accompanying administrative class exemption. This action was expected following the recently announced additional delay of the effective date of the final rule originally published in the Federal Register on January 21, 2009, immediately after President Obama's inauguration (but delivered to the Federal Register at the close of the Bush Administration).

The withdrawal notice indicates that EBSA now believes the conflict of interest protection in the class exemption may not have been sufficient. The notice summarizes some of the comments EBSA received in the most recent comment period on the prior rule, including criticism of allowing affiliates of a fiduciary adviser to receive differential compensation under the fee-leveling prong of PPA. The notice also indicates that new proposed regulations will be published in the Federal Register shortly. It appears the re-proposed rule will not include an administrative class exemption.

PBGC Issues Regulations on USERRA Benefits Under ERISA

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations on November 17 addressing benefits provided under the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) in the event of a terminated defined benefit pension plan. USERRA, which establishes certain rights and benefits for employees that serve or have served in the uniformed services and prescribes certain duties for their employers, specifically provides that an individual who leaves his or her job to serve in the uniformed services is generally entitled to re-employment by his or her previous employer and, upon re-employment, to receive credit for benefits, including employee pension plan benefits, that would have accrued but for the employee's absence due to the military service.

The final regulations amend PBGC's final regulations on benefits payable in terminated single-employer plans to address the benefits for participants who are serving in the uniformed services at the time that their pension plan terminates. Under PBGC's existing regulations, a benefit is guaranteed only if the participant satisfies the conditions for entitlement to the benefit on or before the plan's termination date.

Under the unique circumstances of persons serving in the uniformed services as of the plan's termination date, the final regulations provide an exception to this rule allowing such persons, upon re-employment, to be treated as if they had never left the employ of their former employer. As long as a service member is reemployed within the time limits set by USERRA, even if the re-employment occurs after the plan's termination date, PBGC will treat the participant as having satisfied the re-employment condition as of the termination date. This will ensure that the pension benefits of reemployed service members, like those of other employees, would generally be guaranteed for periods up to the plan's termination date.

The regulations become effective December 17, 2009, and will apply to re-employments under USERRA initiated on or after December 12, 1994. U.S. Department of Labor (DOL) final regulations implementing USERRA were issued in July 2005 and summarized by Davis and Harman, LLP.

IRS Issues Final Regulations for Stock Programs

On November 17, the Internal Revenue Service (IRS) issued final regulations regarding options granted under an employee stock purchase plan (ESPP), including minor changes for incentive stock option (ISO) plans. The IRS also unveiled new rules related to the reporting requirements for stock options issued pursuant to ESPP and ISO plans. The IRS previously released proposed regulations in July 2008.

Final regulations on employee stock purchase plans (ESPP) under Internal Revenue Code Section 423 clarify the rules regarding options granted under an ESPP, setting forth the requirements that a stock purchase plan must meet to qualify as an ESPP. The final rules provide that certain requirements may be satisfied by the terms of the plan or an offering made under the plan.

The regulations are effective as of November 17, 2009, and apply as of January 1, 2010. The regulations discuss:

- General requirements;
- Offerings under a plan, including employees covered by the plan and equal rights and privileges applicable to the participants of each offering under a plan;
- The maximum number of shares that may be purchased by an employee;
- The annual $25,000 limitation on the accrual of stock rights under Code Section 423(b)(8); and
- Stockholder approval requirements.

The IRS also issued final regulations on the information reporting requirements under Internal Revenue Code Section 6039 for the exercise of options under ESPPs and ISOs. The Tax Relief and Health Care Act of 2006 modified pre-existing reporting rules by requiring that corporations report to the IRS as well as the employee (prior to 2007, corporations were only required to provide information to the affected employees). The new reporting requirements to the IRS have been waived for 2007, 2008 and 2009 but enhanced information must be provided to the employees who exercised options during those years. The final regulations provide guidance to assist corporations in complying with the return and information statement requirements under Section 6039. For 2007, 2008 and 2009 reporting to employees, employers can rely on final regulations issued in 2004 (prior to the 2006 legislation) or proposed regulations issued in July 2008. For 2009 reporting, employers can also rely on the new final regulations.

These regulations are also effective as of November 17, 2009. The regulations state that "[a] principal objective of these final regulations is to require corporations to furnish employees with sufficient information to enable them to calculate their tax obligations upon disposition of the shares acquired by the exercise of a statutory option." The IRS intends to issue two forms (with accompanying instructions) that corporations must use to satisfy the return and information statement requirements under Section 6039.

PBGC Announces $22 Billion Deficit

The Pension Benefit Guaranty Corporation (PBGC) announced on November 13, with the release of its annual report, that the organization ended Fiscal Year 2009 with an overall deficit of $22 billion. The result is an increase from the $11.2 billion deficit recorded at the previous fiscal year-end on September 30, 2008, but does not match the $33.5 billion deficit projected in a PBGC interim report in May.

The $22 billion figure reported for the fiscal year ending September 30 is $11 billion greater than the figure for last year and $11 billion less than the projected figure just six months ago.

IRS Issues Long-Awaited Hybrid Plan Guidance

On November 10, the Internal Revenue Service (IRS) issued Announcement 2009-82, providing transitional and procedural guidance for sponsors of hybrid pension plans that must amend the interest crediting rate in those plans.

Under the Pension Protection Act of 2006, a hybrid pension plan (such as a cash balance plan) will not satisfy the age discrimination rules if it credits interest at a rate that exceeds a market rate of return. The PPA provides relief from the anti-cutback rules for plan amendments that would reduce an above-market rate of return to a market rate, but this relief expires at the end of the 2009 plan year.

Announcement 2009-82 confirms that:

- IRS will soon issue final and proposed regulations regarding what constitutes a "market rate of return."
- the market-rate-of-return regulations will not go into effect before the first plan year that begins in 2011;
- plan sponsors making a rate-of-return amendment before the effective date of the regulations will not violate Internal Revenue Code Section 411(d)(6) (regarding protected benefits) even if done after the last day of the first plan year beginning in 2009 (the PPA remedial amendment period);
- there is special deadline relief for the 204(h) notice (the notice of an amendment that would possibly reduce future benefit accruals) completed for an amendment that is effective not later than the first day of the first plan year that begins on or after January 1, 2010. That notice is due 30 days after the effective date of the amendment (instead of the typical 45 days before).

RECENT JUDICIAL ACTIVITY – Nothing To Report.