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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 2

Health Care Reform Update: 2
Short and Long-term COBRA Extensions under Immediate Consideration 2
Doggett Circulating Draft Retirement Plan Nondiscrimination Legislation 3
Obama 2011 Budget Analysis: Health and Retirement Plan Proposals 3

RECENT REGULATORY ACTIVITY 6

DOL Issues New Proposed Investment Advice Regulations 6
DOL Announces Outreach, compliance assistance for 403(b) Plans 7
DOL/EBSA Issues Revised Application for Review of COBRA Subsidy Denial 8
DOL Issues Model Employer CHIP Notice of Premium Assistance 8
Mental Health Parity Interim Final Regulations Released 9
DOL, IRS Request Comments on Lifetime Income Options for Retirement Beneficiaries 9

RECENT JUDICIAL ACTIVITY – Nothing To Report.

RECENT LEGISLATIVE ACTIVITY

PLEASE NOTE: Health Care Reform is updated through March 9, 2010, 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 any updates in the April Issue.

Health Care Reform Update

On March 2, President Obama sent a letter to congressional leadership summarizing the events of the White House health care summit on February 25. As we reported in last month's addition of the WEB Benefits Insider, the President recently released a summary of his health care reform proposal, which is intended to bridge the gap between the measures already passed by the Senate and the House of Representatives.

Most notably, President Obama's letter to Congress cites "four policy priorities identified by Republican Members" that he is willing to explore as part of final legislation:

- Additional initiatives to combat fraud, waste, and abuse, including random undercover investigations (conducted by medical professionals) of health care providers that receive reimbursements from Medicare, Medicaid, and other federal programs;
- Appropriations of $50 million for additional grants to states that demonstrate alternatives to resolving medical malpractice disputes;
- Increased Medicaid reimbursements to doctors, particularly those in remote and rural areas; and
- Clarification that high-deductible health plans, commonly associated with health savings accounts (HSAs), could be offered within insurance exchanges.

President Obama also affirmed that his proposal would eliminate certain controversial state-specific arrangements, like the Medicare Advantage provision that provided transitional extra benefits for Florida and other states and the full federal Medicaid funding provision with special allowances for Nebraska, which the President has proposed to make available to all states.

Senate Majority Leader Mitch McConnell (R-KY) responded to Obama's letter later in the day, saying that Republicans "were surprised and disappointed with your latest proposal to simply paper a few of these commonsense proposals over an unsalvageable bill," and urging Democrats to "scrap the bills [Americans] have already rejected and start over with commonsense, step-by-step reforms we can all agree on."

Congressional leaders have indicated that further action on health reform is possible before Congress takes a spring recess (starting on March 29), although it is still unclear whether there are sufficient votes to approve the legislation, particularly in the House of Representatives where moderate Democrats – many of whom have still not expressed support for the measure proposed by the President – are likely to determine the outcome of the legislation.

Short and Long-Term COBRA Extensions Under Immediate Consideration

The Senate is planning consideration of legislation that would extend a number of expiring tax provisions and provide further proposals related to jobs. This legislation would further extend eligibility of the federal government's COBRA continuation coverage premium assistance program through December 31, 2010. The program is currently scheduled to expire after March 31, 2010, after the most recent extension provided by the Temporary Extension Act of 2010.

The legislation also clarifies that individuals whose hours were reduced prior to being laid off entirely would become eligible for COBRA subsidies upon subsequent involuntary termination.

The House has not yet produced a comparable bill to extend expiring tax provisions, but the Jobs for Main Street Act, approved in December 2009, does include an extension of premium assistance eligibility to June 30, 2010.

All of these measures include the clarification regarding eligibility for reduction of hours as clarified in the tax extender measure discussed above.

Doggett Circulating Draft Retirement Plan Nondiscrimination Legislation

Representative Lloyd Doggett (D-TX), a member of the House of Representatives Ways and Means Committee, is currently circulating draft legislation that would amend the nondiscrimination rules for retirement plans. Specifically, the bill directs the Secretary of the Treasury to review the current nondiscrimination regulations under Section 401(a)(4) of the Internal Revenue Code of 1986 and modify such regulations to address "abusive practices and plan designs that may comply with such current regulations but that have the effect of significantly discriminating in favor of highly compensated employees."

In its review, Treasury is to consider modifying the interest rate used for purposes of “cross-testing” defined contribution plans, which could have a dramatic effect on many plans. Treasury would also be directed to examine certain practices, which appear to include Qualified Supplemental Executive Retirement Plans (QSERPs). (QSERPs are similar to other executive compensation arrangements, like "top hat" or "excess benefit" plans, except QSERPs are provided through a qualified retirement plan.) These arrangements have come under public scrutiny because they have been characterized as providing executive benefits through qualified plans.

The legislation would also revise the treatment of part-time employees under the coverage rules, so that certain part-time employees are treated as a fraction of an employee for testing purposes. This provision, which is aimed at certain abusive practices, could impose significant burdens on many employers not engaging in such practices.

Representative Doggett sponsored a broader nondiscrimination bill, the Retirement Fairness Act (H.R. 4126), in November 2009. The new draft measure takes a much narrower approach, but still does much more than target clear nondiscrimination abuses. Doggett and the co-sponsors of the bill continue to be interested in adding the bill’s provisions to defined benefit funding legislation currently being developed by the House Ways and Means Committee. In this regard, they are interested in employer feedback on how the bill could be further narrowed so that it targets only abuses.

Obama 2011 Budget Analysis: Health and Retirement Plan Proposals

President Obama released his Fiscal Year 2011 budget outline on February 1, dedicating $3.8 trillion for the government's operation next year. The White House Office of Management and Budget (OMB) released the budget overview documents for each of the administrative agencies; historical tables, which illustrates budget data over the last century; and Analytical Perspectives, which provides a detailed discussion of certain budget concepts and Administration policies. The U.S. Treasury Department also released its General Explanations

of the Administration's Fiscal Year 2011 Revenue Proposals document, commonly known as the "green book."

The budget includes a 5.7 percent spending increase, with substantial amounts for economic recovery measures and extending many of the tax cuts enacted in 2001 and 2003. The budget also addresses a number of health and retirement benefit initiatives:

Health Care Reform

The Analytical Perspectives document notes that "increasing health costs and population aging will place the budget on an unsustainable course unless policy changes are made to address these challenges." While the President's budget does not reference the specific coverage requirements of the House of Representatives or Senate-passed health care reform legislation, the document states that "the health care legislation being considered in Congress is designed to be deficit-neutral (or better) over the next 10 years … and to slow the growth rate of health care spending over the longer term." Most notably, the administration asserts that the excise tax on high-cost insurance plans (as included in the Senate-passed reform measure) "will encourage substitution of more efficient plans with lower costs, while raising take-home pay."

As for the budgetary scoring of health care reform, the "Health insurance reform" line item in the budget table (Page 188 of the Analytical Perspectives document) indicates a net gain in revenue of $743 billion over 10 years. The precise computation method used by OMB is unclear, though the text suggests that the line item reflects the average receipt and outlay effects of the House and Senate bills as scored by CBO, adjusted to remove overlap between the two measures.

COBRA Premium Assistance

Elsewhere, the budget includes a proposal of additional premium assistance for COBRA health care continuation coverage, further extending the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). The Department of Defense Appropriations Act, signed by President Obama on December 19, 2009, extended the eligibility period until February 28, 2010 and increased the maximum period for receiving the subsidy from nine to 15 months, while the subsequent Temporary Extension Act of 2010 further extended eligibility through March 31, 2010. (See story above.)

Under the budget proposal, the administration seeks to extend eligibility to those individuals who are involuntarily terminated through December 31, 2010. Individuals terminated between February 28, 2010, and January 1, 2011, would be eligible to receive subsidy assistance for twelve months.

Retirement Savings

The budget proposal includes a number of retirement savings recommendations, some of which were included in the previous year's budget proposal.

Employers that do not currently offer a retirement plan would be required to offer automatic enrollment in an individual retirement arrangement (IRA), effective for taxable years beginning after December 31, 2011. Small employers (ten employees or fewer) and new businesses (in existence for two years or less) would be exempt. An employee not providing a written

participation election would be enrolled at a default rate of three percent of the employee's compensation in a Roth IRA. (In previous iterations of this proposal, the default vehicles were traditional IRAs.) Employees would always have the option of opting out, opting for a lower or higher contribution within the IRA limits, or opting for a traditional IRA. Employers that offer an automatic IRA (including those that are not required to do so) would be entitled to a temporary business tax credit of $25 per participating employee up to a total of $250 per year for two years. Contributions by employees to automatic payroll-deposit IRAs would qualify for the saver's credit (to the extent the contributor and the contributions otherwise qualified).

A related proposal included in the budget (but not included in the president's middle-class relief initiative) is an increased small employer pension plan startup credit. Under current law, small employers are eligible for a tax credit equal to 50 percent (up to a maximum of $500 a year for three years) of the start-up expenses of establishing or administering a new qualified retirement or SIMPLE plan. To encourage small employers to offer pensions to their workers in connection with the automatic IRA proposal, the budget would increase the maximum credit from $500 a year to $1,000 per year. The auto IRA and start-up credit expansion proposals are budgeted at a combined cost of $10.4 billion over ten years.

The budget also proposes converting the "Saver's Credit" into a governmental matching contribution. The current law Saver's Credit allows low- and moderate-income individuals to take a tax credit of up to $1,000 (adjusted for inflation and phased out for incomes between $30,000 and $50,000) on voluntary contributions of up to $2,000 to an employer-sponsored retirement plan or an individual retirement arrangement. The administration's proposal would simplify the Saver's Credit to match 50 percent of the first $500 of contributions per individual per year (again, indexed for inflation). The proposal would also expand the eligibility threshold to begin at $32,500 for individuals and between $65,000 and $85,000 for married couples filing jointly. The proposal would also make this tax credit refundable. This proposal is estimated to cost $29.8 billion over ten years.

The budget also reiterates the administration's intention to examine regulations on 401(k) plan fee disclosure and investment advice for defined contribution plan participants, in addition to further studying ways to encourage automatic enrollment for small businesses, the rules surrounding target-date funds and the availability of annuities and other forms of guaranteed lifetime income (see story below).

Other Issues

According to the budget materials, the Departments of Labor and Treasury intend to pursue a joint proposal that eliminates incentives in law for employers to misclassify their employees as "independent contractors," enhances the ability of both agencies to penalize employers who misclassify and restores protections to these employees. The use of contract and contingent workers has been scrutinized under previous administrations.

With regard to family leave issues, the budget also establishes a $50 million "State Paid Leave Fund" within the Labor Department to provide competitive grants that would to help states cover the start-up costs of launching paid-leave programs. The budget also provides resources to explore ways to improve the collection of data related to the intersection of work and family responsibilities.

RECENT REGULATORY ACTIVITY

DOL Issues New Proposed Investment Advice Regulations

On February 26, the U.S. Department of Labor released proposed regulations interpreting the investment advice provisions of the Pension Protection Act. The newly proposed regulations replace the final regulations published January 21, 2009, by the Bush Administration (after the inauguration of President Barack Obama). The Obama Administration delayed the effective date of the Bush regulations multiple times and requested additional comments before withdrawing them completely in November 2009.

The new proposal, like the Bush Administration version, clarifies that the regulation does not invalidate or otherwise affect prior regulations, exemptions, interpretive or other guidance previously issued by the DOL (such as the "SunAmerica" guidance) concerning the circumstances under which the provision of investment advice would not constitute a prohibited transaction. Therefore, plans using the "SunAmerica" model with advice generated by a computer model developed by an independent third party can rest a little easier. However, language in the proposed regulations relating to generally accepted investment theories appears to question advice based on differing historical rates of returns of investments in the same asset class (see discussion below under computer model).

The proposed regulations allow investment advice to be provided in two ways: (1) through the use of a computer model certified as unbiased, and (2) through an adviser compensated on a level-fee basis. The proposed regulations are very similar to the withdrawn regulations except they (1) do not include provisions attributable to the proposed class exemption that were incorporated into the Bush Administration final regulations, (2) clarify rules restricting fees and payments from affiliates and others under the "level-fee" method of providing investment advice, (3) appear to generally prohibit computer models from distinguishing among investment options within a single asset class based on historical performance, and (4) provide guidance on some types of investment options which do not need to be considered by a computer model.

Level-fee rule

The proposed regulations apply the level-fee requirement at the entity level. The fees to the company – but not its affiliates – employing the individual providing the advice (as well as compensation received by the individual) cannot vary based on the investment selections made by the participant or beneficiary receiving the advice. The new regulations do not allow the level-fee requirement to apply solely to the compensation received by the individual employee providing the advice (as was permitted in the portion of the Bush Administration final regulation that was based on the proposed class exemption).

The proposal also clarified that the company employing the individual providing the advice, as well as the individual, cannot receive direct payments or payments used for their benefit from any party, including affiliates, which is based, in whole or in part, on investments selected by participants or beneficiaries.

Computer model rule

The proposed regulations indicates that computer models should be designed and operated to avoid investment recommendations that "[i]nappropriately distinguish among investment options

within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future…" and the preamble clearly indicates that differences in historical performance within an asset class "are less likely to persist and therefore less likely to constitute appropriate criteria for asset allocation."

The implication appears to be that the computer model generally cannot favor one investment within the same asset class (for example, large cap stock fund) with another based on differences in historical returns. With other language requiring that the computer model take into account investment management and other fees and expenses, the computer model would likely favor passive, index funds with low expenses. The DOL clearly wants to explore this area further. The preamble includes a "Request for Comment" section with numerous questions related to generally accepted investment practices and theories.

The proposed regulations also continue to require that the computer model take into account "all designated investment options" available under the plan with exceptions for employer securities, in-plan annuity options, target date or life cycle funds, brokerage windows, self-directed brokerage accounts or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. However, participants and beneficiaries must receive a general description of these options if they are available.

The regulations are expected to be effective 60 days after the date they are published in final form in the Federal Register but the DOL has also asked for comments, which are due by May 5th.

DOL Announces Outreach, Compliance Assistance for 403(b) Plans

The U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) recently released a number of new compliance resources for sponsors of retirement plans under 403(b) of the Internal Revenue Code and subject to Title I of the Employee Retirement Income Security Act (ERISA).

Form 5500 annual reporting requirements have changed for the 2009 plan year. 403(b) plan administrators now must file basic financial and other compliance information annually with the government on a Form 5500 or Form 5500-SF (a simplified report that many small 403(b) plans can use). Large plans (generally those with 100 or more participants) must include a report of an independent qualified public accountant with their Form 5500. All Form 5500s beginning with the 2009 plan year must be filed electronically using the department's new EFAST2 system.

The outreach material includes Field Assistance Bulletin (FAB) 2010-01, which provides guidance (in the form of questions and answers) with regard to the previous FAB 2009-02, issued in July 2009. Under FAB 2009-02, the administrator of a 403(b) plan does not need to treat some 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 if they meet certain conditions.

FAB 2010-01 was released on the DOL and EBSA's new Web page dedicated to 403(b) plan compliance. The new page (http://www.dol.gov/ebsa/403b.html) provides links to important guidance, publications (including the new brochure Getting Ready for Changes In Filing Your Plan's Annual Return/Report Form 5500), electronic filing resources, reporting and filing requirements, voluntary correction programs and other IRS resources. 403(b) plan sponsors may wish to bookmark the new site.

DOL/EBSA Issues Revised Application for Review of COBRA Subsidy Denial

On February 17, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) released an updated application for Expedited Review of Denial of the COBRA premium reduction, as provided under the American Recovery and Reinvestment Act of 2009 (ARRA) and extended as part of the 2010 Department of Defense Appropriations Act (DOD Act) and the Temporary Extension Act of 2010.

ARRA, as amended, requires that plans notify certain current and former participants and beneficiaries about the available subsidy and the extension. On January 13, DOL/EBSA issued model notices to help plans comply with the recent extension of the COBRA premium subsidy assistance program. On January 11, DOL released other outreach materials related to the program.

As discussed above, Congress is considering additional COBRA extension, although timing for enactment remains uncertain.

DOL Issues Model Employer CHIP Notice of Premium Assistance

The U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) recently announced the availability of a model notice for employers to use to inform employees of potential opportunities for premium assistance for group health plan coverage in states in which they reside. The model can be used to satisfy the content requirements of the notice provisions of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).

Under CHIPRA, employers are required to notify each employee of potential opportunities currently available in their state of residence for premium assistance under Medicaid and the Children's Health Insurance Program (CHIP) for health coverage of the employee or the employee's dependents. Employers are required to inform employees of these potential opportunities beginning with the first plan year that begins after the date on which the initial model notices are first issued. An employer may provide the Employer CHIP Notice concurrent with the furnishing of materials notifying the employee of health plan eligibility, concurrent with materials provided to the employee in connection with open season (or other coverage election process under the plan), or concurrent with the furnishing of the Summary Plan Description (SPD) provided under ERISA.

In addition to the Employer CHIP Notice requirement, CHIPRA also provides that, in order for states to evaluate an employment-based plan to determine whether premium assistance is a cost-effective way to provide medical or child health assistance to an individual, group health plans are required to provide, upon request, information about their benefits to state Medicaid or CHIP programs. The notice states that DOL and other agencies of jurisdiction in conjunction with an advisory committee are separately developing a model coverage coordination disclosure form to be issued in the future. States may begin requesting this information from plans beginning with the first plan year after this model form is issued.

The deadline for comments on the model notice is April 5, 2010. The DOL is also requesting comments regarding compliance with the Employer CHIP Notice requirement for use in the development of future compliance assistance materials and regulations.

Mental Health Parity Interim Final Regulations Released

An advance copy of interim final regulations, implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008, was jointly issued on January 29 by the U.S. Departments of Labor, Health and Human Services and Treasury.

The MHPAEA, enacted October 3, 2008, expanded the requirements of the Mental Health Parity Act of 1996 (which required parity in aggregate lifetime and annual dollar limits for mental health benefits and medical surgical benefits) to include parity in financial requirements and treatment limitations. The MHPAEA also extended parity requirements to substance use disorder treatment. The statutory provisions of the MHPAE became effective for plan years beginning after October 3, 2009.

The interim final regulations provide that:

- Plan terms defining whether benefits are mental health or substance abuse disorder benefits must be "consistent with generally recognized independent standards of current medical practice." Such standards would include the most current version of the DSM, "state guidelines" or other sources.
- A plan may not apply separate deductibles for treatment related to mental health or substance abuse disorders and medical-surgical benefits, but may only use a combined deductible. The agencies indicated that although the statutory language can be interpreted to support either approach, the agencies' view is that requiring separate deductibles is more consistent with the policy goals of MHPAEA.
- Plans are only permitted to compare medical-surgical and mental health benefits for purposes of applying parity using six specified categories:
    - inpatient, in-network;
    - inpatient, out-of-network;
    - outpatient, in-network;
    - outpatient, out-of-network;
    - emergency care; and
    - prescription drugs.

The interim final regulations replace regulations implementing the original Mental Health Parity Act of 1996. The new regulations apply for plan years beginning on or after July 1, 2010, and a special effective date is provided for collectively bargained plans.

The preamble to the regulations states that, for purposes of enforcement, the agencies will take into account good-faith efforts to comply with a reasonable interpretation of the statutory MHPAEA requirements with respect to a violation that occurs before the regulations' applicability date. The preamble notes, however, that this does not prevent participants or beneficiaries from bringing a private action.

DOL, IRS Request Comments on Lifetime Income Options for Retirement Beneficiaries

On February 1, the Department of Labor Employee Benefits Security Administration (EBSA) and the Internal Revenue Service (IRS) issued a request for information (RFI) regarding lifetime income options for participants and beneficiaries in retirement plans.

According to the RFI, "DOL and Treasury are currently reviewing the rules under the Employee Retirement Income Security Act (ERISA) and the plan qualification rules under the tax code to determine whether, and, if so, how, the Agencies could or should enhance, by regulation or otherwise, the retirement security of participants in employer-sponsored retirement plans and in individual retirement arrangements (IRAs) by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement.

RECENT JUDICIAL ACTIVITY – Nothing to Report