BENEFITS INSIDER
A Member Exclusive Publication

Volume 61, May 2010

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

Worker Misclassification Legislation Introduced in House, Senate

Senator Sherrod Brown (D-OH) and Representative Lynn Woolsey (D-CA) have each introduced legislation to prevent workers from being misclassified as independent contractors. According to a news release from Brown's Senate office, The Employee Misclassification Prevention Act (EMPA, S. 3254/H.R. 5107) "would ensure access to safeguards like fair labor standards, health and safety protections, and unemployment and workers' compensation benefits."

EMPA seeks to reduce the number of misclassification violations by:

- Ensuring that employers keep records that reflect the accurate status of each worker as an employee or non-employee and clarifying that employers violate the Fair Labor Standards Act when they misclassify workers;
- Increasing penalties on employers who misclassify their employees and are found to have violated employees' overtime or minimum wage rights;
- Requiring employers to notify workers of their classification as an employee or non-employee;
- Creating an "employee rights Web site" to inform workers about their federal and state wage and hour rights; and
- Providing protections to workers who are discriminated against because they have sought to be accurately classified.

At the same time, EMPA would improve federal and state efforts to detect and stop misclassification by:

- Mandating that states conduct audits to identify employers who misclassify workers and by requiring that DOL monitor states' efforts to identify misclassification;
- Directing states to strengthen their own penalties for worker misclassification;
- Permitting the U.S. Department of Labor (DOL) and Internal Revenue Service to refer incidents of misclassification to one another; and
- Directing DOL to perform targeted audits focusing on employers in industries that frequently misclassify employees.

The Senate version of the bill has been referred to the Senate Health, Education, Labor and Pensions (HELP) Committee (Chairman Tom Harkin (D-IA) has signed on as an original cosponsor of S. 3254). The House version of the bill has been referred to the House Education and Labor Committee (Chairman George Miller (D-CA) and Health, Employment, Labor and Pensions Subcommittee Chairman Robert Andrews (D-NJ) have signed on as original cosponsors of H.R. 5107).

The Obama Administration's Fiscal Year 2011 budget includes legislative proposals to "increase certainty with respect to worker classification," which could have considerable impact on employee benefit plans. The U.S. Treasury Department's General Explanations of the Administration's Fiscal Year 2011 Revenue Proposals document (commonly known as the "green book") estimates that new worker classification standards could raise $7.3 billion over ten years, with an additional $376 million in possible penalties.

Groom Law Group, Chartered, has prepared a summary of legislative issues with worker classification legislation. Such legislation would dramatically impact employment practices and benefit plans, and raise significant federal revenue.

COBRA Extension Enacted, Signed Into Law

On April 16, both the U.S. Senate and House of Representatives approved a revised version of the Continuing Extension Act (H.R. 4851), including an extension of eligibility for the COBRA subsidy assistance program through May 31, 2010. President Obama signed the bill into law shortly thereafter.

Eligibility for the program, originally established under the American Recovery and Reinvestment Act of 2009 (ARRA) and most recently extended through the Temporary Extension Act (H.R. 4691), expired after March 31, 2010. The measure effectively extends eligibility for the COBRA subsidies to include any qualifying individual involuntarily terminated (or who experiences a significant reduction in hours) between September 1, 2008 (as under the original ARRA legislation) and May 31, 2010 – including the period between April 1, 2010 and the enactment of the new law. Subsidies may last for as long as 15 months.

Employment and tax "extenders" legislation, approved by the Senate and currently under consideration in the House, would extend the COBRA subsidy program through December 31, 2010. This legislation may be enacted before the current May 31 expiration date.

Pension Funding Update: DOL Secretary Issues Letter to Congress

On April 13, U.S. Secretary of Labor Hilda Solis sent a letter to U.S. House of Representatives Education and Labor Committee Chairman George Miller (D-CA) and House Ways and Means Committee Chairman Sander Levin (D-MI) setting forth a number of principles with regard to pension funding relief. Writing in her capacity as chair of the board of directors of the Pension Benefit Guaranty Corporation, Solis wrote that "The [Obama] Administration supports targeted legislation that allows plan sponsors to temporarily delay pension contributions … giving them more time to make up these extraordinary losses while requiring the same funding levels by the end of a defined period. … At the same time, the legislation should not allow employers who take advantage of this relief to use their resulting improved temporary cash flows to put payments to shareholders and executives ahead of the security of workers' pensions."

The four principles suggested in Solis' letter are:

- *Funding relief should allow companies to protect jobs and increase investment.*
- *Cash not needed for these purposes should be put into pension funds before it is voluntarily distributed to shareholders or spent on high levels of pay for executives.*
- *Workers have a right to be informed of decisions that could have significant ramifications for their retirement security.*
- *Legislation should not provide funding relief to companies that are unlikely to be able to meet their pension obligations in the future because of severe financial distress, such as firms in bankruptcy or those that have failed to make past required pension contributions*.

Solis' letter also makes reference to "transparency regarding fees charged by retirement plan service providers," a subject that Miller has sought to address through his 401(k) Fair Disclosure and Pension Security Act (H.R. 2989).

The U.S. Senate has already approved relief provisions for both single-employer and multi-employer defined benefit pension plans as part of the substitute amendment to H.R. 4213, the American Workers, State, and Business Relief Act. The House is expected to act on a similar measure – which includes 401(k) plan fee disclosure – prior to Memorial Day.

House Committee Cancels Hearing Prompted By Retiree Drug Subsidy Accounting Charges

The U.S. House of Representatives Energy and Commerce Committee cancelled its planned April 21 hearing on the impact of the health care reform law on large employers. Committee Chairman Henry Waxman (D-CA) had announced the hearing on March 26 as a number of major employers began to report significant charges on their financial statements in response to the change in tax treatment of the subsidy they receive in connection with sponsorship of drug coverage for their retirees. In a series of letters to the chief executive officers of major American employers requesting their testimony at the hearing, the Committee had expressed its interest in learning more about the charges as well as a broader examination of the cost and savings implications of the Patient Protection and Affordable Care Act (PPACA).

In announcing the cancellation of the hearing, Waxman and Oversight and Investigations Subcommittee Chairman Bart Stupak (D-MI), released two memoranda explaining their decision and citing the information they had gathered in the weeks since the hearing was originally scheduled:

- Memo from Chairmen Waxman & Stupak
- Memo from Majority Staff to Chairmen Waxman & Stupak

Specifically, Waxman and Stupak noted that "We are taking this action at the request of several of the companies invited to testify and their representatives. They asked the Subcommittee to allow more time for key health care reform implementation decisions to be made before holding a hearing … As several of the companies recommended, the Subcommittee will closely monitor the implementation of the new law and will schedule hearings on the impact of the law as appropriate."

RECENT REGULATORY ACTIVITY

Employers Urge OMB to Withdraw Proposed DOL Regulations Defining Welfare Plan

The U.S. Department of Labor (DOL) is preparing to issue regulations with potentially significant implications for ERISA preemption of state or local health care reform initiatives. In an abstract of the forthcoming notice of proposed rulemaking, the agency indicates that it will seek to issue regulations clarifying the definition of "employee welfare benefit plan" for purposes of ERISA, specifically with respect to the application of that definition to state or local health care initiatives. The proposed rule is currently being reviewed by officials at the White House Office of Management and Budget (OMB).

On April 27, 126 employers and employer groups signed on to a letter to OMB expressing serious concern with the proposed regulations. The letter explains that a redefinition could obligate employers, whose plans are currently governed by nationally uniform rules under ERISA, to comply with myriad state or local rules. The letter makes clear that such a change would undermine the clear intent of Congress and the President that health care reform should maintain the uniform framework provided by ERISA.

During a recent Web chat on April 26, DOL Employee Benefit Security Administration Web chat, Assistant Secretary for Employee Benefits Security Phyllis Borzi responded to a question about the proposed regulations, saying "With the passage of the Patient Protection and Affordable Care Act, we are reviewing all of our health care initiatives for their interaction with this historic legislation. We will continue that review throughout the next several months and make decisions accordingly."

IRS Issues Guidance for Tax Treatment of Certain Plans Under New Health Legislation

The Internal Revenue Service (IRS) recently issued Notice 2010-38, which provides important guidance for plan sponsors regarding certain changes made to the Internal Revenue Code (IRC) by health reform legislation enacted earlier this year, specifically the Patient Protection and Affordable Care Act (PPACA), and the Health Care and Education Reconciliation Act of 2010 (HCERA).

Generally, PPACA amended the Public Health Service Act (PHSA) to require group health plans and health insurance issuers that provide dependent child coverage to make corresponding coverage available to an employee's adult children until age 26. HCERA included a corresponding change to the tax code that makes excludable from an employee's income any employer-paid coverage attributable to the employee's child to the extent such child is not yet age 27 during the taxable year. HCERA also included numerous conforming changes to the tax code regarding voluntary employees beneficiary associations (VEBAs), IRC Section 401(h) transfer accounts, and the deduction for medical insurance for self-employed persons under IRC Section 162(l). Notice 2010-38 specifically addresses the tax changes made by HCERA in connection with the new adult child coverage provisions of the PHSA, as added by the PPACA.

Highlights of the guidance are as follows:

- Notice 2010-38 makes clear that the age, limit, residency and support tests applicable to IRC Section 152 dependents do not apply in determining whether an individual qualifies as an adult child for purposes of tax-free employer-paid coverage. Thus, to qualify, an adult child need only be less than 27 for the taxable year at issue and be a legal child, stepchild or eligible foster child of the employee in order to qualify.

- As noted above, HCERA amended the tax code to make excludable from an employee's income any employer-paid coverage attributable to the employee's child to the extent such child is not yet age 27 during the "taxable year" at issue. Notice 2010-38 makes clear that "taxable year" means the employee's taxable year. The guidance goes on to state that employers may assume that an employee's taxable year is the calendar year.

- Notice 2010-38 provides that employers may rely on an employee's representation as to the child's date of birth. Notably, the guidance is silent as to whether such representations must be in writing.

- Although HCERA amended IRC Section 105(b), regarding amounts received by an employee under employer-paid coverage, HCERA did not make a corresponding change to IRC Section 106 (which makes excludable the employer-paid coverage itself). Notice

2010-38 addresses this issue and notes that “[t]here is no indication that Congress intended to provide a broader exclusion in Section 105(b) than in Section 106”, and that, therefore, “IRS and Treasury intend to amend the regulations under § 106, retroactively to March 30, 2010, to provide that coverage for an employee’s child under age 27 is excluded from gross income.” The Notice goes on to state that "Thus, on and after March 30, 2010, both coverage under an employer-provided accident or health plan and amounts paid or reimbursed under such a plan for medical care expenses of … an employee’s [qualifying adult] child … are excluded from the employee’s gross income."

- Existing Treasury regulations do not permit mid-year changes to cafeteria plan elections where a coverage change results from an individual either qualifying or no longer qualifying as an adult child. This could have posed significant administrative difficulties and employee relations issues for employers in administering extended adult child coverage. Notice 2010-38 expressly states that “IRS and Treasury intend to amend the regulations under § 1.125-4, effective retroactively to March 30, 2010, to include change in status events affecting nondependent children under age 27, including becoming newly eligible for coverage or eligible for coverage beyond the date on which the child otherwise would have lost coverage.”

- Notice 2010-38 provides a transition rule for cafeteria plan amendments. Pursuant to proposed regulations, cafeteria plan amendments generally may only be effective on a prospective basis and may not be retroactive. The guidance acknowledges, however, that some cafeteria plans may need to be amended to include an employee's qualifying adult child for purposes of the 2010 plan year. Accordingly, the guidance states, "Notwithstanding this general rule, as of March 30, 2010, employers may permit employees to immediately make pre-tax salary reduction contributions for accident or health benefits under a cafeteria plan (including a health FSA) for children under age 27, even if the cafeteria plan has not yet been amended to cover these individuals. However, a retroactive amendment to a cafeteria plan to cover children under age 27 must be made no later than December 31, 2010, and must be effective retroactively to the first date in 2010 when employees are permitted to make pre-tax salary reduction contributions to cover children under age 27 (but in no event before March 30, 2010)." Thus, under the transition rule, plans are permitted to allow employees to pre-tax premiums for coverage attributable to a qualifying adult child, even in the absence of a plan amendment, so long as the plan is amended on or before December 31, 2010. Moreover, under the terms contained in the Notice, the amendment must relate back to the first date in 2010 when employees were permitted to make pre-tax salary reduction contributions to cover children under age 27, but in no event before March 30, 2010.

- Notice 2010-38 clarifies that that the guidance applies equally to health reimbursement arrangements (HRAs).

- Notice 2010-38 makes clear that qualifying adult child coverage, and any benefits received thereunder, are not wages for purposes of FICA and FUTA.

  Notice 2010-38 describes certain conforming changes included in the health reform legislation with respect to VEBAs, IRC Section 401(h) accounts, and the deduction for medical insurance for self-employed persons under IRC Section 162(l).

  - Regarding VEBAs, the guidance makes clear that for purposes of providing for the payment of sick and accident benefits to members of a VEBA and their dependents, the term dependent includes any qualifying adult child (i.e., a child who has not attained age 27 by the close of the calendar year).

- o Regarding IRC Section 401(h) accounts, the guidance explains that, as amended by the PPACA, IRC Section 401(h) "provides that the term dependent includes any individual who is a retired employee's [qualifying adult] child" (i.e., a child who has not attained age 27 by the close of the calendar year).
- o Regarding IRC Section 162(l), the guidance states that IRC § 162(l), as amended, now covers expenses associated with medical insurance attributable to a qualifying adult child (i.e., a child who has not attained age 27 by the close of the calendar year).

DOL/EBSA Issue Semi-Annual Regulatory Agenda for Spring 2010

On April 26, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) released its Spring 2010 Semi-Annual Regulatory Agenda. The agenda lists all regulations that are expected to be under review or development between April 2010 and April 2011, as well as those completed during the past 6 months.

Of note for health plan sponsors, the agenda notes that forthcoming regulatory action to implement the Patient Protection and Affordable Care Act of 2010 (PPACA) will be issued on a number of topics. In a public Web chat on April 26, DOL Assistant Secretary for EBSA Phyllis Borzi said, "Unfortunately, the timing of the Agenda did not lend itself to a detailed listing of these regulatory initiatives. However, in the short time since the new law was enacted, the promulgation of implementing regulations under the Affordable Care Act has been this Agency's highest priority. We have been working in close coordination with the Department of Health and Human Services, Department of Treasury and Internal Revenue Service staff on staged guidance that will begin to be issued shortly. The departments are focusing first on health reform provisions that are effective for plan years beginning on or after September 23, 2010. Regulations will be issued on an ongoing basis to ensure that guidance is made available as soon as possible."

In addition, for health plan sponsors:

- The agency plans to publish a compliance assistance checklist, no later than September 2010, providing clarifications to group health plans, health insurance issuers, participants, beneficiaries, and other interested stakeholders regarding the health plan coverage provisions of ERISA, including the Genetic Information Nondiscrimination Act (GINA), the Mental Health Parity and Addiction Equity Act (MHPAEA), and the special enrollment and notice provisions added by the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).

- Proposed regulations on the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) are expected to be issued shortly. Interim final regulations on MHPAEA were released on February 2, but Borzi indicated in a public Web chat on April 26 that "there are some remaining issues under MHPAEA that are not covered by the recently published interim final rule" – specifically, the provisions of the increased cost exemption under Section 712(c)(2) – and the proposed rule would be the first step in addressing those issues.

- The agenda also indicates that DOL is still preparing to issue regulations clarifying the definition of "employee welfare benefit plan" for purposes of ERISA, specifically with respect to the application of that definition to state or local health care initiatives. However, in response to a question about this effort during the DOL/EBSA Web chat, Borzi said that "With the passage of the Patient Protection and Affordable Care Act, we are reviewing all of our health care initiatives for their interaction with this historic legislation. We will continue that review throughout the next several months and make decisions accordingly."

Also notable, for employer retirement plan sponsors:

- Very soon, DOL intends to issue final regulations regarding Qualified Domestic Relations Orders (QDROs) that are issued late or are issued after another QDRO or that revise another QDRO. These regulations would implement Section 1001 of the Pension Protection Act of 2006 (PPA).

- The agency will issue interim final regulations relating to ERISA Section 408(b)(2), addressing fee disclosure between service providers and plan fiduciaries, as early as May 2010. Also in the area of fee disclosure, DOL is expected to issue participant fee disclosure regulations in final form in September 2010. The agency is also expected to issue proposed regulations regarding fee disclosure for welfare (group health plans) in March 2011. Various legislative proposals on plan fee disclosure are still pending in Congress and may be considered as part of defined benefit funding relief legislation.

- DOL intends to amend the regulatory definition of a "fiduciary" for plan investment advisers to include pension consultants and other plan advisers who do not meet the current regulatory definition. DOL plans to issue proposed regulations on this issue in June 2010.

- Proposed regulations for qualified default investment alternatives and target-date fund disclosure are expected to be issued in August 2010. (DOL has also released fact sheets regarding the compliance assistance checklist for fiduciaries regarding target date funds and the expansion of required qualified default investment alternative (QDIA) disclosures to participants regarding target date funds.

- In August 2010, DOL intends to issue proposed regulations implementing the annual pension funding notice requirements of the PPA.
- Proposed regulations regarding pension benefit statements are expected to be issued in September 2010.

- Final investment advice regulations are expected to be issued in December 2010. Proposed regulations were issued on February 26.

- In supplemental materials, the DOL also announced that it will update the Voluntary Fiduciary Correction Program (VFCP), which is designed to help fiduciaries correct certain violations.

IASB Releases Exposure Draft of Proposed Amendments to Employee Benefit Accounting Standards

On April 29, the International Accounting Standards Board (IASB) published an exposure draft of changes to IAS 19 *Employee Benefits*. If adopted, these changes would amend the accounting rules for defined benefit plans such as pensions and post-employment medical care. A snapshot of the amendments produced by the IASB is also available. Specifically, the amendments would change IAS 19 by requiring plan sponsors in affected countries to:

- account immediately for all estimated changes in the cost of providing these benefits and all changes in the value of plan assets (often referred to as removal of the 'corridor' method);
- use a new presentation approach that would clearly distinguish between different components of the cost of these benefits; and
- disclose clearer information about the risks arising from defined benefit plans.

Changes to IAS 19 will impact all retiree benefits accounting for companies domiciled in countries outside the US that are subject to the IASB requirements. For companies within the United States, this standard may govern the local accounting requirements for non-U.S. subsidiaries.

The Financial Accounting Standards Board (FASB) and the IASB have publically stated their mutual commitment to converge U.S. and International Accounting Standards. To this end, the IASB and FASB have collaborated extensively on this IASB exposure draft. Although the proposed accounting changes would not immediately apply to U.S.-based companies, we can expect to see similar proposals from the FASB over time. In addition, at some point over the next decade, the SEC is expected to adopt international standards for use by U.S.-based companies.

One stated objective of the SEC is to drive accounting rules that are in the best interests of investors. Changes in accounting rules over the last 20 years have contributed greatly to the decline in the number of defined benefit pension plans and in the number of retiree health care plans.

The IASB is soliciting comments on the exposure draft by September 6, 2010.

DOL Issues Updated ARRA COBRA Model Notices Related to New Eligibility Deadline

On April 27, the Department of Labor (DOL) issued revised model notices to help plans comply with the recent extension of the COBRA premium subsidy assistance program originally established under the American Recovery and Reinvestment Act of 2009 (ARRA). The Continuing Extension Act (CEA) (enacted by the Senate and House of Representatives on April 15) extended eligibility for the COBRA subsidy assistance program through May 31, 2010.

Current law requires that plans notify certain current and former participants and beneficiaries about the available subsidy and the extension. Each model is designed for a particular group of qualified beneficiaries:

- The Model Updated General Notice is for all qualified beneficiaries (not just covered employees) who experienced a qualifying event at any time from September 1, 2008, through May 31, 2010, regardless of the type of qualifying event, and who have not yet been provided an election notice. This model notice includes updated information on the premium reduction, as well as information required in a COBRA election notice. Please note, individuals who experienced a qualifying event that was a termination of employment from April 1, 2010, through April 14, 2010, may not have been provided proper notice. Those individuals who have not been provided any notice must get the updated General Notice and receive the full 60 days from the date the updated notice is provided to make a COBRA election.)

- The Model Notice of New Election Period must be provided, within 60 days of the date of the termination of employment, to all individuals who (1) experienced a qualifying event that was a reduction in hours at any time from September 1, 2008, through May 31, 2010; (2) subsequently experience a termination of employment at any point from March 2, 2010, through May 31, 2010; and (3) either did not elect continuation coverage when it was first offered OR elected but subsequently discontinued the coverage. Additionally, CEA provides that for the April 1, 2010, through April 14, 2010, period, the notice requirement applies to any termination of employment. The Department strongly recommends that notice be provided to individuals who experienced any termination of employment because employers may be subject to civil penalties if it is later determined that the termination was involuntary and notice was not provided.

- The Model Supplemental Information Notice must be provided to all individuals who elected and maintained continuation coverage based on (1) all qualifying events related to a termination of employment that occurred from March 1, 2010 through April 14, 2010 for which notice of the availability of the premium reduction available under ARRA was not given; OR reductions of hours that occurred during the period from September 1, 2008, through May 31, 2010, which were followed by a termination of the employee's employment that occurred on or after March 2, 2010, and by May 31, 2010. For the first item above, plans must provide this notice to all individuals with a qualifying event related to any termination of employment if they have not already been provided notice of their rights under ARRA. This notice must be provided before the end of the required time period for providing a COBRA election notice. For the second item above, generally, individuals who experience an involuntary termination of employment from March 2, 2010, through May 31, 2010, after experiencing a qualifying event that consists of a reduction of hours must be provided this notice within 60 days of the termination of employment. However, the CEA requires plans to provide notices to all individuals with qualifying events related to any termination of employment that occurred from April 1, 2010, through April 14, 2010. In those cases, this notice must be provided before the end of the required time period for providing a COBRA election notice. Because employers may be subject to civil penalties if it is later determined that the termination was involuntary, DOL strongly recommends that notice be provided to individuals who experienced any termination of employment.

- The Model Notice of Extended Election Period must be provided, before the end of the required time period for providing a COBRA election notice, to all individuals who (1) experienced a qualifying event that was a termination of employment at some time from April 1, 2010 through April 14, 2010; (2) were provided notice that did not inform them of their rights under ARRA, as amended by CEA; and (3) either chose not to elect COBRA continuation coverage at that time or elected COBRA but subsequently discontinued that coverage.

- The Model Updated Alternative Notice must be provided by insurance issuers that offer group health insurance coverage that is subject to comparable continuation coverage requirements imposed by state law to all qualified beneficiaries (not just covered employees) who have experienced a qualifying event through May 31, 2010. However, because continuation coverage requirements vary among states, this notice should be further modified to reflect the requirements of the applicable State law. Issuers of group health insurance coverage subject to this notice requirement should feel free to use the model Alternative Notice, the model Notice of New Election Period, the model Supplemental Information Notice, the model Notice of Extended Election Period, or the model General Notice (as appropriate).

All COBRA-related materials, including the model notices, are posted on the DOL Employee Benefits Security Administration's COBRA Web site.

DOL Updates Employer Model Notice for Medicaid/CHIP Premium Assistance

The U.S. Department of Labor has released an updated model notice for employers to use regarding eligibility for premium assistance for group health plan coverage under Medicaid or the Children's Health Insurance Program (CHIP). This edition reflects new contact information for residents of Arizona, Idaho, Louisiana, and Oregon.

Under the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), employers are required to notify employees of potential opportunities in their state of residence for premium assistance under Medicaid or CHIP programs. Employers may use the model notice to satisfy the content requirements of CHIPRA's notice provisions.

ERISA Advisory Council Releases Recommendations to DOL

The ERISA Advisory Council, a group of benefits experts established by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy, has released its recommendations stemming from its 2009 working group topics.

The report on Approaches for Retirement Security in the United States focuses on the adequacy of and structure of defined contribution and defined benefit vehicles to assess whether structural aspects of these plans contribute to retirement security. Recommendations include:

- Support the creation of a Presidential Commission to define a National Retirement Policy and develop new structures for lifetime retirement security.

- Take leadership in developing workers who are financially literate by facilitating, coordinating and collaborating with other government agencies, interagency councils, the private sector, professional organizations and academia to leverage all available support for the need to address financial literacy including promoting financial literacy as part of elementary education.

- In her capacity as chair of the board of the Pension Benefit Guaranty Corporation (PBGC), the DOL Secretary should champion the maintenance and expansion of the defined benefit system by convening an inter-agency task force to review and revise the current burdensome regulatory regime and by charging the PBGC to develop initiatives to encourage the continuation, maintenance, and expansion of voluntary private defined benefit pension plans.

- Support measures to enhance retirement security for defined contribution plan participants by increasing participation and contributions, and by preventing leakage of assets from plans, when necessary. DOL should develop approaches to address participation disparities across racial, gender and ethnic groups. It should examine the role of race, gender and ethnicity on participation in voluntary plans to determine the best methods to ensure that diverse groups have equal opportunities to achieve retirement security.

- Amend Interpretive Bulletin 96-1 to expand its scope to the de-cumulation phase of retirement planning.

The report on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries focuses on the issue of promoting retirement literacy and security by streamlining disclosures to participants and beneficiaries. This working group studied the efficacy of ERISA's reporting and disclosure regime as well as problems and costs related to such disclosures. Recommendations include:

- Amend DOL electronic disclosure regulations to provide a safe harbor for pension plan administrators who comply with the U.S. Treasury Department's electronic disclosure requirements.

- Review all pension plan disclosures required under Title I of ERISA and determine whether there are opportunities for streamlining such requirements.

- Encourage pension plan administrators to furnish participants and beneficiaries with a "quick start" guide that would help participants and beneficiaries get oriented to their plans. Prospectively, the concept of a quick-start guide could serve as a basis for a new streamlined, electronic-focused disclosure regime that is founded on the concept of progressive access.

- Form an interagency working group that would adopt regulations and propose legislation, both of which would replace the current participant disclosure requirements (including statutory requirements) with respect to pension plans in its entirety with a new streamlined, electronic-focused system.

The report on Stable Value Funds and Retirement Security in the Current Economic Conditions examined whether the DOL should provide (1) requirements or guidelines to retirement plan service providers related to the design or marketing of stable value fund investments; (2) requirements or guidelines to plan sponsors and fiduciaries for selecting and monitoring stable value funds; and (3) information to plan participants to assist them in making informed investment decisions regarding stable value fund investments in participant-directed plans. Recommendations include:

- Prepare and make available informal information, such as frequently asked questions, best practices or other general guidance, targeted to plan sponsors and plan fiduciaries that would assist them in discharging their fiduciary duties when selecting, monitoring and making available plan investments in stable value products.

- Prepare and make available simple and concise educational materials targeted to plan participants that would assist them in the potential investment of their participant-directed investment account in stable value products.

RECENT JUDICIAL ACTIVITY

District Court Dismisses 401(k) Fee Suit Against Employer, Service Provider

On April 26, the U.S. District Court for the Eastern District of Pennsylvania dismissed the case of *Renfro v. Unisys Corporation, et al*, in which Unisys Corporation and Fidelity Management Trust Company (FMTC) had been accused of charging excessive fees to participants in Unisys' retirement savings plans. This was another in a string of 401(k) plan fee litigation cases to be dismissed and again with pointed reference to the previous decision in Hecker et al v. Deere & Company/Fidelity.

In dismissing *Renfro v. Unisys*, Judge Berle M. Schiller found "no sound basis on which to conclude that FMTC was a functional fiduciary with respect to investment selection". In particular Schiller noted that Unisys' plan agreement with FMTC did not restrict the "ability to establish another trust that would offer plan participants the opportunity to invest in non-Fidelity mutual funds. In fact, the language of this trust agreement makes clear that the trust would not be the only one holding plan assets." Further, the plaintiffs' claim that FMTC was a fiduciary of the plan because it "exercised discretion over so-called 'float interest' on plan contributions" was determined by the judge to be irrelevant to any fiduciary obligations relating to investment selections.

The court also dismissed the plaintiffs' claims against Unisys because it found that the plan offered a sufficient mix – more than 70 different funds with fees from .1% to 1.21% – of investments at a wide range of cost. Quoting the Seventh Circuit's decision in Hecker, Schiller wrote, "a plan fiduciary need not select the cheapest fund available [and] ERISA does not require fiduciaries to get the best deal imaginable for the plan; it requires them to act carefully, skillfully, prudently, diligently, and solely in the interest of participants and beneficiaries. While this is not a light duty, it does not support a law suit that simply claims the fiduciaries could have done better had they worked harder to leverage their market power."

The court also failed "to see the import" of the plaintiffs' claim that Unisys did not disclose to them what revenue would be shared among different Fidelity entities based upon fees collected from different investment options. "Plan participants were made aware of the fees they would pay for allocating their plan contributions to particular funds. To whom that money ultimately flowed would seem irrelevant to a participant once it left his wallet," wrote Schiller.

The Court also refused to give deference to the Department of Labor's interpretation of Section 404(c) of ERISA (which relieves fiduciaries of liability from a loss resulting from a plan participant's exercise of [investment] control) based on the pre-regulatory Third Circuit decision of In re Unisys Saving Plan. The Court stated that deference to the agency's interpretation after the effective date of a regulation is not necessary when Congress has issued a clear directive and the statutory language is not ambiguous, and that 404(c) clearly indicates that a fiduciary may call upon 404(c) where a causal connection between a participant's exercise of control and the claimed loss is demonstrated.

Supreme Court Rules in ERISA Case

On April 21, the U.S. Supreme Court handed down a decision in the case of *Conkright v. Frommert*, a case involving Xerox Corporation's pension plan and the plan administrator's interpretation of the plan's terms. In its decision, the Supreme Court ruled (by a 5-3 majority) that the district court has an obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at the interpretation outside the context of an administrative claim for benefits.

This case involves interpretation of the plan's offset provisions which takes into account prior distributions from the pension plan (for rehired participants). The plan calculated the offset by reference to what the participant's lump sum distribution would have grown to had it remained in the plan. The Second Circuit struck down this method on the grounds that it was inadequately disclosed to participants. The plan administrator then interpreted the remaining plan terms to require an offset by the actuarial equivalent (taking into account the time value of money) of the participant's lump sum distribution. The district court rejected this interpretation and held that the plan may offset only by the nominal amount of the original distribution, without making any allowance for the time value of money.

The Supreme Court's majority opinion, authored by Chief Justice John Roberts, reverses the lower court decision. Justice Stephen G. Breyer contributed a dissenting opinion. (Justice Sonya Sotomayor took no part in the decision.)