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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

Auto-IRA Legislation Introduced House, Comparison of Bills Now Available

On August 10, Representative Richard Neal (D-MA), chairman of the Subcommittee on Select Revenue Measures of the Ways and Means Committee, introduced the Automatic IRA Act of 2010 (H.R. 6099) during the House of Representatives' rare mid-recess session held on that day. A summary of the proposal was also made available.

The House version of the bill is based upon President Obama's Fiscal Year 2011 budget and serves as a companion bill to that introduced last week by Senator Jeff Bingaman (D-NM) also called the Automatic IRA Act (S. 3760).

PERAB Publishes Options for Tax Changes Affecting Retirement Policy

On August 27, the President's Economic Recovery Advisory Board (PERAB) released its final report on options for changes to the current federal tax system, including a number of options that would have a significant impact on retirement benefits policy.

The PERAB was created by President Obama in February 2009 as an outside advisory panel tasked with considering options for (1) simplifying the U.S. tax system, (2) improving taxpayer compliance and (3) reforming corporate taxes. The report's preface makes clear that the PERAB does not represent Obama Administration policy. However, the report is likely be used as a resource by the Administration (and possibly Congress) during future debates over changes to the tax system. The President specifically asked the board to exclude options that would raise taxes for families with annual incomes less than $250,000 and to avoid recommendations involving fundamental and overarching tax reform. Consistent with these directives, the final report discusses the pros and cons of various reform ideas relating to the goals listed above, but does not propose or advocate any particular reforms – including any major overhaul of the tax system.

The report is organized into the three categories listed above: simplification, compliance, and corporate reform. The simplification section of the report, in particular, devotes significant attention to existing retirement savings plans and tax incentives. It lays out a number of proposals for reform in the retirement savings area (see numbered pages 23 to 36 of the report). The report indicates that the reform proposals were motivated by three sets of concerns about the existing retirement system: (1) that the array of savings options with differing rules cause confusion, deterring both plan sponsorship and individual utilization, (2) that the complexity of the current system deters plan sponsorship by small employers, and (3) that the tax benefits of the current system accrue primarily to higher-income individuals and do not sufficiently further the policy goal of spurring savings by those who do not currently save at significant levels.

With these three concerns in mind, the report lays out eight possible options for "simplifying savings and retirement incentives" and discusses the advantages and disadvantages of each. These reform options include familiar proposals as well as new ideas and range from minor adjustments to the rules to significant structural reforms:

- *Consolidate Retirement Accounts and Harmonize Statutory Requirements*. A series of consolidation options, from establishment of the ERSA, RSA and LSA savings account options (as advanced by the George W. Bush Administration) to a focus only on

workplace plans through consolidation of 401(k), 403(b) and 457 plans into a single plan design, to a more modest step of establishing a uniform set of rules for “eligibility, contributions, and administration” of workplace plans.

- *Integrate IRA and 401(k)-type Contribution Limits and Disallow Nondeductible Contributions*. Integration of IRA and 401(k) contribution limits by allowing deductible IRA contributions for individuals at all income levels and disallowing non-deductible IRA contributions. Existing IRA and plan contribution limits would be retained, but a new aggregate limit equal to the 401(k) contribution limit (currently $16,500) would apply to cap total personal IRA and workplace plan contributions.
- *Consolidate and Segregate Non-Retirement Savings*. Consolidate savings vehicles focused on education (529, Coverdell) and health (HSA, MSA, FSA) savings into a single non-retirement savings vehicle with federal tax incentives. Alternatively, create one dedicated education savings vehicle and one dedicated health savings vehicle.
- *Clarify and Improve Savings Incentives*. Turn the Saver’s Credit into a governmental matching contribution and removes the "cliff" drop-off in the current income eligibility structure. This section of the report also recommends expanding automatic enrollment, but does not offer any additional detail. It alludes to automatic IRA initiatives (as proposed by the Obama Administration and contained in recently introduced legislation) and seems to contemplate mandated auto enrollment for workplace retirement plans. It also alludes to implementation of additional automatic features, such as default investments, auto-escalation of participant contribution levels and automatic annuitization of retirement account balances.
- *Reduce Retirement Account Leakage*. Reduce retirement account “leakage” (the spending of saved assets prior to retirement) by requiring 401(k) balances to remain in the plan or be automatically rolled to an IRA upon employment severance, and tightening the limitations and penalties on withdrawals, especially for IRAs.
- *Simplify Rules for Employers Sponsoring Plans*. Repeal the nondiscrimination rules (including the cross-testing rules), require plans to meet safe harbor designs and repeal permitted disparity (related to Social Security integration). Alternatively, significantly simplify the nondiscrimination rules.
- *Simplify Disbursements*. Eliminate minimum distribution requirements for IRAs and tax-qualified retirement plan accounts for individuals with retirement assets below a stated threshold, such as $50,000.
- *Simplify Taxation of Social Security Benefits*. Simplify the formula used to calculate the tax on Social Security benefits by replacing the multi-tiered phase-in schedule with a single phase-in.

It is unclear how much attention these specific retirement policy options will get from policymakers in the executive branch or in Congress. However, the report certainly indicates that retirement savings tax incentives and designs are likely to be a significant topic of discussion in the context of upcoming debates about tax reform and deficit reduction.

Also of note, the report's "compliance" section includes the option "Clarifying the Definition of a Contractor." Under this proposal, lawmakers would repeal the common law rules – including the Internal Revenue Code Section 530 safe harbor – and allow the IRS to publish guidance on worker classification. The Obama Administration's Fiscal Year 2011 budget includes legislative proposals to "increase certainty with respect to worker classification" and legislation has already been introduced in this area. The Repeal of the Section 530 safe harbor would be considerably burdensome for employee benefit plans.

Legislation Introduced to Repeal PPACA Employer Mandate

Senator Orrin Hatch (R-UT) has introduced the American Job Protection Act (S. 3501), legislation that would repeal Sections 1513 and 1514 and Subsections (e), (f), and (g) of Section 10106 of the Patient Protection and Affordable Care Act of 2010 (PPACA), effectively eliminating the "pay or play" mandate requiring employers to provide health insurance for their employees or pay a penalty.

The repeal measure has been endorsed by four employer organizations: the U.S. Chamber of Commerce, the National Federation of Independent Business, the National Association of Wholesalers and the National Retail Federation. The legislation certainly will not receive serious consideration in the current Congress. However, that could change if Republicans gain a majority in Congress following the November election, or if the courts rule adversely on the constitutionality of the employer mandate. "Message" bills such as S. 3501 may become more common in the weeks leading up to the 2010 elections.

RECENT REGULATORY ACTIVITY

HHS Releases ERRP Approval List, Launches Secure Web Site

The U.S. Department of Health and Human Services (HHS) is rolling out the next phase of the Early Retiree Reinsurance Program (ERRP) under Section 1102 of the Patient Protection and Affordable Care Act (PPACA). Under the program, employer health plan sponsors will be qualified to file for reimbursement of early retiree health care expenses.

On August 31, HealthCare.gov released a fact sheet with a link to view the approved employers by state. HHS has also begun sending formal notification to the nearly 2,000 employers, both public and private, that have been approved for the program. Applications have been approved in every State and the District of Columbia, and HHS is still in the process of reviewing applications.

As part of this roll-out, HHS has also launched an ERRP secure Web site. Plan sponsors whose application(s) have been approved will be able to use this new secure website to view and change application information; submit summary cost data, claims line-item data, and other information; and request ERRP reimbursement for a portion of the costs of health benefits for early retirees and their spouses, surviving spouses, and dependents. The Account Manager and Authorized Representative of a plan sponsor whose application has been approved will receive a registration email from HHS' ERRP Center (errpnotice@errp.gov) inviting them to register for the ERRP Secure Website. Once the Account Manager and Authorized Representative have access to their online account they will be able to view and change certain application information, as noted below. Quick reference guides, such as How to Register as an Account Manager, How to Register as an Authorized Representative, and How To View and Change Application Information, are now available.

The Account Manager or Authorized Representative of a plan sponsor whose application has been approved will be able to:

- assign the individuals and/or vendor responsible for submitting information on behalf of the sponsor;
- submit files through either a ERRP Secure Website file upload or Mainframe-to-Mainframe transfer;

- add or remove individuals, or designees, associated with an application; and
- submit summary cost data and other information, as well as its first reimbursement request.

The first reimbursements to such sponsors are expected to be deposited in October.

The ERRP provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents. The HHS secretary will reimburse plans for certain claims between $15,000 and $90,000. Congress has appropriated $5 billion in funding for the temporary program that will end when the funding has been exhausted or no later than January 1, 2014.

The application and instructions were posted to the HHS Office of Consumer Information and Insurance Oversight ERRP Web site. The agency began accepting applications on June 29 and this week made a point of noting that applications may still be submitted.

Agencies Issue Guidance on PPACA External Review

The U.S. Treasury Department, Department of Labor (DOL) and Department of Health and Human Services (HHS) have issued regulatory guidance regarding the availability of interim procedures for federal external review relating to claims and appeals for issuers and self-insured group health plans under the Patient Protection and Affordable Care Act (PPACA). In conjunction with the guidance, DOL released Technical Release 2010-1 as well as model notices for use in announcing claims determinations and reviews.

The PPACA amends the Public Health Service Act (PHSA) relating to group health plans and health insurance issuers in the group and individual markets. Section 2719 of the PHSA applies to group health plans and health insurance coverage that are not grandfathered health plans and sets forth standards for plans and issuers regarding both internal claims and appeals and external review. The agencies have issued interim final regulations (IFR) relating to internal claims and appeals and external review processes. The preamble to the IFR provided that regulators would issue additional guidance on the federal external review process. In addition, the preamble stated that the agencies would issue model notices that could be used to satisfy the notice requirements under the interim final regulations. This notice announces the availability of that guidance on the interim federal external review process, as well as links to the model notices.

Specifically, the guidance establishes an interim enforcement safe harbor that applies for plan years beginning on or after September 23, 2010, and until superseded by future guidance. During the period that this interim enforcement safe harbor is in effect, DOL and the Internal Revenue Service will not take any enforcement action against a group health plan that complies with the prescribed interim compliance methods under either Technical Release 2010-1 OR state external review law. Subsequent guidance, in the form of DOL Technical Release 2010-02, (1) sets forth an enforcement grace period through July 1, 2011 for employers and health plans to comply with several significant changes in the federal claims review and appeals standards and (2) expands the safe harbor standard for complying with the new external review requirements included in PPACA.

Additionally, the following new model notices have been released:

- Model Notice of Adverse Benefit Determination
- Model Notice of Final Internal Adverse Benefit Determination
- Model Notice of Final External Review Decision

EBSA Issues Additional EFAST Guidance

The Department of Labor (DOL) Employee Benefits Security Administration (EBSA) has released additional guidance with regard to EFAST2, the electronic filing program designed to simplify and expedite the receipt and processing of Form 5500 for employee benefit plans. The agency's frequently asked questions document has been updated to add questions 23a, 24a, and 24b, which clarify issues regarding invalid characters in names and separating attachments. In addition, Question 11 was clarified so the definition of a "Filing Signer" matched the language in IREG (the Internet Registration system that will allow filers and signers to apply for credentials required under the new format). Question 27A was added to describe protected PDF files, and Question 29 was updated to include two sentences on optimizing PDFs.

DOL Withdraws Proposed Revision of Welfare Benefit Plan Definition

On August 2, the U.S. Department of Labor's (DOL) Employee Benefits Security Administration issued a press release announcing the withdrawal of a notice of proposed rulemaking regarding the definition of a "welfare benefit plan" under ERISA.

DOL submitted the NPR to the White House Office of Management and Budget (OMB) in early 2010, prior to the enactment of the Patient Protection and Affordable Care Act (PPACA). The proposed regulation was intended to address issues relating to state health care efforts and their effect on the maintenance of ERISA-covered welfare plans. Now that PPACA has been enacted and the implementation process is well underway, DOL will ask OMB to return the proposed regulation while the agency reviews whether additional regulations are still necessary or appropriate.

The withdrawal of the proposed regulation was referenced in the U.S. government's amicus brief to the U.S. Supreme Court in the case of the Golden Gate Restaurant Association v. The City and County of San Francisco. In urging the high court not to review the case, the U.S. Solicitor General opined that the enactment of PPACA “significantly reduces the potential that state or local governments will choose to enact health care programs” and may also affect the question of whether such programs are preempted by federal law.

Lawmakers Comment on Disclosure Rules for Defined Contribution Plans and Service Providers

On August 31, congressional committee leaders filed written comments with the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) regarding interim final regulations (IFR) governing disclosure of defined contribution plan fees under ERISA Section 408(b)(2). The letter, signed by Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Tom Harkin (D-IA), Senate Finance Committee Chairman Max Baucus (D-MT), Senate Special Aging Committee Chairman Herb Kohl (D-WI), House of Representatives Education and Labor Committee Chairman George Miller (D-CA) and House Ways and Means Committee Chairman Sander Levin (D-MI), formally requests specific modifications to the IFR that would align the new rules with proposed defined contribution plan fee legislation.

The regulations would require that service providers give plan fiduciaries written disclosures of certain fee and services information necessary to assist plan fiduciaries in assessing the reasonableness of compensation or fees paid by the plan, as well as the potential for conflicts of interest. Along with the interim final regulations, DOL also released an official fact sheet, a news release announcing the issuance and a class exemption model notice. Specifically, the lawmakers request that DOL/EBSA:

- Modify the IFR to require that a covered service provider furnish to plan fiduciaries a single written statement detailing all fees and compensation received by the service provider as well as the other disclosures required by the IFR;
- Retain the clarification that mere compliance with the IFR does not satisfy a fiduciary's duties under ERISA Section 404;
- Require fiduciaries to pass through to participants certain service provider disclosures; and
- Actively enforce compliance with the regulation.

The 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), which includes substantial new defined contribution plan fee disclosure requirements, sponsored by Miller, has already been approved by the Education and Labor Committee. The Defined Contribution Fee Disclosure Act (S. 401) has been introduced in the Senate by Harkin and Kohl. There has been an indication that some lawmakers continue to be interested in the possible passage of additional fee disclosure legislation, despite the release of new rules, as part of a Pension Reform Act technical corrections measure.

EBSA Updates Questions and Answers Regarding Expiring COBRA Subsidy Program

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) has re-released its Frequently Asked Questions (FAQ) document providing updated guidance on the COBRA continuation coverage premium assistance program (first enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA)). Eligibility for the program expired on June 1, 2010, with subsidies for eligible individuals available for a total of 15 months. (The program will officially close, therefore, on August 31, 2011.)

The FAQ answers common questions for employers and employees that will exit the program over the next 12 months. A fact sheet is also available for employees with "tips" to ensure continuity of health coverage.

PBGC Proposes New Rules on Partial Plan Terminations

On August 10, the Pension Benefit Guaranty Corporation (PBGC) published proposed regulations on ERISA Section 4062(e), which provides for reporting of, and liability for, “partial” terminations of single-employer defined benefit pension plans.

The proposed regulations provide guidance on whether and when a “Section 4062(e) event” occurs, describe the liability that arises and how the liability is satisfied, prescribe recordkeeping requirements, and provide for waivers in appropriate circumstances. Under these rules, companies that shut down a facility (or other similar "cessation of operations") that results in a reduction of 20 percent or more of participants in a pension plan would be required to file with the PBGC within 60 days and either pay the partial termination liability amount to the PBGC

(which will be held in escrow) or post a bond of up to 150 percent of the liability. The PBGC can also work out other means of satisfying the liability.

The PBGC indicated in the proposed regulations' preamble that significant changes to the previous rules were not made by the agency. Along with the proposed regulations, PBGC also issued draft information requirements under the proposed rule to the Office of Management and Budget. Comments on the proposed rule and information requirements are due by October 12, 2010.

RECENT JUDICIAL ACTIVITY – NO ACTIVITY TO REPORT THIS MONTH