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Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Senate Finance Committee Hears Testimony on Long-Term Disability Insurance;

The U.S. Senate Finance Committee held the hearing Do Private Long-Term Disability Policies Provide the Protection They Promise?, focusing on perceived abusive practices by long-term disability insurance providers.

In his opening statement, Committee Chairman Max Baucus (D-MT) argued that "ERISA preempts state insurance measures to address these abuses," preventing claimants from receiving jury trials, pre-trial discovery, the right to submit evidence to the court, or punitive or consequential damages. He also claimed that "discretionary clauses" unfairly raise the standard for claimants in coverage disputes.

Ranking Republican member Charles Grassley (R-IA), in his opening statement, did not take a position on private disability insurance providers but noted that jurisdiction over ERISA resides with the Senate Health, Education, Labor and Pensions (HELP) Committee. Grassley focused on the importance of keeping the Social Security Administration's Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs unencumbered by excessive claims or other inefficiencies. "Any changes to ERISA must be carefully reviewed in terms of their impact on Social Security," he said.

The committee heard testimony from:

- Ronald Leebove, a rehabilitation specialist from Scottsdale, Arizona;
- Mark DeBofsky, an attorney with the law firm of Daley, DeBofsky, & Bryant;
- The Honorable William M. Acker, Jr., Senior United States District Court Judge for the Northern District of Alabama and author of a 1998 law review article, "Can the Courts Rescue ERISA?";
- David Rust, Deputy Commissioner for Retirement and Disability Policy at the Social Security Administration; and
- Paul Graham, Senior Vice President, Insurance Regulation and Chief Actuary for the American Council of Life Insurers

Leebove, DeBofsky and Acker all asserted that ERISA's remedy structure were insufficient for regulating long-term disability insurance and suggested the need for a more stringent review of cases. Rust explained that the SSA makes a concerted effort to develop a full medical evidence record. Graham, the lone insurance representative, explained that long-term disability programs are designed to have broad appeal and to be affordable through voluntary, employer-provided plans, which are prudently administered solely in the interest of the participants. Graham noted that while there have been some unfortunate problems with certain plans of certain providers, these are the exception and not the rule.

Graham's testimony asserts that (1) the discretionary clause is essential for reducing costs to voluntary sponsors of these plans and (2) existing safeguards are already in place under ERISA, which gives every plan participant the right to have an impartial federal judge review benefit claim denials.

In his closing remarks, Baucus said that he would be going to meet with HELP Committee Chairman Tom Harkin (D-IA) regarding next steps on this issue, since – as Grassley noted – that committee holds primary jurisdiction over ERISA.

Senate HELP Committee Holds Hearing on Retirement Security

On October 7, the Senate Health, Education, Labor and Pensions (HELP) Committee held the hearing The Wobbly Stool: Retirement (In)security in America, focusing on concerns that some raised about perceived retirement insecurity among low- and middle-income American families and the critical importance of maintaining Social Security (without retirement age increases or benefit cuts) as a safeguard against poverty and insecurity in retirement. Committee Chairman Tom Harkin (D-IA) and Senator Bernie Sanders (I-VT) were the only two Senators to attend the hearing. Republican members of the Committee did not appear and also did not call any witnesses.

In his opening statement, Harkin said, "As Chairman of the Committee on Health, Education, Labor and Pensions, I am making retirement security a priority. Over the coming year, I plan to hold a series of hearings examining the crisis in retirement security from a number of different angles, and I look forward to working with my colleagues on comprehensive reforms to help workers save for retirement and ensure that they have a source of retirement income that they cannot outlive." Harkin also indicated during the hearing that he has particular concerns about 401(k) plan loans and loan defaults and about whether participants are sufficiently protected regarding IRA rollovers.

Sanders, in his opening statement, emphasized the importance of the Social Security program and called on the White House National Commission on Fiscal Responsibility and Reform (President Obama's deficit reduction commission, scheduled to release its recommendations before the end of the year) to reject proposals to raise the official retirement age. "Let us not go forward in privatization and let's not go forward in raising the retirement age to 70," he said.

The Senators first heard from Phyllis Borzi, Assistant Labor Department Secretary for the Employee Benefits Security Administration (EBSA). In her testimony, Borzi reviewed EBSA's mission and current regulatory and enforcement priorities and activities. She indicated that the 401(k) plan participant fee disclosure regulation was in its final stages (likely within the next several weeks) and indicated that it would require disclosure in the form of a comparative chart. She also indicated that EBSA is studying other issues such as investment advice, lifetime income options (such as annuities), retirement plan reporting and access to financial information and education.

The committee then heard from a second panel of witnesses:

- Jack VanDerhei, research director for the Employee Benefit Research Institute, provided statistical data about plan sponsorship and participation and the general decline in Americans' preparedness for retirement.
- Ross Eisenbrey, vice president for the Economic Policy Institute (a non-profit think tank that studies the effects of economic policy on low- and middle-income workers) criticized the existing tax incentives for employer-sponsored defined contribution plans and made the case both against cuts to Social Security benefits and for increases in the Social Security taxable wage base. Eisenbrey also expressed support for a new mandatory retirement system to supplement Social Security that would contain subsidies for low-income workers.
- Shareen Miller, a personal health care assistant and member of the Service Employees International Union, described her challenging family economic circumstances, her lack of current retirement plan coverage, the significant decline in the balance of her 401(k)

from a prior job, and the difficulty she might have working until an extended Social Security age.

Most notable during the question-and-answer portion of the hearing was a discussion of the shift from defined benefit plans to defined contribution plans. Both VanDerhei and Eisenbrey recounted the many economic, legal and accounting factors (including a number of specific statutory changes adopted by Congress) that led to this shift.

RECENT REGULATORY ACTIVITY

DOL Proposes Updated Definition of "Fiduciary" for Investment Advice Arrangements

On October 21, the U.S. Department of Labor (DOL) issued proposed regulations that would significantly expand the definition of the term "fiduciary" with respect to investment advice provided in conjunction with defined benefit pension plans or individual retirement accounts (including defined contribution plans). Generally, the proposal is designed to protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing such advice are subject to ERISA's fiduciary standards. For example, the proposed rule would define certain advisers as fiduciaries even if they do not provide advice on a "regular basis."

The DOL proposed regulation indicates that problems in recent DOL enforcement initiatives were caused by the inability of the agency to establish that a service provider is a fiduciary. The DOL states that the current regulation had not been updated since 1975 and that the retirement plan community has changed significantly during that time period, citing the shift from defined benefit plans to defined contribution plans and the types and increasing complexity of investment products and services available to plans.

ERISA imposes stringent requirements on individuals who act as plan fiduciaries, supplemented by certain "prohibited" transactions. Fiduciaries are personally liable for losses sustained by a plan that result from a violation of these rules. Section 3(21)(A)(ii) of ERISA sets out a simple two-part test for determining fiduciary status: a person renders investment advice with respect to any moneys or other property of a plan, or has any authority or responsibility to do so; and the person receives a fee or other compensation, direct or indirect, for doing so.

According to the DOL, the existing regulation (which the proposal would replace) significantly narrowed the statutory language of Section 3(21)(A)(ii), creating a 5-part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. For advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

The proposed regulation broadens the definition in a number of ways. Added to the definition of investment advice are appraisals and fairness opinions (the DOL's focus here is apparently on valuation of closely held employer securities but would apply to other investments such as real estate), as well as advice and recommendations as to the management of securities or other properties (examples include advice on voting proxies and selection of persons to manage plan investments).

The fiduciary definition is further expanded by providing alternative conditions, at least one of which must be met by a person rendering advice in order for the person to be considered rendering investment advice under the proposal (conditions may be met by the person acting directly or indirectly, such as through an affiliate). Alternatives include:

- The persons providing advice or recommendations represent or acknowledge that they are acting as ERISA fiduciaries;
- Any person who exercises any discretionary authority or discretionary control with respect to the management of the plan, exercises any authority or control with respect to the management or disposition of its assets, or has any discretionary authority or discretionary responsibility in the administration of the plan;
- Investment advisers within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940; and
- A person meeting a revised version of the old five-part test that does not require the advice to be provided on a regular basis and does not require that the parties have a mutual understanding that the advice will serve as a primary basis for plan investment decisions. (It is sufficient if the understanding of the parties is that the advice will be considered in connection with making a decision related to plan assets.)

A necessary element of fiduciary status for rendering investment advice under the statute is that a person must render investment advice for a fee or other compensation, direct or indirect. The proposed regulations also clarify that this would include any fee or compensation for advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered.

The proposed regulations also clarify that fiduciary status may result from the provision of advice or recommendations to a plan fiduciary, participant or beneficiary and indicates that this reflects the DOL's long-standing interpretation of the current regulation. Although the regulation noted that, in general, a recommendation to a plan participant to take a permissible plan distribution does not constitute investment advice even when that advice is combined with a recommendation as to how the distribution should be invested, the DOL also asked for comment on whether and to what extent the final regulation should define the provision of investment advice to include recommendations related to taking a plan distribution.

The proposal also makes clear that certain activities, such as providing investment education, will not be considered fiduciary investment advice. Other situations that do not constitute investment advice include:

- When the person can demonstrate that the recipient of the advice knows or should reasonably know that the person is providing the advice in an adverse capacity (seller of security or other property) and is not undertaking to provide impartial advice (but acknowledgment of fiduciary status with respect to the transaction negates the exception), and
- The marketing or making available (through a platform or similar mechanism) of investments without regard to the individualized needs of the plan, its participants or beneficiaries, etc., if the person making available such investments discloses in writing

to the plan fiduciary that the person is not undertaking to provide impartial investment advice. The latter disclosure includes language indicating that the activity, by itself, would not result in fiduciary investment advice.

The DOL is seeking comments on the proposed regulations, due January 20, 2011.

IRS Releases Final and Proposed Hybrid Retirement Plan Regulations

On October 18, the Internal Revenue Service (IRS) released long-awaited final regulations with respect to hybrid retirement plans (plans, such as cash balance plans, that incorporate elements of defined benefit and defined contribution plans) under the Pension Protection Act of 2006 (PPA). The final regulations address such critical issues as age discrimination, vesting and conversions from traditional defined benefit plans. At the same time, IRS also proposed new hybrid plan regulations relating to issues that are not covered in the final regulations, with particular attention to a hybrid plan's permitted market rate of return assumptions.

In general, both the final and proposed regulations refer to the special rules for computing accrued benefits by reference to a hypothetical account balance (or equivalent amounts) under Internal Revenue Code Section 411(a)(13)(A)).

Final Regulations

The final regulations are based on proposed regulations that were originally issued in December 2007. In general, these final regulations incorporate the transitional guidance provided under Notice 2007-6 as well as the provisions of the 2007 proposed regulations. The regulations adopt the terminology used in the proposed regulations (such as "statutory hybrid benefit formula" and "lump sum-based benefit formula") to take into account situations where plans provide more than one benefit formula. These regulations take into account comments received in response to the 2007 proposed regulations and also reflecting the enactment of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). Specifically, the final regulations clarify the following elements of the proposed regulations:

- Applicable definitions, relief of section 411(a)(13)(A), and special vesting rules for applicable defined benefit plans
- The safe harbor for age discrimination, conversion protection, and market rate of return limitation
- Changes in a plan’s interest crediting rate

The final regulations generally apply to plan years that begin on or after January 1, 2011. However, some sections that provide that the regulations set forth the exclusive list of interest crediting rates and combinations of interest crediting rates that satisfy the market rate of return requirement apply to plan years that begin on or after January 1, 2012. For plan years that begin before January 1, 2012, statutory hybrid plans may utilize a rate that is permissible under these final regulations or the 2010 proposed regulations for purposes of satisfying the statutory market rate of return requirement.

Proposed Regulations

The proposed regulations provide guidance on certain issues that are not addressed in the final regulations, with particular attention to hybrid defined benefit plans that adjust benefits using a variable rate. Specifically, the proposed regulations cover:

- The scope of relief available under Section 411(a)(13)(A), including:
    - Application of the 2010 final regulations
    - Limitations on the relief
    - Application to distributions other than single sums
    - Application to plans with multiple formulas
    - Application to pension equity plans
- The special rule with respect to statutory hybrid plans;
- The special conversion protection rule and additional rules with respect to the market rate of return limitation, including:
    - Comparison at effective date of conversion amendment
    - The process for calculating the assumed market rate of return (see below for more details)
    - Plan termination
    - The special rule with respect to changes in interest crediting rates
    - The special rule with respect to interest crediting rate after normal retirement age
- Changes in interest crediting rates, including:
    - The special rule with respect to changes in future interest crediting rates
    - Changes that would otherwise violate the special rule but that are made to the extent necessary to satisfy the accrued benefit requirements

Most significantly, the proposed rules prescribing a "market rate of return" appears to permit five additional interest crediting options (in addition to the options listed in the final regulations): (1) the actual rate of return on plan assets if properly diversified, (2) an interest credit based on the rate of return on a non-leveraged, broad-based (either U.S. or international) regulated investment company (like an S&P 500 fund), (3) a variable long-term investment grade corporate bond interest rate, with a 4 percent "floor," (4) the rate from (1) or (2) with a 3 percent cumulative "floor" (annual floor is not permitted for an equity-based rate), or (5) a 5 percent fixed rate of return. The proposed rule indicates the agencies intend to allow plan sponsors that currently have crediting rates in excess of the market rate to amend their plans after the proposed regulations are finalized to reduce the crediting rate but only to the extent necessary to enable the plan to meet the market rate of return requirements. It is expected that relief from the protected benefit rule (411(d)(6)) would apply only if the amendment is adopted before the final regulations apply to the plan.

The specific rules that would be implemented under the proposed regulations generally would apply to plan years that begin on or after January 1, 2012. However, as stated in the preamble to the 2010 final regulations, a plan is permitted to rely on the provisions of these proposed regulations, as well as the 2010 final regulations, the 2007 proposed regulations, and Notice 2007-6, for purposes of satisfying the requirements under the Internal Revenue Code for periods before the regulatory effective date.

On Page 48 of the proposed regulations, the IRS and U.S. Treasury Department request public comments on the clarity of the proposed regulations as well as ten specific plan-related issues, including whether to limit the crediting rates that can be used in switching from an impermissible rate of return. Comments are due by January 12, 2011, with an IRS hearing scheduled for January 26, 2011.

DOL Releases Final 401(k) Participant Fee Disclosure Regulations

On October 14, the U.S. Department of Labor (DOL) released long-awaited final regulations addressing fiduciary requirements for fee disclosure to participants in participant-directed individual account plans (such as 401(k) plans). Along with the final regulations, DOL provided a fact sheet and revised model chart for helping participants compare investment options under their plan.

The final rule provides that a plan administrator must provide to each participant or beneficiary certain plan-related information and certain investment-related information in specific categories:

- Plan-related information, including general plan information about the structure and mechanics of the plan, administrative expenses individual expenses and statements of actual charges or deductions;
- Investment-related information, including performance data, benchmark information, fee and expense information and educational resources for each investment option Comparative information, provided annually, in a form similar to the revised model chart.

These rules are applicable in plan years beginning on or after November 1, 2011. Also notable:

- The rule provides plan administrators protection from liability for the completeness and accuracy of information provided to participants if the plan administrator reasonably and in good faith relies upon information provided by a service provider.
- After a participant has invested in a particular investment option, he or she must be provided any materials the plan receives regarding voting, tender or similar rights in the option.
- Upon request, the plan administrator must also furnish prospectuses, financial reports and statements of valuation and of assets held by an investment option.
- The regulation is compatible with the existing safe harbor for electronic disclosures.
- The final rule would also make conforming changes to the disclosure requirements for plans that elect to comply with the existing ERISA section 404(c) regulations.

Among the key changes present in the final regulations were:

- revision of the effective date (plan years beginning on or after November 1, 2011), while still ambitious, gives employers and service providers more time than previously provided (just over 12 months after the expected formal issuance of the regulations);
- permitting disclosure on or before the first investment rather than "on or before the date of eligibility;" and
- inclusion in text of the regulation the reliance relief for plan fiduciaries relying reasonably and in good faith on information from service providers and, as applicable, issuers of designated investment alternatives.
- In addition, the regulations include a number of other changes to the proposed regulations including the required disclosure of the presence of so called "revenue sharing arrangements" so that, to the extent applicable, an explanation is required to be included in the statement to be furnished the participant that notes that in addition to any fees reported in the statement, some of the plan's administrative expenses for the preceding quarter were paid from the annual operating expenses of one or more of the plan's designated investment alternatives. Along with the regulations, the DOL also announced its intent to issue a request for public comment relating to the electronic distribution of plan information to plan participants and beneficiaries.

SEC Issues Regulations Implementing Financial Reform Law

The U.S. Securities and Exchange Commission (SEC) has begun issuing regulations implementing portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the landmark financial system reform legislation including a number of provisions affecting retirement plans. On October 20, the SEC released proposed regulations regarding shareholder approval of executive compensation and golden parachute compensation under the Dodd-Frank Act. The SEC solicited preliminary public comments on these issues and others earlier in the year.

The proposed regulations implement Section 951 of the Dodd-Frank Act, which amends the Securities Exchange Act of 1934 to require that companies:

- conduct a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K or any successor to Item 402;
- conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation; and
- solicit votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

PPACA Guidance Released Addressing Retiree-Only Plans, Long-Term Disability

On October 13, the U.S. Department of Labor (DOL) issued new "Frequently Asked Question" guidance relating to implementation of the Patient Protection and Affordable Care Act (PPACA). The new guidance follows an initial series of FAQs released on September 20 and a second series of FAQs released on October 8. The new guidance contains two questions, both regarding the exception from the PPACA insurance reforms for those plans with less than two active employees. Specifically:

- Question and answer No. 1 makes clear that plans with "less than two participants who are current employees" are excepted from the insurance reforms under the PPACA. This encompasses plans that apply only to retirees and other former employees. The agencies initially addressed this issue in the preamble to the interim final regulations regarding grandfathered plans, but sponsors and issuers continued to have questions regarding whether these types of plans are generally excepted from the PPACA's insurance reforms.
- Question and answer No. 2 addresses the status of a plan that covers both retirees and individuals on long-term disability (LTD). The guidance states that the "Departments [of Labor, Treasury and Health and Human Services] have not issued guidance on this specific issue," and that "[i]n order to fully analyze the issue, and balance the goal of ensuring that the Affordable Care Act's market reforms and patient protections are provided to eligible enrollees of group health plans with the goal of preventing disruption of existing coverage, the Departments will be issuing a request for information (RFI) very soon." The Department indicates that it expects to publish guidance on this issue in 2011. The guidance goes on to state that "[u]ntil guidance is issued, the Departments will treat plans described above as satisfying the exemption from HIPAA and the Affordable Care Act's group market reforms for plans with less than two participants who are current employees," and that "[t]o the extent future guidance on this issue is more restrictive with respect to the availability of the exemption than this interim relief, the

guidance will be prospective, applying to plan years that begin sometime after its issuance." The guidance states that pending such further guidance, "a plan may adopt any or all of the HIPAA and Affordable Care Act market reform requirements without prejudice to its exemption."

PPACA Guidance Released Detailing Grandfathering and Other Issues

Late on Friday, October 8, the U.S. Departments of Labor (DOL), Treasury and Health and Human Services collectively issued additional guidance relating to implementation of the Patient Protection and Affordable Care Act (PPACA). The new guidance is in the "frequently asked question" (FAQ) format adds to an initial series of FAQs released on September 20.

The October 8 "FAQs About the Affordable Care Act Implementation Part II" covers issues including:

- Grandfathered health plans;
- Dental and vision benefits;
- Rescissions;
- Preventative health services; and
- Clarification of policy year/effective date of PPACA for individual health insurance policies.

The section on grandfathered health plans includes several questions covering: whether other changes beyond those listed in the interim final regulations could affect the status of a grandfathered plan; whether a PPO, POS arrangement and HMO provided by one employer may be treated as individual "benefit packages"; application of the rules on employer contribution changes when the plan sponsor restructures its tiers of coverage; the effect of increases in copayment levels for certain categories of services that exceeds the standards set in the interim final regulations; and the effect on wellness programs sponsored by group health plans. The FAQs also clarify circumstances under which the agencies would not consider a retroactive elimination of coverage to be a rescission for purposes of PPACA.

IRS Makes PPACA W-2 Reporting Optional for 2011

On October 12, the Internal Revenue Service (IRS) released a new draft Form W-2 for 2011 along with Notice 2010-69, guidance indicating that the agency will defer the new requirement for employers to report the cost of coverage under an employer-sponsored group health plan, making that reporting by employers optional for forms issued for the 2011 tax year.

Under the Patient Protection and Affordable Care Act (PPACA), employers are required to report the cost of coverage under an employer-sponsored group health plan on the Form W-2. This reporting requirement was intended to provide employees with greater transparency into overall health care costs. Under the statute, employers are instructed to use rules similar to COBRA valuation rules to determine "aggregate cost."

According to Notice 2010-69, "The Treasury Department and the IRS have determined that this relief is appropriate to provide employers with additional time to make any necessary changes to their payroll systems or procedures in preparation for compliance with the reporting requirement." Although reporting the cost of coverage will be optional with respect to 2011, to quell rumors to the contrary, the IRS continues to stress that the amounts reportable are not taxable. Additional guidance on this issue is expected to be provided before the end of 2010.

PBGC Issues Guidance on Maximum Guarantees

The Pension Benefit Guaranty Corporation (PBGC) continues to provide guidance with respect to defined benefit pension plans. On October 27, the agency published the maximum guarantee tables for 2011, 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. The values in the table for a calendar year apply to distributions with annuity starting dates in that calendar 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.

Notably, the amounts in this table are generally 5 percent higher than permitted values for 2010, and greater than the limits in effect in each of the prior three years.

The PBGC and the Internal Revenue Service (IRS) have indicated that other insurance benefits, contribution limits and Social Security benefits will remain at 2010 levels for the 2011 plan year. The IRS limits were formally announced in IR-2010-108 and Revenue Procedure 2010-40.

PBGC Formally Extends Comment Period for Comments on Partial Termination Proposal

The Pension Benefit Guaranty Corporation (PBGC) has announced that it will extend the comment period relating to recently proposed regulations on ERISA Section 4062(e), which provides for reporting of, and liability for, "partial" terminations of single-employer defined benefit pension plans.

National Quality Forum Releases Final Recommendations to HHS

On October 15, the National Priorities Partnership (a multi-stakeholder group convened by the National Quality Forum (NQF)) provided its **final report** to the U.S. Department of Health and Human Services with recommendations for priorities and goals to improve health care quality. The NQF was requested to convene such a multi-stakeholder group to provide feedback on the proposed National Quality Strategy framework developed by HHS as directed the Patient Protection and Affordable Care Act (PPACA).

As detailed in the report, NPP identified a set of priorities and goals intended to advance the guiding framework of better care, affordable care, and healthy people/healthy communities.

PBGC Grants Request for Reconsideration of Premium Filing

The PBGC recently granted a company's request for reconsideration of its variable premium filing and accepted its election to use the alternative premium funding target for the 2009 plan year. The PBGC had previously notified the company of a filing error and requested that the company amend its filing using the standard premium funding target. PBGC regulations allow plans to elect to compute unfunded vested benefits using the alternative premium funding target in premium calculations so long as elections to do so are filed by the variable-rate premium due date. For certain years, such as 2009, the alternative premium funding target can have the effect of substantially reducing the amount of variable premiums owed by a company. The company, in this instance, had submitted the actual premium in a timely manner but had failed to properly submit the filings via the PBGC provided online filing application, MyPAA, due to an individual error in submitting. When notified, the company submitted the filing application making the appropriate election matching the premiums it had submitted, not using the standard funding target amount. The reconsideration was granted based on the facts in the case including that the company timely submitted the variable rate premium.

HHS Releases Additional ERRP Information Including Eligible Claims Guidance

As part of the ongoing roll-out of the Early Retiree Reinsurance Program (ERRP), the U.S. Department of Health and Human Services (HHS) has released new information for employer participants in the program.

The ERRP, enacted under Section 1102 of the Patient Protection and Affordable Care Act (PPACA), allows employer health plan sponsors to apply and qualify for reimbursement of early retiree health care expenses. HHS' dedicated ERRP secure website includes the following new releases:

- New reimbursement preparation features now available: plan sponsors are now able to complete a number of processes in preparation for reimbursement, including the updating of banking information, submission of early retiree lists and assigning account manager reimbursement privileges.

- New reimbursement guidance: claims eligible for reimbursement: This guidance further clarifies ERRP reimbursement policy by describing the types of medical items or services that are generally excluded from Medicare coverage and will not be reimbursed or credited toward the program’s cost thresholds.

- Preparing for ERRP reimbursement: identifying early retirees: Participating plan sponsors are required to submit an Early Retiree List prior to submitting each reimbursement request. The Early Retiree List must be specific to the plan year for which reimbursement is requested.
- ERRP reimbursement preparations: HHS is encouraging plan sponsors with approved applications to begin taking the next steps in preparing for the ERRP reimbursement process.

To date, HHS’ Office of Consumer Information and Insurance Oversight has approved nearly 3,000 employer and union plans. The temporary $5 billion program ends on January 1, 2014, when the state-based health insurance exchanges are scheduled to be operational. However, there is widespread belief that the $5 billion will be exhausted before that date.

RECENT JUDICIAL ACTIVITY – NO ACTIVITY TO REPORT THIS MONTH