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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

House Votes to Repeal CLASS Program

The U.S. House of Representatives passed the Fiscal Responsibility and Retirement Security Act (H.R. 1173), a bill to repeal the Community Living Assistance Services and Supports (CLASS) program by a 267-159 vote on February 1. Twenty-eight Democrats joined all voting Republicans in approving the measure.

The CLASS program, enacted as part of the Patient Protection and Affordable Care Act (PPACA), permits workers to pay into an insurance fund that would provide a daily cash benefit for long-term care and support services. H.R. 1173 was introduced in March 2011 by Representatives Charles Boustany (R-LA) and Phil Gingrey (R-GA) and was approved by the House Energy and Commerce Committee on November 30, 2011, and by the House Ways and Means Committee on January 18.

Congress' Joint Committee on Taxation provided a brief description of H.R. 1173 in December 2011. Despite the margin of support in the House, the Senate is unlikely to take up the bill because U.S. Department of Health and Human Services (HHS) Secretary Kathleen Sebelius conceded in an October 2011 letter to Congress that the program was not viable. "Despite our best analytical efforts, I do not see a viable path forward for CLASS implementation at this time," she wrote, citing a formal HHS report and the statute's requirement that the program be actuarially sound and financially solvent for at least 75 years.

RECENT REGULATORY ACTIVITY

IRS Revises Guidance on Form W-2 Informational Reporting Under PPACA

On January 3, the Treasury Department and Internal Revenue Service (IRS) issued Notice 2012-09, which restates and amends interim guidance regarding informational reporting to employees of the cost of their employer-sponsored group health plan coverage, as required by the Patient Protection and Affordable Care Act (PPACA). Section 6051(a)(14) of the Internal Revenue Code, as added by PPACA, requires employer health plan sponsors to report the cost of coverage under an employer-sponsored group health plan on the Form W-2. Notice 2012-09 is applicable beginning with 2012 Forms W-2 (forms that employers are required to give employees by the end of January 2013).

Notice 2012-09 supersedes "question-and-answer" interim guidance initially provided under Notice 2011-28 (issued in March 2011). The new notice modifies some of the prior Q&As and provides additional guidance through new Q&As.

Modifications to interim guidance made by Notice 2012-9 include:

- Clarification that the reporting requirement does not apply to coverage under a health FSA if contributions occur only through employee salary reduction elections (Q&A-19); and
- Clarification that an employer is not required to report the cost of coverage under a dental or vision plan if the plan satisfies requirements for being excepted benefits under HIPAA (Q&A-20).

Notice 2012-09 also provides the following additional guidance through new Q&As:

- The guidance clarifies that employers are not required to include the cost of coverage under an employee assistance program (EAP), wellness program, or on-site medical clinic in the reportable amount if the employer does not charge a premium with respect to that type of coverage provided under COBRA to a qualifying beneficiary (Q&A-32).
- The guidance clarifies that an employer may include in the aggregate reportable cost on Form W-2 the cost of coverage that is not required to be reported under applicable interim relief, including for example, the cost of coverage under a Health Reimbursement Account (HRA), a multi-employer plan, an EAP, wellness plan or on-site medical clinic, provided the calculation of such costs satisfies guidance requirements and constitutes applicable employer-sponsored coverage.
- The guidance clarifies how to calculate the reportable cost of coverage under programs, such as long-term disability programs, where only a portion of the program constitutes coverage under a group health plan (Q&A-34).
- The guidance clarifies that the aggregate reportable cost for a calendar year on Form W-2 may be based on information available to the employer as of December 31 of the calendar year (Q&A-35).
- The guidance clarifies how an employer may treat a coverage period, such as the final payroll period of a calendar year that continues into a subsequent calendar year for purposes of allocating the cost of coverage (Q&A-36).
- The guidance clarifies that an employer is not required to include the cost of coverage provided under hospital indemnity or other fixed indemnity insurance, or the cost of coverage for specified disease or illness in the aggregate reportable cost for W2 reporting if those benefits are offered as independent, non-coordinated benefits and the employee pays the full amount of the premium with after-tax dollars (Q&A-38).
- The guidance clarifies that aggregate reportable cost is not required to be reported on a Form W-2 furnished by a third-party sick pay provider (Q&A-39).

Notice 2012-09 states that this interim guidance is applicable until further guidance is issued, with Treasury and IRS continuing to consider comments submitted on Notice 2011-28 as they work to develop regulations under Section 6051(a)(14).

IRS Formalizes Changes to Determination Letter Program

The Internal Revenue Service (IRS) has amended the employee plans determination letter program to eliminate certain features of the determination letter program (and eliminate the application process entirely for some plan sponsors).

These changes were formalized in Revenue Procedure 2012-06, published on January 3 as part of Internal Revenue Bulletin 2012-1.

IRS Issues Guidance on Permitted Disparity on Employee Covered Compensation

On January 5, the Internal Revenue Service (IRS) issued **Revenue Ruling 2012-5**, providing tables of "covered compensation" for determining "permitted disparity" under Internal Revenue Code Section 401(l)(5)(E) for the 2012 plan year.

Permitted disparity refers to the method of computing and allocating non-elective contributions under an employer sponsored plan — in conjunction with integration of Social Security benefits

— where the allocation method results in participants with compensation above the integration level receiving a higher percentage of contribution.

Section 401(l)(5)(E)(i) defines covered compensation with respect to an employee as the average of the contribution and benefit bases in effect under Section 230 of the Social Security Act for each year in the 35-year period ending with the year in which the employee attains Social Security retirement age. Section 401(l)(5)(E)(ii) states that the determination for any year preceding the year in which the employee attains Social Security retirement age shall be made by assuming that there is no increase in covered compensation after the determination year and before the employee attains Social Security retirement age.

CFTC Releases Final Rules for Business Conduct Standards; EBSA Affirms No Conflict with Fiduciary Rules

The Commodity Futures Trading Commission (CFTC) has released **final regulations** relating to business conduct standards for swap dealers and major swap participants in their dealings with counterparties, including ERISA plans, under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). The CFTC approved these final regulations in a January 11 public meeting, at which they also released a fact sheet and questions-and-answers document.

The final business conduct rules have been revised to provide increased flexibility for ERISA plans utilizing swap trades. ERISA plans commonly use swaps to hedge or mitigate risks endemic to plan liabilities and investments.

In response to the adoption of the final regulations, U.S. Department of Labor (DOL) Assistant Secretary for the Employee Benefits Security Administration (EBSA) Phyllis Borzi **formally wrote the CFTC** to affirm that the final regulations "do not require swap dealers or major swap participants to engage in activities that would make them fiduciaries under the [DOL's] current five-part test defining fiduciary advice ... In the Department's view, the CFTC's final business conduct standards neither conflict with the [DOL's] existing regulations, nor compel swap dealers or major swap participants to engage in fiduciary conduct."

Additionally, the CFTC adopted a set of rules to govern segregation of swap collateral. The CFTC is also considering proposal of additional regulations on this matter that would provide additional protections for ERISA plans.

In a September 2011, News Release, DOL announced that EBSA would withdraw and re-propose regulations revising the definition of a "fiduciary." The new proposal is expected to be issued in the coming months. As part of her letter to CFTC, Borzi said that DOL "is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap dealers and major swap participants who comply with these business conduct standards."

DOL Releases Updated Regulatory Agenda

The U.S. Department of Labor (DOL) has **updated its Semi-Annual Regulatory Agenda** to reflect regulations that are expected to be under review or development within the next year, as well as those completed during the past 6 months. The Employee Benefits Security Administration (EBSA) section begins on Page 10 of this summary document. While the agenda includes timetables with expected publication dates, it is important to note that these dates are tentative and flexible.

(To view the regulatory agenda itself, **click this link** and under "Select Agency," select "Department of Labor (DOL)")

For employer retirement plan sponsors, the following matters are discussed:

- *Service provider-fiduciary fee disclosure:* In July 2010, DOL issued interim final regulations governing disclosure of defined contribution retirement plan fees by service providers to plan fiduciaries under ERISA Section 408(b)(2), requiring service providers to 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. In July 2011, EBSA issued final regulations extending the initial disclosure effective date for these rules to April 1, 2012 .

  According to the regulatory agenda, DOL intends to issue final regulations on service provider-fiduciary fee disclosure in January 2012, meaning that they could be issued very soon.

- *Guide or similar requirement for Section 408(b)(2) disclosures:* Related to the fee disclosure regulations mentioned above, it is expected that DOL will require retirement plan service providers to provide a guide or similar tool, offered along with such disclosures, to assist fiduciaries in identifying and understanding the potentially complex disclosure documents that are provided to them or if disclosures are located in multiple documents. The DOL regulatory agenda indicates that this summary/guide requirement will be contained in a separate proposed regulation, expected to be issued in June 2012.

- *Definition of fiduciary:* In October 2010, EBSA proposed regulations that would have significantly expanded 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. DOL announced in September 2011 that EBSA would withdraw and re-propose these regulations pending additional study. The agency notes further that "alternatives will be considered" and "preliminary estimates of the costs and benefits will be developed, as appropriate, following a determination regarding the alternatives to be considered." A new Notice of Proposed Rulemaking (NPRM) is tentatively scheduled to be issued in May 2012.

- *Pension benefit statements:* The Pension Protection Act of 2006 (PPA) requires ERISA plans to provide participants and certain beneficiaries with individual pension benefit statements. Generally, defined benefit plans must provide the statement every three years (with an annual notice alternative) while defined contribution plans that permit participant direction must provide the statement quarterly. Individual account plans that

do not permit participant direction must provide the statement annually. This proposed rule is expected to "require or facilitate the presentation of a participant's ... account balance as a lifetime income stream of payments, in addition to presenting the account balance as an account balance." In February 2010, DOL issued a request for information regarding lifetime income options — such as annuities — for participants and beneficiaries in retirement plans.

- *Target date funds (TDFs):* DOL released proposed regulations regarding target date funds, which would amend the final regulations of October 2007 on qualified default investment alternatives (QDIAs) as well as the October 2010 participant-level fee disclosure regulations. DOL expects to issue final regulations on this matter in April 2012.

- *Annual funding notice:* DOL has issued proposed regulations that would implement the annual funding notice requirement under ERISA, as amended by PPA and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). DOL expects to issue final regulations on this topic in May 2012.

- *Amendment of abandoned plan program:* DOL published a package of final regulations, collectively entitled Termination of Abandoned Individual Account Plans, that facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers. DOL "intends to revise the regulations to expand the program to include plans of businesses in liquidation proceedings to reflect recent changes in the U.S. Bankruptcy Code." Proposed regulations are expected to be issued in May 2012.

Regulatory activity impacting retirement and health and welfare plans include:

- *ERISA claims procedures:* ERISA provides that each employee benefit plan must provide "adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." The notice must set forth the specific reasons for the denial and must be written in a manner calculated to be understood by the claimant. Each plan must also afford "a reasonable opportunity" for any participant or beneficiary whose claim has been denied to obtain "full and fair review" of the denial by the "appropriate named fiduciary of the plan." DOL intends to "strengthen, improve, and update the current rules governing the internal claims and appeals process" with proposed regulations expected in June 2012.

The revised agenda does not include any specific regulatory items pursuant to the Patient Protection and Affordable Care Act of 2010 (PPACA), though the summary document notes that "EBSA will continue to issue guidance implementing the health reform provisions of [PPACA] the Affordable Care Act to help provide better quality health care for American workers and their families." The only health care plan items referenced are cease and desist orders for fraudulent multiple employer welfare arrangements (MEWAs) and filings required of MEWAs and certain other entities.

RECENT JUDICIAL ACTIVITY – Nothing to Report This Month