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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

Testimony Before House Subcommittee on IRS Implementation of PPACA

On September 11, the U.S. House of Representatives Ways and Means Subcommittee on Oversight heard testimony on the Internal Revenue Service's (IRS) implementation and administration of the Patient Protection and Affordable Care Act (PPACA).

The hearing was intended to focus on IRS implementation of various tax provisions of PPACA and consider how the agency's implementation of the law will affect taxpayers and its core revenue-collection mission. In his opening statement, Subcommittee Chairman Charles Boustany (R-LA) described the expansion of IRS responsibilities under the health care law, including new rules that "pose significant challenges for job creators."

The hearing began with testimony from Steven T. Miller, deputy IRS commissioner for services and enforcement, who outlined IRS' efforts to implement PPACA thus far including "ensuring tax law changes that were retroactively or immediately effective were implemented in an expedited manner; and putting structures and processes in place to begin planning for provisions with future effective dates." He said that the agency is currently preparing for its two most substantial forthcoming implementation issues – the premium assistance tax credits and the individual minimum coverage provision – both of which begin in 2014. To manage these efforts, he noted the need to invest in information technology system upgrades as included in the agency's Fiscal Year 2013 budget request.

During the question-and-answer period, subcommittee members discussed procedural matters such as the interaction between IRS and other federal regulators and the White House, the need for additional enforcement agents and the privacy of individual taxpayer information. Representatives also raised a number of policy questions about the calculation of household income (for determining tax credit eligibility), reconciliation of tax credit overpayments and the appropriateness of excise taxes on items such as medical equipment.

Testifying on the panel:

- Seth Perretta, a partner at Crowell & Moring, LLP, acknowledged that the regulators have generally sought to give employers flexibility. In that regard he described a number of examples in which the agencies have addressed challenges faced by employer plan sponsors – including the new Form W-2 reporting requirements for employer-sponsored group health coverage, PPACA's "pay-or-play" provision and fees for the Patient-Centered Outcomes Research Institute (PCORI) Trust Fund – and mentioned a number of important and highly anticipated decisions yet to be made. "In regulatory projects yet to be developed, we urge the IRS to be receptive to input from employers in the same fashion that it has sought and received suggestions since enactment of the PPACA."
- Fred Goldberg, Jr., a partner at Skadden, Arps, Slate, Meagher & Flom LLP and a former IRS chief counsel and commissioner, characterized PPACA as a "needless administrative and compliance quagmire" that "will lead to significant unintended consequences." He suggested that IRS could streamline implementation by giving responsibility for determining premium tax credits to individuals rather than the exchanges.
- Kathy Pickering, vice president of government relations and executive director of The Tax Institute at H&R Block, addressed what she described as "the disparate focuses" of

the IRS and the Department of Health and Human Services (HHS) as well as the need to finalize PPACA regulations and guidance by April 30, 2013, to ease burdens on taxpayers.

- Scott A. Hodge, president of The Tax Foundation, described the current tax system as "a Byzantine monstrosity" and decried "the relentless growth of credits and deductions over the last 20 years" which "has made the IRS a super-agency." He argued that PPACA has saddled the agency with duties beyond its core competency and strongly recommended comprehensive reform of PPACA and the tax code.

During the question-and-answer period, Boustany asked the panelists to describe some of the unintended consequences that could result from full implementation of PPACA. Goldberg suggested that "employers will have enormous incentives to discontinue coverage or share costs with employees," while Hodge added that fees and taxes will ultimately cascade to employers and employees in the form of higher premiums.

Ranking Democratic subcommittee member John Lewis (D-GA) asked Perretta to expand on which elements still require clarification from IRS and other agencies. Perretta cited matters such as reporting and disclosure obligations, determining the minimum value of coverage and treatment of wellness programs.

Perretta also answered a question from Rep. Diane Black (R-TN), who had asked about the personal privacy concerns inherent to PPACA, by noting IRS' efforts to mitigate privacy issues that employers may use Form W-2 information when making the household income determination.

Senate Committee Holds Hearing on Pension Modernization

On September 20, the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP) held a hearing on September 20 to discuss "pension modernization" and possible reforms to the retirement system.

In his opening statement, Harkin touted the rewards of the traditional defined benefit pension system, as a source of retirement security as well as investment capital. He cited a U.S. "retirement deficit" – which he defined as the difference between the amount of money people have saved for retirement and the amount they need to live adequately – of $6.6 trillion, underscoring the need for reform.

Harkin released a report in July, The Retirement Crisis and a Plan to Solve It, in which he recommends strengthening certain aspects of the Social Security program and creating a new "USA Retirement Funds" savings program. According to his proposal, USA Retirement Funds would be required hybrid-type savings vehicles for employers who do not offer retirement programs with automatic enrollment and a minimum level of employer contributions, though they could be offered by employers to supplement existing retirement plans.

The hearing took the form of a roundtable discussion, with the invited witnesses responding to three fundamental questions posed by Committee Chairman Tom Harkin (D-IA): (1) what should the retirement system look like; (2) what would make it easier for business to provide a retirement plan; and (3) what do workers want and need for a stable retirement.

The following witnesses participated in the roundtable discussion:

- Susan L. Breen-Held, consulting actuary with Principal Financial argued that the current system is "not broken" and represents a firm foundation for the development of a modern retirement system. She emphasized that public policy should retain and improve incentives for employers to sponsor both defined benefit and defined contribution plans, including the existing tax incentives. Specifically, regarding employer needs, she suggested measures to address the ongoing volatility of defined benefit plan funding and a reduction in annual testing burdens.
- David Madland, director of the American Worker Project at the Center for American Progress, argued that the 401(k) system has done a poor job of managing costs and investment risks by shifting them from employers to employees. He cited his own Collective Defined Contribution Plan proposal as a more equitable approach to retirement savings.
- Andrew G. Biggs, resident scholar at the American Enterprise Institute, stressed the importance of simplicity in crafting a retirement system. He noted that the shift from defined benefit plans to defined contribution plans has not only shifted investment risk but has also resulted in lower participation and contribution rates. Regarding Breen-Held's recommendation for additional pension funding stabilization, he suggested that such measures (like the provisions included in the Moving Ahead for Progress in the 21st Century Act (MAP-21)) are dangerous because they artificially manipulate interest rates to achieve a desired funding level.
- John Adler, retirement security campaign director at the Service Employees International Union (SEIU), argued that the federal government should take a stronger role in funding retirement for lower-income workers, who are overwhelmingly reliant on Social Security benefits and are therefore unable to achieve an adequate standard of living in retirement. In particular, he made a plea for help for multiemployer plans, as they have been unsuccessful in recruiting employers to participate in the plans since 2008. He also pushed back against the expansion of contribution limits for defined contribution plans, as suggested by Breen-Held, suggesting that increased limits will only benefit highly compensated workers. (Breen-Held noted later that the non-discrimination rules benefit lower-wage workers in such circumstances.)
- Karen Friedman, executive vice president and policy director of the Pension Rights Center and representing the Retirement USA coalition, strongly encouraged the preservation of defined benefit plans. She expressed support for Harkin's proposal and cited the principles for a new retirement system espoused by her organization.
- Richard Hudson, consulting actuary for Cheiron, observed that the evolution from a defined benefit environment to a defined contribution environment has resulted in a shift of not only investment risk but longevity risk. He cited the benefits of annuitization as a firewall against longevity risk.
- Jim Davis, owner of Iowa Title and Realty (representing small business), asserted that the ideal modern pension system would be mandatory, with diversified, professionally managed investment, and should include strict waiting periods and vesting schedules.
- Aliya Wong, executive director of retirement policy at the U.S. Chamber of Commerce, echoed Breen-Held's comments and stressed that a modernization approach should preserve an employer-sponsored system that is voluntary, flexible and innovative. She recommended the finalization of rules that would ease electronic communication and disclosure and also noted that the Federal Accounting Standards Board continues to undermine plan sponsorship through new broad financial reporting disclosure rules for entities that participate in pension and other postretirement benefit plans.

Harkin acknowledged that Congress will not act on pension modernization legislation during the remainder of this year, although he vowed to be very aggressive about pursuing these issues

next year. Some of these topics could certainly arise as part of comprehensive tax reform discussions in 2013.

House Subcommittee Examines PPACA Exchanges

On September 12, the U.S. House of Representatives Ways and Means Committee's Health Subcommittee held a hearing to discuss the implementation of state and federal health insurance exchanges under the Patient Protection and Affordable Care Act (PPACA).

PPACA provides for the establishment of state-based "Affordable Health Exchanges", scheduled to be operational beginning January 1, 2014. The exchanges will be the sole source for subsidized health coverage for individuals with household incomes below 400 percent of the federal poverty level (FPL). Subsidized health coverage will also be available through the insurance exchanges for qualified individuals (also on the basis of household income below 400 percent of FPL) who are full-time employees and do not have the opportunity to elect "affordable" health coverage from their employer. The "employer shared responsibility" penalty is also contingent on an employee's enrollment in the exchanges.

The exchanges will initially be open only to those in the individual and small group insurance markets. Beginning in 2017, states are authorized (but not required) to make health coverage under the insurance exchanges available to large employer groups. (The definition of "large" employer groups for this purpose will be based on separate state standards.) If a state is unwilling or unable to establish an exchange, the law authorizes the Secretary of Health and Human Services (HHS) to establish a federal exchange within the state. States have until November 16, 2012, to declare their intentions.

HHS issued proposed regulations for establishment of exchanges in July 2011 and additional proposed regulations on exchange functions in the individual market in August 2011.

In a statement announcing the hearing, Subcommittee Chairman Wally Herger (R-CA) said that "the necessary regulations for exchange operation, plan design, and eligibility still have not been finalized by the Obama Administration, leaving many to question whether political motivations are delaying the release of much-needed guidance for states, employers and health plans. Such uncertainty threatens to saddle stakeholders with higher costs and also increases the risk of waste, fraud, and abuse."

Testifying before the committee were:

- Michael Consedine, Pennsylvania's state insurance commissioner, observed that his state has not received clear direction or flexibility from federal regulators with regard to state-level PPACA implementation. He also noted the unknown costs that will be incurred by the states, though he expects them to be substantial.
- E. Neil Trautwein, vice president and employee benefits policy counsel at the National Retail Federation, expressed concern that "a cascade of last-minute regulations will create confusion and thus could encourage more employers to back out of coverage." He urged the administration to issue final rules on exchanges and other matters within the first quarter of 2013 to avoid employer plan attrition.
- Daniel T. Durham, executive vice president for policy and regulatory affairs at America's Health Insurance Plans, echoed the call "for HHS to issue clear regulatory guidance on a

number of key issues as soon as possible" to ensure that health plans, states, and other stakeholders can meet important PPACA deadlines.

- James F. Blumstein, Vanderbilt Law School professor of Constitutional Law and Health Law & Policy, discussed the issue of whether individuals in federally-facilitated exchanges are entitled to the same subsidies as participants in the state-based exchanges. He concluded that they are not, and any attempt by the federal government to rule otherwise is an unlawful assertion of its authority.
- Heather Howard, director of the State Health Reform Assistance Network and lecturer in Public Affairs at the Woodrow Wilson School of Public and International Affairs of Princeton University (and former New Jersey state insurance commissioner), expressed confidence that "many states are actively working and are on schedule to stand up exchanges … just over a year from now," though she acknowledged that state budgetary implications will ultimately drive many decisions.

During the question-and-answer period, Acting Subcommittee Chairman Sam Johnson (R-TX) asked Consedine about HHS' responsiveness to the Pennsylvania insurance commission's numerous inquiries about the timeline for finalization of its exchange regulations. Consedine criticized HHS' failure to respond to a recent letter with 26 detailed questions about exchange implementation.

Ranking Subcommittee Democrat Pete Stark (D-CA) asserted that the establishment of the exchanges will ultimately be worthwhile, expanding coverage while lowering overall costs, and noted that California expects to be ready when 2014 begins.

Business Groups Send Letter of Support for 401(k) Plan Leakage Bill

12 trade associations representing employers authored a letter urging members of the House of Representatives to cosponsor the Savings Enhancement by Alleviating Leakage in 401(k) Savings (SEAL) Act (H.R. 3287) – legislation to address "leakage" of retirement assets occurring through hardship withdrawals and defined contribution plan loans to participants.

Specifically, H.R. 3287 would (1) extend the right of participants to make a rollover contribution for plan loan offset amounts, allowing employees to contribute the amount outstanding on their loan to an IRA by the time they file their taxes for that year; and (2) direct the U.S. Treasury Department to adjust its regulations to allow 401(k) participants to continue to make elective contributions during the six months following a hardship withdrawal.

The group letter notes that "In today's economy, the current law prohibition on plan participation placed on individuals who take a hardship distribution is inappropriate" and argues that H.R. 3287 "would reduce leakage from 401(k) plans by allowing workers who, through loss of a job, a job change or for any other reason, have terminated their employment and have an outstanding loan from their 401(k) plan to have an extended period of time to roll over the unpaid balance to another savings vehicle."

RECENT REGULATORY ACTIVITY

IRS Issues Long-Awaited Defined Benefit Funding Guidance Implementing MAP-

On September 11, the Internal Revenue Service (IRS) issued Notice 2012-61, guidance on the special rules applicable to single-employer defined benefit pension plan funding stabilization under the Moving Ahead for Progress in the 21st Century (MAP-21) Act (H.R. 4348), enacted on July 6. This guidance, covering matters such as benefit restriction and transition issues, is provided in question-and-answer format.

Plan sponsors (with calendar year plans) have until September 15, 2012, to make contributions for 2011. Contributions for 2011 can result in benefit restrictions being lifted for the remainder of 2012 and can also affect the applicability of credit balances (now called pre-funding balances and funding standard carryover balances) and benefit restriction presumptions for 2013. Under the guidance, plan sponsors may also take other actions to reverse certain decisions made prior to the enactment of MAP-21.

PBGC Issues Guidance Related to Pension Funding Stabilization, 4010 Reporting

In a related story, the Pension Benefit Guaranty Corporation (PBGC) released Technical Update 2012-02 on September 11, providing guidance on the effect of the Moving Ahead for Progress in the 21st Century Act (MAP-21) – specifically, its defined benefit pension plan funding stabilization provisions – on annual financial and actuarial reporting under ERISA Section 4010.

The measure stabilizes interest rates for purposes of calculating defined benefit plan funding by constricting the segment rates used to determine funding status within 10 percent (for 2012) of a 25-year average of prior segment rates.

Specifically, Technical Update 2012-02 sets forth the instances in which the funding stabilization does and does not apply to Section 4010 reporting. Unfortunately, the stabilization rules do not apply to the discount rates used to determine the funding target attainment percentage (FTAP) applicable in determining whether reporting is required under ERISA section 4010(d).

Technical Update 2012-02 also indicates that reporting is waived for a person for an information year if:

1. Reporting is not required under ERISA sections 4010(b)(2) or (b)(3) for the person for that information year; and
2. The FTAP (for the plan year ending within that information year) of each plan maintained by the person's controlled group, determined without regard to the MAP-21 stabilization rules, would be at least 80 percent if the value of plan assets used for minimum funding purposes were substituted for the value described in Q&A NA-3 of IRS Notice 2012-61.

For all other Section 4010 reporting requirements involving minimum funding-related determinations affected by the MAP-21 stabilization rules, ERISA Section 4010(d)(3) does not apply. Thus, filers are to make such determinations using the same assumptions used for minimum funding or benefit restrictions purposes (as applicable), such that to the extent the MAP-21 stabilization rules are used for those purposes, they are also to be used to determine a plan's 4010 funding shortfall as well as certain actuarial information requirements.

PBGC Technical Update 2012-02 follows the August 29 issuance of Technical Update 2012-01, which provided guidance on the effect of the funding stabilization provisions on premiums paid to PBGC by plan sponsors.

PBGC Requests Comments on Premium Filing Procedural Changes

On September 11, the Pension Benefit Guaranty Corporation (PBGC) issued a Federal Register notice modifying its procedures for collection of information related to premium payments from defined benefit plan sponsors. The notice also requests comments from stakeholders on this modification.

According to the notice, PBGC will revise its 2013 filing procedures and instructions to:

- Provide for revoking a prior election to use the Alternative Premium Funding Target to determine unfunded vested benefits;
- Require plan administrators to provide a breakdown of the total premium funding target into the same categories participants used for reporting on Schedule SB to Form 5500;
- Require plan administrators to report a contact name to make it easier for PBGC to contact a plan (filers also will have the option of providing an additional plan contact);
- Require plan administrators to report the plan effective date for all plans rather than just new and newly covered plans;
- Require plan administrators to break down the premium credit information in the comprehensive premium filing into two items rather than aggregating the premium credit;
- Add a data item for the Moving Ahead for Progress in the 21st Century (MAP-21) Act variable-rate premium cap, which is first effective for 2013;
- Explain how MAP–21 affects premium computations;
- Eliminate certain data items;
- Reorder and re-number some items on the illustrative form that accompanies and is part of the instructions; and
- other minor changes.

Comments on these changes are due by October 11.

Consumer-Purchaser Disclosure Project Writes CMS on PPACA Quality Efforts

As the Patient Protection and Affordable Care Act (PPACA) progresses on a course toward full implementation, the Council continues to advocate for broad-based improvements in health care quality, which should help to reduce costs across the health care system. As part of these efforts, the Consumer-Purchaser Disclosure Project (CPDP), a group of leading employer, consumer, and labor organizations and companies working toward the common goal of improving health quality and affordability through nationwide access to publicly reported health care performance information.

On September 4, the CPDP sent two letters to the U.S. Department of Health and Human Services (HHS) Centers for Medicare & Medicaid Services (CMS), commenting on quality improvement programs authorized by PPACA.

Payment Policies Under the Physician Fee Schedule

27 CPDP organizations signing on to comments on the payment policies Under the Physician

Fee Schedule and other revisions to recent CMS proposed regulations. "The Medicare physician fee schedule and related regulations are vitally important to moving our health care system forward to reward and foster better quality and value," The letter says. "We also strongly believe the needs of patients have to be a higher priority in the design of these programs. While supporting physician participation is an important goal, we must not lose sight of the underlying imperative to transition towards patient-centered care and away from current physician-centric approaches."

The letter makes the following several general recommendations on how to prioritize patient-centered care while streamlining measurement processes:

- Use a parsimonious core set of high-impact measures that support achievement of HHS' aims. Patient experience, intermediate and other outcomes, appropriateness, resource use, and cost of care should be the cornerstones for the initial set of measures.
- Identify the ideal dashboard of measures and chart a course for achieving quality goals.
- Improve the Resource-Based Relative Value System by rebalancing payments between primary care and specialty services.
- Align select program activities within Medicare and across other payers. CMS should borrow design elements from the private sector that have already successfully rewarded physicians for providing high quality, safe, and efficient care.
- Encourage individual accountability and shared accountability by incorporating physician-level performance in its near-term rule-making on payment and reporting. Shared accountability supports team-based care, coordination across providers, and progress toward a genuine "system" of care, rather than the individualized system we have today.

Hospital Outpatient Prospective and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Electronic Reporting Pilot

27 organizations signing on to comments on the recent CMS proposed regulations updating the calendar-year 2013 Hospital Outpatient Prospective Payment System. These comments relate specifically to the Outpatient Quality Reporting (OQR) and Ambulatory Surgical Center Quality Reporting (ASCQR) programs, as well as the Electronic Reporting Pilot, which were designed to improve quality and value in the hospital outpatient setting by focusing on measures of safety, outcomes, and efficiency.

Regarding the OQR and ASCQR programs, the letter expresses concern that CMS did not address earlier recommendations from the Measure Applications Partnership (MAP), which suggested that CMS identify measures included in clinician reporting programs that could be harmonized with the OQR. The MAP report also stated that the OQR would benefit from adding measures related to supporting better health in communities, making care more affordable, and person- and family-centered care.

Regarding the electronic reporting pilot program, the letter expresses support for the continued advancement and use of e-measures. However, the CPDP remains concerned that:

- the pilot will require eligible hospitals to submit patient-level clinical quality measure data that is inconsistent with the requirement in the Meaningful Use program to report summary-level data and could have adverse consequences for patient privacy; and

- the pilot requires reporting only Medicare data, which represents a step backward from the positive trend over the last decide for hospitals to submit all-payer quality data to CMS.

IRS Cancels Letter-Forwarding Service Used by Some Retirement Plans

The Internal Revenue Service (IRS) recently issued Revenue Procedure 2012-35, formally discontinuing the letter forwarding program used by some retirement plans to locate missing participants.

Under Revenue Procedure 94-22, any individual, company, or organization that controls assets that may be due a taxpayer – including retirement plan sponsors and administrators – were permitted to make a written request of IRS to use its letter forwarding program. This service was commonly used to find "lost" participants or beneficiaries to resolve situations in which the payment of additional benefits is required under the Employee Plans Compliance Resolution System (EPCRS).

Revenue Procedure 2012-35 effectively revokes this allowance, effective for requests postmarked on or after August 31, by limiting the letter-forwarding program "to situations in which a person is trying to locate a taxpayer to convey a message for a humane purpose … or in an emergency situation." The IRS is expected to provide an extended correction period in future guidance addressing the EPCRS.

RECENT JUDICIAL ACTIVITY – Nothing to Report This Month