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RECENT JUDICIAL ACTIVITY – Nothing to Report this Month

RECENT LEGISLATIVE ACTIVITY

Group Letter to Congress Urges Scrutiny of Additional PBGC Premium Increases

On December 5, a letter to congressional leaders was formally submitted and undersigned by 39 organizations and sent to the chairmen and ranking members of the four committees of jurisdiction – the Senate Finance Committee and Health, Education, Labor and Pensions (HELP) Committee and the House of Representatives Ways and Means Committee and Education and the Workforce Committee. The letter describes the harmful effects of premium increases imposed by the Pension Benefit Guaranty Corporation (PBGC) on defined benefit plan sponsors. The letter argues that "the biggest threats to the defined benefit system, and by extension to the PBGC as its guarantor, are the burdens on pension plan sponsors. Competitive pressures, funding obligations, and accounting volatility, in combination with PBGC premiums, have effectively forced plan sponsors to focus less on how to enhance benefits under their plans and more on addressing those challenges."

Congress previously enacted a premium increase, raising $9 billion, as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21) in July. President Obama's 2012 budget proposal had suggested raising a total of $16 billion through premium increases, meaning that lawmakers could seek the balance of that total as part of a larger deficit reduction deal. The December 5 letter also strongly recommends renewed scrutiny by Congress of the PBGC's reported deficit, premium policy and other governance issues before considering further increases.

House Committee Hears PBGC Testimony on Multiemployer Plans

In a related story, Pension Benefit Guaranty Corporation (PBGC) Executive Director Joshua Gotbaum appeared before the U.S. House of Representatives Education and the Workforce Committee's Health, Employment, Labor, and Pensions Subcommittee on December 19, providing testimony on multiemployer pension plans. This discussion followed a previous hearing, Assessing the Challenges Facing Multiemployer Pension Plans, on June 20.

In an opening statement, Subcommittee Chairman Phil Roe (R-TX) noted that the Pension Protection Act (PPA) rules governing multiemployer pensions will expire in two years, "which means Congress has an important opportunity to study the system, assess its strengths and weaknesses, and pursue solutions that support workers without discouraging participation in the voluntary pension system." He also expressed frustration that PBGC had not yet provided two reports (on multiemployer premium levels and funding rules for small employers) requested by the committee by the end of 2011.

Gotbaum, in his testimony, observed that "like single-employer plans, multiemployer plans were strongly affected by recent declines in the economy and the investment markets. Virtually all of these plans suffered massive asset losses, causing underfunding to soar and compelling increased contributions at a time of economic contraction."

While Gotbaum noted that PBGC's multiemployer plan insurance premiums are much lower than single-employer plan premiums, and speculated that "PBGC premiums will be insufficient to support the guarantee at some point in the future," he did not specifically recommend increases to multiemployer plan premiums, instead calling for bipartisan dialogue on the matter.

During the question and answer period, Gotbaum discussed the powerful effect of funding relief on improving the financial position of pension plan sponsors, though some members of the committee expressed concern that such relief was an “accounting gimmick.”

Gotbaum also elaborated, in response to a question from Representative Bobby Scott (D-VA), on the need for increased PBGC premiums. “Some of the rhetoric I get about ‘your premiums are too high’ is just rhetoric. But some of it is the very legitimate concern of businesses all across the country – that are trying to stay competitive, trying to control their costs – and saying ‘you’ve become too big a piece of my costs.’ ”

The legislative and regulatory treatment of multiemployer plans is significant because they face similar pressures as the single-employer plan system. Though the two systems are subject to different rules, measures addressing one system can affect the other and legislation focused on multiemployer plans may have provisions targeted to single-employer plans.

In closing, Roe acknowledged this dynamic between single- and multi-employer plans and said that his subcommittee and the full committee will be very active on this issue by proposing legislation early in 2013.

RECENT REGULATORY ACTIVITY

IRS Issues Q&A for Proposed Rules on PPACA Employer ‘Shared Responsibility’ Provisions

The Internal Revenue Service (IRS) released a set of 23 Questions and Answers (Q&A) to clarify portions of the December 28 proposed regulations addressing the ‘shared responsibility’ provisions for employers under Section 4980H of the Internal Revenue Code, as amended by the Patient Protection and Affordable Care Act (PPACA). These provisions (commonly known as the "pay or play" mandate) require employers to offer health coverage for their full-time employees or pay a penalty under certain circumstances.

The questions and answers offer additional detail of what is required of employers under the shared responsibility provisions of PPACA. They also expand upon which employers are subject to the provisions, employer responsibility for required payments and how to calculate them, how payments are made, and qualifications for transition relief.

Comments on the proposed regulations are being solicited by the IRS through March 18, 2013. A public hearing to discuss the proposed regulations will be held on April 23, 2013; requests to speak at the hearing and an outline of those remarks are due to IRS by April 3, 2013.

IRS Finalizes Regulations for PCORI Fee Paid by Insurers, Self-Insured Plans

On December 5, the U.S. Treasury Department and the Internal Revenue Service (IRS) released final regulations implementing a fee on health insurance policies and self-insured health plans to fund the Patient-Centered Outcomes Research Institute (PCORI) Trust Fund. The Patient Protection and Affordable Care Act (PPACA) established PCORI to conduct research to evaluate and compare the clinical effectiveness, risks and benefits of medical

treatments, services, procedures, drugs or other items or strategies that treat, manage, diagnose or prevent illness or injury.

As set forth in the statute and regulations, the fee is imposed on issuers of health insurance policies for each policy year ending on or after October 1, 2012, and before October 1, 2019 and plan sponsors of applicable self-insured health plans for each plan year ending on or after October 1, 2012, and before October 1, 2019. The fee is two dollars (one dollar in the case of policy years ending before October 1, 2013) multiplied by "the average number of lives covered under the policy." For policy years ending on or after October 1, 2014, the fee is increased based on increases in the projected per capita amount of National Health Expenditures.

The final regulations generally adopt the provisions of the proposed regulations with certain modifications. Specifically, the final regulations:

- Exclude from the definition of applicable self-insured health plan an employee assistance plan (EAP), disease management program, or wellness program, if the program does not provide significant benefits in the nature of medical care or treatment;
- Clarify that the PCORI fee applies to self-insured health plans and policies that provide coverage to retirees, including retiree-only plans and policies;
- Expressly require that COBRA coverage must be taken into account in determining the PCORI fee;
- Permit two or more arrangements established or maintained by the same plan sponsor that provide health coverage (other than an insurance policy) and that have the same plan year to be treated as a single applicable self-insured plan for purposes of calculating the fee. For example, a self-insured major medical plan and a separate self-insured arrangement for prescription drug benefits could be treated as one applicable self-insured plan so that the same covered life covered under each arrangement would count as only one covered life for purposes of calculating the fee.
- Permit an applicable self-insured health plan that provides coverage through fully-insured options and self-insured options to determine the fee by disregarding the lives that are covered solely by the fully-insured options.
- Clarify, with examples, the application of the PCORI fee to an HRA and FSA, including when those plans are "integrated" with coverage under a separate self-insured or fully insured plan.
- Clarify that for purposes of the PCORI fee, "an individual residing in the United States" means an individual who has a place of abode in the United States.
- Clarify that the term "applicable self-insured health plan" does not include a self-insured plan (if facts and circumstances show) was designed specifically to cover primarily employees who are working and residing outside the United States.
- Provide additional rules and examples for determining the applicable fee using the "snapshot" actual count and Form 5500 methods.
- Provide a special rule the first year the fee is in effect permitting a plan sponsor to use "any reasonable method" to determine the average number of covered lives under an applicable self-insured health plan for a plan year beginning before July 11, 2012 and ending on or after October 1, 2012.
- Clarify that third party reporting or payment of the PCORI fee is not permitted.

Plan sponsors and insurers with calendar year plans or policies will be required to pay the fee for 2012 by July 31, 2013. The preamble to the final regulations notes that the U.S. Department of Labor (DOL) has advised that, because the fee is imposed on the plan administrator under

the statute (instead of the plan), paying the PCORI fee generally does not constitute a permissible expense of the plan for purposes of Title I of ERISA. The DOL anticipates providing guidance “in the near future” on the PCORI fee payments on the Employee Benefit Security Administration website.

DOL Issues Semi-Annual Regulatory Agenda

On December 21, the U.S. Department of Labor (DOL) formally released its semi-annual agenda, which describes the regulations recently issued or expected in the coming year, as well as rules currently in effect that are under departmental or bureau review – including those with specific implications for employer-sponsored retirement and health benefit plans. A number of these items have been held over from previous agendas.

Retirement Policy

- *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 "explore whether, and how, an individual benefit statement should and could present a participant's accrued benefits in a defined contribution plan (i.e., the individual's account balance) as a lifetime income stream of payments in addition to presenting the benefits 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. DOL plans to release an "advance notice of proposed rulemaking" (ANPRM), which is intended to allow DOL to gather more public input on the lifetime income disclosure. The ANPRM is currently under review at the White House Office of Management and Budget. In the meantime, DOL issued Field Assistance Bulletin (FAB) 2012-02 in May 2012, providing interim guidance on the form and content of required disclosures.
- *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. However, in response to criticism from benefits groups as well as lawmakers on Capitol Hill, DOL announced in September 2011 that EBSA would withdraw and re-propose these regulations pending additional study. The new Notice of Proposed Rulemaking (NPRM) is tentatively scheduled to be issued in July 2013.
- *Target date funds (TDFs)*: DOL previously 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. In May 2012, however, DOL temporarily re-opened the comment period for the proposed regulations in light of a separate initiative by the Securities and Exchange Commission (SEC). DOL now expects to finalize regulations on this matter in November 2013.
- *Amendment of abandoned plan program*: DOL has issued proposed regulations and a related class exemption, allowing bankruptcy trustees to use the existing Abandoned Plan Program to terminate, wind up and distribute benefits from such plans. The

Abandoned Plan Program, established in 2006, provides streamlined termination and distribution procedures for abandoned individual account plans, including 401(k) plans. The program can also limit potential fiduciary liability of financial institutions that step in to manage various aspects of abandoned plans, such as the disposition of distributions to missing or deceased beneficiaries. *Guide or similar requirement for Section 408(b)(2) disclosures*: Related to recent fiduciary-level fee disclosure regulations applicable to defined contribution and defined benefit plans under ERISA Section 408(b)(2), DOL intends to require retirement plan service providers to provide a "guide" or similar tool 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 issued in May 2013.

- *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 finalize these regulations in October 2013.

Health Policy

- *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act (PPACA)*: DOL (along with the U.S. departments of Treasury and Health and Human Services (HHS)) are in the process of issuing a series of proposed regulations providing guidance on the rules relating to coverage of preventive services without cost sharing under PPACA. The most recent of these, issued March 21, addresses coverage of contraceptive measures for religious institutions. The next proposal in this series is expected soon.
- *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans*: DOL (along with the U.S. departments of Treasury and HHS) recently proposed regulations addressing wellness programs under PPACA, under which employers can increase the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related health insurance coverage) from 20 percent to 30 percent of the cost of coverage – and up to 50 percent for programs designed to prevent or reduce tobacco use. (A fact sheet on these proposed regulations is also available.)

The U.S. Treasury Department and Internal Revenue Service (IRS) issued its priority guidance agenda on November 19.

While these agendas include timetables with expected publication dates, it is important to note that these dates are tentative and flexible.

IRS Guidance Revises Tax Relief for Employers Prospectively Classifying Workers as Employees

In dual announcements issued December 17, the Internal Revenue Service (IRS) alters the Voluntary Classification Settlement Program (VCSP). This program, established in 2011 under Announcement 2011-64, provides tax relief to employers that gives employers the opportunity to voluntarily reclassify their workers as employees for future tax periods with limited federal employment tax liability for the past nonemployee treatment. To be eligible for the VCSP,

employers must meet certain requirements, successfully apply to participate and enter into a closing agreement with the IRS.

Under IRS announcements 2012-45 and 2012-46 (published in Internal Revenue Bulletin 2012-51), the VCSP has been revised to:

- permit a taxpayer under IRS audit, other than an employment tax audit, to be eligible to participate;
- clarify that a member of an "affiliated group" is not eligible to participate in the VCSP if any member of the affiliated group is under employment tax audit;
- clarify that a taxpayer is not eligible to participate in the VCSP if the taxpayer is contesting in court the classification of the class or classes of workers from a previous audit by the IRS or the U.S. Department of Labor (DOL);
- eliminate the requirement that a taxpayer agree to extend the period of limitations on assessment of employment taxes as part of the VCSP closing agreement with the IRS.
- Expand eligibility to taxpayers who would otherwise be eligible for the current VCSP but have not filed all required Forms 1099 for the previous three years with respect to the workers to be reclassified provided the taxpayer pays 25 percent of the employment tax liability that would have been due on the compensation being reclassified for the most recent tax year and meets certain other requirements.

The expanded eligibility in the last bullet point above only applies to applications filed by June 30, 2013. The Obama Administration has previously demonstrated a strong interest in this issue. Initiatives to address worker misclassification are likely to draw renewed attention in coming months because they typically raise federal revenue by increasing tax collections.

DOL Proposes Regulations on Distribution of Retirement Plan Assets in Bankruptcy

The U.S. Department of Labor issued proposed regulations and a related class exemption on December 11, allowing bankruptcy trustees to use the existing Abandoned Plan Program to terminate, wind up and distribute benefits from such plans.

The Abandoned Plan Program, established in 2006 and run by the DOL Employee Benefits Security Administration (EBSA), provides streamlined termination and distribution procedures for abandoned individual account plans, including 401(k) plans. The program can also limit potential fiduciary liability of financial institutions that step in to manage various aspects of abandoned plans, such as the disposition of distributions to missing or deceased beneficiaries.

A DOL/EBSA fact sheet is also available.

IRS Revises Certain Retirement Plan Qualification Requirements

The Internal Revenue Service (IRS), in issuing Notice 2012-76 on December 7, has set forth the qualification requirements ("cumulative list of changes") for "Cycle C" retirement plans filing determination letters

Under general filing guidelines, “Cycle C” plans are those whose plan sponsor has an employer identification number ending in 3 or 8. The IRS will begin accepting determination letter applications for these plans beginning February 1, 2013.

The qualification guidance – implementing provisions of the Moving Ahead for Progress in the 21st Century (MAP-21) Act, the Pension Protection Act and other recently enacted laws – applies to individually designed defined contribution and defined benefit plans (including master and prototype (M&P) or volume submitter (VS) plans), as well as Internal Revenue Code Section 414(d) governmental plans. Note, 401(k) plans are addressed in Section 4, No. 10 (Page 7 of the guidance).

The IRS will not consider in its review of any determination letter application for the submission period that begins February 1, 2013, any statutes enacted or guidance issued after October 1, 2012, any qualification requirements first effective in 2014 or later; or statutory provisions that are first effective in 2013, for which there is no guidance identified in Notice 2012-76.

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