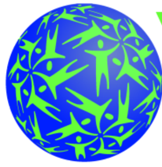

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RECENT LEGISLATIVE ACTIVITY

Tax Reform Discussions to Begin in House Ways and Means Committee; Pensions/Retirement Working Group Named

Congress is involved in an extensive debate of comprehensive tax reform legislation as a means of modernizing and simplifying the Internal Revenue Code as well as possibly helping alleviate federal deficits.

Congress is contemplating modifications to the tax treatment of incentives for sponsorship of (and participation in) employee benefit plans. Such tax incentives are frequently referred to as "tax expenditures" – including exclusions from taxable income (such as the current exclusion of employer-paid health care premium contributions) and deferrals (such as pre-tax contributions to defined contribution arrangements), as well as exemptions, deductions, credits and preferential tax rates. According to the Office of Management and Budget's most recent budget proposal, health and retirement plan contribution incentives respectively constitute the first- and second-largest expenditures in the federal budget.

The U.S. House of Representatives Ways and Means Committee, which has jurisdiction over all tax issues and where all tax legislation must originate, has begun the process of evaluating tax reform alternatives by announcing the formation of 11 tax reform working groups.

Each of the 11 groups is reviewing current law in its designated issue area and then identify, research and compile feedback related to the topic of the working group. The working groups are responsible for compiling feedback on its designated topic from: (1) stakeholders, (2) academics and think tanks, (3) practitioners, (4) the general public and (5) colleagues in the House of Representatives." Based on this feedback, the Joint Committee on Taxation will prepare a report for the full committee, due by April 15, 2013, that describes current law in each issue area and summarizes the other information gathered by the committee members.

The working group on "Pensions/Retirement" is chaired by Representative Pat Tiberi (R-OH), with Rep. Ron Kind (D-WI) as vice chair. Both Tiberi and Kind have demonstrated a very good understanding of the importance of the private retirement plan system.

Other working groups with possible implications for employee benefits include the Debt, Equity and Capital working group (led by Reps. Kenny Marchant (R-TX) and Jim McDermott (D-WA)), Education and Family Benefits (led by Reps. Diane Black (R-TN) and Danny Davis (D-IL)), Financial Services (led by Adrian Smith (R-NE) and John Larson (D-CT)), Income and Tax Distribution (led by Lynn Jenkins (R-KS) and Joseph Crowley (D-NY)) and Small Business/Pass Throughs (led by Reps. Vern Buchanan (R-FL) and Allyson Schwartz (D-PA)). Interestingly, the committee did not provide for a working group on health or health benefit issues.

Senate Committee Discusses Retirement Policy

The future of American retirement policy was the subject of a hearing before the Senate Health, Education, Labor and Pensions (HELP) Committee with lawmakers and witnesses calling for improved automation in retirement plans and increased financial education for participants.

The hearing, Pension Savings: Are Workers Saving Enough for Retirement?, was called by Committee Chairman Tom Harkin (D-IA) to “take a close look at how much people need to save, what is holding folks back, and how we can help people build a nest egg.” In his opening statement, Harkin noted that the “retirement income deficit” – the gap between what workers are saving and what they need for a secure retirement – is currently estimated at $6.6 trillion dollars, and expressed his belief in the “three-legged stool,” (consisting of Social Security, employer plans and personal savings) and “that starts with rebuilding the pension system.”

Harkin, who is retiring at the end of his Senate term in 2014, is soon expected to introduce a legislative proposal based on his July 2012 report, The Retirement Crisis and a Plan to Solve It, which recommends strengthening certain aspects of the Social Security program and creating new “USA Retirement Funds.” USA Retirement Funds, which would resemble hybrid pension plans with benefits based on contributions, would be required vehicles for employers who do not offer retirement programs with automatic enrollment and a minimum level of employer contributions. Ranking Republican committee member Lamar Alexander (R-TN), in his opening statement, expressed support for the voluntary employer-sponsored benefit system and warned against the imposition of new mandates on businesses, particularly in light of new requirements under the Patient Protection and Affordable Care Act (PPACA).

Testifying before the committee were:

- Julia McCarthy, executive vice president of Fidelity Investments, described the importance of participant education and financial literacy for improving retirement income adequacy. She also discussed improved automated and default programs to raise participation and deferral rates.

- Edward Moslander, senior managing director of TIAA-CREF, described TIAA-CREF’s positive experience operating predominantly with defined contribution plans. He observed that successful retirement models follow a “shared responsibility” approach, with plan sponsors, providers and participants each playing a role in managing their retirement savings, both in the accumulation and de-cumulation stages. He also expressed support for the Lifetime Income Disclosure Act, legislation that would require 401(k) plan sponsors to inform participating workers of the projected monthly income they could expect at retirement based on their current account balance.

- Cindy Hounsell, president of the Women’s Institute for a Secure Retirement (WISER), discussed the unique challenges women face in saving for retirement, such as longer life expectancy, family-related gaps in employment and increased risks of poverty in old age. She stressed the importance of strengthening the Social Security program and specifically cited Harkin’s plan as a positive step.

- Dr. Brigitte C. Madrian, Aetna professor of Public Policy and Corporate Management at Harvard University’s Kennedy School of Government, described her research on certain plan design elements that can improve outcomes in retirement, including improvements to automatic escalation and matching contribution designs and through increased use of in-plan annuities. She also expressed concern about “leakage” from defined contribution plans, brought about by pre-retirement distributions.

During the question-and-answer period, Harkin asked whether automatic enrollment is “crowding out” other kinds of savings. Madrian said that, although the available data is limited, it

appears there are relatively few adverse effects. McCarthy noted that the primary objective of automatic enrollment is to get people into the plan and has been remarkably powerful in doing so.

Senator Michael Enzi (R-WY) asked whether there are significant participant behavioral differences between traditional and Roth IRAs. Madrian and McCarthy replied that the data is not conclusive but there do not appear to be large differences.

Senator Elizabeth Warren (D-MA) asked the panel what steps could be taken to encourage more employers to sponsor plans. All of the witnesses recommended simplification initiatives that would minimize regulatory requirements. Madrian also suggested instituting a tax incentive to employers that offer plans.

Senator Johnny Isakson (R-GA) asked what effect the U.S. Department of Labor's pending fiduciary definition rule would have on financial education efforts for employers. McCarthy answered that the rule could very well have a chilling effect on employers' willingness to provide investment advice services, which would hinder efforts to promote financial literacy.

While most of the discussion centered on defined contribution plans, Senator Al Franken (D-MN) expressed interest in examining the implications of plan sponsors going bankrupt and freezing a plan."

Alexander, closing the hearing for Harkin, suggested to the witnesses that they continue to consider additional ways to encourage employers to sponsor retirement plans for their employees.

Multiemployer Pension Group Releases Report, Recommendations

A business-and-labor partnership issued the report **Solutions not Bailouts** on February 19, offering recommendations for strengthening the multiemployer pension system, which has recently come under scrutiny from lawmakers because multiemployer funding provisions of the Pension Protection Act of 2006 (PPA) are scheduled to expire after 2014.

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. The multiemployer plan crisis also raises the profile of the PBGC and its deficit, which we have argued is misleading and a poor rationale for premium increases.

The Retirement Security Review Commission of the National Coordinating Committee for Multiemployer Plans (NCCMP) — under the umbrella of The Partnership for Multiemployer Retirement Security, a collection of 40 business and labor organizations with a stake in multiemployer pension plans — issued the report with the objective of providing Congress with input on the future of the multiemployer system. The report is based on the experience of the participating organizations as well as the testimony of economists, public pension policy experts, investment firms, investment consultants, actuaries and experts in alternative plan designs.

Among the recommendations, categorized under preservation, remediation, and innovation, are:

- specific, permanent technical changes to PPA;
- facilitation of plan mergers and alliances; and
- allowing plans to harmonize normal retirement age with Social Security.

The U.S. House of Representatives Education and the Workforce Committee's Health, Employment, Labor, and Pensions Subcommittee, led by Chairman Phil Roe (R-TX), has already held a number of hearings to discuss the multiemployer pension system's challenges. "While some pension plans are financially sound and prepared to meet their obligations, it is becoming increasingly clear the depth and breadth of the challenges facing the system will demand significant reform," Roe has publicly said. In the most recent hearing, 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. Senate staff have also indicated interest in considering multiemployer plan legislation this year.

RECENT REGULATORY ACTIVITY

Final Regulations Issued Regarding PPACA Essential Health Benefits; "Out-of-Pocket" Limit Requirements Clarified

The U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) has **finalized regulations on Essential Health Benefits (EHB)** under the Patient Protection and Affordable Care Act (PPACA), setting standards for a core package of benefits, called essential health benefits, that individual and small group health insurance issuers must cover both inside and outside the Health Insurance Exchanges.

Most notably, the final EHB regulations address an issue of direct concern to sponsors of self-insured and insured large group plans regarding the application of "out-of-pocket" (OOP) cost-sharing limits, as well as methods for determining "minimum value" of employer-sponsored coverage.

The proposed EHB regulations included an important clarification that the provisions of Public Health Service Act (PHSA) Section 2707(b) (as added by PPACA) that limit deductibles to $2,000 (for self-only coverage) and $4,000 (for other coverage), as described in PPACA Section 1302(c)(2), "apply only to plans and issuers in the small group market and do not apply to self-insured plans or health insurance issuers offering health insurance coverage in the large group market." The proposed regulations were silent with respect to the application of PPACA Section 1302(c)(1) OOP limitations that are linked to the limits established for Health Savings Accounts (HSAs) under Internal Revenue Code Section 223.

The final EHB regulations, together with a new **Frequently Asked Questions (FAQ) document**, also issued on February 20, clarify that HHS, the Department of Labor, and the Department of the Treasury intend to engage in future rulemaking to implement PHSA Section 2707(b) and "continue to believe that only plans and issuers in the small group market are required to comply with the deductible limit described in section 1302(c)(2)." The FAQ guidance invites "public input" in advance of future rulemaking, which will provide that only plans and issuers in the small group market will be subject to the deductible limit. Comments are due by April 22, 2013, and should be submitted by e-mail to e.ohpsca-2707.ebsa@dol.gov.

The preamble of the final regulations and the FAQ guidance also provide that the departments interpret PHSA Section 2707(b) as requiring all non-grandfathered group health plans to comply with the annual limitation on OOP maximums described in section 1302(c)(1) of PPACA. The guidance also provides an enforcement safe harbor, given the operational and timing issues that arise where a group health plan or issuer utilizes multiple service providers to help administer benefits (such as one third-party administrator for major medical coverage, a separate pharmacy benefit manager, and a separate managed behavioral health organization). Under the enforcement safe harbor, only for the first plan year beginning on or after January 1, 2014, where a group health plan or group health insurance issuer utilizes more than one service provider to administer benefits that are subject to the annual limitation on OOP maximums under section 2707(a) or 2707(b), the Departments will consider the annual limitation on OOP maximums to be satisfied if both of the following conditions are satisfied: (a) the plan complies with the requirements with respect to its major medical coverage (excluding, for example, prescription drug coverage and pediatric dental coverage); and (b) to the extent the plan or any health insurance coverage includes an OOP maximum on coverage that does not consist solely of major medical coverage (for example, if a separate OOP maximum applies with respect to prescription drug coverage), such OOP maximum does not exceed the dollar amounts set forth in PPACA Section 1302(c)(1).

The final regulations generally adopt the methodology established in the proposed regulations for determining whether an employer-sponsored plan satisfies the 60 percent minimum value requirements of PPACA. These include the use of (1) A minimum value (MV) calculator and methodology made available by Internal Revenue Service (IRS) and HHS, (2) "any safe harbor established by HHS and the IRS" (proposed regulations had indicated design-based safe harbors) and (3) certification by an actuary if the plan contains non-standard features not suitable to the calculator or safe harbors. The final regulations also added a fourth method for use by small employers.

The final regulations also provide that employer contributions to an HSA and amounts newly made available under integrated health reimbursement arrangements (HRAs) — specifically HRAs that may be used only for cost-sharing — will be taken into account in determining MV.

New PPACA FAQs Focus on Preventive Care

The U.S. Department of Labor (DOL), in conjunction with the departments of Treasury and Health and Human Services (HHS), issued a new **Frequently Asked Questions (FAQ) document** with guidance on implementation under the Patient Protection and Affordable Care Act (PPACA). The FAQs begin with a discussion of limitations on cost-sharing (see story above) but focus predominantly on coverage of preventive services under the law.

Under Public Health Service Act (PHSA) Section 2713 (as added by PPACA) and interim final regulations issued in July 2010, non-grandfathered plans are required to provide preventive care services (such as mammograms, colonoscopies and immunizations) without cost-sharing. The coverage offered must be consistent with published recommendations and guidelines from the United States Preventive Services Task Force (USPSTF), the Centers for Disease Control and Prevention Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration; if a recommendation or guideline does not specify the frequency, method, treatment, or setting for the provision of that service, the plan or issuer can use reasonable medical management techniques to determine any coverage limitations.

The FAQ guidance clarifies several aspects of the USPSTF and women's preventive health requirements, including:

- If a plan or issuer does not have in its network a provider who can provide the particular service, then the plan or issuer must cover the item or service when performed by an out-of-network provider and not impose cost-sharing with respect to the item or service.

- Aspirin and other over-the-counter recommended items and services must be covered without cost-sharing only when prescribed by a health care provider.

- A plan or issuer may not impose cost-sharing with respect to a polyp removal during a colonoscopy performed as a screening procedure.

- Genetic counseling and BRCA testing, if appropriate, must be made available as a preventive service without cost-sharing.

- Specific requirements apply for well-woman visits, contraceptive, lactation counseling and breastfeeding supplies coverage.

New Summary Available: PPACA Tax Reporting Obligations under Code Sections 6055, 6056

A Benefits Brief summary, prepared by Crowell and Moring LLP, describes a number of new tax reporting requirements imposed by the Patient Protection and Affordable Care Act (PPACA).

The IRS previously issued Notice 2012-32, requesting comments on reporting requirements under Code Section 6055 for health insurance issuers, government agencies, employers that sponsor self-insured plans, and other persons who provide minimum essential coverage to an individual. Code Section 6055 requires these entities to file annual returns with the IRS reporting information for each individual for whom minimum essential coverage is provided after January 1, 2014. At the same time, IRS issued Notice 2012-33 requesting comment on Section 6056, which requires reporting of certain information on employer-sponsored coverage provided on or after January 1, 2014.

According to notices 2012-32 and 2012-33, Treasury and IRS plan to propose regulations implementing these new reporting requirements and “intended to minimize administrative burden and duplicative reporting.”

IRS Publishes 25-Year Interest Rate Averages for Pension Plans Under MAP-21

The Internal Revenue Service (IRS) published Notice 2013-11 providing the much anticipated 25-year averages of the interest rates applicable for defined benefit plan funding purposes for the 2013 plan year, pursuant to the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012.

MAP-21 included a provision to ease the cost burden of pension plan sponsorship by stabilizing the interest rates associated with plan funding calculations.

The IRS previously released Notice 2012-55 with guidance on the 25-year averages for the 2012 plan year. For purposes of the 2012 plan year calculations, the IRS' methodology used to estimate the interest rates for months prior to October of 2005 was not consistent with the methodology used for current (October 2005-present) periods.

However, for purposes of calculating the 25-year averages for the 2013 plan years, the IRS has conformed the pre-October 2005 methodology to the current methodology. This has resulted in a material reduction of the 25-year averages. Thus, the adjusted segment rates for 2013 listed below are much lower than the corresponding rates for 2012 for two reasons: (1) the new methodology resulted in lower 25-year averages, and (2) for 2013, the applicable rates are, pursuant to MAP-21, 15% lower than the 25-year averages, as opposed to 10% in 2012.

The new 25-year segment rates, for plan years beginning in 2013, are as follows:

Applicable Month	24-Month Average Segment, Rates Not Adjusted			Adjusted 24-Month Average Segment Rates, Based on Applicable Percentage of 25-Year Average Rates		
	First Segment	Second Segment	Third Segment	First Segment	Second Segment	Third Segment
February 2013	1.58	4.34	5.38	4.94	6.15	6.76
January 2013	1.62	4.40	5.45	4.94	6.15	6.76
December 2012	1.66	4.47	5.52	4.94	6.15	6.76
November 2012	1.69	4.53	5.60	4.94	6.15	6.76
October 2012	1.72	4.58	5.67	4.94	6.15	6.76
September 2012	1.75	4.62	5.72	4.94	6.15	6.76

DOL Advisory Opinion Clarifies: Swaps Dealers Do Not Become Pension Plan Fiduciaries Under Standard Clearing Agreements

An advisory opinion issued by the U.S. Department of Labor helps clarify that swap dealers do not become pension plan fiduciaries by reason of standard and necessary provisions included in swap clearing agreements. This is critical since standardized swaps are generally required to be cleared under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Moreover, if dealers were to become plan fiduciaries, swaps could become prohibited transactions and generally unworkable with respect to plans. An advisory opinion articulates the Department's views with respect to the application of the law to a specific set of facts, but does not have the force of law.

Under the Dodd-Frank Act and final regulations issued by the Commodity Futures Trading Commission (CFTC), certain participants in the swap market — including a number of large funds containing the assets of ERISA plans — would have been subject to mandatory clearing as early as March 11, 2013. However, because of potential technical issues under ERISA regarding, for example, the possible treatment of dealers as fiduciaries, and resulting uncertainty in the marketplace, many ERISA plans and plan asset funds have found it difficult, if

not impossible, to enter into clearing arrangements so that they will be able to meet Dodd-Frank's mandatory clearing requirement.

DOL/EBSA Advisory Opinion 2013-01A, states that "a Clearing Member acting pursuant to the Agreement negotiated with the plan fiduciary would not be … a plan fiduciary … solely by reason of liquidating the swap contracts in a plan's account and selling any collateral posted as margin in order to pay off losses suffered by such account." The opinion also states that margin provided by the plan is not a plan asset, consistent with a similar rule applicable in the futures area. Under the guidance, central counterparties (CCPs) are not parties in interest, but the Clearing Member representing the plan is a service provider and thus a party in interest. The guidance then discusses how the qualified professional asset manager (QPAM) exemption can apply with respect to the agreement between the plan and the Clearing Member.

IRS Expanding Worker Classification Settlement Program

The Internal Revenue Service (IRS) recently provided additional details on the expansion of the Voluntary Classification Settlement Program (VCSP). The VCSP, established in 2011 under Announcement 2011-64, provides tax relief to employers that allows them to voluntarily reclassify their workers as employees for future tax periods, with limited federal employment tax liability for the past nonemployee treatment.

IRS announcements 2012-45 and 2012-46 (published in Internal Revenue Bulletin 2012-51 in December 2012) previously clarified eligibility for the program. The February 27 release provides links to additional guidance, including a questions and answers document as well as the Form 8952 application.

Worker misclassification efforts are particularly relevant to employee benefit plans, since retroactive classification of employees can sometimes trigger (or imply liability for) retroactive taxes or contributions to benefit plans on the employee's behalf.

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.

OSHA Rule Implements Whistleblower Protections under PPACA

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor released an interim final regulation (IFR) on February 22 establishing protections for employees who file complaints against their employer for certain violations under the Patient Protection and Affordable Care Act (PPACA).

Section 1558 of PPACA protects employees against retaliation by an employer for:

- receiving a tax credit or cost-sharing reduction as a result of participating in a Health Insurance Exchange or Marketplace; or
- reporting alleged violations of Title I of the statute, which includes a range of insurance company accountability policies, such as the prohibition of lifetime limits on coverage and exclusions due to pre-existing conditions.

If an employee reports a violation of one of these policies or requirements, PPACA's whistleblower provision prohibits employers from retaliating against the employee. If an employee is subject to retaliation in violation of the whistleblower provision, he or she may file a complaint with, and ultimately receive relief from, OSHA or the courts.

The IFR establishes procedures and time frames for the handling of retaliation complaints, including procedures and time frames for employee complaints to OSHA, subsequent investigations, appeals of OSHA determinations to an administrative law judge (ALJ), hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary's final decision.

A fact sheet, issued in conjunction with the IFR, summarizes and provides examples of protected activities and prohibited retaliatory actions, along with procedures and deadlines for filing a complaint.

The IFR became effective on February 27, 2013, when it was be formally published in the Federal Register. OSHA is soliciting comments on the IFR through April 28.

IRS Provides 403(b) Plan Correction Resources

The Internal Revenue Service (IRS) has issued a package of resources for 403(b) plan sponsors who must identify or correct plan administration errors.

The 403(b) Plan Fix-It Guide describes common mistakes and methods for finding and fixing the mistakes as well as avoiding them in the future.

The Voluntary Correction Program (VCP) Submission Kit for 403(b) plans provides guidance for sponsors that failed to adopt written plan document(s) for the plan by December 31, 2009, and must now file a submission for a VCP compliance statement.

Obama Administration Seeking New Comments on Contraceptive Coverage for Religious Employers

The U.S. Departments of Treasury, Labor (DOL) and Health and Human Services (HHS) collectively issued proposed regulations spelling out how non-profit religious organizations can satisfy the preventive health services requirements (including no-cost coverage of contraceptives) of the Patient Protection and Affordable Care Act (PPACA). A fact sheet is also available. The agencies are soliciting public comments on the proposed regulations through April 8, 2013.

With respect to insured plans, including student health plans, affected religious organizations (such as schools or hospitals) would provide notice to their insurer. The insurer would then notify enrollees that it is providing them with no-cost contraceptive coverage through separate individual health insurance policies.

With respect to self-insured plans, as well as student health plans, these religious organizations would provide notice to their third party administrator. In turn, the third party administrator would work with an insurer to arrange no-cost contraceptive coverage through separate individual health insurance policies.

The proposed regulations do not provide any additional clarification regarding the actual preventive coverage requirements.

RECENT JUDICIAL ACTIVITY

278 Companies and Employer Groups File *Amicus* Brief with U.S. Supreme Court on Benefits Implications of Defense of Marriage Act

On February 27, a number of large and small employers, local business organizations and municipalities in filing an *amicus* (friend-of-the-court) brief with the U.S. Supreme Court in *United States v. Windsor*, a landmark case addressing the federal Defense of Marriage Act (DOMA).

The brief focuses specifically on the unequal tax treatment that DOMA applies to employees who are legally married in states recognizing same-sex marriages and the cost and administrative burdens the law imposes on employer sponsors of health and retirement benefits. The brief explains the disparate treatment of employees and the financial and administrative burdens placed on employers such as:

- Imposition of Federal income tax (and the corresponding withholding required) on the value of health benefits for spousal coverage, applicable only to coverage of same-sex spouses;
- Differing eligibility for participation and utilization of pre-tax "cafeteria" plans;
- Differing eligibility for pre-retirement hardship distributions from retirement plans;
- Disqualification of same-sex spouses from the estate tax marital deduction on proceeds from employer-sponsored life insurance;
- Differing eligibility for receiving spousal pension benefits in the form of a qualified joint and survivor annuity;
- Administration of dual systems of benefits and payroll — related to federal tax withholding, payroll taxes and more complicated enrollment processes, and special training for call center operations, and the additional costs and FICA payroll tax burden on employers because the value of employer provided spousal health benefits is imputed income to the employee with a same-sex spouse; and
- Requiring employers to determine how DOMA corresponds with state non-discrimination laws.

The amicus brief takes no position on the constitutionality of same-sex marriage. That issue is the subject of a separate case pending before the U.S. Supreme Court, *Hollingsworth v. Perry* (regarding California's Proposition 8 ballot measure). A factual analysis of the two cases before the U.S. Supreme Court is available via SCOTUS Blog.