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Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

House Votes on PPACA Employer, Individual Mandates; House Subcommittee Grills Treasury Official

The U.S. House of Representatives approved two measures on July 17 delaying various provisions of the Patient Protection and Affordable Care Act (PPACA), following the Obama Administration's recent delay of the law's employer mandate provisions.

The PPACA "shared responsibility" employer mandate, which will now take effect in 2015, requires employers with 50 or more full-time (or equivalent) employees to offer health coverage that satisfies affordability and minimum value requirements to their full-time employees or pay a penalty if even one full-time employee receives a premium tax credit for health coverage obtained through a health insurance exchange.

The Internal Revenue Notice (IRS) Notice 2013-45 (following an initial series of blog posts by the U.S. Treasury Department and the White House), formally delayed for one year (until January 2015) the mandatory employer and insurer reporting requirements under sections 6055 and 6056 of the Patient Protection and Affordable Care Act (PPACA), as well as the associated "employer shared responsibility" penalties under Section 4980H.

By a vote of 264 to 161, the House approved the Authority for Mandate Delay Act (S. 2667), introduced by Representative Tim Griffin (R-AR), which would formally write the one-year employer mandate delay into the law. (Thirty-five Democrats voted to approve the measure, along with all but one Republican.)

By a vote of 251 to 174, the House approved the Fairness for American Families Act (S. 2668), introduced by Representative Todd C. Young (R-IN). (Twenty-two Democrats voted to approve the measure, along with all but one Republican.) This measure would apply the same one-year delay on the individual mandate, which is currently still scheduled to go into effect on January 1, 2014, and requires individuals to maintain "minimum essential coverage" or pay a penalty.

The measures are unlikely to receive consideration in the Democratic-controlled U.S. Senate. President Obama has also indicated that he would veto the measures if they were to proceed that far.

The House Committee on Ways and Means Subcommittee on Health also held a follow-up to its July 10 hearing on the Obama Administration's move to delay the employer mandate.

Testifying on behalf of the Obama Administration, Iwry described the practical application of the one-year transition relief. He noted that the delay would not materially affect applications for the premium tax credit or any other provisions of PPACA. He also defended the Treasury Department's authority to grant transition relief under the Internal Revenue Code. During the question-and-answer period, he covered the following topics, among others:

- When the administration made the decision: Iwry indicated that the decision was made "in a deliberate way" over an extended period of time, as the Treasury Department received feedback from employers additional time was needed. He could not specify when the decision was communicated to the White House or other agencies or explain the timing and method of the public release.

- Implications of a delay to the individual mandate: Iwry asserted that the PPACA's key insurance market reform provisions would become "problematic" if the individual responsibility penalties were not in force. Adverse selection on the part of individuals would likely drive up insurance costs.

- Whether Treasury performed analyses of the delay's potential impact on federal revenue and insurance coverage: Iwry noted that the Obama Administration has been continuously analyzing the effects of the PPACA and these studies, along with employer feedback, was used in making the determination to provide transition relief.

Legislation to Redefine 'Full Time Employee' Introduced

On June 29, Representative Todd C. Young (R-IN) introduced the Save American Workers Act (H.R. 2575), which would:

- replace the number 30 with the number 40 for purposes of identifying full-time employees, and
- modify the calculation of full-time *equivalent* workers with respect to PPACA by requiring employers to divide the aggregate number of hours of service of employees who are not full-time employees by 174 rather than 120.

The measure was introduced with 120 cosponsors (all Republicans) and has been referred to the House Ways and Means Committee for further consideration.

The bill is effectively identical to the bipartisan Senate bill, the Forty Hours is Full Time Act (S. 1188), which was reintroduced by Senators Susan Collins (R-ME) and Joe Donnelly (D-IN) on June 19, 2013. (Collins had previously introduced the same bill as S. 701 by herself in April.) S. 1188 has been referred to the Senate Finance Committee for further consideration.

Donnelly and Collins sent a letter to President Obama on June 19, noting "reports that uncertainty surrounding implementation could serve as a disincentive for businesses and organizations to hire or expand their workforce" and asserting that the statutory definition of a full-time employee "has caused significant confusion among employers."

It is not yet clear whether the Obama Administration's recent move to delay the employer mandate provides a greater opportunity to enact such a change, since proponents will now have time to make their case, or if the delay will reduce the need or urgency for changes to the law. It is important to note that a re-definition of full-time employee would likely incur a cost to the federal budget since some workers who might otherwise have been provided coverage from their employers will now (at least in 2014) obtain coverage in the insurance exchanges where some of them will be eligible for federal premium tax credit subsidies.

It remains very uncertain whether the deeply divided Congress will be able to move forward on this legislation. But it is noteworthy that some of these matters have begun to garner bi-partisan support.

Retirement Bill Would Create State Annuity Plans, Reform Existing Defined Contribution Plans

Senator Orrin Hatch (R-UT), Ranking Republican on the U.S. Senate Finance Committee has introduced legislation that would create a new state and local government defined benefit retirement plan while making numerous favorable reforms to existing private plans. The Secure Annuities for Employee (SAFE) Retirement Act (S. 1270) was formally introduced on July 9 and an official summary of the measure is also available.

Title I of the bill would establish a new type of State and local government "defined benefit" plan in which the government would purchase annuity contracts on behalf of eligible public employees, and the plan benefits would be what is provided under the annuity contract. Under this design, plan underfunding would not be possible.

Title II of the bill includes a long list of private plan reforms under the headings of Coverage Reforms, Simplification Reforms, Longevity Reforms and ERISA Modifications, including:

- Creation of a new automatic enrollment safe harbor and elimination of the 10 percent automatic escalation limit under the existing safe harbor;
- Allowing electronic delivery of all plan-related notices under the Internal Revenue Code and ERISA, including through a website (provided that participants have the right to obtain paper copies);
- Modification of the multiple employer plan rules so that a qualification violation by one or more participating employers does not necessarily disqualify the entire plan;
- Repeal of the top-heavy rules;
- Enhancement of the small employer tax credit for new plans, so that the limit on the credit is increased from $500 to as much as $5,000;
- Expansion of the IRS correction program (EPCRS) to apply to certain IRA errors and governmental 457(b) plans while also facilitating plan loan corrections;
- Consolidation of certain plan disclosures;
- Establishment of benchmarks for target date funds that more accurately reflect their mix of asset classes;
- Creation of a new safe harbor for selecting an annuity provider for distributions under a defined contribution plan;
- Updating of the life expectancy tables (to reflect longer life expectancies) for purposes of the minimum required distribution rules; and
- Allowing in-plan annuities to be rolled over to an IRA if the employer stops offering the in-plan annuity as an investment option.

Title III of the bill addresses regulatory authority of certain retirement plan matters. Specifically, the measure would prospectively transfer authority for IRA-related prohibited transaction issues from the U.S. Department of Labor (DOL) to the Department of the Treasury, including the definition of a fiduciary. (The DOL is currently aiming to re-propose the definition of fiduciary before the end of the year.) In addition, the bill would prospectively give Treasury and DOL joint jurisdiction over regulations interpreting the prohibited transaction rules applicable to employer-sponsored plans, including the fiduciary definition. Rulings, opinion letters, and exemptions with respect to the application of the prohibited transaction rules to plans would not be affected by this new provision.

Senate HELP Committee Hearing Examines Small Business Pensions; Harkin Introduces Legislation

In a July 16 hearing, Pooled Retirement Plans: Closing the Retirement Plan Coverage Gap for Small Businesses, the U.S. Senate Health, Education, Labor and Pensions Committee discussed ways to reduce retirement plan costs, complexity and risk for small businesses through "pooling" - programs that allow employees from multiple businesses to pool their retirement resources to gain the same advantages as large employer plans.

In his opening statement, Committee Chairman Tom Harkin (D-IA) voiced support for increased retirement plan coverage. "If we are ever going to solve the retirement crisis, we need to make sure everyone, including those who work for small businesses, has the opportunity to participate in a quality retirement plan. That means we have to address the issues that are keeping small business owners from starting retirement plans. We have to make the plans less costly, less complex and less risky," he said.

Harkin's USA Retirement Funds proposal - embodied by his July 2012 report, The Retirement Crisis and a Plan to Solve It (but not yet developed as legislative language) - would also permit employers to pool their retirement plans while allowing them to delegate their fiduciary responsibilities to professional boards of trustees.

The committee heard testimony from the following panel of retirement policy experts and stakeholders:

- Charles A. Jeszeck, director of education, workforce and income security at the U.S. Government Accountability Office (GAO), described research indicating that the 14 percent of small employers who sponsor a retirement plan face unique administrative challenges, most notably a poor understanding of fees. He also described the various types of multiple-employer plans (MEPs) and their potential to address these challenges.

- David J. Koetje, president & CEO of Christian Schools International, discussed his organization's successful MEP and the role it plays in talent recruitment and retention. He strongly recommended legislative reforms to the PPA defined benefit plan funding rules, particularly for small employers.

- Jim Kais, senior vice president & national practice leader for special markets at Transamerica Retirement Solutions, described how employers have played a vital role in improving plans and enhancing employee benefits. He urged the panel to support legislation that would control costs, reduce complexity, limit fiduciary liability and encourage innovation.

During the question-and-answer portion of the hearing, committee members - including Harkin - repeatedly raised the matter of annuitization and lifetime income options as a protection against retirement plan leakage (the early drawdown of retirement assets). Kais affirmed that lifetime income needs to be a part of one's financial plan in retirement but the process begins with education of participants and beneficiaries. Jeszeck noted that GAO is currently conducting a study of other nations' approaches to annuitization and the different strategies offered for employees, with the report to be released in September.

In conjunction with the hearing, Committee Chairman Tom Harkin (D-IA) and Senator Pat Roberts (R-KS) introduced the Cooperative and Small Employer Charity Pension Flexibility Act (S. 1302), which establishes new pension funding rules for smaller, non-profit employers - replacing the temporary exemption granted under the Pension Protection Act of 2006 and facilitating plan pooling arrangements. The measure also freezes Pension Benefit Guaranty Corporation (PBGC) premiums at current levels while the agency reevaluates how much these plans should be paying for pension insurance.

RECENT REGULATORY ACTIVITY

Administration Finalizes PPACA Regulations Addressing Premium Tax Credit Applications

The U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) published final regulations on July 5 addressing a variety of statutory provisions related to the Medicaid program and Affordable Insurance Exchanges (also known as "Marketplaces"), as enacted under the Patient Protection and Affordable Care Act (PPACA) and other statutes, including the application process for individuals seeking premium tax credits within a Marketplace. A fact sheet has been posted on the CMS website.

The regulations aim to provide states with substantial discretion in the design and operation of a health exchange, including greater standardization and coordination in the subsidy application process (for low- and moderate-income individuals) with Medicaid and CHIP. Eligibility for subsidized coverage within an exchange is limited to individuals whose household income is 100 percent to 400 percent of the federal poverty level and who do not have access to affordable employer-sponsored coverage (defined as coverage that costs more than 9.5 percent of household income).

The regulations include details on the procedures for a Marketplace to verify individuals' access to and enrollment in employer-sponsored coverage, as well as eligibility for subsidies in the form of a premium tax credit. The final regulations also address coordination of appeals of eligibility determinations, notices to Medicaid, CHIP and Marketplace applicants, Medicaid benefit plan designs, Medicaid cost sharing, open enrollment and presumptive eligibility by health care providers.

As we reported above, the Internal Revenue Service has just issued formal guidance on the delay of the reporting requirements under sections 6055 and 6056 of PPACA and the penalties under 4980H employer shared responsibility requirements.

DOL Issues Modifiable Notices to Employees of Coverage Options

The U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) has issued modifiable Microsoft Word versions of the model notices that can be used to satisfy the Patient Protection and Affordable Care Act (PPACA) requirement that employees receive notice of their options under state and federally-facilitated health insurance marketplaces.

The following modifiable notices are now available:

- Model notice for employers who offer a health plan to some or all employees
- Model notice for employers who do not offer a health plan

These notices, along with non-modifiable Spanish-language versions, are also available on the DOL Affordable Care Act website.

PPACA amends current law to require that applicable employers must provide each employee with a written notice providing the employee with information about the exchange and how to request assistance, describing the availability of a premium tax credit (if applicable) and outlining the implications for the employee if they choose to purchase a qualified health plan through an exchange. The notice requirement was originally scheduled to take effect on March 1, 2013, but subsequent guidance has indicated that the timing for distribution of notices will be the late summer or fall of 2013 in coordination with the open enrollment period for exchanges.

The U.S. Department of Labor (DOL) recently issued Technical Release 2013-02, providing temporary guidance on the notice requirement, along with English-language model notices.

DOL Allows Defined Contribution Plan Sponsors to Reset Timing for Annual Fee Disclosure

In Field Assistance Bulletin (FAB) 2013-02, issued on July 22, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) provided temporary enforcement relief from defined contribution plan fee disclosure requirements to allow plan sponsors to "reset" the timing of this annual notice.

Under the final regulations governing fee disclosure for participant-directed individual account plans (including defined contribution arrangements like 401(k) plans), plan administrators must annually disclose detailed investment-related information to plan participants and beneficiaries about the plans' designated investment alternatives in the form of a comparative chart. The regulations require that the disclosure must be provided at least once in any 12-month period for both calendar- or fiscal-year plans.

FAB 2013-02 gives employers a single opportunity to "reset" their annual deadline for the 2013 or 2014 disclosures to align the comparative chart with other participant disclosures.

- If a plan that has not yet furnished the 2013 disclosure, they will have until 18 months after the 2012 disclosure was provided to issue the new disclosure. (So, for example, if a plan administrator furnished the disclosure on August 25, 2012, the 2013 disclosure would technically be due no later than August 25, 2013, but under this guidance DOL will not take enforcement action for tardiness if the plan administrator furnishes the 2013 disclosure by February 25, 2014.)

- For plans that have already furnished or intend to furnish the 2013 disclosure, they may furnish the 2014 disclosure no later than 18 months after furnishing the 2013 comparative chart. (So, for example, if a plan administrator furnished the first disclosure on August 25, 2012, and intends to furnish the second disclosure on August 25, 2013, the 2014 disclosure would technically be due no later than August 25, 2014, but under this guidance DOL will not take enforcement action for tardiness if the plan administrator furnishes the 2014 disclosure by February 25, 2015.)

  In an associated news release, U.S. Department of Labor Assistant Secretary for the Employee Benefits Security Administration (EBSA), Phyllis C. Borzi, noted that plans may use the relief "only if the responsible plan fiduciary determines that doing so will benefit the plan's participants and beneficiaries." This enforcement policy does not alter a plan administrator's obligations under the regulation to timely update the investment information that is available at the plan's internet web address or to notify participants about changes to investment information, such as a new plan investment option.

The FAB acknowledges that this temporary relief does not address ongoing concerns that the regulatory timing requirement may still result in a fixed annual deadline for comparative charts. EBSA is therefore considering whether to revise the regulation's timing requirement to provide reasonable flexibility to plan administrators on a permanent basis, perhaps through the use of a 30- or 45-day window for furnishing the required disclosure. The agency is soliciting comments from plan sponsors and service providers on this matter.

PBGC Proposes Changes to Defined Benefit Plan Premium Rules

In proposed regulations released on July 22, the Pension Benefit Guaranty Corporation (PBGC) seeks to simplify due dates for defined benefit plan insurance premiums, along with other changes to make payments less burdensome.

Specifically, the proposed regulations aim to:

- *Simplify and streamline due dates*: under the proposal, all annual premiums (flat- and variable-rate) for plans of all sizes will be due on the same day in the premium payment year - the historical variable-rate premium due date.

- *Coordinate the due date for terminating plans with the termination process*: for a plan terminating in a standard termination, PBGC proposes to set the final premium due date no later than the last day the post-distribution certification can be submitted without penalty.

- *Premium variable-rate changes:* to address the problem in which some small plans determine their funding level too late in the year to be able to use current-year figures for the variable-rate premium by the new uniform due date, PBGC proposes that small plans generally use prior-year figures for the variable-rate premium. PBGC also proposes to clarify the computation of the premium funding target for plans in "at-risk" status for funding purposes.

- *Reduce the maximum penalty for delinquent filers that self-correct*: The one percent per month late premium penalty for filers that self-correct will remain in force, but to encourage self-correction the cap on those penalties will be reduced from 100 percent of the underpayment to 50 percent. PBGC also proposes to codify the penalty relief policy for payments made not more than seven days late to give itself more flexibility in exercising its authority to waive premium penalties.

- *Simplify the process for plan administrators to determine whether the plan has an obligation to make a premium payment*: PBGC proposes that, if a plan is the subject of distress or involuntary termination proceedings, the plan's obligation to pay premiums should cease when termination proceedings begin, at which time the premium payment obligation falls solely on the plan sponsor's controlled group.

- *Clarify the definition of "newly covered plan"*: PBGC proposes to revise this definition to remove the exclusion of new plans, allowing newly covered plans and new plans to prorate premiums based on coverage date rather than its effective date.

The proposed regulations are motivated in part by the White House's Executive Order 13563, in which President Obama directed his administrative agencies to improve the regulatory review process.

PBGC is soliciting comments on the proposed regulations through September 23.

IRS Issues Updated Mortality Tables for Calculating Lump Sum Distributions

The Internal Revenue Service (IRS) issued IRS Notice 2013-49, providing updated static mortality tables to be used for a variety of purposes under ERISA, including the calculation of lump sum distributions as well as determining the present value of plan benefits for purposes of minimum survivor annuity distributions. These tables apply for purposes of calculating the funding target and other items for valuation dates occurring during calendar years 2014 and 2015, and for distributions with annuity starting dates that occur during stability periods beginning in the 2014 and 2015 calendar years.

The IRS and U.S. Treasury Department are required to revise the mortality tables at least every 10 years to reflect the actual mortality experience of pension plans and projected trends in that experience. The IRS and Treasury are aware of a study that is currently being conducted by the Society of Actuaries to measure the actual experience and trends in mortality for participants of uninsured pension plans in the United States and an associated report issued in September 2012. Notice 2013-49 also requests comments as to whether other studies of actual mortality experience of pension plans and projected trends of that experience are available that should be considered for use in developing mortality tables for future use. The deadline for comments is October 8.

DOL Advisory Opinion Discusses Treatment of ERISA Accounts as Plan Assets

The U.S. Department of Labor (DOL) issued Advisory Opinion (AO) 2013-03A, providing long-awaited guidance on the plan asset status of "ERISA Accounts," sometimes referred to as ERISA Budget Accounts, Budget Accounts or ERISA recapture accounts. (Advisory opinions provide interpretations of current law by applying the law to a specific set of facts.) The issuance of AO 2013-03A is significant because it helps clarify the treatment of ERISA Accounts as "plan assets" and provides plan sponsors with a framework for monitoring and administering these ERISA Accounts.

Financial institutions and record keepers providing services to a plan often receive payments in connection with the investments offered under the plan. These payments can take various forms, but industry parlance groups them together under the term "revenue sharing." These payments are used to offset the cost of providing recordkeeping and other plan services, like participant education. Revenue sharing arrangements have come under additional scrutiny in recent years as a result of new fee disclosure requirements.

Many service providers have entered into arrangements with plans to make part of these revenue sharing payments available to the plan. The payments are credited to an account which may be used to pay recordkeeping and administrative services or used for other plan purposes. One key question is whether an account set up for the plan holds ERISA "plan assets."

Very generally, AO 2013-03A identifies two types of ERISA Accounts, based on how the arrangement is made. ERISA Accounts will not be considered plan assets if the financial institution simply enters into an agreement and keeps the assets with its general assets - even if it sets the money aside for ease of administration - and pays everything they are supposed to pay out of the bookkeeping account. If, in this case, the financial institution fails to pay, the claim for the payment is a plan asset the fiduciary must pursue.

Alternatively, if the contract requires the financial institution to set the money aside in an account that is clearly for the benefit of the plan only, it is a plan asset.

Most importantly, regardless of whether they are plan assets, the DOL says ERISA's general standards of fiduciary conduct apply, and the parties must take care to avoid non-exempt prohibited transactions.

IRS Seeks Public Comment on Form 5500

According to a formal request published in the July 29 Federal Register, the Internal Revenue Service (IRS) is seeking comments on Form 5500, the Annual Return/Report of Employee Benefit Plan.

This form is used to fulfill annual reporting requirements under the Internal Revenue Code and ERISA. The IRS, U.S. Department of Labor and Pension Benefit Guaranty Corporation use the Form 5500 to perform oversight, including audit activity, of employee benefit plans.

The IRS specifically invites comments on the practical necessity of Form 5500 filing and how the current burden of collection can be reduced. Written comments will be accepted through September 27, 2013.

RECENT JUDICIAL ACTIVITY

In Wake of Windsor Decision, District Court Rules Same-Sex Spouse Has Right to Pension Benefits under ERISA

In the first significant court ruling in the wake of the U.S. Supreme Court's *United States v. Windsor* decision - in which the high court invalidated Section III of the federal Defense of Marriage Act (DOMA) - the U.S. District Court for the Eastern District of Pennsylvania has ruled that a same-sex widow was entitled to survivor benefits under ERISA, even though the couple lived in a state where same-sex marriages are not performed.

At issue in *Cozen O'Connor v. Tobits* was whether a tax-qualified ERISA pension plan was required to provide a qualified pre-retirement survivor annuity (QPSA) to Jean Tobits, as surviving spouse of plan participant Sarah Farley. Farley and Tobits were legally married in Canada in 2006. The two lived in Illinois, which does not issue marriage licenses to same-sex couples but will recognize a same-sex marriage performed in another jurisdiction as a civil union. After Farley died in 2010, Tobits requested payment of the survivor benefit from the plan as Farley's surviving spouse. Farley's parents also made a competing claim for the survivor benefits under the plan terms (they claimed that Farley had named them as her beneficiaries, which could have entitled them to benefits if Farley was found to be unmarried at the time of her death).

The court noted that the term "Spouse" was not defined by the plan and that as a result, it had to determine if Tobits was Farley's spouse under ERISA and the Code. It noted that "following the [Supreme] Court's ruling [in *U.S. v. Windsor*, the term 'Spouse' is no longer unconstitutionally restricted to members of the opposite sex, but now rightfully includes those same-sex spouses in 'otherwise valid marriages.'" The court then found that "post-*Windsor*, where a state recognizes a party as a 'Surviving Spouse,' the federal government must do the same with respect to ERISA benefits-at least pursuant to the express language of the ERISA-qualified Plan at issue here." Since Illinois, the couple's place of domicile, recognized the marriage as valid (albeit as a "civil union" under Illinois law), the Court held that Tobits was to be treated as the "spouse" of Farley for purposes of the plan and, therefore, was entitled to the QPSA benefits.

Notably, the court specifically found that Pennsylvania law did not apply even though the plan had a choice-of-law provision referencing Pennsylvania law, and the plan sponsor was headquartered in Pennsylvania. The court based its analysis of whether Tobits was Farley's surviving spouse on the law in the state where the couple was domiciled.

Also of note is the fact that the court found that the couple's status as a "civil union" under Illinois law was sufficient to validate their Canadian marriage and establish Tobits as Farley's surviving spouse. Left unanswered is how the court would have ruled if the couple had lived in a state that does not recognize same-sex marriage or civil unions, or has a constitutional ban against legal recognition of same-sex relationships.

This decision may be the first example of a court reading *Windsor* broadly to find avenues to provide parity in treatment to same-sex couples. It may also provide a roadmap to the Obama administration as it develops guidance regarding how same-sex spouses should or may be treated under ERISA and the Code.

The *Windsor* decision raises numerous questions related to the administration of health and retirement benefits for employees and their spouses.