BENEFITS INSIDER
A Member Exclusive Publication

Volume 102, November 18, 2013 (covering news from November 1-15, 2013)

WEB's ***Benefits Insider*** is a bi-monthly member exclusive publication providing the latest developments from Washington, DC, on matters of interest to employee benefits professionals. The content of this newsletter is being provided through 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

CBO Options for Reducing Deficit Include Health, Retirement Tax Changes

Currently circulating on Capitol Hill is a list of "options for reducing the deficit" over the next 10 years, prepared by the Congressional Budget Office (CBO) in anticipation of legislative negotiations over the federal budget and tax reform. The release of this document coincided with CBO Director Doug Elmendorf's November 13 testimony before the U.S. Senate and House of Representatives budget conference committee.

These negotiations bear close scrutiny because the tax incentives supporting these plans, such as the exclusion of employer-paid health care premium contributions and deferrals of tax on contributions to retirement plans, represent foregone federal tax revenue. While proposals remain conceptual in nature, complex in practice and unpopular in many corners, any need to raise federal revenue is likely to address benefit plans in some way.

The CBO list of options does not constitute a proposal or set of proposals, but lawmakers and their staffs may refer to these options frequently as they develop legislation. These items constitute especially attractive revenue-raising options for budget conferees because CBO has already calculated the amount of money raised by each such proposal. With regard to employer-sponsored benefit plans, the list includes (with the estimated revenue raised/outlays reduced over the next 10 years):

- Eliminate exchange subsidies for people with income over 300 percent of the federal poverty guidelines [pages 198-200] ($190 billion)
- Reduce tax preferences for employment-based health insurance, namely accelerate and expand the excise tax on high-cost plans and/or replace the excise tax with a limit on the tax exclusions for employment-based health insurance [pages 243-249] ($777 billion)
- Restricting the value of itemized deductions [pages 121-123] (up to $352 billion), which would limit the value of contributions to defined contribution plans
- Adding a "public plan" to the Health Insurance Exchanges [pages 198-200] ($158 billion)
- Reduce limits on employer and employee retirement contributions [pages 133-134] ($88.7 billion)
- Raising single-employer flat-rate and variable PBGC premiums [pages 24-25] ($5 billion)
- Replacing the current methodology for computing cost-of-living adjustments with a "Chained Consumer Price Index (Chained CPI)" calculation [pages 113-114] ($140 billion), which would be applicable to Section 415 retirement contribution caps, the excise tax on high cost health plans and many other programs.
- Raising the full retirement age for Social Security [page 40] ($58.2 billion)
- Including employer-paid premiums for income replacement insurance in employees' taxable income [pages 124-125] ($326 billion)
- Including include investment income from life insurance and annuities in taxable income [pages 126-127] ($210 billion)
- Eliminating deductibility of dividends on employer stock held in an ESOP [Appendix, page 281] (no figure given)

Over the past two weeks, budget conferees have continued to negotiate a compromise agreement on a 2014 budget resolution, perhaps including a pathway forward on tax reform, but little progress has been reported thus far.

RECENT REGULATORY ACTIVITY

Final Mental Health Parity Regulations Released

Final regulations implementing the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) were released by the U.S. departments of Treasury, Labor (DOL) and Health and Human Services (HHS) on November 8, more than three years after **interim final regulations** became applicable for plan years beginning on or after July 1, 2010. The final regulations were unveiled as part of President Obama's **initiative to reduce gun violence**.

The final regulations apply to plan and policy years (for grandfathered and non-grandfathered plans) beginning on and after July 1, 2014 (January 1, 2015, for most calendar year plans). Until the final rules become applicable, plans and issuers must continue to comply with the mental health parity provisions of the interim final regulations.

The MHPAEA prohibits large employer and group health plans that provide medical and surgical benefits and mental health or substance use disorder benefits from applying financial requirements or quantitative treatment limitations (such as a limit on the number of outpatient visits or inpatient days covered) that are more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical and surgical benefits.

As noted in a DOL press release, the final regulations are intended to protect consumers by:

- Ensuring that parity applies to intermediate levels of care received in residential treatment or intensive outpatient settings;
- Clarifying the scope of the transparency required by health plans, including the disclosure rights of plan participants, to ensure compliance with the law;
- Clarifying that parity applies to all plan standards, including geographic limits, facility-type limits and network adequacy; and
- Eliminating an exception to the existing parity rule for differences in "nonquantitative treatment limitations" between medical/surgical and mental health or substance use disorder benefits based on "clinically appropriate standards of care."

Along with the final regulations, DOL also issued the latest in its series of Patient Protection and Affordable Care Act (PPACA) Frequently Asked Questions (FAQ) documents addressing the integration of the final rules with the health care law. PPACA applies MHPAEA to health insurance issuers offering individual health insurance coverage (both through the Health Insurance Marketplaces, also known as Exchanges, and outside the Marketplaces). The agencies previously issued **Part V**, specifying small employer exemptions from the law, clarified criteria for medical necessity determinations and provided an interim enforcement safe harbor, and **Part VII**, partially addressing the permissibility of certain non-quantitative treatment limitations imposed by plans.

FAQ Part XVII provides additional information on the new rules, addressing:

- The Obama Administration's efforts to promote and enforce compliance;
- The use of multiple provider network tiers;
- Exemptions from MHPAEA;
- The process for claiming an "increased cost" exemption;
- The use of medical management techniques (such as preauthorization) to manage care for mental health and substance use disorder services and the process for disputed claims (including required disclosures to participants); and

- How to obtain more information about health plan benefits and MHPAEA.

Through the FAQ, the agencies are requesting comments on what additional steps should be taken to ensure compliance with MHPAEA through health plan transparency, including what other disclosure requirements would provide more transparency to participants, beneficiaries, enrollees, and providers. Comments are due by January 8, 2014.

PBGC Issues Guidance on 2014 Premiums, Maximum Guarantees

On November 6, the Pension Benefit Guaranty Corporation (PBGC) **published the premium amounts** payable by defined benefit pension plan sponsors for 2014. The numbers have been updated to reflect increases resulting from the Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21), which allows for increases in these premiums based on inflation adjustments.

For 2014, the flat-rate premium for single-employer plans is set at $49 per participant, a 16.6 percent increase over the 2013 value. The flat-rate premium for multiemployer plans is set at $12 per participant, unchanged from 2013.

The variable-rate premium is set at $14 (up from $9 in 2013) per $1,000 of unfunded vested benefits, as in prior years, although the amount is now capped at $412 per-participant (although this may be less for plan sponsors with fewer than 25 employees.

Also on November 6, the PBGC published **maximum monthly guarantee tables for 2014**, indicating the maximum pension benefit that may be paid by the PBGC with respect to a plan participant in a single-employer pension plan that terminates during the year.

The maximum guaranteeable monthly benefit (for a 65-year old beneficiary) for 2013 is $4,943.18, up from $4,789.77 in 2013. The values in the table for a calendar year apply to distributions with straight-life annuity starting dates in that calendar year. Values for joint and survivor annuity beneficiaries are slightly lower.

Under the benefit restrictions enacted by the Pension Protection Act of 2006 (PPA) and governed by **PBGC Technical Update 2007-04**, single-employer plans that are between 60 and 80 percent funded may not pay lump sums or other accelerated distribution forms with values in excess of: (1) 50 percent of the amount that would be paid absent the restriction or, if smaller, (2) the present value of PBGC's maximum guarantee. Under the PBGC's **2014 table** of present values of the PBGC maximum guarantee for use by single-employer plans subject to the partial lump sum benefit restrictions, the 2013 value level for a 65-year old beneficiary is $750,830, down from $782,324 in 2012.

On November 15, the PBGC released its Fiscal Year 2013 Annual Report, revealing an operating deficit of $36 billion. Last year the agency reported a deficit of $34 billion. (The agency reported that the deficit for the single employer guarantee program declined by $1.7 billion, while for the multi-employer system it grew by $3 billion.)

In past years, PBGC has cited this deficit as a rationale for increasing premium amounts paid by defined benefit plan sponsors and for giving the agency additional authority to set its own premiums "based on the circumstances of the individual plans and their sponsors." Such

premium increases are commonly scored as federal revenue raisers and could arise in tax reform or deficit reduction negotiations.

IRS Finalizes Rules for Reduction or Suspension of Safe Harbor Contributions

Under **final regulations** issued November 14, the Internal Revenue Service (IRS) has revised the requirements for permitted mid-year reductions or suspensions of safe harbor non-elective contributions and permitted mid-year reductions or suspensions of safe harbor matching contributions to 401(k) and 401(m) plans.

These regulations generally apply to reductions in nonelective contributions to a safe harbor plan made after May 18, 2009, when the **proposed regulations** were first published. With regard to safe harbor matching contributions, the amendments to the requirements for permitted mid-year reductions of safe harbor matching contributions apply for plan years beginning on or after January 1, 2015.

The preamble indicates that the applicability of the final regulations for safe harbor matching contributions were delayed because they place new limitations on the ability of the employer to amend the matching contribution safe harbor plan (when compared to the proposed regulations). Therefore, for plan years beginning before January 1, 2015, the proposed regulations will continue to apply to permitted mid-year reductions of safe harbor matching contributions.

Under the final regulations, mid-year reductions or suspensions of safe harbor non-elective contributions (applicable May 18, 2009) and safe harbor matching contributions (applicable January 1, 2015) will be permitted if either (1) the employer meets a revised "employer operating at an economic loss" standard, or (2) notice is provided to participants, before the beginning of the plan year, that discloses the possibility that contributions might be reduced or suspended mid-year, and a supplemental notice is provided during the plan year but at least 30 days before the effective date of the actual reduction or suspension (along with meeting certain other required criteria including non-discrimination testing).

Under the proposed regulations, permitted mid-year reduction or suspension of safe harbor matching contributions was not subject to the business hardship standard or the required notice prior to the beginning of the plan year. Therefore, in plan years beginning before January 1, 2015, these requirements do not apply to permitted mid-year reduction of matching safe harbor contributions.

The final regulations also provide that the IRS can set forth additional situations in which sponsors can make mid-year changes through future guidance and allow that future guidance may set forth additional situations in which sponsors can make mid-year changes, to "provide the IRS with greater flexibility … such as an amendment to the plan in connection with a mid-year corporate transaction."

Electronic Disclosure Update: GAO Issues Report

The Government Accountability Office (GAO) has issued a report, Private Pensions: Revised Electronic Disclosure Rules Could Clarify Use and Better Protect Participant Choice, examining current practices regarding electronic dissemination of benefit plan information to participants.

From an analysis of current disclosure rules, as requested by Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Tom Harkin (D-IA) and House Education and the Workforce Ranking Democrat George Miller (D-CA), GAO identified weaknesses and inconsistencies in the prevailing electronic delivery requirements. The report recommends that DOL and Treasury "consider clarifying regulatory requirements and expanding participants' ability to opt out of electronic delivery."

RECENT JUDICIAL ACTIVITY

No activity to report for this time period.