BENEFITS INSIDER
A Member Exclusive Publication

Volume 130, January 16, 2015 (covering news from January 1-15, 2015)

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 Smith, employee benefits attorney and Principal of Flexible Benefits Systems, Inc., csmith@fbsi.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

House Approves Legislation Marking 40 Hours as 'Full Time' for PPACA Purposes

The U.S. House of Representatives approved a measure on January 8 that would establish 40 hours as the benchmark for "full time" work under the Patient Protection and Affordable Care Act (PPACA). The 252-172 vote included 12 Democrats.

The Save American Workers Act (H.R. 30), introduced by House Ways and Means Committee member Todd C. Young (R-IN), would replace the number 30 (hours per week) with the number 40 (hours per week) for purposes of identifying full-time employees and satisfying the PPACA employer mandate under Internal Revenue Code Section 4980H. H.R. 30 would also modify the calculation of full-time equivalent workers 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.

President Obama has issued a Statement of Administration Policy asserting that he would veto H.R. 30 if it reached his desk, noting that the measure would increase the federal budget deficit, reduce the number of people receiving employer-based health insurance coverage and increase the number of individuals who are uninsured. The latest Congressional Budget Office budget score estimates that H.R. 30 would increase the deficit by $53.2 billion over the next ten years. House Minority Leader Nancy Pelosi (D-CA) stated in a January 8 news conference that the measure would add half a million people to the ranks of the uninsured.

Senators Susan Collins (R-ME) and Joe Donnelly (D-IN) have introduced a companion bill in the U.S. Senate, the Forty Hours is Full Time Act (S. 30), but Senate action has not yet been scheduled.

House Passes Bill Exempting Veterans When Determining Employer Mandate Applicability

On January 6, the U.S. House of Representatives passed the Hire More Heroes Act (H.R. 22) by unanimous, bipartisan vote of 412-0.

The measure, sponsored by Representative Rodney Davis (R-IL), would exempt veterans already enrolled in coverage under TRICARE or the U.S. Department of Veterans Affairs (VA) from being taken into account for the purposes of determining if an employer is subject to the employer mandate under the Patient Protection and Affordable Care Act (PPACA).

The PPACA "shared responsibility" employer mandate under Internal Revenue Code Section 4980H, which took effect on January 1, requires employers with 100 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 100 employee threshold is applicable only under transition relief for 2015; after 2015, the threshold is 50 employees.)

The bill would allow businesses to hire veterans covered by TRICARE or the VA without counting them as full-time employees. Supporters of the measure point out that it will help some small businesses stay below the mandate threshold as well as encourage the hiring of veterans.

The Hire More Heroes Act was previously introduced in the House in the 113th Congress and approved by a vote of 406-1. That measure was not considered by the Senate. Senate consideration of H.R. 22 has not yet been scheduled.

Senate Finance Committee to Establish Bipartisan Tax Reform Working Groups

On January 15, U.S. Senate Finance Committee Chairman Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) announced the launch of five bipartisan tax working groups within the committee in an effort to facilitate congressional comprehensive tax reform in the 114th Congress.

According to the announcement, "The groups will analyze current tax law and examine policy trade-offs and available reform options within the group's designated topic areas" and "will work directly with the Joint Committee on Taxation (JCT) to produce an in-depth analysis of options and potential legislative solutions."

The stated goal is to have a single comprehensive report featuring recommendations from each of the five categories completed by the end of May. The report recommendations will then serve as a foundation for the development of bipartisan tax reform legislation.

The groups will be co-chaired by Republican and Democrat members. (One of the groups will have two Republican co-chairs and one Democratic co-chair.) Policy focus areas for the working groups and their respective co-chairs are listed below:

- *Savings & Investment*, chaired by Senator Mike Crapo (R-ID) and Sen. Sherrod Brown (D-OH). This is the group that will examine retirement tax policy.
- *Individual Income Tax*, chaired by Senator Chuck Grassley (R-IA), Sen. Mike Enzi (R-WY) and Sen. Debbie Stabenow (D-MI).
- *Business Income Tax*, chaired by Sen. John Thune (R-SD) and Sen. Ben Cardin (D-MD).
- *International Tax*, chaired by Sen. Rob Portman (R-OH) and Sen. Chuck Schumer (D-NY).
- *Community Development & Infrastructure*, chaired by Sen. Dean Heller (R-NV) and Sen. Michael Bennet (D-CO).

As the Senate committee with jurisdiction over the tax code, the Finance Committee has been active in examining comprehensive tax reform, especially with regard to the current tax incentives for employer-sponsored benefit plans. Hatch recently released an analysis, Comprehensive Tax Reform for 2015 and Beyond, outlining various issues likely to come up in the effort to reform the tax code, including employer-sponsored benefits.

It is currently unclear which, if any, working group will examine health benefits tax policy. It may possibly be shared by the Individual Income Tax and Business Income Tax groups.

The House of Representatives Ways and Means Committee initiated a similar process in 2013, designating 11 tax reform working groups to evaluate ideas for comprehensive tax reform. That committee specifically did not establish a health policy working group given the very partisan disagreements about the Patient Protection and Affordable Care Act. It is possible the Senate Finance Committee has chosen not to establish a health group for the same reason.

As part of the House Ways and Means Committee effort, the Pensions/Retirement Tax Reform Working Group's resulting 568-page document issued by the JCT was the basis for former Ways and Means Chairman Dave Camp's Tax Reform Act proposal.

First State-Mandated Employer Retirement Plan Signed Into Law in Illinois

On January 4, Illinois became the first state in the nation to require employers to automatically enroll employees in Roth Individual Retirement Accounts (IRAs).

Governor Pat Quinn (D) signed into law the Illinois Secure Choice Savings Program Act (S.B. 2758), stating that the new measure would provide access to an employer-sponsored retirement plan for almost 2.5 million employees. According to the governor's office, 44 percent of Illinois workers currently do not have access to an employer-sponsored retirement plan. The law applies primarily to those employers that do not offer a retirement plan but does not require employers to make contributions on behalf of their employees.

Below are some key features of the program:

- The program applies only to private employers with 25 or more employees that have operated for two or more years and offer no retirement plan outside of Social Security.
- Employers must administer payroll deductions and deposits into "Secure Choice" Roth IRA accounts using their existing payroll systems.
- Employees are automatically enrolled, but may opt out at any time.
- Employee contributions are automatically set at three percent unless the worker designates a different amount.
- Employees will be able to retain their Secure Choice accounts when moving from job to job.

The law is effective June 1, but employers will have two years to fully implement the program. State-level retirement plan initiatives have raised questions about the responsibilities they might impose on employer plan sponsors, as well as possible concerns about the erosion of ERISA's federal framework for benefits plan administration. While encouraging savings is crucial for Americans' retirement security, the creation of state laws establishing mandates over retirement policy may pose issues of concern for the business and benefits community, as variations in state laws will create substantial administrative burdens and costs on multi-state employers sponsoring employee benefits.

Additionally, the U.S. Treasury Department recently launched the *my*RA program to provide savings vehicles similar to Individual Retirement Accounts (IRAs), targeted at individuals who do not already have access to an employer plan. In a December 15 letter to the Treasury, the U.S. Department of Labor's decision to not rely more directly on the existing exemption for payroll deduction IRAs and instead create an exemption for federal government-run programs raises some potential questions concerning the application of ERISA to state-run retirement arrangements for those without access to employer-sponsored retirement plans.

RECENT REGULATORY ACTIVITY

PBGC Participant and Plan Sponsor Advocate Suggests Improved Communication, Coordination in First Annual Report

The Pension Benefit Guaranty Corporation's (PBGC) Participant and Plan Sponsor Advocate, Constance Donovan, issued her **first annual report** on December 31, 2014, generally praising the agency's commitment to the defined benefit plan system but identifying a number of ways in which relations with its customers can and should be improved.

The advocate position was established by the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012 to assist participants and sponsors in resolving persistent problems with the PBGC. Since the beginning of her tenure in 2013, Donovan has been helpful in facilitating solutions on such issues as ERISA Section 4062(e) enforcement (regarding cessation of certain business operations) and inadvertent nondiscrimination violations arising from frozen plans.

The report identifies four persistent problems requiring improvement:

- Lack of clarity in communications with participants and plan sponsors.
- Lack of process for handling certain participant and plan sponsor issues outside of the routine transactions that PBGC performs quite well.
- Lack of coordination among and between PBGC departments.
- A "growing adversarial and over-reaching approach by PBGC."

A detailed examination of several plan sponsor issues, beginning on Page 19 of the report, focuses on this adversarial approach. Plan sponsors cited in the report suggest that "the business community relationship with PBGC has turned decidedly much more antagonistic and unwilling to negotiate with a free exchange of information from both parties, often with PBGC insisting that the plan sponsor be prepared to settle without first being told of PBGC's rationale for its enforcement action."

Among the specific issues cited in the report, along with 4062(e) enforcement, is the ongoing concern about pension plan "de-risking" – in which plan sponsors pursue strategies to reduce the volatility and risk inherent in pension plan funding – and its connection to PBGC premium increases.

According to the report, "PBGC needs to understand what is driving companies to de-risk, including increasing premiums and other PBGC-related issues, such as how PBGC values its liabilities, which plan sponsors and some participant advocacy groups believe are overstated and thus lead to premium increases which leads to plan de-risking."

Treasury Formally Launches myRA Program

In December 2014, the U.S. Department of the Treasury launched the *my*RA program for employees and employers. A Treasury website dedicated to the program is now live.

The *my*RA program is an executive branch initiative that provides savings vehicles similar to Individual Retirement Accounts (IRAs), intended to expand workplace retirement savings. Initially announced by President Obama in his 2014 State of the Union address, *my*RAs are provided through employers and are targeted at individuals who do not already have access to an employer plan, although they can be offered in conjunction with an existing employer plan. The accounts are invested only in a new class of nonmarketable, electronic Treasury retirement savings bonds that replicate the variable rate of the Government Securities Investment Fund (G Fund) of the Thrift Savings Plan for federal employees. Treasury issued final regulations authorizing the new retirement savings bonds on December 12, 2014.

The official Treasury website provides resources on *my*RAs for both individuals and employers, including a savings calculator and Frequently Asked Questions for employees and a guide and promotional materials for employers. Currently, *my*RA accounts can only be funded by direct deposit through an employer. An individual can fund a *my*RA account through any employer as long as they offer direct deposit and they are able to set up a portion to be directed to the account. The website states that in the near future, Treasury will be making other methods available for individuals to contribute to their *my*RA account.

In a December 15 letter, the U.S. Department of Labor (DOL) concluded that an employer permitting its employees to contribute to a *my*RA through payroll deduction does not constitute sponsoring "an employee pension benefit plan" subject to ERISA.

IRS Issues Revenue Bulletin, Updated Procedures for Determination Letters, User Fees

On January 2, the Internal Revenue Service (IRS) issued Internal Revenue Bulletin 2015-1, updating procedures for 2015 for employee plans and exempt organizations.

The bulletin includes the following plan guidance effective for the new calendar year:

- **Revenue Procedure 2015-6** provides guidance on the changes to the determination letter process for employee plans, reflecting the changes made by the Employee Plans reorganization where the technical work was moved from the Tax Exempt and Government Entities (TE/GE) Division to the Office of Associate Chief Counsel.The new procedure also changes the treatment of incomplete applications.

- **Revenue Procedure 2015-8** provides the user fees that must be included with requests for determination letters or other guidance. In addition to the annual update of fees, there are a number of changes related to the reorganization of the Employee Plans division.

Other revenue procedures in the bulletin include guidance on the following:

- Rev. Proc. 2015-1, on letter rulings and information letters.
- Rev. Proc. 2015-2, on technical advice memoranda.
- Rev. Proc. 2015-3, on areas or matters on which the IRS will not issue letter rulings or determination letters.
- Rev. Proc. 2015-4, on rulings and information letters under the jurisdiction of the Office of Division Commissioner, TE/GE.
- Rev. Proc. 2015-7, on international matters on which the IRS won't issue letter rulings or determination letters.

All of the revenue procedures are effective as of January 2, except for Rev. Proc. 2015-6, which is effective February 1.

PBGC Ends Moratorium on Section 4062(e) Enforcement

The Pension Benefit Guaranty Corporation (PBGC) announced on January 5 that it is ending its moratorium on enforcement of "shutdown" benefit violations under ERISA Section 4062(e). The moratorium is being canceled in light of the legislative clarification enacted as part of the Consolidated and Further Continuing Appropriations Act (H.R. 83).

H.R. 83, recently signed into law by President Obama, formally clarifies that that there is no 4062(e) event unless there is a substantial shutdown of operations at a facility *relative to the size of the entire employer*, ensuring that enforcement only applies to major downsizing transactions, not routine business transactions. Very generally, the modifications:

- ensure that there is no 4062(e) event unless there is a substantial shutdown of operations at a facility relative to the size of the entire employer.
- subject to certain exceptions, ensure that there is no 4062(e) event unless employees lose their jobs, as opposed to going to work for another employer.
- significantly reduce the scope of an employer's liability if there is a 4062(e) event.

The new rules generally apply to prior transactions, as well as future transactions.

PBGC had previously initiated a 6-month enforcement moratorium in a July 2014 news release. According to the latest PBGC announcement, "Now that Congress has addressed the cessations to which Section 4062(e) should apply and the amount and manner of satisfying the liability, PBGC has decided that there is no need to continue its enforcement moratorium. Employers that had or have a cessation of operations on or after December 16, 2014, that is not exempt and that meets the 15% reduction trigger described above should report the event to PBGC. Employers that had a cessation before that date should report it to PBGC, if they have not already done so. PBGC may be contacting employers that previously reported a cessation for additional information to determine whether and how the new rules apply to that event."

PBGC to Revise De-Risking Reporting Guidelines

In a new filing with the White House Office of Management and Budget (OMB) on January 12, the Pension Benefit Guaranty Corporation (PBGC) indicated that it will revise the 2015 premium filing procedures and instructions "to require after-the-fact reporting of certain risk transfers through lump sum windows and annuity purchases."

These risk transfers are a reference to defined benefit plan "de-risking" strategies, such as transferring all or a portion of their pension plan's assets and liabilities to an insurance company through an annuity buyout or directly to plan participants through a voluntary lump-sum distribution. PBGC notes that "risk transfers can substantially reduce the premiums that plans otherwise would pay to PBGC. Because PBGC premiums and the investment income earned on them are a major source of income for PBGC, information about risk transfers is critical to PBGC's ability to assess its future financial condition."

While a September 2014 information collection request previously indicated PBGC's interest in requiring the reporting of such risk-transfer activity, the January 12 document clarifies that such reporting will be "after-the-fact."

PBGC's updated notice also announces that it will be changing certain premium declaration certification procedures, offering the option for a plan to provide a telephone number specifically for inclusion in PBGC's Search Plan List on PBGC's Web site and updating premium rates.

Comments on the updated notice will be accepted through February 11, 2015.

DOL Updates Pension Plan Notice Requirements Under HATFA; IRS Releases Segment Rates

The U.S. Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2015-1 on January 14 updating the annual funding notice requirements for single-employer defined benefit plans.

These updates reflect changes pursuant to the Highway and Transportation Funding Act of 2014 (HATFA), which included a five-year extension of defined benefit pension plan funding stabilization (or "smoothing") rules originally passed as part of the previous transportation bill, the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012.

FAB 2015-1 provides guidance to the DOL Employee Benefits Security Administration's national and regional offices on compliance by plan administrators of single-employer defined benefit plans with the annual funding notice requirements of ERISA Section 101(f), which sets forth the requirements for annual funding notices to plan participants and beneficiaries.

The guidance also includes a modified supplement to the model annual funding notice that plan administrators may use to comply with the law.

As a matter of good faith compliance, the DOL will treat a plan administrator of a single-employer defined benefit plan as satisfying the Section 101(f) requirements if the plan administrator complies with the guidance in FAB 2013-01 and FAB 2015-01.

In a related matter, the Internal Revenue Service (IRS) issued Notice 2015-5, providing guidance on the corporate bond monthly yield curve, the corresponding spot segment rates used for defined benefit plan funding purposes. The notice also provides guidance as to the interest rate on 30-year Treasury securities in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate.

IRS Announces Automatic Approval for "Takeover" Plans Changing Funding Method

On January 6, the Internal Revenue Service released Announcement 2015-3 to announce automatic approval for single-employer defined benefit "takeover" plans with a change in funding method resulting from a change in the plan's enrolled actuary when certain requirements are met. The announcement applies to plan years beginning on or after January 1, 2013. "Takeover" plans are plans for which both the enrolled actuary and the business organization providing actuarial services have changed.

A change in funding method can occur when both the enrolled actuary and business organization providing actuarial services for a plan are changed and the new enrolled actuary uses different valuation software or otherwise applies the overall funding method in a different manner. Under Section 412(c)(5) of the Internal Revenue Code, any change of funding method requires the approval of the U.S. Treasury Secretary. Certain changes in funding methods under tax code Section 430 were previously provided with automatic approval in Announcement 2010-3.

This announcement expands upon the automatic approval for takeover plans subject to Section 430 by allowing the so-called "five percent" tests, which are required to be applied with respect to the liabilities and assets reflected on the Schedule SB (Form 5500, Single-Employer Defined Benefit Plan Actuarial Information), to be performed for the year in which the takeover occurs and permitting the new enrolled actuary to use a signed actuarial valuation report issued by the prior enrolled actuary for the plan in lieu of the Schedule SB.

GAO Report Recommends Additional Protections for 401(k) Automatic Rollovers

In a new report released on December 22, 2014, the Government Accountability Office (GAO) examined the effects of job changes on the savings of 401(k) plan participants who leave savings in a former employer's 401(k) plan.

Under current law, when a participant has saved less than $5,000 in a 401(k) plan and changes jobs without indicating what should be done with the money, following a notice to the participant, the plan can transfer the account savings into an Individual Retirement Account (IRA),which the GAO called a "forced transfer." The GAO report, 401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts, studied the following aspects of forced transfers (automatic rollovers):

- *What happens over time to the savings of participants in forced-transfer IRAs:* Using current fee and return data from 10 providers, the GAO projected forced-transfer IRA outcomes over time and found that because fees outpaced returns in most of the IRAs analyzed, these account balances tended to decrease over time. GAO also described the provision in the law that allows a plan to disregard previous rollovers when determining if a balance is small enough to force out; for example, a plan can initiate a transfer for a participant with a balance of $20,000 if less than $5,000 is attributable to contributions other than rollover contributions.

- *The challenges 401(k) plan participants face keeping track of retirement savings in general:* GAO indicated that many 401(k) plan participants have difficulty keeping track of their savings, especially when they change jobs. The report noted that although the Social Security Administration (SSA) provides information to individuals on benefits they may have from former employers, the information is not provided in a consolidated or timely manner.

- *How other countries address similar challenges of inactive accounts:* GAO reviewed the process with which inactive accounts were handled with six other countries: Australia, Belgium, Denmark, the Netherlands, Switzerland and the United Kingdom. The report found that these countries use forced transfers that help preserve account value and provide a variety of tracking tools, referred to as "pension registries."

The GAO report made several recommendations to the U. S. Department of Labor (DOL) and the SSA, including:

- Congress should consider amending current law to permit alternative default destinations for plans to use when transferring participant accounts out of plans.

- Congress should repeal a provision allowing plans to disregard rollovers when identifying balances eligible for transfer to an IRA, thus reducing the number of eligible transfers.

- The SSA should make information on potential vested plan benefits more accessible to individuals before retirement, such as by consolidating information on potential vested benefits with the Social Security earnings and benefits statement.

- The DOL should expand the investment alternatives currently available under the DOL's safe harbor regulation (generally money market funds, certificates of deposit and other low investment risk vehicles).

- The DOL should convene a taskforce to explore the possibility of establishing a national pension registry.

Both the DOL and the SSA disagreed with some of the recommendations. The DOL asserted that the current conservative investment options are appropriate and the SSA was concerned that recommendation would open the agency to questions from the public on ERISA, which the SSA considers to be out of the scope of its mission. However, the GAO maintained the need for all the recommendations.

IRS Issues Guidance on Retroactive Application of Mass Transit Benefit Parity Provision

On January 8, the Internal Revenue Service (IRS) issued guidance on the application of the retroactive increase in the pre-tax allowance for mass transit benefits for 2014.

IRS Notice 2015-02 provides guidance for the mass transit benefit parity provision contained in the recently enacted Tax Increase Prevention Act (H.R. 5771), a short-term extension of certain expiring tax provisions. Among other provisions, H.R. 5771 extended a provision in the American Taxpayer Relief Act of 2012, which had provided for an increase from $130 to $250 per month in the pre-tax allowance for mass transit expenses, to match the allowance for parking.

The notice provides guidance to employers on the retroactive application of the increased exclusion and how the increase applies for 2014 to reduce filing and reporting burdens on employers. It also provides special administrative procedures for employers using Form 941, Employers Quarterly Federal Tax Return, for the fourth quarter of 2014.

NTIS Proposes Certification Program for Access to Death Master File

On December 30, 2014, the National Technical Information Service (NTIS), a division of the U.S. Department of Commerce, published a proposed rule and request for comments on a proposed certification program to provide access to the Death Master File (DMF).

The DMF is a list of deceased individuals maintained by the Social Security Administration and distributed through the Commerce Department. These records, updated weekly, contain the full name, Social Security number, date of birth and date of death for listed decedents. Defined benefit and defined contribution plans commonly use these files for administrative purposes, such as determining when benefits to a deceased participant should be terminated or when a payment should be made to a surviving beneficiary.

However, under the Bipartisan Budget Act enacted in December 2013 (and effective as of March 26, 2014), the Secretary of Commerce must restrict access to the information in each individual's DMF for a three-year period beginning on the date of the individual's death, except to persons who are certified under a program to be established by the Secretary of Commerce. Only parties that have "a fraud prevention interest or other legitimate need for the information and agree to maintain the information under safeguards similar to those required of federal agencies that receive return information" may apply for certification.

On March 25, 2014, the NTIS issued an Interim Final Rule (IFR) establishing a temporary certification program for continued access to the DMF.

The new proposed rule would create a permanent certification program to (1) provide immediate access to a "Limited Access DMF" to those users who demonstrate a legitimate fraud prevention interest or a legitimate business purpose for the information and (2) otherwise delay the release of the DMF to all other users to reduce opportunities for identity theft and restrict information sources used to file fraudulent tax returns. The rule outlines the following aspects of the program:

- Sets requirements to have certified access to the DMF.
- Establishes a process for third party attestation and auditing of the "information safeguarding" requirement for certification.
- Provides that certified persons will be subject to periodic scheduled and unscheduled audits.
- Sets out penalties for persons who disclose or use DMF information in a manner not in accordance with the Act.
- Establishes the process for appealing denials or revocations of certification, the imposition of penalties and a fee program.

The IFR will continue to be in effect until a final regulation is published. Persons previously certified under the Interim Final Rule will need to become certified in accordance with the requirements of the final rule when it becomes effective.

The proposed rule adds language clarifying that "an individual element of information (name, social security number, date of birth, or date of death) in the possession of a Person, whether or not certified, but obtained by such Person through a source independent of the Limited Access DMF, will not be considered "DMF information" for the purposes of the rule." Thus, information that the certified person already had before receiving the DMF information, or information obtained from another source in addition to the DMF, can be disclosed to non-certified persons. However, it is unlikely that the certified person would have received the date of death from a source other than the DMF and the date of death can be very important in plan administration (for example, cutting off pension payments or commencing them to a survivor) and is often shared between service providers or with the plan sponsor.

The NTIS is requesting comment on the updated definition, as well as the specificity with which a person should be required to provide the basis for certifying its fraud prevention interest or business purpose under the proposed rule. Comments on the proposal are due on January 29.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.