BENEFITS INSIDER
A Member Exclusive Publication

Volume 112, April 15, 2014 (covering news from April 1-14, 2014)

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

Senate Passes UI Bill With Pension Funding Stabilization

The U.S. Senate formally approved the bipartisan Emergency Unemployment Compensation Extension Act (H.R. 3979) on April 7, a measure to temporarily extend long-term unemployment insurance (UI) for four months. The federal revenue cost of this extension is partially offset by a temporary delay in the phase-out of the pension funding stabilization provision originally enacted as part of a 2012 transportation measure.

The funding stabilization provision, originally enacted in the 2012 MAP-21 law, helps mitigate funding volatility by "smoothing out" the effect of historically and artificially low interest rates by constricting the segment rates used to determine funding status to be within 10 percent of a 25-year average of prior segment rates.

The subsequent phase-out of the original MAP-21 stabilization provision – under which the 10 percent corridor is gradually increased to 30 percent – has reduced the effectiveness of the measure. The UI measure essentially delays the phase-out until 2017. The Senate's UI agreement also gives employers an option to apply the new rule for 2013 and allows prepayment of PBGC flat-rate premiums for up to five years.

The measure will now proceed to consideration in the House of Representatives, but Republican leaders there have indicated opposition to the bipartisan Senate measure.

One-Year 'Doc Fix' Legislation Enacted into Law

President Obama has signed into law a measure providing for a one-year "patch" of the Sustainable Growth Rate (SGR) affecting payments to Medicare providers (commonly referred to as the "doc fix"). The Protecting Access to Medicare Act (H.R. 4302), approved by the U.S. Senate and House of Representatives in late March, will extend current payment levels to providers (delaying substantial cuts) through March 31, 2015.

A more permanent ten-year fix had been discussed among members of Congress but the estimated cost (roughly $116 billion over ten years) and other matters stymied negotiations. It had been previously suggested that defined benefit pension plan funding stabilization (as currently included in the long-term unemployment insurance extension bill) could appear as a revenue offset to a long- or short-term doc fix measure, but S. 4302 contains no such provision.

The bill also contains a number of assorted Medicare program extensions and other health provisions, most of which will have little impact on large employer health plan sponsors. Perhaps most notable is the repeal of the limitation on deductibles in employer sponsored health plans in the small group market under Section 1302(c)(2) of the Patient Protection and Affordable Care Act. These limits had been set at $2,000 for single coverage and $4,000 for family coverage.

Measure Clarifying PPACA Expatriate Plans Fails

The U.S. House of Representatives on April 9 failed to advance a bipartisan measure clarifying the treatment of expatriate plans under the Patient Protection and Affordable Care Act (PPACA). The vote tally was 257-159 in favor of passage, short of the two-thirds majority necessary to pass a bill under an expedited procedural process known as "suspension of the rules."

The Expatriate Health Coverage Clarification Act (H.R. 4414), introduced with bipartisan co-sponsorship, seeks to exempt expatriate plans from certain key provisions of PPACA, including the law's individual and employer mandates, health insurance taxes and other requirements. The health care law's application to expatriate health plans – and to the employer sponsors and employees covered by such plans – has created compliance uncertainty among plan sponsors and caused them to consider obtaining coverage for their ex-pats from non-U.S. insurance carriers.

Although some of the compliance uncertainty has been addressed in earlier transition guidance issued by the agencies, the guidance is temporary and does not fully address the outstanding concerns. The application of PPACA to U.S. insurance carriers that sell coverage for Americans working abroad makes those plans less competitive relative to plans being marketed by non-U.S. insurance companies.

The vote broke down generally along party lines, with only 20 Republicans opposing the bill and only 52 Democrats supporting it. (Notably, House Minority Leader Nancy Pelosi (D-CA) did not cast a vote.) Indications are that some Democrats were concerned that exempting expatriate plans would effectively allow for the provision of lesser coverage to foreign workers with jobs in the United States, such as migrant farm workers, although the language of the bill does not address that issue at all.

Since the bill did receive a majority of votes, it is unclear whether its sponsors will try to bring it up again in the future under normal procedures. If so, the bill might be modified to address concerns, including any possible concerns by U.S. insurance carriers that do not market expatriate health plans.

Senate Finance Committee Approves Tax 'Extenders' Bill

In an April 2 mark-up session, the U.S. Senate Finance Committee approved by voice vote the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act, which provides a two-year extension of several tax provisions expiring in 2013 and 2014. A description of the base bill and the filed amendments, as well as an initial Joint Committee on Taxation revenue estimate, are now available.

So-called "tax extenders" renew expiring tax provisions for individuals, and employers. In his opening statement, Chairman Ron Wyden (D-OR) emphasized the need for a more permanent solution. "I want to be straightforward on one point — this will be the last tax extenders bill the committee takes up as long as I'm chairman. That's why the bill is called the EXPIRE Act. It is meant to expire."

Specifically, Wyden added language to the bill indicating the "Sense of the Committee to express support for comprehensive tax reform … making permanent those provisions that merit such treatment and allowing others to expire." Other members of the Committee echoed Wyden's remarks and also voiced support for the passage of comprehensive tax reform.

Wyden also called for further bipartisan work to address a number of pressing issues, including retirement policy. He stated that the committee will "need to take a hard look at the issues surrounding multi-employer pension plans in order to protect Americans' benefits." The EXPIRE

Act includes an extension of the multiemployer pension funding provisions of the Pension Protection Act of 2006 (PPA), which are scheduled to expire after 2014. A substantial minority of multiemployer plans are reportedly in so-called "critical" condition. According to the Pension Benefit Guaranty Corporation (PBGC), which insures multiemployer and single-employer defined benefit pensions, the multiemployer insurance fund is projected to be exhausted by 2023, which could lead to more stringent rules or higher insurance premiums for single-employer plans.

Specifically, the EXPIRE Act would extend for one year PPA provisions relating to automatic extensions of amortization, deemed approval of a multiemployer plan's adoption, use, or cessation of use of the shortfall funding method, and rules relating to so-called "endangered" and "critical" status. The provision also provides that if a plan is operating under a funding improvement or rehabilitation plan for its last plan year (i.e., beginning before January 1, 2016), the plan must continue operating under the funding improvement or rehabilitation plan and comply with Internal Revenue Code and ERISA provisions.

Wyden's "Chairman's Mark" of the EXPIRE Act includes several other provisions affecting employer-sponsored benefits:

- *Mass transit benefit parity*: the American Taxpayer Relief Act of 2012 (H.R. 8) provided for an increase in the pre-tax allowance for mass transit expenses, making it equal to the benefit provided for parking ($245 per month) through the end of 2013. The EXPIRE Act extends this parity for another two years. The committee also passed an amendment, offered by Senator Charles Schumer (D-NY), to add expenses associated with the use of a bike sharing program to the list of qualifying transportation expenses.
- *Tuition assistance*: tuition assistance under Internal Revenue Code Section 222 provides for tax deductibility of tuition and related expenses for individuals. The EXPIRE Act extends the above-the-line deduction for qualified college tuition payments (as distinct from Section 127, which relates to employer-provided tuition assistance).
- *Distributions from Individual Retirement Plans for Charitable Contributions*: the EXPIRE Act extends an expiring provision that allows taxpayers age 70.5 and older to make a tax-free distribution from an IRA of up to $100,000 to a 501(c)(3) organization and simultaneously satisfy the minimum required distribution rules.

In addition, the committee passed an amendment, sponsored by six senators, to extend the health coverage tax credit (HCTC) to individuals dislocated from their work due to trade competition as well as retirees who receive pension payments through the PBGC.

Other amendments to the EXPIRE Act were filed, but not ultimately included in the final legislation:

- Senator John Cornyn (R-TX) filed an amendment to prohibit the enforcement of the Patient Protection and Affordable Care Act (PPACA).
- Schumer filed an amendment to remove the prohibition for IRA rollover gifts to donor-advised funds and supporting organizations.
- Senator Pat Roberts (R-KS) proposed three amendments during discussion – one to restore the ability of plan participants to use the funds in a health flexible spending account to purchase over-the-counter medications, and two to repeal or delay the PPACA (Sec. 9010(b)) annual fee on health insurance providers – but ultimately withdrew these amendments.

Enactment of a tax extenders package is uncertain in the near term, but consideration of such a measure could be possible later in 2014.

House Subcommittee Discusses PPACA Employer Mandate

The Health Subcommittee of the U.S. House of Representatives Ways and Means Committee discussed the employer mandate and reporting requirements of the Patient Protection and Affordable Care Act (PPACA) in a wide-ranging April 9 hearing. The subcommittee heard testimony from just one witness, J. Mark Iwry, senior advisor to the secretary and deputy assistant secretary for retirement and health policy at the U.S. Department of the Treasury.

The U.S. Treasury Department and Internal Revenue Service (IRS) released final regulations implementing the "Employer Shared Responsibility" provisions (commonly known as the "employer mandate" or the "pay-or-play mandate") under Section 4980H of the Internal Revenue Code, as added by PPACA. A Treasury Department fact sheet is also available.

Generally, the employer shared responsibility provisions require employers to offer affordable, minimum-value health coverage to their "full-time employees" (defined as on average at least 30 hours per week) or pay a penalty, triggered when at least one full-time employee receives a premium tax credit to purchase coverage through a health insurance exchange. Employers that employed on average at least 50 full-time employees (or equivalents) on business days during the preceding calendar year are subject to the rules. These provisions were originally intended to be effective beginning in 2014, but Notice 2013-45 delayed implementation until 2015 and the final regulations effectively extended this delay to 2016 for companies with between 50 and 99 employees, subject to certain conditions.

Subcommittee Chairman Kevin Brady (R-TX), in his statement opening the hearing, argued that PPACA is likely to increase costs and administrative complexity for businesses. He also suggested that the regulatory process "is again raising the question of fairness. Why has big business received better treatment than individual Americans?" – a reference to the individual mandate that applies in 2014.

In his prepared remarks, Iwry walked the subcommittee through the employer "shared responsibility" provisions, and noted that the Treasury has worked with companies to simplify reporting requirements to make them more practical. Specifically, he noted, employers that self-insure will have a streamlined way to fulfill the information reporting requirements using a single consolidated form.

During the question-and-answer period, subcommittee Democrats and Republicans generally traded partisan arguments for and against the law. Most notably, in response to a question from Brady, Iwry stated that the Treasury would not have any reason to delay the individual mandate. Iwry also described the one-year moratorium on the employer reporting provisions as necessary, saying that it grants companies more time to gather information to make for an effective and smooth transition.

Lawmakers Talk Tax Reform in Senate Budget Committee

On April 8, the U.S. Senate Budget Committee held the hearing Supporting Broad-Based Economic Growth and Fiscal Responsibility through a Fairer Tax Code to discuss tax reform.

In her opening statement, Chairman Patty Murray (D-WA) described financial challenges facing low- and middle-income families and called for comprehensive tax reform as part of a solution. "Changes in the tax code cannot solve the problem[s of the economy] alone, but there is no question that tax reform can and should be a powerful tool in the fight, because right now inefficiency and unfairness are actually making things worse."

Murray recently introduced the 21st Century Worker Tax Cut Act (S. 2162), a measure intended primarily to expand the Earned Income Tax Credit for low-income workers. The revenue cost of the measure is partially offset by changes to executive compensation provisions of the Internal Revenue Code. Specifically, under Section 162(m), the definition of "covered employee" would be changed from "covered employee" to "covered individual" and the tax code would be amended to change both the number and type of individuals to whom 162(m) applies from "the chief executive officer and the next four most highly compensated individuals" to "the officer, director or employee of the taxpayer or former officer, director or employee of the taxpayer." S. 2162 would also eliminate the current law exception for commission-based pay, a provision previously included in the wide-ranging tax reform proposal offered by House of Representatives Ways and Means Chairman Dave Camp (R-MI). (Camp's proposal would also eliminate the exception for *performance*-based compensation, but Murray did not adopt that provision.) The Senate measure also makes some changes to Code Section 162(m)(6) the limitation on pay for health insurance providers.

Specific details of the bill were not addressed during the hearing. Rather, the following witnesses focused on the general need for thoughtful, comprehensive tax reform:

- John L. Buckley, former chief counsel for the House Committee on Ways and Means and former chief of staff for the Joint Committee on Taxation, described the demographic and fiscal changes that have occurred since enactment of the Tax Reform Act of 1986 and how it complicates efforts to take a similar approach now. During the question-and-answer period, Buckley briefly discussed how Camp's tax proposal could be viewed as a manipulation of the standard ten-year budget window. Camp's plan, he said, "forces everyone into Roth IRAs and claims that to be a revenue increase. It's not a revenue increase; it's a tax benefit disguised as a revenue increase within the budget window." Buckley explained how financing a tax rate reduction using revenue from such "timing" methods produces a seemingly revenue neutral budget during the budget window but leads to future deficits.

- Jane Gravelle, senior specialist in economic policy at the Congressional Research Service (CRS), cited a recent study that highlighted difficulties in broadening the base and lowering tax rates, noting that most tax expenditures are viewed as serving an important purpose – including, for example, the tax incentives for providing defined benefit pension plans.

- Diana Furchtgott-Roth, a senior fellow at the Manhattan Institute for Policy Research, emphasized the power of lower taxes to facilitate economic growth. She also sought to refute the notion that income inequality is bad for economic growth. "Much of the concern about inequality is caused by problems of measurement and changes in demographic patterns over the past quarter-century," she said.

Tax reform remains extremely unlikely this year, though the matter will continue to spur conversation among lawmakers in the coming months.

RECENT REGULATORY ACTIVITY

IRS Guidance Outlines Application of Windsor Same-Sex Marriage Decision to Retirement Plans

In Internal Revenue Service (IRS) **Notice 2014-19**, issued April 4, the U.S. Treasury Department set forth the rules for recognition of same-sex spouses in retirement plan administration, as required under the U.S. Supreme Court's decision in *U.S. vs. Windsor*, which struck down key sections of the Defense of Marriage Act. Very generally, the guidance does *not* require application of new spousal standards prior to June 26, 2013, but does permit optional retroactive application of *Windsor* prior to that date.

In light of the high court's ruling in the *Windsor* case, retirement plans must recognize same-sex marriages for purposes of issuing survivor benefits, obtaining spousal consent, eligibility for joint and survivor annuities and other administrative functions.

Plans must also comply with the "state of celebration" standard established by the IRS under Revenue Ruling 2013-17, under which same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage.

Notice 2014-19 requires application of *Windsor* as of June 26, 2013 (the date of the decision), and application of the "state of celebration" approach as of September 16, 2013 (the effective date of Revenue Ruling 2013-17). Failure to recognize the same-sex spouse of a participant as a spouse before June 26, 2013, will not incur penalty or plan disqualification.

For the time period between June 26, 2013, and September 16, 2013, the rules are based on whether the marriage is recognized in the state in which the couple *currently* lives, but the plan can choose to apply the "state of celebration" approach prior to September 16. Failure to recognize a same-sex spouse according to the "state of celebration" standard prior to September 16, 2013, will likewise not incur penalty or plan disqualification.

The plan can also choose to apply *Windsor* prior to June 26, 2013, and can choose to only apply it for certain purposes (e.g., for purposes of qualified joint and survivor annuities and qualified pre-retirement annuities) as long as the amendment is nondiscriminatory and the amendment can specify it will only apply to annuity starting dates on or after a certain date.

Amendments for the required provisions (i.e., June 26, 2013, for application of *Windsor* and September 16, 2013, for application of the "state of celebration" approach) can be made regardless of whether the plan would otherwise be subject to limitations under Section 436 (because of underfunding) but any voluntary (optional) changes would be subject to the limitations.

The notice also provides guidance on whether an amendment will be necessary and provides various scenarios. If necessary, the deadline for amendments will be as follows:

"The deadline to adopt a plan amendment pursuant to this notice is the later of (i) the otherwise applicable deadline under section 5.05 of Revenue Procedure 2007-44 [which established the staggered remedial amendment period,] or its successor, or (ii) December 31, 2014. Moreover, in the case of a governmental plan, any amendment made pursuant to this notice need not be adopted before the close of the first regular legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014."

The issuance of Notice 2014-19 follows prior IRS guidance under *Windsor* addressing payroll taxes and health savings plans, including:

- Notice 2013-61, guidance for employers and employees to make claims for refunds or adjustments of overpayments of payroll taxes with respect to certain benefits and remuneration provided to same-sex spouses; and
- Notice 2014-01, guidance on the rules governing cafeteria plans, Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs).

PBGC Issues Rules on Defined Contribution-to-Defined Benefit Plan Rollovers

In **proposed regulations** released April 1, the Pension Benefit Guaranty Corporation (PBGC) seeks to clarify the treatment of benefits resulting from a rollover distribution from a defined contribution plan (or other qualified trust) to a defined benefit plan, if the defined benefit plan was terminated and trusteed by PBGC. This proposed rule would amend PBGC's regulations on allocation of assets and benefits payable in terminated single-employer defined benefit pension plans.

Under the new proposal, benefits earned from a rollover generally would not be affected by PBGC's maximum guarantee limits, currently set at $59,320 annually for a 65-year old retiree. Also under the proposal, the PBGC's five-year phase-in limits – under which benefit increases from changes in the final five years of a plan are only partially guaranteed – generally would not apply.

The proposed regulations were prompted by Internal Revenue Service Revenue Ruling 2012-04, issued in February 2012 as part of the White House's lifetime income initiative, which clarified certain qualification requirements under Section 401(a) of the Internal Revenue Code for use of rollover amounts to provide an additional benefit under a defined benefit plan.

In a news release publicizing the issuance, the PBGC suggested that the new rules would make it easier for retirement plan participants to secure lifetime retirement income by giving them more access to annuity vehicles. "The agency wants employees that have rollover options to move their benefits from defined contribution plans to defined benefit plans. The new proposal removes the fear that the amounts rolled over would suffer under guarantee limits should PBGC step in and pay benefits," PBGC said. Comments on the proposed rule will be accepted through June 2.

IRS Issues New Guidance to Facilitate Retirement Plan Rollovers

In **Revenue Ruling 2014-9**, issued April 3, the Internal Revenue Service (IRS) provided new guidance that it says "simplifies the rollover process by introducing an easy way for a receiving plan to confirm the sending plan's tax-qualified status."

Specifically, the guidance provides two new simplified safe harbor due diligence procedures a plan administrator may use in order to be deemed to have reasonably concluded that an amount was a valid rollover contribution. In the absence of evidence to the contrary, following these procedures will give rise to the presumption that the administrator of the receiving plan reasonably concluded that a rollover was valid.

The revenue ruling describes two examples of situations in which an employer may handle qualified plan rollovers. The guidance then provides its interpretation of the law and explains how the safe harbor procedures can be used to ensure proper tax treatment.

According to an IRS news release, the guidance is "designed to help individuals accumulate and consolidate retirement savings by facilitating the transfer of savings from one retirement plan to another."

Obama Administration Reverses Course on Medicare Advantage Cuts

In an April 7 news release, the U.S. Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) announced that it would not implement proposed rate cuts to the Medicare Advantage (MA) program for 2015.

CMS had recently proposed a 1.9 percent cut in the 2015 payment rates for the MA program (although independent studies suggested that the effective rate cut would be closer to six percent), after PPACA and subsequent payment changes had already resulted in a 6.7 percent rate reduction in 2014. The April 7 announcement indicates that the forthcoming MA Payment Guide will instead *increase* payment rates by 0.4 percent in 2015.

The proposed cuts posed significant concerns for retiree health plan sponsors, insurers, and beneficiaries.

RECENT JUDICIAL ACTIVITY

No news to report this period