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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. To inquire about membership with the Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Possible Two-Year Delay of 40% 'Cadillac Tax' Under Discussion

Although members of Congress departed for the Thanksgiving holiday this week, reports have emerged that serious discussions are underway for a possible two-year delay of the 40 percent so-called "Cadillac Tax" on high-cost plans. The delay is among a number of items being considered for inclusion in legislation that would extend expiring tax provisions and continue funding of government operations beyond December 11.

There are conflicting reports as to whether the White House is directly engaged in the discussion of this effort, or whether it is being conducted, for now, just among the Republican and Democratic congressional leadership.

As reported by *Tax Analysts*, the deal under discussion would also delay the medical device tax and provide additional funding for the so-called "risk corridors" under the Affordable Care Act (ACA) that provide payments to health plans. Separate provisions would permanently extend the earned income and child tax credits as well as the research and development tax credit.

Other informal reports suggest that the House of Representatives Ways and Means Committee will begin to consider the "tax extenders" bill, along with the various associated items, as early as Monday, November 30 when Congress returns from the holiday recess.

Congressional Income Protection Caucus Launched

A bipartisan, bicameral caucus has been established in Congress to raise awareness about the risk of disability and the importance of financial preparedness.

The Congressional Income Protection Caucus was founded on November 6 by Senators Mark Kirk (R-IL) and Gary Peters (D-MI) and Representatives Stephen Fincher (R-TN) and Alma Adams (D-NC). In a "dear colleague" letter to their fellow lawmakers, they noted the value of private disability insurance, citing a study that shows "employer-sponsored benefits like disability insurance save the government up to $4.5 billion per year by reducing pressure on the public safety net."

RECENT REGULATORY ACTIVITY

DOL Releases Rules for State-Run Retirement Plans

The U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) released a regulatory guidance package on November 16 designed to facilitate state-sponsored retirement plans for non-governmental employees.

A number of states have passed (or are considering) legislation to require private-sector employers that do not sponsor retirement plans to provide payroll deduction contributions into a state-sponsored retirement plan.

Although these state initiatives are generally intended to apply to small employers, there is also the potential that there could be related responsibilities imposed on larger employers regarding certain employees who are not eligible for an employer-sponsored plan.

The EBSA release includes proposed regulations that specifically provide a new safe harbor that would allow states to mandate a payroll deduction IRA for employees that are not otherwise eligible for a workplace savings plan. Importantly, the DOL stated the arrangement would not establish an employee benefit plan under ERISA and would not be subject to ERISA preemption. The DOL has acknowledged that a court could decide that ERISA preemption applies, but notes that the objective of the safe harbor is to reduce the risk of such state programs being preempted if they are ever challenged.

The proposed regulations add a new safe harbor which exceeds the existing 1975 safe harbor for payroll deduction IRA programs established by employers that are "completely" voluntary. "Completely voluntary" has been interpreted as ruling out the use of automatic enrollment in the existing safe harbor. Therefore, the proposed new safe harbor uses "voluntary" instead of "completely voluntary" and the DOL explains that the new state safe harbor plans can include automatic enrollment.

The preamble also indicates that the DOL is not expressing any view regarding the application of the provisions of the Internal Revenue Code (which would be controlled by the Treasury Department). Presumably, the DOL is referring to certain requirements contained in both ERISA and the tax code that would apply to IRA arrangements even if they are not ERISA plans (including excise taxes for prohibited transactions). The state can contract with commercial service providers, such as investment managers and recordkeepers, to operate and administer the program. Comments on the proposed regulations are due on or before January 19, 2016.

The DOL also released an Interpretative Bulletin, effective November 18, 2015, allowing states to create or facilitate three types of ERISA-covered plans:

- The first would allow states to contract with a private sector entity to establish a program that connects eligible employers with qualifying savings plans available in the private sector market.

- The second would be a state-sponsored "prototype plan" in which a state-administered prototype plan could designate the state or a state designee as "named fiduciary" and "plan administrator" of the plan (taking on fiduciary liability).

- The third type of plan would be a state-sponsored multiple employer plan (state MEP) that could be either a defined contribution or defined benefit plan.

Under this guidance, a state could design a defined contribution MEP so that the participating employers could have limited fiduciary responsibilities but would still have the duty to prudently select the arrangement and to monitor its operation. If structured properly, any participating employer would not be the "sponsor" of the plan and also would not act as plan administrator or named fiduciary, according to the guidance. The DOL also took the position that "a state has a unique representational interest in the health and welfare of its citizens" and "the state should be considered to act indirectly in the interest of the participating employers," which distinguishes the state MEP from other business enterprises that underwrite benefits or provide administrative services to several unrelated employers. This explains why they are effectively allowing states to sponsor open MEPs (allowing groupings of unrelated employers) but do not allow private-sector open MEPs.

A DOL fact sheet on the guidance package is available.

DOL Proposes New Claims Procedures for Plans Providing Disability Benefits

The U.S. Department of Labor (DOL) is seeking to apply certain existing claims procedures for group health plans, enacted under the Affordable Care Act (ACA), to disability benefit plans, according to a notice of proposed rulemaking published on November 18.

"Because of the volume and constancy of litigation in this area, and in light of advancements in claims processing technology, the Department recognizes a need to revisit, reexamine, and revise the current regulations in order to ensure that disability benefit claimants receive a fair review of denied claims as provided by law," The DOL wrote in the proposed rule. The proposed amendments under Section 503 of ERISA would affect plan administrators and participants and beneficiaries of plans providing disability benefits, and others who assist in the provision of these benefits, including third-party benefits administrators and other service providers.

The proposed regulations adopt many of the procedural protections for health care claimants as provided in the ACA, including provisions to ensure:

- claims and appeals are adjudicated in manner designed to ensure independence and impartiality of the persons involved in making the decision.

- benefit denial notices contain a full discussion of why the plan denied the claim and the standards behind the decision.

- claimants have access to their entire claim file and are allowed to present evidence and testimony during the review process.

- claimants are notified of and have an opportunity to respond to any new evidence reasonably in advance of an appeal decision.

- final denials at the appeals stage are not based on new or additional rationales unless claimants first are given notice and a fair opportunity to respond.

- if plans do not adhere to all claims processing rules, the claimant is deemed to have exhausted the administrative remedies available under the plan, unless the violation was the result of a minor error and other specified conditions are met.

- certain rescissions of coverage are treated as adverse benefit determinations, thereby triggering the plan's appeals procedures.

- notices are written in "a culturally and linguistically appropriate manner."

The DOL is also seeking comment regarding notice related to contractual limitation periods. As explained in the supplementary information of the proposed rulemaking, ERISA does not specify a limitations period after a final adverse benefit determination for bringing a lawsuit. Instead federal courts look to analogous state laws to determine appropriate limitations period. In *Heimeshoff v. Hartford Life & Accident Ins. Co*, the Supreme Court recently upheld the use of contractual limitations periods so long as they are reasonable.

The DOL is soliciting comments on whether the final regulation should require plans to provide claimants with a clear and prominent statement of any applicable contractual limitations period and its expiration period for the claim at issue in the final notice of adverse benefit determination on appeal and with an updated notice of that expiration date if tolling or some other event causes that date to change.

RECENT JUDICIAL ACTIVITY

Nothing to report in this issue