**BENEFITS INSIDER**
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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, 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

### Full Senate to Vote on Legislation Clarifying Defined Benefit Plan 'Shutdown' Procedures

The U.S. Senate is expected to vote as early this week on a measure to clarify the definition of "substantial cessation of operations" of a defined benefit pension plan sponsor under ERISA Section 4062(e). The legislation, H.R. 2511, was approved by the Senate Health, Education, Labor and Pensions (HELP) Committee in a closed-door session on July 23. **Final text of the committee report** is now available.

Under current law, if an employer with a pension plan shuts down operations at a facility – and, as a result of that shutdown, more than 20 percent of the workers who are plan participants are separated from employment – the employer is required to provide the PBGC with short-term financial guarantees in the form of a bond or escrow amount based on the plan's unfunded termination liability. In the past few years, PBGC has enforced this provision of ERISA in a very expansive manner. This has given rise to significant compliance challenges and large unexpected liabilities for many companies that have engaged in normal business transactions (such as the sale of a very small business unit or the consolidation of small operations at different facilities).

Very generally, S. 2511 would:

- 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.
- Ensure (subject to certain exceptions) 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 legislation would apply to both prior transactions and future transactions. It is intended to return enforcement to its original purpose, which was to provide a tool for PBGC when a true cessation of operation is signaling a spiraling down of the company's financial condition.
There are still a few outstanding issues with the bill, such as the rules regarding timing of the election, contributions of the alternative liability amount and clarification that *all* operations at a facility need to cease to trigger 4062(e).

The HELP Committee's noncontroversial, bipartisan approval of S. 2511, and its ongoing dialogue with the U.S. House of Representatives Education and Workforce Committee, suggests that the measure could receive positive consideration in both houses of Congress.

### House Approves Measure Allowing Insurers to Continue Offering Existing Plans

The U.S. House of Representatives approved a measure on September 11, by a vote of 247 to 167, effectively allowing health issuers to continue offering existing plans even if those plans do not meet certain minimum standards under the Patient Protection and Affordable Care Act (PPACA).

The Employee Health Care Protection Act (H.R. 3522) would allow health insurance issuers to continue offering group coverage that was in effect during 2013, including plans that do not comply with the PPACA requirements. Groups would be allowed to enroll in such plans even if they had not previously been covered by them, and people enrolled in those plans would be considered to be in compliance with the individual mandate imposed by PPACA. (Insurers would not be allowed to offer such coverage through health insurance exchanges.)

The House Energy and Commerce Committee approved the measure on a mostly party-line vote on July 30.

H.R. 3522 is unlikely to be considered this year in the Senate, where Democrats hold the majority, and President Obama has issued a veto threat if the bill is enacted and sent for his signature. The measure would need to be re-proposed in 2015 for future consideration.

## House Subcommittee Holds Hearing on Status of PPACA Implementation

In a September 10 hearing, the U.S. House of Representatives Ways and Means Subcommittee on Health heard testimony from Obama Administration officials on the continued implementation of the Patient Protection and Affordable Care Act (PPACA), including two major provisions of PPACA taking effect this year, the premium tax credit and the individual "shared responsibility" mandate. The upcoming 2015 tax filing season will be the first opportunity for individual reporting of the required health coverage.

PPACA provides for an income-based, advanceable, refundable premium tax credit for individuals who purchase health coverage through insurance exchanges. These tax credits, provided for coverage beginning on January 1, 2014, are determined by an individual's income and their eligibility for affordable employer-sponsored insurance. Verification of the availability of employer-sponsored coverage is based on employer reporting, which was delayed for 2014 under previously issued Notice 2013-45 transition relief and will not be effective until 2015 (first reporting is due in early 2016). As stated in prior regulatory guidance, the IRS is encouraging voluntary reporting for coverage in 2014.

The September 10 hearing focused on how the Internal Revenue Service (IRS) is changing tax filing requirements in order to verify required health coverage for individuals, as well as the process for correcting inaccurate tax credits paid to individuals.

In his opening statement, Chairman Kevin Brady (R-TX) stated his concern about the individual mandate being enforced for 2014 despite the delay of the employer mandate and that improper subsidy amounts are being paid out by the government.

The subcommittee heard from the following witnesses:

- John Koskinen, commissioner for the IRS, described the agency's approach to the premium tax credit and the individual shared responsibility provision. He stated that for the majority of taxpayers who receive coverage through their employer, their tax returns will only include an additional box to check verifying that they have coverage, but for taxpayers who receive coverage through an insurance exchange and receive a subsidy, they will need to complete an additional calculation to verify they are receiving the correct tax credit amount. He also stated the concerns of the IRS over the anticipated increase in customer service calls during the 2015 tax filing season, which may be difficult for the agency to handle because of ongoing budget constraints (as well as the possibility of an additional increase in call volume related to the impact of additional tax legislation that may be passed later this year).

- Andy Slavitt, principal deputy administrator for the Centers for Medicare & Medicaid Services (CMS), testified that CMS continues to build on the lessons learned from the first open enrollment period by bringing more value to consumers and adding critical functionality to operate the insurance exchanges. He stated that PPACA implementation "will take sustained effort, persistence, and focus from all stakeholders."

In the question-and-answer period, members of the subcommittee asked about the processes in place for reimbursement of incorrect subsidies. Koskinen replied that, although challenging, the IRS will be able to identify instances of incorrect tax credits.

In response to questions about what individuals receiving coverage through an exchange should do in the case of an income change during the year, Koskinen and Slavitt replied that individuals should report their new income as soon as possible on the PPACA website to update the tax credit amount for which they qualify. Koskinen noted that if individuals do not report an income change until filing their taxes, there is no penalty and the difference in tax credits will be applied at that point, similar to tax returns and refunds.

Representative Earl Blumenauer (D-OR), expressing his frustration with repeated Republican attempts to unwind PPACA, suggested that the subcommittee hold hearings on health issues that would have a chance of obtaining bipartisan support.

## RECENT REGULATORY ACTIVITY

### IRS Issues Guidance on Pension Plan Funding Elections Under Transportation Bill

Under **Internal Revenue Service (IRS) Notice 2014-53**, issued September 11, defined benefit plan sponsors have until December 31, 2014, to decide whether to take advantage of interest rate stabilization for 2013 plan years. However, the notice also establishes a number of other deadlines – some prior to December 31– that plan sponsors may need to review immediately.

On August 8, President Obama signed into law the Highway and Transportation Funding Act (H.R. 5021), including a five-year extension of defined benefit pension plan funding stabilization (or "smoothing") measures originally passed as part of the previous transportation bill, the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012.

While the funding provisions are effective for the 2013 plan year, plan sponsors are able to elect to have the funding stabilization extension first become effective for the 2014 plan year. This election could be made for all purposes for which funding stabilization applies, or it could be made only for purposes of benefit restrictions that apply to pension plans that do not meet certain funding levels.

Notice 2014-53 sets forth the conditions for electing to use the smoothing provisions for the 2013 plan year. Under this guidance, elections are irrevocable and must be reported no later than the later of: (1) the Form 5500 deadlines beginning in 2013; or (2) December 31, 2014. The notice also provides detailed guidance on other smoothing-related issues, including reversing prior elections to reduce credit balances and options regarding how to take the new smoothing provisions into account for purposes of the benefit restrictions (such as the restrictions on the payment of lump sums).

## CMS to Continue Webinar Series on Reinsurance Contributions

The U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) will host the latest in a series of webinars on required Transitional Reinsurance Program (TRP) contributions under the Patient Protection and Affordable Care Act (PPACA). Under PPACA, during the first three years that health insurance exchanges are operational (i.e., 2014 through 2016), health insurance issuers and plan administrators (on behalf of self-insured group health plans) will be assessed a per-enrollee fee to finance the three-year transitional reinsurance program. The fee is $63 per covered life for 2014.

HHS and CMS released guidance on the process for making TRP contributions in May, previewing "a streamlined process for the collection of reinsurance contributions" through Pay.gov. This issuance was followed by an initial series of webinars to provide an overview of policy and operations for reinsurance contributions, followed by a second series to provide an overview of how a contributing entity can submit its annual enrollment count and make reinsurance contributions through Pay.gov.

CMS has announced this latest webinar series to provide an overview of the "job aid" available to assist entities in the development of supporting documentation and detail how an entity can update reinsurance contribution filings through Pay.gov if an issue arises after submission. The new webinars will be held on the following days and times:

- Wednesday, September 17, 2-3:30 p.m. ET
- Friday, September 19, 2-3:30 p.m. ET
- Wednesday, September 24, 2-3:30 p.m. ET

Registration will be on a first-come, first-serve basis, limited to three participants per organization. Registration will be limited to selecting only **one** of the event dates. **You will need to log in to the official Registration for Technical Assistance Portal for more information.**

## RECENT JUDICIAL ACTIVITY

### Fourth Circuit Declines to Re-hear Fiduciary Duty Case

The full U.S. Court of Appeals for the Fourth Circuit has declined to revisit an earlier three-judge panel decision in the case of *Tatum v. R.J. Reynolds*.

In *Tatum v. R.J. Reynolds*, the plaintiffs asserted a breach of fiduciary duty against the plan sponsor because of the elimination of a company stock investment option from the company's 401(k) plans shortly after a spinoff. After the fund's removal, the company's stock rose significantly higher. This is commonly referred to as a "*reverse* stock drop" case.

On August 4, a three-judge panel from the Fourth Circuit found for the plaintiffs in a split decision. As previously reported, the panel's majority opinion accepted the arguments of the plaintiffs (and the U.S. Department of Labor, as outlined in its *amicus* brief) that the district court applied an erroneous legal standard to determine whether the breach resulted in losses to the plan. The panel therefore remanded the case back to the district court level "to review the evidence to determine whether RJR has met its burden of proving ... that a prudent fiduciary would have made the same decision."