BENEFITS INSIDER
A Member Exclusive Publication

Volume 125, October 31, 2014 (covering news from October 16-31, 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. 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

Senate Committee Leaders Ask Agencies to Examine Pension Plan De-risking Activity

The chairmen of the two Senate committees sharing jurisdiction over pension policy **sent a letter** to several Obama Administration officials on October 22 expressing concerns about defined benefit plan "de-risking" strategies and requesting guidance that strengthens protections for plan participants.

The letter was sent by Senate Finance Committee Chairman Ron Wyden (D-OR) and Senate Health, Education, Labor and Pensions Committee Chairman Tom Harkin (D-IA) to the departments of Labor (DOL) and Treasury, the Pension Benefit Guaranty Corporation (PBGC) and the Consumer Financial Protection Bureau (CFPB).

A growing number of companies have adopted strategies to reduce the volatility and risk inherent in pension plan funding. Such strategies can include transferring all or a portion of their pension plan's assets and liabilities to an insurance company through an involuntary annuity buyout or directly to plan participants through a voluntary lump-sum distribution.

The Wyden-Harkin letter suggests "the lack of clear and specific rules to protect participants and retirees" in de-risking transactions and proposes that the regulatory departments and agencies consider procedural and clarifying guidance, such as:

- Requiring advance notice of de-risking action to participants and the government. (On September 23 the PBGC formally requested comments on its intention to modify the premium filing procedures for 2015 to require companies making pension risk-transfer offers to their employees to report such offers to the PBGC *after the fact*; Wyden and Harkin are suggesting disclosure *before the fact*.)

- Establishment of standards for employers choosing an annuity provider.

- Requiring specific disclosures and other protections when retirees are offered lump sum distributions.

- Clarification of the circumstances and conditions under which de-risking activity is permissible in the absence of a formal plan termination.

Such guidance could impose expanded fiduciary duties on multiple parties to de-risking transactions or necessitate an independent fiduciary. In addition, the guidance could impact prior transactions.

While Harkin has announced his retirement at the end of the year, Wyden has demonstrated a strong interest in retirement policy issues for the next session of Congress. The Finance Committee held a hearing on September 16, Retirement Savings 2.0: Updating Savings Policy for the Modern Economy.

RECENT REGULATORY ACTIVITY

Submission Form for Transitional Reinsurance Program Annual Enrollment Count Now Available

On October 24, the U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) formally released the form for submitting the Transitional Reinsurance Program (TRP) annual enrollment count. The deadline for the 2014 benefit year's annual enrollment count submission is November 15, 2014.

Section 1341 of the Patient Protection and Affordable Care Act (PPACA) established a transitional reinsurance program (2014 through 2016) intended to stabilize premiums in the individual insurance market. Health insurance issuers and certain self-insured group health plans will be assessed a per-enrollee contribution to fund this transitional reinsurance program. The contribution is $63 per covered life for 2014.

Using www.pay.gov, filers will be able to complete all of the informational requirements: registration, submission of the Annual Enrollment Count and remittance of contributions.

HHS and CMS announced the form's impending release on October 20. The announcement noted that the reinsurance contribution payments are not due on November 15, 2014, and that contributing entities have the option to pay (1) the entire 2014 benefit year contribution in one payment no later than January 15, 2015, reflecting $63 per covered life; or (2) in two separate payments for the 2014 benefit year, with the first remittance due by January 15, 2015, reflecting $52.50 per covered life, and the second remittance due by November 15, 2015, reflecting $10.50 per covered life.

For additional information on the reinsurance contributions submission process, log on to the Registration for Technical Assistance Portal (REGTAP) and visit the Reinsurance-Contributions Library.

Society of Actuaries Releases Final Mortality Reports

The Society of Actuaries (SOA), a professional organization serving 24,000 actuarial members, released its final mortality table reports on October 27.

Along with the final versions of the **RP-2014 Mortality Table Report** and the **MP-2014 Mortality Improvement Scale**, the SOA's Retirement Plans Experience Committee (RPEC) issued formal responses to comments on the earlier mortality table exposure draft and responses to comments on the mortality improvement scale exposure draft.

These documents establish a new basis for mortality assumptions for retirement programs in the United States. With respect to pension funding, benefit restrictions, insurance premiums and other related purposes, SOA's assumptions are usually taken into account by the government in formulating updated mortality assumptions, though those updates may not take effect until at least 2016. For accounting purposes, the assumptions may be taken into account earlier in some cases.

As expected, the new tables show that longevity in the U.S. is increasing. For example, the updated reports show that among males age 65, overall longevity rose by two years from 84.6

years in 2000 to 86.6 years in 2014. For women age 65, overall longevity rose by 2.4 years from 86.4 years in 2000 to age 88.8 years in 2014. Based on the data, SOA estimates there could be a four to eight percent increase in private pension plan liability, though the average cost impact will vary greatly according to the design and demographic profile of each plan.

IRS/DOL Guidance Permits Use of Annuities Inside TDFs Used as QDIAs

The Internal Revenue Service (IRS) released guidance on October 24 expanding the use of target-date fund (TDF) series in defined contribution plans as qualified default investment alternatives (QDIAs), following a letter on QDIA and annuity selection issues from the U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA).

IRS Notice 2014-66 provides a special rule that "enables qualified defined contribution plans to provide lifetime income by offering, as investment options, a series of target date funds (TDFs) that include deferred annuities among their assets, even if some of the TDFs within the series are available only to older participants." Specifically, the IRS guidance sets forth the conditions under which the provision of TDFs as a QDIA will not be considered as violating the benefits, rights and features test under Section 401(a)(4) of the Internal Revenue Code, which prohibits discrimination in favor of highly compensated employees.

Additional guidance is provided in EBSA's letter to the U.S. Treasury Department on October 23, which stated that the use of unallocated deferred annuity contracts as fixed income investments would not cause the TDFs to fail to meet the prevailing QDIA requirements. The letter also indicated that the annuity selection safe harbor criteria (for meeting fiduciary obligations in the selection of annuities) can be met by the investment manager selected by the plan fiduciary. Of course, the plan fiduciary must prudently select and monitor the investment manager.

Most notably among the conditions that a series of TDFs must meet to satisfy the nondiscrimination requirements, each TDF in the series must be "treated in the same manner with respect to rights or features other than the mix of assets." The fees and administrative expenses for each TDF – whether the target retirement date is 2020 or 2040, for example – must be determined in a consistent manner, and the extent to which those fees and expenses are paid from plan assets (rather than by the employer) must be the same.

PBGC Provides 4010 Filing Guidance Under HATFA Pension Funding Provisions

The Pension Benefit Guaranty Corporation (PBGC) issued **Technical Update 2014-2** on October 17, providing guidance on the effect of the Highway and Transportation Funding Act of 2014 (HATFA) on annual financial and actuarial information reporting under Section 4010 of ERISA and Part 4010 of PBGC's regulations.

Section 4010 of ERISA requires certain underfunded plans to report identifying, financial and actuarial information to the PBGC. For information years ending on or after December 31, 2004, such information must be submitted electronically.

HATFA 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.

Plan sponsors may elect to wait until funding attributable to the 2014 plan year is due to use HATFA rates, in which case the MAP-21 rates will apply for the 2013 plan year. Under IRS Notice 2014-53, plans may decide whether to use MAP-21 or HATFA rates for 2013 funding determinations as late as December 31, 2014 (or, if later, the due date for the 2013 Form 5500 Annual Return/Report).

Technical Update 2014-2 confirms that the rules and concepts set forth in Technical Update 2012-2, which provided guidance regarding the application of the MAP-21 funding stabilization provision to ERISA Section 4010, continue to apply. The update also provides relief for plans that have already completed the 4010 filing and for filings submitted prior to the availability of an actuarial valuation report.

IRS Announces Changes in Retirement Plan Limits for 2015

Each year, various dollar limits applicable to health and retirement plan contributions and benefits are adjusted for inflation.

In **News Release 2014-99**, released October 23, the Internal Revenue Service (IRS) announced a series of retirement plan limits for Tax Year 2015. Section 415 of the Internal Revenue Code provides for dollar limitations on benefits and contributions under qualified retirement plans. In some cases, these amounts have not changed from the 2014 levels.

Annual Limit [Applicable Tax Code Section]	2014	2015
Maximum elective deferral [401(k) and 403(b)]	$17,500	**$18,000**
Maximum annual pension benefit [415(b)] (The limit applied is actually the lesser of the dollar limit or 100 percent of the participant's average compensation (generally the high three consecutive years of service))	$210,000	$210,000
Defined contribution maximum deferral [415(c)]	$52,000	**$53,000**
Maximum catch-up contribution for those age 50 and over [414(v)]	$5,500	**$6,000**
Qualified plan compensation limit [401(a)(17)]	$260,000	**$265,000**
Highly compensated threshold [414(q)]	$115,000	**$120,000**
Key employee definition in a top-heavy plan [416]	$170,000	$170,000
Deductible amount for individual making qualified retirement contributions to an IRA [219(b)(5)(A)]	$5,500	$5,500

This IRS table shows these and other limits updated for 2015.

IRS Issues Annual Guidance on Inflation Adjustments for Certain Tax Provisions

On October 30, the Internal Revenue Service (IRS) issued Revenue Procedure 2014-61 to announce the inflation adjustments for certain tax provisions for 2015. Most notably, the dollar limit for contributions to a health flexible spending arrangement (FSA) has been increased from $2,500 to $2,550.

Rev. Proc. 2014-61 sets the 2015 limits for 44 provisions, including the following (with the applicable Internal Revenue Code section in brackets):

- ***Cafeteria Plans*** **[125]**
  The 2015 dollar limitation on voluntary employee salary reductions for contributions to a health FSA is $2,550.

- ***Medical Savings Accounts*** **[220]**

  - Self-only coverage: a High-Deductible Health Plan (HDHP) with an annual deductible not less than $2,200 and not more than $3,300 must not exceed $4,450 in annual out-of-pocket expenses required to be paid for covered benefits (other than premiums).

  - Family coverage: a HDHP with an annual deductible not less than $4,450 and not more than $6,650 must not exceed $8,150 in annual out-of-pocket expenses required to be paid for covered benefits (other than premiums).

- ***Refundable Credit for Coverage Under a Qualified Health Plan*** **[36B(f)(2)(B)]**
  The limitation on tax imposed for excess advance credit payments is determined using the following table:

If the household income (expressed as a percent of poverty line) is:	The limitation amount for unmarried individuals (other than surviving spouses and heads of household) is:	The limitation for all other taxpayers is:
Less than 200%	$300	$600
At least 200% but less than 300%	$750	$1,500
At least 300% but less than 400%	$1,250	$2,500

- ***Employee Health Insurance Expense of Small Employers [45R]***
  The dollar amount for taxable years beginning in 2015 for limiting the small employer health insurance credit and for determining who is an eligible small employer for purposes of the credit is $25,800.

- ***Overall Limitation on Itemized Deductions [68]***

For 2015, itemized deductions will be limited to $309,900 in the case of a joint return or a surviving spouse, $284,050 in the case of a head of household, $258,250 in the case of an individual who is not married and who is not a surviving spouse or head of household and $154,950 in the case of a married individual filing a separate return.

- ***Eligible Long-Term Care Premiums [213(d)(10)]***
  For 2015, the limitations regarding eligible long-term care premiums includible in the term "medical care" are as follows:

Attained age before the close of the taxable year:	**Limitation on premiums:**
40 or less	$380
More than 40 but not more than 50	$710
More than 50 but not more than 60	$1,430
More than 60 but not more than 70	$3,800
More than 70	$4,750

- ***Periodic Payments Received under Qualified Long-Term Care Insurance Contracts or under Certain Life Insurance Contracts* [7702B(d)]**
  The dollar amount of the per diem limitation regarding periodic payments received under a qualified long-term care insurance contract or periodic payments received under a life insurance contract that are treated as paid by reason of the death of a chronically ill individual is $330.

PBGC Publishes Premium Rates for 2015

On October 24, the Pension Benefit Guaranty Corporation (PBGC) posted flat-rate and variable-rate premium amounts for the 2015 plan year on its Premium Rates page.

The per-participant flat premium rate for plan years beginning in 2015 is $57 for single-employer plans (up from a 2014 rate of $49) and $13 for multiemployer plans (up from a 2014 rate of $12).

For plan years beginning in 2015, the variable-rate premium (VRP) for single-employer plans is $24 per $1,000 of unfunded vested benefits (UVBs) (up from a 2014 rate of $14). For 2015, the VRP is capped at $418 times the number of participants (up from a 2014 cap of $412). Plans sponsored by small employers (generally fewer than 25 employees) may be subject to an even lower cap.

For information about future rates, see the PBGC's Scheduled Increases for years after 2015.

Retirement Plan Sponsors, Providers Write EBSA, Make Recommendations for Fee Disclosure Windows

A coalition of ten groups representing retirement plan sponsors and service providers sent a letter to the U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) with recommendations for implementation of an annual "window" for disclosing retirement plan fee information.

Under the final regulations governing fee disclosure for participant-directed individual account plans (including defined contribution arrangements like 401(k) plans), plan administrators must annually disclose detailed investment-related information to plan participants and beneficiaries about the plans' designated investment alternatives in the form of a comparative chart. The regulations require that the disclosure must be provided at least once in any 12-month period for both calendar- or fiscal-year plans.

DOL Field Assistance Bulletin (FAB) 2013-02, issued in July 2013, provided temporary enforcement relief from defined contribution plan fee disclosure requirements by allowing plan sponsors to "reset" the timing of this annual disclosure to align the comparative chart with other participant disclosures. EBSA also stated in the FAB that it is also considering providing a 30-day or 45-day window in connection with the due date for disclosing subsequent annual comparative charts.

The October 15 group letter encourages EBSA to provide a window for all annual disclosures, noting that "an Annual Disclosure Window would provide them with the flexibility to provide the annual disclosures to participants without concern that they may miss the deadline."

The letter also recommends that EBSA consider a minimum of 45 days for such a window and urges the issuance of final or interim final regulations "as soon as possible" to ensure that the disclosure can be implemented immediately.

EBSA has not provided a time frame for issuance of further guidance on the disclosure window.

EBSA Extends Deadlines for Numerous Information Collection Requests

On October 15, the U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) issued a public notice of the extension of numerous Information Collection Requests (ICRs) related to retirement and health benefit plans.

The Paperwork Reduction Act of 1995 requires that agencies routinely receive Office of Management and Budget (OMB) clearance in conjunction with any regulation that requests information from the public. An ICR provides an overview of the collection and estimates the cost and time for the public to respond. The public is also welcome to provide comments in response to the ICR itself.

The October 15 issuance includes extensions of ICRs on the following topics:

- Prohibited Transaction Class Exemption 86-128, which permits persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions on behalf of employee benefit plans.

- Consent to receive employee benefit plan disclosures electronically under the existing safe harbor.

- Furnishing documents to the Secretary of Labor on request under ERISA Section 104(a)(6).

- Summary disclosures as required by Patient Protection and Affordable Care Act (PPACA) Section 2715.

- ERISA Section 408(b)(2) final regulations, governing fee disclosure between service providers and plan sponsors.

- ERISA Procedure 76-1, which establishes a public process for requesting guidance from EBSA on the application of ERISA to particular circumstances.

- ERISA Technical Release 91-1, which provides guidance on how to satisfy the notice requirements prescribed by governing ERISA Section 101(e), which established the notice requirements that must be satisfied before an employer may transfer excess assets from a defined benefit pension plan to a retiree health benefit account.

- Disclosures by insurers to "General Account Policyholders" under ERISA Section 401(c).

- Registration for EFAST-2 credentials, permitting the electronic filing of certain reports with DOL.

- Notice of a blackout period under ERISA, pursuant to The Sarbanes-Oxley Act of 2002 and subsequent final regulations.

- PPACA internal claims and appeals and external review procedures for non-grandfathered plans.

RECENT JUDICIAL ACTIVITY

EEOC Continues to Pursue Legal Action Against Employer Wellness Programs

The U.S. Equal Employment Opportunity Commission (EEOC) filed **a new lawsuit** against an employee wellness program on October 27, alleging violations of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

The lawsuit, filed in the U.S. District Court for the District of Minnesota, seeks a temporary restraining order and a preliminary injunction to prevent Honeywell International Inc. from imposing penalties on employees who decline participation in the company's biometric screening program. The program assesses a $500 surcharge if employees forego biometric screening and an additional $1,000 tobacco surcharge for the employee as well as a $1,000 tobacco surcharge for the employee's spouse/domestic partner if either foregoes the biometric screening and does not satisfy a reasonable alternative, such as participating in a tobacco cessation program. Additionally, only employees who participate in the biometric screening will receive a contribution to their Health Savings Account.

The EEOC's lawsuit contends that "The proposed medical testing is not voluntary, and therefore violates the [ADA]. The testing imposes penalties on employees whose spouses do not provide their medical information, and therefore violates [GINA]."

In a public statement, Honeywell called the lawsuit "frivolous," noting that the "incentives we provide are specifically sanctioned by two separate Federal statutes" (the Health Insurance Portability and Accountability Act (HIPAA) and the Patient Protection and Affordable Care Act (PPACA)) and "are in strict compliance with both HIPAA and [PPACA's] guidelines … No Honeywell employee has ever been denied healthcare coverage or disciplined in any way as a result of their voluntary decision not to participate in our wellness programs."

This is the third lawsuit filed by the EEOC in recent months challenging employer-sponsored wellness programs. As we have previously reported, the EEOC is also pursuing a lawsuit challenging a wellness plan sponsored by a Flambeau, Inc. (a Wisconsin-based manufacturer with 1,600 employees) as well as a similar suit against Orion Energy Systems.
Importantly, the EEOC lawsuit against Honeywell cites the *Seff v.Broward County* case, in which the Court of Appeals held that the employer's wellness program fell within a safe harbor of the ADA, which states that the ADA does not restrict organizations from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are not based on or not inconsistent with State law." The EEOC lawsuit contends that "*Seff*'s analysis is inconsistent with the language, the legislative history and the purpose of the safe harbor provision."

The EEOC announced in its most recent semi-annual regulatory agenda that it intends to issue regulations later this year addressing wellness programs under the ADA and GINA. Specifically, EEOC states such regulations will address "whether, and to what extent, Title I of ADA allows employers to offer financial inducements and/or impose financial penalties as part of wellness programs offered through their health plans, and to address other aspects of wellness programs that may be subject to the ADA's nondiscrimination provisions." Additionally, EEOC is drafting a proposed rule to amend GINA regulations "to resolve whether employers may offer inducements to employees' spouses or other family members who answer questions about their current medical conditions on a health risk assessment."

Ninth Circuit Sides with Participants in Stock Drop Case Remanded from Supreme Court

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit again reversed and remanded a district court decision which had previously dismissed the case in which plan participants alleged breach of fiduciary duty in **the latest ruling in *Harris et al. v. Amgen et al***. on October 30. The matter centers on a time period in which the employer's stock price performed below expectations, affecting investment returns, commonly known as a "stock drop" case.

In this case, the plaintiffs (current and former employees of Amgen and AML) participated in two retirement plans that qualified as "eligible individual account plans" under ERISA. When the value of Amgen common stock fell, the plaintiffs alleged that the employers breached their fiduciary duties under ERISA as a result of alleged misrepresentations to the SEC relating to the company's products. The U.S. District Court for the Central District of California dismissed the complaint, finding that the plan fiduciaries did not violate their ERISA duties and were furthermore entitled to a presumption of prudence, as precedent had been established in other cases at the circuit court level. However, on June 4, the U.S. Ninth Circuit Court of Appeals overturned the district court

ruling and remanded the case for further proceedings, concluding that the presumption of prudence (often referred to as the "Moench" presumption) did not apply in this case. The case is significant because it is essentially trying a securities law case under ERISA as a fiduciary breach case.

The Ninth Circuit ruling was subsequently appealed to the U.S. Supreme Court. Because the high court ruled on June 25 in a separate, similar case, *Fifth Third Bancorp v. Dudenhoeffer*, substituting a different standard of fiduciary prudence (summary available here), the *Harris v. Amgen* case was remanded back to the Ninth Circuit.

In its October 30 ruling, the Ninth Circuit followed the Supreme Court's ruling that the defendants "are not entitled to a presumption of prudence" and once again reversed the district court's decision. The Ninth Circuit also rejected the defendants' argument that the Supreme Court's *Fifth Third Bancorp* decision requires particular pleading when there is an allegation that fiduciaries possessed and should have acted on nonpublic information. The case will now be returned to the district court level for further proceedings under the revised standard set by the Supreme Court.