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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

Senate Approves Tax "Extenders" Package

On December 19, President Obama signed into law the Tax Increase Prevention Act (H.R. 5771), which provides a short-term extension of more than 50 expiring tax breaks, including provisions for individuals, families and employers.

H.R. 5771 also includes a number of expiring tax provisions that affect employee benefit plans, including renewal of equal tax treatment for mass transit and parking benefits and allowing distributions from individual retirement plans for charitable purposes.

Summary: Expatriate Provision Included in Omnibus Spending Bill

The Consolidated and Further Continuing Appropriations Act (H.R. 83), signed into law by President Obama on December 16, includes clarifications regarding which provisions of the Patient Protection and Affordable Care Act (PPACA) apply to expatriate health plans.

An expatriate health plan is generally defined as (1) a group health plan, (2) health insurance coverage offered in connection with a group health plan, or (3) health insurance coverage offered to certain expatriates (and their dependents) that meets certain requirements under the legislation. Substantially all of the primary enrollees must be "qualified expatriates," which means (1) certain foreign employees transferred or assigned to the U.S. for a specific and temporary employment purpose or assignment, (2) individuals working outside the U.S. for at least 180 days in a 12-month period, and (3) individuals who are members of certain groups, such as students or religious missionaries.

The application of PPACA 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 was addressed in earlier transition guidance issued by the federal agencies, the guidance was temporary and did not fully address several outstanding concerns.

The provision included in H.R. 83 is based on The Expatriate Health Coverage Clarification Act (H.R. 4414), which (after failing once) ultimately passed the House of Representatives earlier this year. The legislation was the subject of recent bipartisan discussions between the House and Senate and provides relief from specific PPACA requirements, fees and taxes for multi-national employers, globally mobile individuals and U.S. providers of expatriate insurance coverage, with the aim of ensuring that U.S. providers of this type of coverage are not at a competitive disadvantage against non-U.S. carriers who are not subject to PPACA. The provisions of the legislation that apply to expatriate health insurance issuers of fully insured expatriate health plans will only apply to health insurers that are licensed in the U.S.

Specifically, the measure:

- Exempts fully insured and self-funded expatriate health plans from most of PPACA's market reforms (though not the adult dependent/age 26 requirement).

- Deems expatriate health plans to be "minimum essential coverage" for expatriate employees and their dependents, regardless of where they are located in the world.

- Deems expatriate health plans to be "minimum essential coverage under an eligible employer-sponsored plan" for purposes of the employer mandate with respect to certain foreign employees working in the U.S. and certain U.S. expatriates working abroad, but does not exempt employers that provide or purchase these plans from other employer mandate requirements including reporting responsibilities.

- Exempts expatriate plans from the health insurance fee (after 2015) (transition rules for 2014 and 2015), the transitional reinsurance program fee, and the Patient Centered Outcomes Research Institute/Comparative Effectiveness Research Fee.

- Exempts employer-sponsored coverage of most categories of expatriates from the excise tax on high cost employer-sponsored health coverage.

- Exempts expatriate health plans from a change in the definition of a "small group," which could have prevented the sale of expatriate coverage to employers with 50 to 99 lives.

- Exempts insurers of expatriate health plans and expatriate health plans from the so-called "administrative simplification" requirements such as the Summary of Benefits and Coverage.

Except for the health insurance fee provisions noted above, the legislation applies only to expatriate health plans issued or renewed on or after July 1, 2015.

The enactment of bipartisan legislation clarifying the treatment of expatriate coverage may signal a turning point for Congress in its approach to PPACA, with lawmakers demonstrating a newfound willingness to work together to improve or otherwise amend the law.

Incoming Finance Committee Chairman Reiterates Support for Retirement Savings

In a December 15 speech before the Financial Services Roundtable, Senator Orrin Hatch (R-UT) expressed strong support for the current retirement savings limits while outlining his legislative agenda for retirement policy. When the new session of Congress begins in January 2015, Hatch will assume the chairmanship of the Senate Finance Committee, which has jurisdiction over tax policy and shares jurisdiction of employee benefits policy.

Hatch began his remarks with a brief discussion of comprehensive tax reform, saying that "tax reform is no longer optional." In addition to the principles of economic growth, fairness and simplicity, as originally enunciated by President Ronald Reagan, Hatch cited permanence, certainty and competitiveness as his goals for a reformed tax code. As we reported in the December 12 *Benefits Byte*, Hatch released a report, Comprehensive Tax Reform for 2015 and Beyond, outlining several issues likely to come up in the effort to reform the tax code. With respect to retirement savings, Hatch underscored the value of the private employer-based retirement savings system, calling 401(k) plans and Individual Retirement Accounts (IRAs) "the greatest wealth creator for the middle class in history."

To emphasize this point, Hatch voiced strong opposition to proposals that would reduce permitted contributions to 401(k) plans and IRAs. Such proposals, he said, "would be both short-sighted and foolish. ... the key to successful retirement savings is participation by employees in a plan at

work, and the key to convincing employers to sponsor a plan at work is a healthy contribution limit."

In addition to his defense of the current contribution limits, Hatch's retirement policy legislative agenda will include:

- Permitting unrelated small employers to pool assets in "Open MEP" multiple employer plans.

- Encouraging the use of annuities in 401(k) plans, as set forth in his Secure Annuities for Employee (SAFE) Retirement Act (S. 1270) [official summary], which also includes provisions facilitating greater use of electronic communication and automatic enrollment. (The SAFE Retirement Act will need to be reintroduced in the 114th Congress.)

- Development of a "Starter 401(k)" plan designed for small or start-up businesses.

Outgoing Finance Committee Chairman Ron Wyden (D-OR) has expressed concerns that the current tax incentives are skewed to benefit those who don't need them and has been critical of large IRA balances in the wake of a recent GAO report. Hatch responded to Wyden's concerns in a September 30 letter, emphasizing testimony from the Government Accountability Office that "it is not possible for a taxpayer to accumulate such a large IRA account balance solely by making the maximum annual contribution permitted by the tax code and earning average investment returns. ... Rather, IRA account balances that great must be the result of other factors, such as extraordinary investment success on the part of the taxpayer." Hatch also noted the bipartisan repeal of an excise tax on "excess" retirement accumulations, saying that it inappropriately penalized favorable investment returns and could deter individuals from saving.

During a September 16 hearing on retirement policy, Hatch refuted assertions that retirement savings tax incentives are "upside down" and stressed the importance of a bipartisan approach to retirement policy.

RECENT REGULATORY ACTIVITY

DOL Releases Advance Copies of Form 5500, 5500-SF

On December 15, the U.S. Department of Labor's Employee Benefits Security Administration (EBSA), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) released advance informational copies of the 2014 Form 5500 and Form 5500-SF annual return/report and related instructions. The advance copies are for informational purposes only and cannot be used for actual filing.

Form 5500 is the annual report that benefit plans file with the federal government and the primary source of information for both the federal government and the private sector on retirement plan assets. Modifications to Form 5500 and Form 5500-SF, and their schedules and instructions for plan year 2014 are described under "Changes to Note" in the 2014 instructions.

As part of its Fall 2014 Regulatory Agenda, EBSA announced that it is preparing proposed regulations to modernize the Form 5500 Annual Return/Report of Employee Benefit Plan to "[make] the investment and other information on the Form 5500 more data mineable" and revisions to Form 5500 Annual Return/Report of Multiple Employer Plans, as required by the

Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act), which created the exemption from the Pension Protection Act of 2006 funding rules.

DOL Letter Clarifies Treatment of *my*RA Programs

In a December 15 letter to the U.S. Department of the Treasury, 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.

The *my*RA program is an executive branch program similar to Individual Retirement Accounts (IRAs) and is intended to expand workplace retirement savings. Announced by President Obama earlier this year, *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 DOL letter responded to an inquiry from Treasury asking whether *my*RAs would be covered under Title I of ERISA. The letter assumes several facts, stating that "Treasury does not at this stage intend for employers to implement automatic contribution arrangements." The letter also assumes no employer contributions to employees' *my*RAs. However, the letter notes that some employers may want to "encourage employees to participate" in *my*RAs (such as through computer and technical support and through employee meetings).

In the letter, the DOL relies primarily on the government sponsorship of *my*RAs as the basis of the exemption from ERISA, rather than relying on the existing exception for payroll deduction IRAs. The letter states "[W]e do not believe Congress intended in enacting ERISA that a federal government retirement savings program created and operated by the U.S. Department of the Treasury would be subject to the extensive reporting, disclosure, fiduciary duty or other requirements of ERISA, which were established to ensure against the possibility that employees' expectation of a promised benefit would be defeated through poor management by the plan sponsor and other plan fiduciaries."

The letter further asserts that an employer would not be establishing or maintaining an "employee pension benefit plan" – within the meaning of ERISA Section 3(2) – if it institutes a *my*RA program where employees participate through payroll withholding contributions and where the employer distributes information, facilitates employee enrollment and otherwise encourages employees to make deposits to *my*RA accounts owned and controlled by employees. This position is supported by the voluntary nature of the program, the establishment, sponsorship and administration by the federal government and the absence of any employer funding or role in the administration or design of the *my*RA program.

The DOL'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 about what expansions of the *my*RA program would trigger ERISA, as well as the application of ERISA to state-run retirement arrangements for those without access to employer-sponsored retirement plans.

Agencies Propose Regulations for Limited Wraparound Coverage as "Excepted Benefits"

On December 19, the U.S. departments of Treasury, Labor and Health and Human Services issued proposed amendments regarding excepted benefits coverage under ERISA, the Internal Revenue Code and the Public Health Service Act with respect to limited wraparound coverage.

The proposed regulations set out requirements under which limited benefits provided through a group health plan that wrap either eligible individual insurance or coverage under a Multi-State plan (limited wraparound coverage) constitute "excepted benefits." Excepted benefits are excluded from the portability provisions established under HIPAA as well as certain health plan requirements of the Patient Protection and Affordable Care Act (PPACA). Excepted benefits generally do not constitute "minimum essential coverage" under PPACA, and thus would not disqualify an individual for premium tax credits for the purchase of individual insurance through a health exchange.

Final rules, providing the criteria to qualify dental, vision and long-term care benefits and employee assistance programs as excepted benefits, were issued on September 26, but guidance on wraparound coverage was not included. The final regulations indicated that the agencies intended to publish regulations in the future for limited wrap around coverage that would address extensive comments received on proposed regulations issued in December 2013. Wraparound coverage supplements core coverage and might provide such things as extra benefits, broader networks or cost-sharing reductions. As explained in the preamble, some group health sponsors have asked whether certain limited benefits that "wrap around" employer sponsored group health plan coverage could be considered an excepted benefit if such benefits are provided to employees for whom the employer's group health plan is unaffordable and who instead obtain major medical coverage through the individual market, including the health insurance marketplaces.

The new proposed rules would allow a group health plan to offer limited benefits that wrap around either eligible individual insurance or coverage under a plan established under the PPACA's Multi-State Plan Program, a type of plan offered through the health care marketplaces. They set out requirements for such wraparound coverage involving the scope of coverage, cost limits, nondiscrimination rules, plan eligibility requirements and reporting requirements. Under the proposed regulations, limited wraparound coverage would be permitted under a pilot program for a limited time. Specifically, this type of wraparound coverage could be offered as excepted benefits to coverage that is offered no later than December 31, 2017.

Comments on the proposed rule are due January 22, 2015.

Proposed Regulations on PPACA Summary of Benefits and Coverage Issued

On December 22, the U.S. departments of Treasury, Labor and Health and Human Services issued proposed regulations on the summary of benefits and coverage (SBC) and the uniform glossary for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act (PPACA). A fact sheet is available as well.

The proposed regulations amend the final regulations released on February 9, 2012 that implement the disclosure requirements under section 2715 of the Public Health Service Act to help individuals better understand their health coverage. According to the departments, the proposed regulations are designed to improve consumers' access to important plan information

and enable them to make informed choices when shopping for and renewing coverage, as well as to provide clarifications that will make it easier for health insurance issuers and group health plans to comply with providing this information.

The proposed rule would add features to make the SBC more user-friendly by streamlining and shortening its length, reducing it from about four double-sided pages to two-and-a-half. The rule would also amend the uniform glossary and add a third coverage example regarding a "simple foot fracture with emergency room visit." The proposed rule retains the two current coverage examples of "having a baby (normal delivery)" and "managing diabetes type 2" (for a well-controlled condition).

If finalized, the new requirements would be implemented for plan years on or after September 1, 2015.

IRS Issues Guidance on Employee Plans Determination Letter Process in 2015

On December 19, the Internal Revenue Service (IRS) released Announcement 2015-01 to describe the changes to the employee plans determination process that will take effect in 2015. These changes are being adopted as part of a process improvement strategy designed to promote case processing efficiency.

The process is being updated by first checking determination letter applications for completeness upon receipt. For an application to be complete, it must include all of the information and documents required, including, but not limited to, a completed copy of the Procedural Requirements Checklist set forth in Forms 5300, 5307, 5310 and 5316. The Procedural Requirements Checklist is designed to assist applicants in the filing of a complete Application. If an application is incomplete, the IRS will contact the applicant in writing to request more information.

Applicants will have 30 days from the date of the letter to provide the information to the IRS, or the IRS will move to close the case. The IRS will keep the incomplete application and the user fee will not be refunded. Applicants will need to submit a new on-cycle application and new user fee by the end of the plan's remedial amendment cycle, unless a later date is specified by the agency in the letter notifying the applicant that the case has closed. However, if the postmark and the response deadline are after the plan's remedial amendment cycle, the cycle will not be extended and the IRS will send a final disposition letter to the applicant.

The IRS will start accepting determination letter applications for Cycle E individually designed plans beginning February 1, 2015. Generally, an individually designed plan is in Cycle E if the last digit of the employer identification number of the plan sponsor is 5 or 0.

The changes will be reflected in Revenue Procedure 2015-6, the IRS's annual guidance on procedures for issuing employee plans determination letters. The guidance is set to be published in Internal Revenue Bulletin 2015-1, and will be effective on February 1, 2015.

DOL Announces New 2015 ERISA Advisory Council Members

The U.S. Department of Labor (DOL) has announced five new members appointed to the 2015 ERISA Advisory Council (EAC). The EAC is a group of benefits experts established by Congress

and appointed by the DOL to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy.

The chair and vice chair, respectively, of the EAC for the 2015 term will be Paul M. Secunda, professor of law and director, Labor and Employment Law Program at Marquette University Law School and Mark E. Schmidtke, shareholder of Ogletree, Deakins, Nash, Smoak & Stewart.

The new appointees to the EAC are:

- Deborah A. Tully, senior director of compensation and benefits finance and accounting analysis at Raytheon Co., representing employers.
- Jennifer Kamp Tretheway, recently retired managing director of investment program solutions with Northern Trust Asset Management, representing corporate trust.
- Rennie Worsfold, vice president at Financial Engines, Inc., representing investment management.
- Elizabeth Ysla Leight, director of government relations and legal affairs at the Society of Professional Benefit Administrators, representing the general public.
- Jeffrey G. Stein, general counsel to 22 Taft-Hartley funds and related organizations serving 1199SEIU United Health Care Workers East, representing employer organizations.

The working group topics for 2015 will be released in the spring. The 2014 topics included pharmacy benefit manager (PBM) compensation and fee disclosure, as well as outsourcing employee benefit plan services. The 2014 EAC gave final recommendations to U.S. Secretary of Labor Thomas Perez and Assistant Secretary Phyllis Borzi of the Employee Benefits Security Administration (EBSA) on November 4.

Final reports from prior years are available on the EAC website.

CMS Updates "Culturally and Linguistically Appropriate" County List for PPACA Disclosures

The U.S. Department of Health and Human Services' Center for Consumer Information & Insurance Oversight (CCIIO) of the Centers for Medicaid and Medicare Services (CMS) has updated its Culturally and Linguistically Appropriate Services (CLAS) county data for purposes of complying with certain disclosure requirements under the Public Health Service Act (PHSA) as amended by the Patient Protection and Affordable Care Act (PPACA).

The CLAS establishes the counties in which group health plans and health insurance issuers offering non-grandfathered health coverage are required to provide notices related to internal claims and appeals and external review processes "in a culturally and linguistically appropriate manner" as required under Section 2719 of the Public Health Services Act (PHSA, as added by PPACA). The regulations implementing PHSA Section 2719 require plans and issuers to make certain accommodations for notices sent to an address in a county meeting a threshold percentage of people who are literate only in the same non-English language. This threshold percentage is set at 10 percent or more of the population residing in the claimant's county, as determined based on American Community Survey (ACS) data published by the United States Census Bureau.

PHSA Section 2715 similarly requires that the Summary of Benefits and Coverage (SBC) be provided "in a culturally and linguistically appropriate manner." A plan or health insurance issuer may meet this requirement by following the Section 2719 rules for providing claims and appeals procedures in this manner.

A June 2011 HHS technical guidance document provides instructions for calculating these county-level estimates, but affirms that plans and issuers are not obligated to perform calculations on their own and can rely on the chart as a safe harbor.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.