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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.

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RECENT LEGISLATIVE ACTIVITY

House GOP Leaders Issue Retirement Policy Recommendations

The **first in a series of policy reports** was issued by Republican leaders in the U.S. House of Representatives on June 7, offering broad policy goals for retirement savings policy, among other matters.

Earlier this year, Speaker of the House Paul Ryan (R-WI) established a number of task forces designed – in tandem with the ultimate official Republican campaign platform (chaired by Ryan) – to set forth an overarching policy philosophy, dubbed "A Better Way," for the next Congress and a potential Republican presidential administration.

The first group to release its report is the Poverty, Opportunity, and Upward Mobility Task Force, charged with developing proposals that aim, in the words of the House GOP leaders, to "strengthen our safety net and reform educational programs," and help people transition from welfare to work. Task force members include House Ways and Means Committee Chairman Kevin Brady (R-TX), Education and the Workforce Committee Chairman John Kline (R-MN), Budget Committee Chairman Tom Price (R-GA) and Financial Services Committee Chairman Jeb Hensarling (R-TX).

While the primary thrust of the report is welfare-to-work policy, the chapter on "Improving the Skills and Knowledge of our Workforce" includes a subsection on "Building Retirement Security through the Private Retirement System" that lists the following policy recommendations:

- *Prevent a taxpayer bailout of the Pension Benefit Guaranty Corporation (PBGC):* While the task force rejected the Obama Administration's suggestion that the PBGC have the authority to set its own premiums levels, it also argues that "Congress should set premium levels that reflect PBGC's financial needs, protecting retirees and finally ending the threat of a taxpayer bailout." In the past five years, Congress has increased PBGC premiums several times to offset unrelated spending measures. There is currently a measure pending in the House, the Pension and Budget Integrity Act (H.R. 4955), that would move these premiums "off-budget" and ensure that Congress is raising premiums only if and when it is appropriate.

- *Ensure plans are well funded and employers remain in the system:* The task force pointedly asserts that "changes to pension policies should be in the best interest of workers, employers, and retirees, rather than funding Washington's spending priorities. Congress should make sure benefits are secure for workers and retirees and that employers are not discouraged from voluntarily offering these plans."

- *Protect access to affordable retirement advice:* The report rejects the U.S. Department of Labor's newly finalized regulations imposing fiduciary

responsibility on providers of investment advice, arguing that the new rules "will make it harder to save and plan for retirement.

- *Make it easier for employers to band together to offer 401(k) plans:* The report specifically endorses the concept of "open multiple employer plans" (open MEPs), under which small networks of unrelated employers can team up to sponsor a single retirement plan and take advantage of the economies of scale enjoyed by larger employers. The report suggests eliminating the "bureaucratic restrictions" that pose an obstacle to these plans, which include the "nexus" requirement that all MEP companies share a common business concern, and the "one bad apple" rule that disqualifies the entire plan based on one employer's failure to meet necessary criteria.

- *Reduce costly red tape:* The report suggests that federal regulations permit the electronic distribution of required notices and disclosures and generally reduce the administrative burdens on plan sponsors and service providers. These and other mandates "aren't helpful and only serve to drive up costs for workers and retirees," the report said.

Additional reports are expected to be released in the coming weeks, including reports on Tax Reform and Health Care Reform.

Bipartisan Policy Center Issues Retirement Policy Recommendations

A widely respected bipartisan think tank issued a set of recommendations for addressing obstacles to retirement security on June 9.

The Bipartisan Policy Center (BPC) is a non-profit organization that was established in 2007 by former Senate Majority Leaders Howard Baker (R-TN), Tom Daschle (D-SD), Bob Dole (R-KS) and George Mitchell (D-ME) to develop and promote pragmatic policy solutions that can attract public support and political momentum.

Over the course of two years, the BPC's Commission on Retirement Security and Personal Savings met to craft a package of proposals that would "streamline and improve the defined contribution retirement system by increasing personal savings for retirement and improving the effectiveness of tax-advantaged savings vehicles," although the final product includes extensive Social Security reform recommendations as well.

The commission was co-chaired by former Senator Kent Conrad (D-ND) and James B. Lockhart III, who served as Executive Director of the Pension Benefit Guaranty Corporation in the George H.W. Bush administration, and as Principal Deputy Commissioner of the Social Security Administration in the George W. Bush administration.

The commission's final report, Securing Our Financial Future, contains 51 specific recommendations, sorted by six "key challenges" for American savers:

- A lack of workplace retirement coverage
- Leakage from retirement accounts
- The risk of outliving one's savings
- Underutilization of home equity
- Limited knowledge of personal finance
- Social Security at a crossroads

The BPC is expected to pursue enactment of its recommendations in the coming months and years.

Ways and Means Committee Votes on Health Policy Legislation Addressing HRAs, HSAs

On June 15, the U.S. House of Representatives Ways and Means Committee approved eight legislative measures, expanding access to Health Reimbursement Accounts (HRAs), Health Savings Accounts (HSAs) and making other small changes to the Affordable Care Act (ACA).

Most significantly, the committee approved (by voice vote) the *Small Business Health Care Relief Act (*H.R. 5447)**,** sponsored by Representatives Charles Boustany (R-LA) and Rep. Mike Thompson (D-CA). This measure eliminates the penalty on small businesses for providing pre-tax monetary assistance to their employees (such as in an HRA) to purchase insurance on the individual market. A prior version of the bill (H.R. 2911) was introduced in June 2015.

In an opening statement, Rep. Charles Boustany (R-LA) stated, "Any employer who wants to assist their employees in having and maintaining health coverage, including the associated out-of-pocket costs, should be encouraged to do so. We should have a tax code that encourages this kind of assistance."

The bill is projected to cost $510 million over the next five years.

The committee also approved the *Heath Care Security Act of 2016* (H.R. 5445), sponsored by Rep. Erik Paulsen (R-MN). The bill, portions of which are taken from the *Health Savings Act of 2016* (H.R. 4469), expands the availability and flexibility of HSAs and flexible spending arrangements (FSAs). It was approved by a vote of 23-15 after extended discussion about the estimated $20.5 billion revenue cost of the bill over ten years. The bill:

- Allows both spouses to make catch-up contributions to the same HSA.

- Includes a special rule for certain medical expenses incurred before establishment of the HSA.

- Increases the maximum contribution limit to HSAs such that it equals the maximum out-of-pocket limitation. Thus, for 2017, the contribution limit would be $6,550 in the case of self-only coverage and $13,100 in the case of family coverage.

The *Student Worker Exemption Act of 2015* (H.R. 210), sponsored by Rep. Mark Meadows (R-NC), stipulates that full-time students who are employed by an academic institution are not counted as employees for purposes of the employer mandate under the ACA. Though the committee's ranking Democrat Sander M. Levin (D-MI) asserted that the bill requires further inquiry on how many people will be affected since the revenue cost is estimated at only $3 million over ten years, the measure passed by voice vote.

The five other bills that were approved include:

- the *Family First Prevention Services Act of 2016* (H.R. 5456), sponsored by Rep. Vern Buchanan (R-FL), promotes provisions to keep children out of foster care and reduces age disparities in group home placements. It was approved by voice vote.

- the *Veterans TRICARE Choice Act (*H.R. 5458*)*, sponsored by Rep. Chris Stewart (R-UT), provides more options, including access to Health Savings Accounts, to those eligible for TRICARE and was approved by voice vote.

- the *Native Americans Health Savings Improvement Act* (H.R. 5452), sponsored by Rep. John Moolenaar (R-MI), improves access to Health Savings Accounts for those who receive services at Indian Health Service facilities and was approved by voice vote.
- the *Tribal Employment and Jobs Protection Act (*H.R. 3080*),* sponsored by Rep. Kristi Noem (R-SD), exempts tribally owned businesses from the ACA's employer mandate and was approved by a vote of 24-13.

- the *Halt Tax Increases on the Middle Class and Seniors Act* (H.R. 3590), sponsored by Martha McSally (R-AZ), which reinstates 7.5% of adjusted gross income as the floor above which itemized deduction for medical expenses are permitted and was approved by a vote of 24-11.

The bills may now be considered by the full House. The bipartisan support for H.R. 5447 in particular sends a positive signal for its ultimate enactment. However, the limited number of legislative days remaining in the session makes enactment in 2016 uncertain.

Aging Committee Examines Retirement Security

The U.S. Senate Special Committee on Aging held a hearing on June 15 to identify retirement security challenges and possible policy solutions.

The hearing, Closing the Gap: Innovations to Promote Americans' Financial Security, is the latest in a series of Aging Committee hearings on retirement issues. In convening the hearing, Committee Chair Susan Collins (R-ME) provided statistics about the lack of retirement savings and discussed the importance of employer-based retirement plans.

"There are many reasons we face such a worrisome gap, including rising health care costs, the need for long-term care, and longer life expectancy. The shift away from employer-based "defined benefit" plans, or pensions, to "defined contribution" plans, such as 401(k)s, has also played a role," Collins said. "The importance of workplace retirement plans in improving Americans' retirement security is worth noting: when full-time workers have access to retirement plans, approximately 80 percent of them contribute. In contrast, workers without access to employer-based plans are much more likely to lack confidence in their retirement security."

The committee's ranking Democrat, Claire McCaskill (R-MO), spoke favorably about the ability of technology to prompt people to build and improve on their retirement security. "These tools can be connected directly with a person's accounts or can be played independently, aimed at changing a person's behaviors by forcing them to consider how to prioritize their saving and spending," she said.

The committee heard testimony from a panel of witnesses:

- Catherine Collinson, president of the Transamerica Center for Retirement Studies (TCRS) and Transamerica Institute, discussed some of the findings of the most recent TCRS survey, The Current State of 401(k)s: The Employer's Perspective, and offered five recommendations to increase retirement security. These are (1) remove impediments to providing part-time workers the ability to participate in employer-sponsored plans, (2) implement more personalized retirement education and planning tools, including the manner in which they are delivered, (3) reduce leakage by limiting the number of plan loans and extending the loan repayment period for terminated plan participants, (4) encourage employers to offer flexible retirement arrangements and phased transition into retirement, and (5) promote and expand the Saver's Credit.

- Tim Flacke, executive director of Doorways to Dreams (D2D), a nonprofit organization dedicated to improving the financial opportunity and security of financially vulnerable consumers, described a pilot program in which online and mobile financial education video games promoted greater financial security among participants.

- Aron Szapiro, associate director of policy research at Morningstar, discussed how innovative financial technology can convey critical information about retirement plans and improve employee's retirement security.

- Brian Plum, president and CEO of Blue Ridge Bank, outlined how prize-linked savings accounts can help improve savings deposits.

During the question-and-answer period, Collins asked the panel if they support the concept of "multiple employer plans" (MEPs), in which small networks of unrelated employers can team up to sponsor a single retirement plan and take advantage of economies of scale enjoyed by larger employers. Collinson said the TCRS survey shows that, among business owners who believe they are too small or cannot afford to sponsor a plan, some said they would consider joining a multiple employer plan. She also said that reforms are needed to create an open multiple employer plan so that small businesses that do not have a common nexus can join together.

The committee and witnesses also covered such topics as retirement plan "leakage" and the effect of the DOL's new fiduciary rule on retirement advice and education.

RECENT REGULATORY ACTIVITY

IRS Advisory Committee Issues Report on Determination Letter Program

An advisory committee to the Internal Revenue Service (IRS) has provided a series of recommendations for preserving important elements of its individually designed plan determination letter program, if the program cannot be saved from elimination.

The IRS intends to eliminate most determination letters for individually designed plans (those that are *not* operating under a pre-approved vendor-sponsored master and prototype or volume submitter plan document), effective January 1, 2017. In anticipation of the forthcoming changes, the IRS recently issued Internal Revenue Bulletin 2016-1 and Notice 2016-3 establishing the new process for obtaining determination letters.

The Employee Plans subgroup of the Internal Revenue Service (IRS) Advisory Committee on Tax Exempt and Government Entities (ACT) – a public forum for discussion of relevant employee plans – launched a survey of retirement plan practitioners and service providers earlier this year to collect feedback on the discontinuation of the determination letter program.

Based on this feedback, the ACT urged the IRS to restore the determination letter program or at least provide a longer transition period to allow for more dialogue with stakeholders. However, recognizing that this was unlikely, the committee urged the IRS to provide certainty of the availability of determination letters to as much of the employer plan community as is feasible. ACT specifically recommended that IRS:

- Look for ways to make the pre-approved program more flexible.

- Reduce the user fees for document sponsors of pre-approved plans.

- Modify the Employee Plans Compliance Resolution System (EPCRS) so it can be used without a plan sponsor having a current determination letter and for issues identified on audit.

- Expand the plan provisions that can be incorporated by reference to the Internal Revenue Code or regulations to simplify plan documents.

- Allow leniency for "immaterial" flaws in plan document language found on IRS examination.

- Immediately confirm that retroactive plan amendment relief will still be permitted for any plan document language that remains unchanged from issuance of a prior determination letter and further consider the feasibility of accepting an independent private review as "good faith" compliance extending this protection.

- Provide sponsors with a safe harbor approach for converting an individually designed plan into a pre-approved plan or establish a program to review and approve such conversions.

- Publish model amendments along with the Cumulative Lists and List of Required Modifications (LRMs).

- Provide adequate time to adopt all interim amendments.

- Ask Congress to increase user fees for the Determination Letter Program and dedicate such amounts for use by, and on behalf of, the Determination Letter Program.

The report also includes an appendix (starting on Page 55 of the report) with the results of the ACT survey**.**

Agencies Issue Proposed Regulations for Expatriate Health Plans
The Obama Administration published proposed regulations on June 10, implementing changes in the treatment of expatriate health plans and amending the rules for excepted benefits.

The proposed regulations implement the Expatriate Health Coverage Clarification Act of 2014 (EHCCA), which provided relief for expatriate health plans, issuers, administrators and plan sponsors of such coverage from certain requirements, fees and taxes of the Affordable Care Act (ACA). The proposed regulations, issued by the U.S. departments of Labor, Treasury Department and Health and Human Services, also propose certain changes to existing regulations for excepted benefits. Key provisions are briefly summarized below.

EHCCA, enacted in December 2014, provides relief from specific ACA 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 ACA. The agencies previously provided interim guidance on the implementation of the EHCCA, including IRS Notice 2015-43.

The proposed regulations include definitions for "expatriate health plan" and "qualified expatriate" and provide that:

- the market reform provisions of the ACA do not apply to an expatriate health plan, an employer (solely in its capacity as plan sponsor of an expatriate health plan) and an expatriate health insurance issuer with respect to coverage under an expatriate health plan.

- the Patient-Centered Outcomes Research Institute (PCORI) fee and the transitional reinsurance program (TRP) fee under the ACA do not apply to expatriate health plans.

- expatriate health plans are not subject to the health insurance providers fee except that the EHCCA provides a special rule solely for purposes of determining the fee for the 2014 and 2015 fee years.

- certain coverage by an expatriate health plan is designated minimum essential coverage under the ACA's individual responsibility requirements.

- special rules are provided for the application of the reporting rules under sections 6055 and 6056 of the Internal Revenue Code to expatriate health plans.

The proposed regulations also affect individuals with and plan sponsors of travel insurance and supplemental health insurance coverage, and individuals with short-term, limited-duration insurance. The proposed regulations revise the definition of short-term, limited-duration insurance so that the coverage must be less than three months in duration, including any period for which the policyholder renews or has an option to renew with or without the issuer's consent.

In addition, the document proposes to amend existing regulations related to the ACA's lifetime and annual limits and the use of benchmark plans and clarify notice requirements for hospital indemnity and other fixed indemnity insurance in the group market to meet the conditions as "excepted benefits."

The proposed regulations are applicable for plan years (or, in the individual market, policy years) beginning on or after January 1, 2017. Issuers, employers, administrators, and individuals are permitted to rely on these proposed regulations until final regulations are published.

IRS Guidance Clarifies Tax Treatment of Pension Payments in Phased Retirement
New guidance issued by the Internal Revenue Service (IRS) on June 10 sets forth the three criteria that defined benefit pension payments received during phased retirement must meet to avoid being classified as "annuities" under the tax code.

Phased retirement refers to an employment arrangement that allows an employee at or near retirement to gradually move from full-time work to full-time retirement, often allowing the employee to collect defined benefit plan distributions without fully separating from service.

Section 72 of the Internal Revenue Code generally says that distributions from an annuity, endowment or life insurance contract can be included in gross income except if that distribution is a nontaxable return of investment.

Under IRS Notice 2016-39, pension plan payments received by an employee during phased retirement are not received as an annuity if all the following conditions apply:

- The employee begins to receive a portion of his or her retirement benefits when he or she enters phased retirement and begins part-time employment, and will not begin receiving his or her entire plan benefits until he or she ceases employment and commences full retirement at an indeterminate future time (for this purpose, even if a full retirement date is agreed upon at commencement of phased retirement, the employee's date of full retirement is indeterminate as long as it is possible that date could change)

- The plan's obligations to the employee are based in part on the employee's continued part-time employment (which affects both the duration of the payment of phased retirement benefits and the amount of additional retirement benefits the employee accrues during that period of part-time employment)

- Under the plan terms, the employee does not have an election as to the form of the phased retirement benefit to be paid during phased retirement, but elects a distribution option at full retirement that applies to the employee's entire retirement benefit, including the portion that commenced as phased retirement benefits.

If the benefit payments meet all three criteria, then alternate taxation rules apply which involves calculating a basis recovery fraction. The notice allows that fraction to be fixed at the time payments commence. Notice 2016-39 spells out the calculation for determining the amount excludible from an employee's gross income and recovering the basis. IRS Revenue Procedure 2016-36, issued along with Notice 2016-39, provides additional guidance on the application of Section 72 to amounts received from a non-qualified contract.

DOL Issues 'Warning Signs' for Mental Health Law Compliance

On June 1, the U.S. Department of Labor (DOL) released an informal guidance document describing "warning signs" for stakeholders concerned about triggering violations of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

The MHPAEA prohibits large employer and group health plans that provide medical and surgical benefits and mental health or substance use disorder benefits from applying financial requirements or treatment limitations that are more restrictive than the "predominant" financial requirements or treatment limitations that apply to "substantially all" medical and surgical benefits. Treatment limitations may be "quantitative treatment limitations" (QTLs), which are numerical in nature (such as visit limits), or "non-quantitative treatment limitations" (NQTLs), which are non-numerical limits on the scope or duration of benefits for treatment (such as preauthorization requirements). The new DOL document provides specific examples illustrating when further analysis may be indicated to ensure that mental health or substance use disorder benefits are in compliance with NQTL rules.

"Language contained in the following provisions (absent similar restrictions on [medical or surgical] benefits) can serve as a red flag that a plan or issuer may be imposing an impermissible NQTL" requiring further review, according to the document. The plan and policy terms described in the document do not automatically violate the law, but plans and issuers will need to provide evidence to substantiate compliance.

PBGC Proposes Rules to Help Multiemployer Pension Plans Merge

The Pension Benefit Guaranty Corporation (PBGC) continued its rollout of rules implementing the Multiemployer Pension Reform Act of 2014 (MPRA) on June 2 with proposed regulations to facilitate mergers between multiemployer pension plans.

The PBGC has the authority to facilitate plan mergers, as a measure to avoid plan insolvency, by providing technical or financial assistance. The proposed rule provides updated guidance on the process for requesting a facilitated merger (including a request for financial assistance) and reorganizes and updates the existing rules.

Under the proposed rule, plan sponsors would not be required to apply, nor prevented from applying, for both benefit suspensions under the MPRA and a merger.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue