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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

House Panel Discusses Innovations in Health Coverage

The U.S. House of Representatives Education and Workforce Subcommittee on Health, Employment, Labor and Pensions discussed ERISA's uniform federal framework and the current tax treatment of employer-provided health benefits at a hearing on April 14.

Convening the hearing, Subcommittee Chairman Phil Roe (R-TN) said that "employers have played a critical role in driving health care innovation, despite unprecedented uncertainty in the health insurance market and drastic changes in employer-sponsored coverage. Employers of all sizes are still developing creative strategies to help control costs and meet the changing needs of the workforce." He specifically cited wellness programs, private exchanges and accountable care organizations as effective employer tools.

Ranking Democratic committee member Jared Polis (D-CO) added, "for better or worse, there's not been a marked shift from the employer-based system of health care," noting that the two-year delay of the so-called "Cadillac Tax" has helped sustain employer sponsorship. Polis also noted that paid sick leave and paid family leave remain very important for employees' wellness and job satisfaction.

The subcommittee heard testimony from the following witnesses:

Tresia Franklin, director - rewards and employee relations at Hallmark Cards, Inc. In her testimony, Franklin urged the committee to "recognize the unique value of employer-sponsored plans, which significantly reduces burdens and costs on public programs and on individuals, to help ensure personal well-being." In discussing Hallmark's innovations, Franklin described her company's long tradition, dating back to 1923, of promoting wellness initiatives for its workforce. She also explained Hallmark's decision to move to a private insurance exchange and its value to the company, its employees and their families. She also called on Congress to preserve the tax exclusion of the value of employer sponsored health coverage and repeal the so-called "Cadillac Tax" imposed on high-cost health coverage.

Amy McDonough, vice president and general manager of corporate wellness for Fitbit, described her company's role in generating data to help inform wellness programs in the employment setting. "Employers are uniquely positioned to improve population health in the workplace," she said, noting that the concept of wellness is evolving to include such factors as financial wellness.

John Zern, executive vice president and global health leader for Aon, explained how private health exchanges "combine cost accountability with meaningful choice," allowing employers to remain "a vital part of the health care delivery system."

Sabrina Corlette, senior research professor at Georgetown University's Health Policy Institute's Center on Health Insurance Reforms, told the panel that while the foundation

of employer-sponsored health insurance is strong, affordability remains a challenge. She recommended local delivery system reforms, driven by employer partnerships, as a way to lower costs.

During the question-and-answer period, Representative Joe Courtney (D-CT) noted the broad support for his legislation to repeal the Cadillac tax, the Middle Class Health Benefits Tax Repeal Act (H.R. 2050), which currently has 186 House cosponsors. Rep. Tim Walberg (R-MI) expressed concerns about the hurdles for employee wellness programs, such as the Equal Employment Opportunity Commission's (EEOC) assertions that some programs are discriminatory.

Franklin emphasized the importance of wellness programs in Hallmark's corporate culture and acknowledged that regulatory challenges from the EEOC and other agencies create a "minefield" for employers. McDonough also said that while wellness programs should be voluntary, additional regulatory clarity would help support program sponsorship.

Rep. Luke Messer (R-IN), drawing a distinction between the employer and individual market, asked how employer plan participants behave differently as consumers. Zern noted that employers play a crucial role in educating workers about their health.

Responding to a follow-up question from Polis, Franklin described some of the financial incentives provided to employees, including premium savings and competition prizes. Although the hearing was focused on employer health care innovations, the conversation pivoted to some discussion regarding paid time off. A number of subcommittee members, including Courtney and Rep. Suzanne Bonamici (D-OR), echoed Polis' earlier comment that paid leave is an important employee benefit.

Roe closed the hearing by reiterating that the ACA has "discouraged consumerism" and credited Franklin and Hallmark for pursuing an approach to health coverage that helps employees be better consumers of health services. Roe, a medical doctor, serves on the House Republicans' task force on Health Care Reform, which will soon be issuing policy proposals setting forth an overarching policy philosophy and game plan for the next Congress.

Employer-Sponsored Health Coverage Tax Exclusion Under Fire in House Hearing

The U.S. House of Representatives Ways and Means Committee, the congressional panel with jurisdiction over federal tax policy, held a hearing on April 14 centering on the tax treatment of health care. Much of the discussion centered on the exclusion from payroll and income tax of the value of employer-sponsored health coverage, commonly known as the "tax exclusion," as well as the so-called "Cadillac Tax" on employer coverage set to take effect in 2020.
Committee Chairman Kevin Brady (R-TX) opened the hearing with a thorough criticism of the exclusion, suggesting that it limits options for employees, creates "job lock,"

contributes to stagnant wage growth, encourages overconsumption of health services and inadvertently penalizes individuals without employer-sponsored coverage. While he called employer-sponsored health coverage "vital," he expressed a desire to make it more affordable and flexible.

Many critics of the exclusion characterize it as "regressive" since higher income individuals enjoy a greater "tax benefit." Some have pointed out, however, that while upper income people in higher tax brackets, who pay more in taxes may get a greater "tax benefit" from the exclusion, the real test for "progressivity" is the value of health coverage since it would be more difficult for a lower income individual than a higher income person, to obtain coverage if they had to do so without the benefit of employer sponsorship. Employer-sponsored health coverage could also be considered one of the most equitable and progressive tax expenditures, since the same coverage is offered to employees at all salary/wage levels and a moderate-income employee with family coverage receives a greater benefit than a higher-income employee with single coverage.

Brady was also critical of the Affordable Care Act (ACA), referring to the ACA's "Cadillac Tax" as "punitive." This 40 percent tax applies to the value of employer-sponsored health coverage in excess of certain benefit thresholds.

The committee heard testimony from the following witnesses:

Joseph Antos, Wilson H. Taylor Scholar at the American Enterprise Institute, called the tax exclusion "inefficient and unfair" for many of the reasons outlined by Brady. He acknowledged that the "Cadillac Tax" has serious defects, but asserted that Congress should not repeal the tax unless it is prepared to replace the employee tax exclusion with a refundable tax credit or retain the tax exclusion but cap the maximum amount that can be excluded.

Avik Roy, senior fellow at the Manhattan Institute, described current health care tax policy as "the central flaw in our health care system" and advocated for a shift away from the employer-sponsored coverage model. He recommended a cap on the employee tax exclusion that is gradually phased in over time, coupled with a refundable tax credit for the purchase of insurance in the individual private market.

Steven Kreisberg, director of research and collective bargaining services for the American Federation of State County and Municipal Employees (AFSCME), a public employee labor union, voiced support for many elements of the ACA, including the employer "shared responsibility" requirement. He also expressed strong opposition to the taxation of health benefits, which he said would erode the strong foundation of employer-sponsored coverage.

During the question-and-answer session, Brady asked whether it was possible to limit the tax exclusion while still preserving employer-sponsored coverage. Antos argued that

it was possible, while Roy questioned whether the employer system was an effective use of tax revenue.

Representative Dave Reichert (R-WA) asked the witnesses a battery of questions about the "Cadillac Tax," specifically its disparate impacts on certain higher-cost geographic areas and its effects on wellness programs and consumer-directed arrangements. Rep. Tom Rice (R-SC) was also critical of the tax's design during the crafting of the ACA, suggesting that its intention was to raise the cost of employer plans. Responding to a question from Rep. Patrick Meehan (R-PA), both Antos and Roy asserted during the discussion that wages would increase as benefit levels are reduced, a controversial argument used to explain how most of the revenue from the "Cadillac Tax" would be raised.

Brady is currently also chairing the House Republicans' task forces on Tax Reform, Health Care Reform and Poverty, Opportunity, and Upward Mobility. These task forces are developing policy proposals that will set forth an overarching policy philosophy and game plan for the next Congress and a potential Republican presidential administration.

'Cadillac Tax' Carve-Out Bills Introduced in House, Senate

Lawmakers in the U.S. Senate and House of Representatives have introduced legislation that would exclude certain consumer-directed health plan designs from the so-called "Cadillac Tax" on high-cost employer-sponsored health coverage.
The "Cadillac Tax" is a 40 percent tax on the value of employer-sponsored health coverage that exceeds certain benefit thresholds – estimated to be $10,800 for self-only coverage and $29,100 for family coverage in 2020. The tax will be imposed on "applicable employer-sponsored coverage," which includes both employer *and* employee contributions to Health Savings Accounts (HSAs), Medical Savings Accounts (MSAs), and health Flexible Spending Accounts (FSAs), as well as notional amounts attributed to HRAs.

The Preserving Consumer Health Accounts Act (S.2698), introduced in the Senate by John Thune (R-SD) and Ron Johnson (R-WI), and the Health Savings Protection Act (H.R. 4832),introduced in the House of Representatives by Representatives Charles Boustany (R-LA) and Ami Berra (D-CA), would exclude from the definition of "applicable employer-sponsored coverage" both employer and employee contributions to health savings accounts, flexible spending arrangements or Archer medical savings accounts.

Removing these health savings vehicles from the calculation of coverage subject to the "Cadillac Tax" thresholds would certainly delay the date when some employer-sponsored plans would trigger the tax and the extent to which the overall cost of coverage exceeds the thresholds. However, there would still remain myriad problems associated with the tax, including the disproportionate impact on plans covering large numbers of older or disabled workers, women, families coping with catastrophic health events or chronic illnesses, or plans operating in especially high cost areas of the country.

Efforts to fix only one aspect of the tax might, inadvertently, lessen enthusiasm for full repeal, which is needed in light of the fact that without repeal almost all employer-sponsored plans will eventually cross the tax-triggering thresholds.

Bipartisan Legislation Introduced to Eliminate PBGC Premiums as Federal Revenue Raiser

A team of Republican and Democratic lawmakers have unveiled legislation that would prevent Pension Benefit Guaranty Corporation (PBGC) premium increases from being used to raise revenue and offset the cost of federal legislation.

Under current law, defined benefit pension plan insurance premiums paid by employers to the PBGC are included in the federal budget and are considered "on-budget," which suggests the revenue can be used for general government spending, even though these premiums cannot be allocated to other government programs besides the PBGC. In the past five years alone, Congress has increased PBGC premiums several times to offset unrelated spending measures. Most recently, the Bipartisan Budget Act of 2015 increased premiums by $7.65 billion through 2025.

The Pension and Budget Integrity Act (H.R. 4955), sponsored by Representatives Jim Renacci (R-OH) and Mark Pocan (D-WI), along with Reps. Daniel Webster (R-FL), John Carney (D-DE) and Derek Kilmer (D-WA), would move these premiums "off-budget" and ensure that Congress is raising premiums only if and when it is appropriate.

RECENT REGULATORY ACTIVITY

DOL Unveils Final Fiduciary Definition Rule: Even With Improvements, Concerns Remain

After more than five yearsof discussion and debate, the U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) has released final regulations substantially redefining fiduciary duty under ERISA, with significant implications for employers that sponsor retirement plans.

The regulatory package includes the final rule itself, as well as:

- An official Best Interest Contract Exemption (BICE) exempting certain parties and activities from the prohibited transactions prevailing under ERISA and the Internal Revenue Code
- Class Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs
- Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1
- Amendment to, and Partial Revocation of, PTE 86-128 and PTE 75-1
- Amendment to PTE 75-1, Part V
- Amendment to and Partial Revocation of PTE 84-24

- Fact sheets on middle-class economics and conflicts of interest, as well as a Frequently Asked Questions document and a chart outlining the agency's response to public comments.

Like the proposed regulations issued in April 2015 and the original October 2010 proposal that was ultimately withdrawn, the new rule broadly expands the definition of "investment advice" by extending fiduciary status to a wide array of advice relationships. The new rule covers the following categories of advice: investment recommendations, investment management recommendations and recommendations of persons to provide advice for a fee or to manage plan assets. Persons who provide advice within these parameters would fall within the definition of fiduciary if they either represent they are acting as a fiduciary or provide advice pursuant to an agreement, arrangement or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan assets. The rule includes a number of significant carve-outs, including one for internal employees of a plan sponsor not receiving additional compensation for the advice they are providing beyond their normal compensation as employees of the plan sponsor (unless their job responsibilities involve providing investment recommendations).

It appears that the final rule makes a number of changes:

Communications: The final rule expressly excepts from "investment advice" a number of communications that "a reasonable person would not view as an investment recommendation."

Investment education: The final rule generally preserves investment education in the plan context, subject to workable conditions.

Seller's exception: The final rule "makes clear that advisers do not act as fiduciaries merely by recommending that a customer hire them to render advisory or asset management services." Also, as under the proposal, the seller's exception does not apply to selling to small businesses (defined as those managing less than $50 million in assets) and will generally still be treated as fiduciary advice.

Asset valuations: All asset valuations are exempted from the final rule.

Data retention requirements: The final rule eliminates the proposed requirement that firms retain detailed data on inflows, outflows, holdings, and returns for retirement investors. Firms will only have to retain the records that show they complied with the law.

Health and welfare plans: The final rule excludes health and welfare plans to the extent that they do not have an "investment component." There is no definition of what it means to have an investment component.

Grandfathered investments: The BICE includes a grandfathering provision that allows for additional compensation from previously acquired assets.

BICE compliance: A firm or adviser using the BICE must commit to provide "advice in the client's best interest, charge only reasonable compensation, and avoid misleading statements about fees and conflicts of interest." The final rule only requires a contract in the case of an IRA or other non-ERISA arrangement, and provides some flexibility on when to enter into the contract and permits existing clients to agree to the new contractual protections by "negative consent." Additionally:

- The BICE has been simplified to apply only to the firm-client relationship and individual advisors do not have to sign the contract.

- The BICE now covers advice to small businesses, applies to variable and indexed annuities and does not limit the assets that can be recommended by advisers.

- The streamlined "level fee" provision specifically permits recommendations to roll over assets from an employer plan to an IRA, as long as it is in the customer's best interest.

- Required transaction disclosure under the BICE has been simplified to focus on potential conflicts of interest.

The final rule, along with a simplified BICE, will be effective April 8, 2017. A more complex BICE will take effect on January 1, 2018.

CMS Issues Payment Rates for Medicare Advantage, Employer Group Waiver Plans

The U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) has announced that it is moving forward with proposed changes to 2017 Medicare Advantage (MA) payment policies, including a change that will effectively reduce payments for MA plans offered by employers and unions to retirees, also known as Employer Group Waiver Plans (EGWPs). The payment cuts for EGWPs will be phased in over two years. According to CMS, 19% of MA beneficiaries were enrolled in EGWPs as of 2015.

The CMS Announcement of Calendar Year (CY) 2017 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies, released on April 4, implements a proposal from the 2017 Medicare Advantage Advance Notice replacing the bidding process for sponsors of MA plans with predetermined payment levels beginning in 2017.

A number of multi-stakeholder groups, including the Better Medicare Alliance (BMA) and the Coalition to Save Medicare Advantage Retiree Coverage, had urged CMS to

reverse course on its policy, warning that the proposal will effectively result in significant cuts to EGWPs, threatening the continuity of benefits for many retirees.
In response to stakeholder concerns, CMS modified the calculation methodology for payment amounts for EGWPs and provided a two year transition to allow employers and plans "more time to adapt to this payment change." CMS provides additional detail (and responds to public comments) beginning on Page 27 of the April 4 notice and in an April 4 fact sheet.

IRS Reveals Proposed 2016 Changes to Form 5500

In a notice and request for information issued on March 31, the Internal Revenue Service (IRS) unveiled its proposed changes to the Form 5500 Annual Return/Report series. The 2016 revisions include a number of compliance questions that have prompted confusion and controversy since they were first proposed in 2015.

The Form 5500 series (including Form 5500-SF and the supplemental Form 5500-SUP) is filed by benefit plans to satisfy the annual disclosure requirements of ERISA and the Internal Revenue Code. It is also the primary source of information for both the federal government and the private sector on retirement plan assets.

While the proposed 2016 changes appear to shorten the form by deleting certain questions, they also incorporate a number of questions that were first suggested by the IRS when it debuted the 5500-SUP for 2015. These new questions were widely regarded as ambiguous and were initially made optional, and ultimately filers were explicitly advised not to answer them because the questions had not been approved by the OMB.

The IRS is soliciting formal comments on the proposed changes through May 31, 2016.

IRS Withdraws QSERP Provisions from Proposed Defined Benefit Nondiscrimination Relief

The Internal Revenue Service (IRS) has withdrawn portions of its recently proposed rules addressing the imposition of certain nondiscrimination rules on closed (soft frozen) defined benefit pension plans. The withdrawn provisions apply specifically to Qualified Supplemental Executive Retirement Plans (QSERPs) but also affect small employer plans.

Traditional Supplemental Executive Retirement Plans are used by employers to increase executive retirement benefit amounts beyond the limitations spelled out in the Internal Revenue Code. Defined benefit plan sponsors, using flexibilities in nondiscrimination testing, can use QSERPS to increase the benefits under the qualified plan, with an offsetting reduction in the benefits under the nonqualified plan.

The increasingly necessary practice of defined benefit plan sponsors "soft freezing" their plans (closing them to new entrants) – and grandfathering existing participants – has inadvertently subjected some plans to nondiscrimination violations.

The IRS proposed regulations on January 28 to provide relief to these defined benefit plan sponsors, including provisions intended to address QSERPs. Plan sponsors and lawmakers raised concerns that the rules' implications for QSERPs and small plans were not fully understood. According to IRS Announcement 2016-16, Treasury and the IRS "have given additional consideration to the potential effects of the provisions … on the adoption and continued maintenance of qualified retirement plans with a variety of designs and have concluded that further consideration will be needed with respect to issues relating to those provisions."

RECENT JUDICIAL ACTIVITY

Ninth Circuit Court Dismisses Fiduciary Suit, Citing Statute of Limitations

The U.S. Court of Appeals for the Ninth Circuit held on April 13 that a longstanding 401(k) plan fee suit against a plan sponsor should be thrown out, affirming a lower court decision that the plan fiduciaries failed to meet the U.S. Supreme Court's standard for overcoming ERISA's statute of limitations.

This is the second time the Ninth Circuit has ruled on *Tibble v. Edison*. The initial lawsuit involved the plaintiffs' claim that the retirement plan fiduciary breached its fiduciary duty by choosing retail-class funds for the plan's investment menu. While the U.S. District Court for the Central District of California initially ruled for the plaintiff on the fiduciary duty question, the district court – later affirmed by the Ninth Circuit – held that ERISA's statute of limitations barred the plaintiffs' claim because the retirement plan fiduciaries had selected the funds more than six years before the filing of the complaint.

The plaintiffs appealed the Ninth Circuit decision to the U.S. Supreme Court, arguing that the decision to offer the fund could have been reconsidered during the six-year window, making it a "continuing violation." In a unanimous opinion in May 2015, the U.S. Supreme Court ruled in favor of the plaintiffs, establishing a "continuing duty" for plan sponsors to "properly monitor investments and remove imprudent ones," but remanded the case back to the Ninth Circuit.

In this most recent decision, the Ninth Circuit ultimately dismissed the case on the plaintiffs' failure to raise the monitoring issue prior to its Supreme Court appeal. The plaintiffs could file for a rehearing by the full Ninth Circuit or appeal the decision to the U.S. Supreme Court.