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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

Revised Budget Agreement Approved by House with Additional PBGC Premium Increases, Extended Pension Relief, Other Provisions

The U.S. Senate and House of Representatives have approved the Bipartisan Budget Act of 2015 (H.R. 1314), a two-year deal to increase federal spending caps and raise the debt ceiling through March 2017.

Included in the package is a series of revenue-raising provisions, most notably an increase in the premiums paid by single-employer defined benefit plans to the Pension Benefit Guaranty Corporation (PBGC). Since the discussion draft was first released on October 27, the measure's authors needed to find additional revenue and have boosted the increases even further.

	Current law	**Under H.R. 1314 discussion draft**	**Under H.R. 1314 as amended**
Flat rate premium	$64 per person in 2016 adjusted for inflation annually	$68 per person in 2017 $73 per person in 2018 $78 per person in 2019 Indexed for inflation thereafter	$69 per person in 2017 $74 per person in 2018 $80 per person in 2019 Indexed for inflation thereafter
Variable rate premium	$30 per $1,000 of underfunding in 2016 adjusted for inflation annually	Continues to be adjusted for inflation, with the following additions: Adds $2 to indexed rate in 2017 Adds $3 to indexed rate in 2018 Adds $3 to indexed rate in 2019	Continues to be adjusted for inflation, with the following additions: Adds $3 to indexed rate in 2017 Adds $4 to indexed rate in 2018 Adds $4 to indexed rate in 2019

In recent years PBGC premium increases have been viewed by some in Congress as a convenient source of revenue to finance measures totally unrelated to pension policy, and this is no exception.

The timing of this provision is particularly unusual since the PBGC's Fiscal Year 2014 Projections Report recently revealed that the financial condition of the single-employer pension insurance program has significantly improved, "continues to be likely to improve" and "is highly unlikely to run out of funds in the next 10 years."

Other revenue-raising provisions include:

Extended Defined Benefit Plan Funding Relief

The amended bill also further expanded the defined benefit plan funding stabilization by one year. This provision was also adjusted after the initial discussion draft was released to generate additional revenue.

	Current law	Under H.R. 1314 discussion draft	Under H.R. 1314 as amended
Pension funding stabilization	Interest rates for valuing liabilities in 2012-2017 are not to vary more than ten percent from the average interest rates over the prior 25 years. That corridor increases by 5 percent per year through 2021, at which point it remains permanently at 30 percent.	The corridor on interest rates would remain at ten percent through 2019. The corridor would increase by five percent per year through 2022, at which point the corridor would remain permanently at 30 percent.	The corridor on interest rates would remain at ten percent through 2020. The corridor would increase by five percent per year through 2023, at which point the corridor would remain permanently at 30 percent.

Election of this funding relief would be at the sole discretion of the plan sponsor.

Mortality Table Relief
The budget deal also provides increased flexibility for defined benefit plan sponsors to use mortality tables that are different than those prescribed by the U.S. Treasury Department. Mortality assumptions are a key component when calculating pension funding obligations, benefit restrictions and PBGC premiums.

Under current law, plans qualify to use a separate table only if (1) the proposed table reflects the "actual experience" of the pension plan maintained by the plan sponsor and projected trends in general mortality experience, and (2) there are a sufficient number of plan participants, and the plan was maintained for a sufficient period of time to have credible information necessary for that purpose.

Under the budget deal, plan may use tables that are adjusted from the Treasury tables if such adjustments are based on a plan's experience. Also, the "credible information" determination shall be made in accordance with established actuarial credibility theory.

Repeal of ACA Automatic Enrollment Provision
Like the budget reconciliation measure that passed the House on October 23, the new budget deal would repeal the automatic enrollment requirement under Section 18A of the Fair Labor Standards Act, as added by the Affordable Care Act (ACA).

President Obama is expected to sign the bill into law soon. According to Treasury, Congress must act before Nov. 3 to raise the debt ceiling, thereby extending the government's borrowing authority and avoiding a potential default on the country's

financial obligations. Lawmakers also have to pass a government funding bill before Dec. 11, when a temporary funding measure is set to expire.

House Approves Budget Reconciliation Measure Repealing Key Provisions of ACA

The U.S. House of Representatives, by a party-line vote of 240-189, has approved a budget reconciliation bill that repeals several elements of the Affordable Care Act. H.R. 3762 would:

- Repeal of the ACA individual mandate (Internal Revenue Code Section 5000A)
- Repeal of the ACA employer "shared responsibility" mandate (Code Section 4980H)
- Repeal of the 40 percent excise tax on high-cost plans (Code Section 4980I)
- Repeal of the medical device tax (Code Section 4221)
- Repeal the ACA automatic enrollment requirement (Section 18A of the Fair Labor Standards Act) [also approved as part of the Bipartisan Budget Act of 2015; see story above]
- Repeal of the ACA Independent Payment Advisory Board
- Repeal of the Prevention and Public Health Fund
- Eliminate funding for Planned Parenthood

With the House's approval, the bill will now proceed to the Senate, where it is likely to pass, although it is unclear whether amendments will be permitted. Under Senate rules, a reconciliation bill cannot be filibustered but, and only require a simple majority (rather than 60 votes) for passage. (Republicans only have a majority of 54 seats in the Senate.)

Since President Obama has already said that he will veto H.R. 3762 as it is currently constituted, this vote is largely a political exercise.

Senate Subcommittee Discusses Expanding Multiple Employer Plans

In a roundtable hearing on October 28, members of the U.S. Senate Health, Education, Labor and Pensions (HELP) Subcommittee on Primary Health and Retirement Security invited several witnesses to discuss ways to improve retirement plan coverage for employees at small businesses.

The primary focus of the hearing was the potential expansion of "multiple employer plans" (MEPs) in which small entities can join together to pool plan assets and reduce the cost of plan administration. Currently, MEPs require a "nexus" or bona fide relationship between each adopting employer to consider a MEP a single plan and

permit certain administrative and expense efficiencies, such as a single 5500 filing and plan audit.

Subcommittee Chairman Michael Enzi (R-WY), voiced his agreement when convening the hearing, saying that "access to [MEPs] can and should be broadened to provide small businesses with administrative simplicity." Enzi specifically asked the roundtable participants to provide policy recommendations for expanding MEPs, indicate what the federal government can do to expand coverage in small businesses and elaborate on any statutory or regulatory impediments to such efforts.

The following witnesses also participated in the roundtable:

- Lance Schoening, Director of Product Management for Principal Financial Group, testifying on behalf of the American Benefits Council
- Scott Anderson, owner of Static Peak (a small business in Jackson , Wyoming) representing the U.S. Chamber of Commerce
- John J. Kalamarides, Senior Vice President Of Institutional Investment Solutions for Prudential Retirement
- David Certner, Legislative Counsel and Legislative Policy Director for AARP

There was broad agreement among the committee members and panelists that open MEPs represent a strong opportunity to improve retirement coverage. With regard to implementation, there was some discussion about where fiduciary liability should rest and how to minimize costs to participating employers.

Regarding regulatory obstacles to retirement coverage generally, Anderson suggested eliminating unnecessary top-heavy rules, simplifying nondiscrimination testing and streamlining disclosure requirements.

Schoening, Kalamarides and Anderson added that easing the constraints on electronic communication would also be helpful, although Certner suggested that important communications should be distributed in paper format as well.

Schoening's fellow panelists supported his recommendation for enhancing small business plan tax incentives and added that expanding the Saver's credit would also be a positive step.

Enzi asked the panel if the various state-sponsored retirement plans are more or less helpful than an open MEP solution. Certner voiced his support for state plans, but Kalamarides stated his support for a federal approach, noting that MEPs could allow for employer matches and higher contribution limits than many of the state plan designs. Schoening added that many of the state plan designs would likely not allow for sufficient adequacy in retirement.

Roundtable participants also cited a number of present and past legislative proposals that could alleviate coverage and administrative pressures on employers.

- In describing regulatory challenges, Kalamarides also cited two measures last introduced in 2013: the Secure Annuities for Employee (SAFE) Retirement Act (S. 1270), introduced by Senate Finance Committee Chairman Orrin Hatch (R-UT), and the Retirement Plan Simplification and Enhancement Act (H.R. 2117), introduced by Representative Richard Neal (D-MA).

- Kalamarides and others expressed support for the Lifetime Income Disclosure Act (S. 1317), introduced by Senators Johnny Isakson (R-GA) and Christopher Murphy (D-CT). The measure would require that sponsors of 401(k) and other defined contribution plans subject to ERISA inform participants of how their account balance would translate into guaranteed monthly payments based on age at retirement and other factors.

- Senator Sheldon Whitehouse (D-RI) asked for reactions to his Automatic IRA Act of 2015 (S. 245), which would mandate automatic enrollment in IRAs for employees who currently do not have access to an employer-sponsored retirement plan. Certner expressed support for this concept, while Schoening and Anderson voiced concern about the effect of a "one-size-fits-all" mandate.

The panelists agreed that a legislative measure combining many of these concepts is the appropriate next step. Certner suggested that, when crafting such legislation, Congress should consult with the regulatory agencies to ensure that they have proper enforcement authority.

Enzi expressed confidence that there is sufficient bipartisan support for a non-controversial measure, though he did not lay out a timeline for development and consideration of such a bill.

House Passes Measure to Delay DOL Fiduciary Rule

The U.S. House of Representatives passed the Retail Investors Protection Act (H.R. 1090) on October 27 in a mostly party-line vote of 245-186.

The DOL's Employee Benefits Security Administration (EBSA) issued proposed regulations in April that broadly update the definition of "investment advice" by extending fiduciary status to a wider array of advice relationships than is done by the existing rules.

H.R. 1090, sponsored by House Financial Services Committee member Ann Wagner (R-MO), would require the DOL to delay publishing a final rule until 60 days after the Securities and Exchange Commission (SEC) finalizes its rule relating to the standards of conduct applicable to brokers and dealers. The SEC requested information in a March 2013 notice but has not issued yet issued rules.

RECENT REGULATORY ACTIVITY

EEOC Proposes Wellness, Genetic Nondiscrimination Rules Under GINA Title II

The Equal Employment Opportunity Commission has released proposed regulations governing Title II of the Genetic Information Nondiscrimination Act (GINA) and its application to employer wellness programs.

Title II of GINA restricts how employers may collect and disclose genetic information and prohibits employers from using genetic information in employment decisions. In the absence of regulatory certainty on these matters, the EEOC had pursued litigation against some employers alleging that the employers were violating GINA and the Americans with Disabilities Act (ADA).

In April, the EEOC issued proposed regulations governing Title I of the ADA, providing guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/ or medical examinations. These regulations have not yet been finalized.

Of note, the new proposed rule states "Currently, employers face uncertainty as to whether providing an employee with an inducement if his or her spouse provides information about the spouse's current or past health status on a HRA will subject them to liability under Title II of GINA. This rule will clarify that offering limited inducements in these circumstances is permitted by Title II of GINA" if certain requirements of GINA have otherwise been met.

Noteworthy provisions of the proposed regulations include:

- Employers may request, require, or purchase genetic information as part of health or genetic services only when those services are reasonably designed to promote health or prevent disease. Per the preamble language, this means that the program must have a reasonable chance of improving the health of, or preventing disease in, participating individuals, and must not be overly burdensome, a subterfuge for violating GINA Title II or other law prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease. Collecting information on a health questionnaire without providing follow-up information or advice would not be reasonably designed to promote health or prevent disease.

- The employer cannot impose, as a condition of obtaining a reward, an overly burdensome *amount of time* for participation, require unreasonably intrusive procedures, or place significant costs related to medical examinations on employees.

- An employer may offer, as part of its health plan, an inducement to an employee whose spouse (1) is covered under the employee's health plan, (2) receives health or genetic services offered by the employer, including as part of a

wellness program; and (3) provides information about his or her current or past health status as part of a health risk assessment. However, there can be no inducement for the spouse providing his or her own genetic information, including results of his or her genetic tests.

- Inducements in exchange for current or past health status information about an employee's children (biological or not) are not permitted, although an employer may offer health or genetic services (including participation in a wellness program) to an employee's children on a voluntary basis and may ask questions about a child's current or past health status as part of providing such services.

- A health risk assessment, which may include a medical questionnaire, a medical examination (e.g., to detect high blood pressure or cholesterol), or both, must otherwise comply with the existing GINA II regulations in the same manner as if completed by the employee, including the requirement that the spouse provide knowing, voluntary, and written authorization when the spouse is providing his/her own genetic information, and the requirement that the authorization form describe the confidentiality protections and restrictions on the disclosure of genetic information. Separate authorization from the employee is not required.

- The total inducement to the employee and spouse may not exceed 30 percent of the total annual cost of coverage for the plan in which the employee and any dependents are enrolled. This includes any inducement for a spouse's current/past health status plus any other inducements to the employee as permitted under the ADA for the employee's participation in a wellness program that asks disability-related questions or includes medical examinations. The maximum share of the inducement attributable to the employee's participation in an employer wellness program is 30 percent of the cost of self-only coverage, which is consistent with the ADA proposed wellness regulations. The remainder of the inducement – 30 percent of the total cost of coverage for the plan in which the employee and any dependents are enrolled minus 30 percent of the cost of self-only coverage – may be provided in exchange for the spouse proving information to an employer wellness program(s) about his/her current or past health status.

- An employer cannot condition participation in a wellness program or an inducement on an employee (or the employee's spouse or other covered dependent) agreeing to the sale of genetic information or waiving unpermitted disclosure of genetic information.

- "Inducements" include both financial and in-kind incentives (e.g., time off awards and prizes).

Comments on the proposal are due December 29. The proposed regulations specifically request comment on any issues related to the proposed rule and several specific issues related to the use of inducements, application of the rule to electronically stored records,

whether the rules should apply only to wellness programs that offer more than "de minimis" rewards or penalties and whether employers offer (or are likely to offer) wellness programs outside of group health plans or insurance and the extent to which GINA regulations should allow inducements provides by such programs.

New ACA FAQ Guidance Addresses Preventive Care, Wellness, Mental Health

On October 23, the U.S. Departments of Labor (DOL), Health and Human Services (HHS) and Treasury issued a new Frequently Asked Questions (FAQ) document providing additional guidance on implementation of the Affordable Care Act (ACA) as well as the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the ACA. The 13 new questions and answers address certain preventive care requirements, the treatment of non-financial (or in-kind) incentives used in outcome-based wellness programs and disclosure requirements under the MHPAEA.

Under the ACA, non-grandfathered group health plans and health insurance coverage must cover certain preventive care services without the imposition of cost-sharing. The FAQs clarify requirements related to coverage of preventive care as related to lactation services, weight management services, colonoscopy screenings, contraceptive coverage and BRCA gene breast cancer screening. As explained in the FAQs:

- Plans and insurers are required to provide a list of lactation counseling providers within the plan network. For group health plans with provider networks that are subject to ERISA, the listing of providers can be furnished in a separate document accompanying the Summary Plan Description (SPD), as long as the SPD describes the provider network and states that provider lists are furnished automatically, without charge, as a separate document.
- Plans and issuers are not permitted to impose cost-sharing with respect to lactation counseling services obtained outside the network, if the network does not include lactation counseling providers.
- Lactation counseling must be covered without cost-sharing when it is performed by an provider acting with the scope of his or her license or certification under applicable state law and must be covered whether provided on an in-patient and or outpatient basis.
- The requirement to cover the rental or purchase of breastfeeding equipment without cost sharing extends for the duration of breastfeeding, provided the individual remains continuously enrolled in the plan or coverage.
- Group health plan or insurance coverage cannot contain a general exclusion for weight management services for adult obesity.
- A pathology exam on a polyp performed in connection with a preventive colonoscopy must be covered without cost sharing.
- Cost-sharing may not be imposed for a consultation by a specialist prior to a screening colonoscopy.

- Two methods are available to effectuate the religious accommodation for qualifying non-profit or closely-held for-profit employers who hold religious objections to providing contraceptive coverage.
- The FAQs further clarify which women must receive coverage without cost sharing for genetic counseling, and if indicated, testing for harmful BRCA mutations.

The new FAQ guidance also clarifies that if a group health plan provides rewards in the form of non-financial (or in-kind) incentives (for example, gift cards, thermoses, and sports gear) to participants who adhere to a wellness program, those non-financial incentives are subject to the wellness program regulations issued by the Departments.

Several clarifications related to disclosure requirements under the MHPAEA addressed the criteria for making medical necessity determinations. As explained in the FAQs, requests for copies of medical necessity criteria for both medical/surgical and mental health/substance use disorder benefits (including anorexia) – as well as any information regarding the processes, strategies, evidentiary standards, or other factors used in developing the medical necessity criteria and in applying them – as required by the MHPAEA may not be denied on the basis that the information is "proprietary" and/or has "commercial value." The FAQs further state that, although they are not required to do so, group health plans and issuers can provide a document that provides a description of the medical necessity criteria in layperson's terms. However, providing such a summary document is not a substitute for providing the actual underlying medical necessity criteria, if such documents are requested.

DOL Guidance Addresses Socially Responsible Investing

In Interpretive Bulletin 2015-01, to be published on October 26, the U.S. Department of Labor is providing guidance on the selection of "economically targeted investments" (ETIs) under ERISA's retirement plan fiduciary standard.

ETIs, also known as "socially responsible" investments, are those that are selected for the real-world benefits they create in addition to the investment return to the employee benefit plan investor. In a statement announcing the guidance, Labor Secretary Thomas E. Perez said that the DOL had been told that Interpretive Bulletin 2008-1 (IB 2008-1) unduly discouraged plan fiduciaries from considering ETIs.

In light of improved financial analysis, the DOL is clarifying its position by withdrawing Interpretive Bulletin 20 08-01 and replacing it with Interpretive Bulletin 2015-01, which reinstates the language of Interpretive Bulletin 1994-01.

This revision confirms DOL's view that "fiduciaries may not accept lower expected returns or take on greater risks in order to secure collateral benefits, but may take such benefits into account as 'tiebreakers' when investments are otherwise equal with respect to their economic and financial characteristics. The guidance also acknowledges that environmental, social, and governance factors may have a direct

relationship to the economic and financial value of an investment. When they do, these factors are more than just tiebreakers, but rather are proper components of the fiduciary's analysis of the economic and financial merits of competing investment choices."

Emerging Issue: State, Local Paid Leave Mandates

On September 7, President Obama issued an Executive Order establishing paid leave requirements for federal contractors. This initiative is representative of the president's stated policy goal to improve paid leave for all workers as well as efforts in various states and localities to impose similar mandates.

Congressional Democrats and Republicans have introduced legislation (the Healthy Families Act (H.R. 932 and S. 497) and the Working Families Flexibility Act (S. 233)) to require paid leave for private sector workers. During consideration of the federal budget resolution earlier this year, 61 Senators supported a federal paid leave mandate. Additional congressional votes to require paid leave are possible in the near future.

In the meantime, California, New Jersey, Oregon and Rhode Island have already enacted programs mandating paid leave, with similar bills being considered elsewhere (including Washington D.C.) and the U.S. Department of Labor recently issued a number of grants to states to study the matter further.

Common features of these state mandates include administration through state unemployment agencies, payroll taxes to finance the program (i.e. premium payments), qualification and permitted leave standards and benefit amounts. However, many of these mandates have unique features and multi-state employers may find the lack of uniformity to be a significant administrative challenge.

IRS Announces Changes in Retirement Plan, Health Account Limits for 2016

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

In News Release 2015-118, released October 21, the Internal Revenue Service (IRS) announced a series of retirement plan limits for Tax Year 2016. Section 415 of the Internal Revenue Code provides for dollar limitations on benefits and contributions under benefit plans, adjusted annually to keep pace with changes in the cost of living.

Most notably, the 401(k) contribution limit remains unchanged at $18,000 for 2016. Revenue Procedure 2015-53 sets forth additional inflation-adjusted items for 2016, including contribution limits for Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs).

It was also announced that the maximum amount of earnings subject to the Social Security tax (taxable maximum) will remain the same at $118,500.

RECENT JUDICIAL ACTIVITY

Nothing to report in this issue