BENEFITS INSIDER
A Member Exclusive Publication

Volume 146, October 2, 2015 (covering news from September 16-October 1, 2015)

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

Bipartisan Legislation to Repeal 40 Percent 'Cadillac' Tax Introduced in Senate, Along With Democrat Alternative

A bill to repeal the 40 percent excise tax on "high-cost" plans, enacted as part of the Affordable Care Act (ACA), was introduced by Senator Dean Heller (R-NV) on September 17. Among the original cosponsors of **the Middle Class Health Benefits Tax Repeal Act (S. 2045)** is Sen. Martin Heinrich (D-NM), making the effort bipartisan, matching a parallel effort in the U.S. House of Representatives.

As we have previously reported, Representative Joe Courtney (D-CT) has also introduced a Middle Class Health Benefits Tax Repeal Act (H.R. 2050), which now includes 145 cosponsors (including 14 Republicans). Courtney appeared at a media event on September 17 to unveil the Senate companion bill. Rep. Frank Guinta (R-NH) has introduced a similar measure, the Ax the Tax on Middle Class Americans' Health Plans Act (H.R. 879), which now features 91 Republican cosponsors. Together, a majority of members in the House of Representatives have co-sponsored one or both House bills.

While all three bills fully repeal the 40 percent tax, the Heller bill and the Courtney bill retain the requirement that employers must report the cost of employer-provided health coverage on the employee's form W-2. Heller's bill is patterned on Courtney's H.R. 2050, with some slight differences pertaining to the W-2 reporting requirement.

Heller's bill also specifically mentions Health Flexible Spending Accounts (FSAs) and Archer Medical Savings Accounts (MSAs) and Health Savings Accounts (HSAs) in its reference to employer-sponsored coverage, while Courtney's bill does not. Conversely, Courtney's bill specifies self-employed individual coverage as "applicable employer-sponsored coverage," while Heller's does not.

Meanwhile, a separate measure to repeal the tax was introduced in the Senate by a group of Democratic lawmakers on September 24, led by Senator Sherrod Brown (D-OH).

The **American Worker Health Care Tax Relief Act** is virtually identical to S. 2045. The principal difference is that the Brown bill includes a non-binding "sense of the Senate" resolution stating that "the revenue loss resulting from the repeal of the excise tax … should be offset to ensure that the [ACA] continues to reduce the deficit while improving health coverage for millions of Americans."

House Committees Move to Repeal Certain ACA Provisions as Part of Budget Reconciliation Process

In a series of "mark-up" sessions during the week of September 28, committees in the U.S. House of Representatives approved legislation repealing certain provisions of the Affordable Care Act (ACA), including the individual and employer mandates, the 40

percent so-called “Cadillac Tax” on health plans and the automatic enrollment requirement.

The joint budget resolution that was passed by the House and Senate in April included instructions for a budget “reconciliation” process. Under Senate rules, a reconciliation bill cannot be filibustered but, rather, would only require a simple majority (rather than 60 votes) for passage in the Senate. (Republicans only have a majority of 54 seats in the Senate.)

Reconciliation bills can only include provisions that have an effect on the federal budget. The joint resolution directs the committees of jurisdiction over health care (and retirement plans as well) to save $1 billion (each) over the ten-year budget period. Republicans have voiced their intention to use the reconciliation to dismantle the budgetary portions of the ACA.

Virtually all Democrats are expected to oppose the overall reconciliation measure and President Obama is likely to veto any legislation that repeals the ACA whole or in part. Consequently, the proposed legislation and committee activity may be little more than a political exercise. Nevertheless, the formal consideration of repeal language may be a significant step in focusing attention on the effort to repeal certain ACA provisions.

House Ways and Means Committee

In a “mark-up” session on September 29, the House Ways and Means Committee approved a reconciliation measure that repeals a number of key provisions of the Affordable Care Act (ACA). The committee voted 23-14, along party lines, to advance the committee report to the budget committee without amendment.

The Ways and Means reconciliation measure includes:

- 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 (the so-called “Cadillac Tax” on high-cost plans (Code Section 4980I)
- Repeal of the medical device tax (Code Section 4221)
- Repeal of the ACA’s Independent Payment Advisory Board, a panel of 15 outside experts tasked with recommending policies regarding Medicare.

A Joint Committee on Taxation (JCT) description and revenue estimate are now available.

Committee Chairman Paul Ryan (R-WI) called these "the five worst parts of Obamacare: two mandates, two taxes and one board of bureaucrats." He referred to these provisions as "the core of the law, and the core of the problem as we see it."

Thomas Barthold, JCT chief of staff, told the Ways & Means Committee members that if the aforementioned changes to the ACA were enacted the number of uninsured is estimated to increase by 14 million people. According to JCT estimates, the package reduces the deficit by $44.2 billion over ten years.

Representative Sander Levin (D-MI), the committee's ranking Democrat, called the exercise a politically motivated "waste of time," since virtually all Democrats are likely to oppose the overall reconciliation measure and because President Obama is likely to veto legislation that repeals the ACA whole or in part.

In response, Rep. Pat Tiberi (R-OH) acknowledged that these provisions of the ACA are unlikely to be repealed with President Obama in the White House, but suggested that forcing the president to exercise his veto power may compel him to negotiate on issues with bipartisan support, such as the 40 percent tax.

In his closing statement, Ryan expressed concern the 40 percent tax and its future effect on employees. "Look at the Cadillac Tax. How many people have you talked to in your constituency who see this tax coming and is really afraid of losing their health care benefits?" he asked his colleagues on the panel. "How many employees have been told, 'come 2018, you're losing your health care plan because there's no way we're paying 40 percent tax on top of this.'"

House Education and the Workforce Committee

In a 22-15 party-line vote on September 30, the House of Representatives Education and the Workforce Committee approved **reconciliation instructions** repealing the automatic enrollment provision of the Affordable Care Act (ACA).

Section 1511 of ACA mandates automatically enrolling new full-time employees into an employer's health plan unless the employee proactively declines or selects alternative coverage. Section 1511 applies to employers with 200 or more full-time workers. An updated estimate of this provision's budget effects is expected to be released soon.

Opening discussion of the legislation, Education and the Workforce Chairman John Kline (R-MN) said that repeal of the automatic enrollment provision would relieve employers and plan participants of a requirement "that is so convoluted and confusing that the Department of Labor (DOL) still hasn't figured out how to implement it."

Some Republican members, such as Representative Elise Stefanik (R-NY), characterized the change as a "technical drafting fix" to remove a source of forced duplicative coverage rather than a wholesale repeal attempt.

Rep. Steve Russell (R-OK) noted that the amendment does not deny any workers access to employer-sponsored coverage as offered and will additionally alleviate

administrative issues with determining who may already be included in another health care program.

Rep. Robert Scott (D-VA), the committee's ranking Democrat, countered that the vote was simply part of a larger Republican plan to repeal the health care law by "chipping away at it." He suggested that a better option to removing the mandate would be for the DOL to release regulations that avoid the aforementioned confusion of an employee being required to acquire a second form of coverage if already participating through another plan such as that of their parents or veterans' benefits.

Now that the Education and the Workforce Committee has approved its reconciliation instructions, the House Budget Committee will combine it with the Ways and Means instructions approved on September 29 and the Energy and Commerce Committee instructions also approved on September 30. (The Energy and Commerce Committee instructions did not include provisions directly related to employer-sponsored plans.) After the Budget Committee reviews and approves the combined measure as expected, House leadership could bring the bill to the floor as early as this month.

Another House Committee Examines DOL Fiduciary Rule

Congressional scrutiny of the U.S. Department of Labor's (DOL) proposed "conflict of interest" rule re-defining who is a retirement plan fiduciary continued on September 30 with a hearing before the House of Representatives Ways and Means Committee's Oversight Subcommittee (video here). The U.S. House of Representatives Committee on Financial Services subcommittees on Oversight and Investigations and Capital Markets and Government Sponsored Enterprises held a similar joint hearing on September 10.

As we have previously reported, 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.

Subcommittee chairman Peter Roskam (R-IL) opened the hearing by saying that the proposed rule, if finalized, would "make it extremely difficult for people to access financial advice without having to pay costly fees." He also argued that the economic study on which the DOL is relying is fundamentally flawed.

Roskam added, "One grave concern I have heard over and over again from my constituents is that the Administration's objective is to force Americans out of private sector IRAs and 401(k)s, which are generally working very well under current law, and into retirement controlled by the government."

The committee heard testimony from the following witnesses, who were – with one exception – generally very critical of the proposal:

- Bradford Campbell, counsel at Drinker Biddle & Reath LLP, told the panel that the DOL proposal "is fundamentally flawed, exceeds the Department's regulatory authority, and must be significantly revised." He also noted that the DOL's efforts to promote state-run private-sector retirement plans require more extensive congressional oversight.

- Paul Schott Stevens, president and CEO of the Investment Company Institute, agreed that the proposal is "deeply flawed," saying that it would increase costs and limit the ability of investors to receive guidance. He disputed the DOL's argument that commission-based and broker-sold arrangements are inherently inferior.

- Judy VanArsdale, a financial advisor with enRich Private Wealth Management, expressed support for the "best interest" standard in principle, but noted that compliance with the proposal's "Best Interest Contract" exemption would be challenging operationally and expose advisors like her to new liabilities.

- Kenneth Specht, financial services Professional, Agent, New York Life Insurance Company, said that the proposal, as written, "could hurt middle class consumers – like those I serve in Wisconsin – by cutting off access to affordable advice and a secure retirement." He noted specifically that the rule seems to equate "best interest" with "lowest cost," even when the cheapest products may not be in a client's best interest.

- Patricia Owen, president of FACES DaySpa (representing the U.S. Chamber of Commerce), highlighted elements of the proposal that would have a negative impact on small businesses and their employees.

- Damon Silvers, director of policy and special counsel at AFL-CIO, defended the proposal and supported DOL's assertion that "conflicts of interest" cost retirement savers $17 billion a year. He suggested that the "flow from Americans' retirement money to financial institutions and advisers as a result of conflicted advice is … a direct transfer from the American public to Wall Street."

Discussion generally broke down along party lines, with Republicans criticizing the proposal's shortcomings and Democrats emphasizing the need for non-conflicted investment advice. All of the witnesses, including those critical of the DOL proposal, expressed support for the fiduciary "best interest" standard and a reexamination of who qualifies as a fiduciary.

Most notably, during the question-and-answer period, Rep. Kristy Noem (R-SD) said her "biggest concern" was that "it specifically is targeted at small businesses …while creating a carve-out for large employers, giving them special treatment, and that's exactly the opposite thing that should be happening."

The deadline for formal comments to DOL on the proposal has passed. There is no timeline for finalization of the proposal.

RECENT REGULATORY ACTIVITY

IRS Issues Guidance on ACA Reporting, Finalizes 2015 Reporting Forms, Instructions

On September 17, the Internal Revenue Service (IRS) issued **Notice 2015-68**, providing guidance on the minimum essential coverage (MEC) reporting requirements under Internal Revenue Code Section 6055, as added by the Affordable Care Act (ACA).

In conjunction with the Notice, the IRS has also released final versions of 2015 Forms 1094-B, 1094-C, 1095-B and 1095-C, as well as instructions for completing the forms (Instructions for Forms 1094-B and 1095-B | Instructions for Forms 1094-C and 1095-C). These forms will be used to fulfill the requirements specified in final regulations implementing the reporting of MEC under Code Section 6055 and the reporting of health insurance coverage under Code Section 6056. These reporting requirements are first effective for 2015, with initial reporting to occur in early 2016.

Specifically, Notice 2015-68 states that the IRS will soon issue proposed regulations that will:

- require health insurance issuers to report, on Form 1095-B, coverage in catastrophic health insurance plans (as described in ACA Section 1302(e)) when enrolled in through an exchange. This requirement would not be effective until 2017 (for coverage provided in 2016).

- permit electronic delivery of statements reporting coverage under expatriate health plans unless the recipient explicitly refuses consent or requests a paper statement.

- allow filers reporting on insured group health plans to use a truncated taxpayer identification number (TTIN) to identify the employer on the statement furnished to a taxpayer.

- specify when a provider of minimum essential coverage is not required to report coverage of an individual who has other minimum essential coverage. Specifically, Notice 2015-68 suggests that if an employee is enrolled in both his or her employer's HRA and insured group health plan, the employer would *not* be required to perform minimum essential coverage reporting with regard to the HRA. This is welcome guidance in light of language in the draft Instructions for Forms 1094-B and 1095-B which suggested that employers might have to independently report coverage under the HRA, notwithstanding that the insurer would be also performing reporting with regard to the major medical coverage.

Notice 2015-68 also invites comments on issues relating to solicitation of taxpayer identification numbers (TINs) of covered individuals. It suggests that, pending additional guidance, reporting entities will not be subject to penalties for failure to report a TIN if (1) the initial solicitation is made at an individual's first enrollment, or if already enrolled

as of September 17, 2015, then the next open season; (2) the second solicitation is made at a reasonable time thereafter, and (3) the third solicitation is made by December 31 of the year following the initial solicitation. It also provides that there is no obligation to solicit a TIN from an individual whose coverage is terminated.

Comments on Notice 2015-68 may be submitted in writing on or before November 16, 2015.

- Form 1095-C: Employer-Provided Health Insurance Offer and Coverage is to be used to fulfill the requirement under Code Section 6055 that every applicable large employer (generally, an employer that employed on average at least 50 full-time employees or equivalents) file a return with the IRS that reports the terms and conditions of the health care coverage provided to the employer's full-time employees during the year.

- Form 1094-C: Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns is to be used for transmitting Form 1095-C.

- Form 1095-B: Health Coverage is used to fulfill the requirement under Code Section 6056 that every health insurance issuer, sponsor of a self-insured health plan, government agency that administers government-sponsored health insurance programs and other entities that provide minimum essential coverage to file annual returns reporting certain information for each individual for whom minimum essential coverage is provided and to provide a copy of the return to the individual.

- Form 1094-B: Transmittal of Health Coverage Information Returns is to be used to transmit Form 1095-B. However, employers (including government employers) subject to the employer shared responsibility provisions sponsoring self-insured group health plans generally will report information about the coverage in Part III of Form 1095-C instead of on Form 1095-B.

The revised forms and instructions reflect the following changes:

- Consistent with Notice 2015-68, an employer with a self-insured major medical plan and an HRA is required to report the coverage of an individual enrolled in both types of MEC under only one of the arrangements. An employer with an insured major medical plan and an integrated HRA is not required to report the HRA coverage if the individual is eligible for the HRA because the individual is enrolled in the insured major medical plan.

- When a former employee terminates employment, an offer of COBRA coverage should *not* be reported as an offer of coverage in all circumstances. This is a change from prior IRS guidance that suggested that an offer of COBRA coverage should be reported as an offer of coverage if the employee actually enrolled in COBRA.

- There is modified guidance for the Form 1095-C relating to when an employer should use the code specific tocertain relief relating to its participation in multiemployer plans under the employer shared responsibility rules.

- Employers must report their total employee count for each month on the Form 1094-C based on a consistent "snapshot" methodology. The methodology has been revised to allow employers to base their employee count on the number of employees as of the 12th day of each month.

- Entities can now truncate the EIN of an employer reported on Form 1095-B when furnishing the forms to recipients (but not on the Form 1095-B filed with the IRS). This is also consistent with Notice 2015-68.

- When an employer is determining if it is subject to the employer shared responsibility rules, it should disregard an employee for any month in which the employee is covered under TRICARE or Veterans Administration coverage, consistent with The Surface Transportation and Veterans Health Care Choice Improvement Act (STVHCC) of 2015.

CMS Provides New Guidance on Federally-Facilitated Marketplace Employer Notice Program

In a set of Frequently Asked Questions (FAQs) released on September 18, the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services provided guidance on the program under which employers will be notified of employees obtaining subsidized coverage in Federally-facilitated Marketplaces under the Affordable Care Act (ACA).

As explained in the FAQs, ACA and its implementing regulations require each Health Insurance Marketplace (or "exchange") to notify any employer whose employee was determined eligible for advance premium tax credits (APTCs) and cost-sharing reductions (CSRs) because the employee attested that he or she was neither enrolled in employer sponsored coverage nor eligible for employer coverage that is affordable and meets the minimum value standard. Federally-facilitated Marketplaces are those that are managed by the federal government in states that elected not to establish their own exchanges.

According to the FAQs, the Federally-facilitated Marketplaces are "phasing in" the employer notice program. Starting in the spring of 2016, the federally-facilitated marketplaces will send notices to employers if the employee received APTC for at least one month in 2016 and if the marketplace has a "complete employer address." For 2016, these exchanges will *not* notify employers when an employee who was benefiting from APTC or CSRs terminates Marketplace coverage.

The guidance briefly describes the timing and method of employer notices, as well as how an employer can appeal a notice and assert that it provides its employees access

to affordable, minimum value employer sponsored coverage or that its employees are enrolled in employer coverage.

PBGC Issues Final Rules for Multiemployer Plan Electronic Filing

In **final regulations** to be published on September 17, the Pension Benefit Guaranty Corporation (PBGC) set forth the requirements for multiemployer pension plans filing informational notices electronically with the agency.

Multiemployer defined benefit plans will be required to file the following notices with PBGC:

- Notices of termination
- Notices of insolvency and of insolvency benefit levels (including after mass withdrawal)
- Applications for financial assistance following mass withdrawal

The final regulations will be effective October 17. They apply only to filings with the PBGC and do not apply to filings with any other agency or notices to participants.

PBGC Projects Improvement in Single-Employer, Multiemployer Pension Plan Programs

The Pension Benefit Guaranty Corporation (PBGC) issued its Fiscal Year 2014 Projections Report on September 28, revealing that the financial condition of the single-employer pension insurance program "continues to be likely to improve" and "is highly unlikely to run out of funds in the next 10 years." Indeed, the agency reported that of the more than 5,000 different simulations performed, none showed the single-employer program running out of money within 10 years.

While the official financial position of PBGC and its programs will not be announced until the agency's annual report is issued later this year, PBGC projects that the program's reported 2014 deficit of $19.3 billion would shrink to, on average, $4.9 billion at FY 2024 (measured in present value). The report notes that it does not take into account "risk transfer activity."

The PBGC also announced modest improvement in its projections for the multiemployer pension program, estimating that the program's 2014 deficit of $42.4 billion will decrease to, on average, $28 billion (measured in present value) for FY 2024. However, the agency also projects that the multiemployer program's assets will be depleted in 2025, a slight improvement over the prior projection that the program would become insolvent starting in 2022.

The PBGC attributes the multiemployer plan improvements to the increased premiums and other measures permitted under the Multiemployer Pension Reform Act of 2014 (MPRA)

The overall positive report should lessen any potential momentum for increases in premiums (at least for the single employer program). But concerns, especially about the long-term status of some multi-employer plans, still persist. Moreover, since projected surpluses or deficits are particularly sensitive to changes in interest rates and the stock market, the projections from year to year can change dramatically.

GAO Examines State-Run Private-Sector Retirement Plans

The U.S. Government Accountability Office (GAO) recommended that Congress consider providing states with additional flexibility under ERISA to enact private-sector retirement savings initiatives in a recently released report. The U.S. Department of Labor has already indicated that it will issue a proposed rule on state programs by the end of 2015.

The report, Retirement Security: Federal Action Could Help State Efforts to Expand Private Sector Coverage, had been requested by Senator Patty Murray, who is the ranking Democrat on the Senate Committee on Health, Education, Labor and Pensions. GAO's report examined:

- recent estimates of retirement coverage, including access and participation, as well as characteristics of workers who lack coverage.
- strategies used by states and other countries to expand coverage.
- challenges states could face given existing federal law and regulations.

GAO calculated that 54 percent of workers currently participate in workplace retirement plans, with the majority of those workers participating in the plan. However, 84 percent of those not participating lacked access because they either worked for employers that did not offer programs or were not eligible for the programs that were offered.

GAO suggested that existing and ongoing state initiatives to expand coverage – such as those in California and Illinois – do so by "encouraging or requiring workplace access, automatic enrollment, financial incentives, and program simplification."

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.