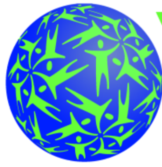

BENEFITS INSIDER
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WEB's ***Benefits Insider*** is a bi-monthly member exclusive publication providing the latest developments from Washington, DC, on matters of interest to employee benefits professionals. The content of this newsletter is being provided 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, Senate Approve Transportation Funding Measure with Extension of Section 420 Transfers

On July 30, the United States Senate passed H.R. 3236, a three-month extension of the highway fund, which had been passed by the House of Representatives on July 29. The legislation now moves to the president for his signature. The revenue provisions in H.R. 3236 remain the same as under the previously-passed House of Representatives' five-month extension of the highway fund (H.R. 3038). Among the revenue raisers for the bill is an extension of the Internal Revenue Code Section 420 transfers of excess defined benefit pension plan assets to retiree health and life insurance accounts. Under current law this provision would expire in 2021. The measure extends a provision that was included in the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012. At that time, the Section 420 transfers were extended through the end of 2021. The highway bill approved last week would further extend it through the end of 2025.

Section 420, originally enacted in 1990, permits the transfer of assets from plans with assets in excess of either 120 percent or 125 percent of liabilities (depending on the type of transfer) to pay for retiree health care costs. Section 420 transfers can help facilitate the continuation of retiree health insurance, without negative implications for pension funding, since it only applies to substantially overfunded plans. The expansion of Section 420 to permit transfers to pay the costs of retiree life insurance also provides additional financial security for seniors.

Senate Finance Committee Approves Tax "Extenders" Legislation

The U.S. Senate Finance Committee approved legislation in a 23-3 vote on July 21 to extend a number of expiring tax breaks, including two provisions that affect employee benefits.
The tax provisions affecting individuals and employers were given a short-term extension in December 2014 with the passage of The Tax Increase Prevention Act. The current legislation would provide for a two-year extension of the provisions.

Expiring tax provisions that affect employee benefits include:

- *Mass transit benefit parity:* The American Taxpayer Relief Act of 2012 (H.R. 8) provided for an increase in the pre-tax allowance for mass transit expenses, making it equal to the benefit provided for parking ($245 per month). The legislation would extend this parity treatment through the end of 2016.

- *Distributions from Individual Retirement Plans for Charitable Purposes:* The expiring provision allows taxpayers age 70 ½ and older to make a tax-free distribution from an IRA of up to $100,000 to a 501(c)(3) organization and simultaneously satisfy the minimum required distribution rules. The legislation would extend the provision through the end of 2016.

RECENT REGULATORY ACTIVITY

IRS Releases Second Notice Requesting Comment on Implementation Approaches to 40 Percent Excise Tax

On July 30, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published Notice 2015-52, their second notice requesting comment on possible approaches for implementation of Code section 4980I, the 40 percent excise tax to be imposed on high-cost health coverage under the Patient Protection and Affordable Care Act (PPACA). Issues addressed in Notice 2015-52 include the identification of the taxpayers who may be liable for the excise tax, employer aggregation, the allocation of the tax among the applicable taxpayers, and matters concerning payment of the applicable tax. Additional issues related to the cost of applicable coverage and age and gender adjustment are also addressed. The deadline for comments to be submitted to the IRS is October 1, 2015.

Starting in 2018, PPACA will impose a nondeductible 40 percent tax on health plan costs exceeding certain thresholds ($10,200 for self-only, $27,500 for family). The tax was included in PPACA as a "revenue raiser" to pay for other aspects of the law, including federal subsidies for coverage for low-income individuals, and also to address perceived over-consumption of health care coverage.

The IRS previously issued Notice 2015-16, requesting comment on issues related to defining applicable coverage and determining cost of coverage for purposes of the 40 percent tax. Notice 2015-16 also indicated that a second notice would be issued prior to publication of proposed regulations.

Notice 2015-52 requests specific comments on issues and possible approaches related to:

Liability for the 40 percent tax: The statute provides that the "coverage provider" is liable for any applicable tax. Under the statute, in the case of applicable coverage provided under an insured group health plan, the coverage provider is the health insurance issuer. With respect to coverage under a Health Savings Account (HSA) or an Archer Medical Savings Account (Archer MSA), the coverage provider is the employer. For all other applicable coverage, the coverage provider is "the person who administers the plan benefits," which is not defined in the statute.
Notice 2015-52 sets out two alternative approaches for determining the "person who administers the plan." Under one approach, the person who administers the plan benefits would be the person responsible for performing the day-to-day functions,, such as receiving and processing claims for benefits, responding to inquiries, or providing a technology platform for benefits information. Treasury and IRS anticipate that this person generally would be a third-party administrator for benefits that are self-insured, except in the rare circumstance in which the employer or plan sponsor performs these functions, or owns the entity performing these functions.

Under the second approach, the person who administers the plan benefits would be the person who has the ultimate authority or responsibility under the plan or arrangement with respect to the administration of the plan benefits (including final decisions on administrative matters), regardless of whether that person routinely exercises that authority or responsibility. Comments are requested on whether the person who administers the plan benefits would be easy to identify under the second approach.

Employer Aggregation: Treasury and IRS invite comments on the practical challenges presented by the application of employer aggregation rules including for employees taken into account for the age and gender adjustment; adjustment for employees in high risk professions or who repair and install electrical or telecommunications lines.

Cost of Applicable Coverage: Issues related to the taxable period, determination period, and exclusion from cost of applicable coverage of amounts attributable to the 40 percent tax are discussed. This latter issue is of particular concern since, as explained in the Notice, if a person other than the employer is the coverage provider (for example an insurer or Third Party Administrator), that person may pass through all or part of the amount of the tax to the employer in some instances. If the coverage provider does pass through the excise tax and receives reimbursement for the tax, the reimbursement will be additional taxable income to the coverage provider. Treasury and IRS are considering whether some or all of the income tax reimbursement could be excluded from the cost of applicable coverage. Notice 2015-52 also sets out approaches for:

- Allocation of contributions to HSAs, Archer MSAs, Flexible Savings Accounts (FSAs), Health Reimbursement Accounts under which contributions would be allocated on a pro-rata basis over the plan year, regardless of timing of contributions during that period; and
- A possible safe harbor related to FSAs with Employer Flex Credits.

According to Notice 2015-52, IRS and Treasury anticipate formulating and publishing tables to be used for facilitating and simplifying calculation of the age and gender adjustment. The Notice 2015-52 also invites further comments on prior Notice 2015-16, specifically noting commenters' concerns about the interaction between Code section 4980H, which imposes employer shared responsibility penalties and the 40 percent tax.

After considering the comments on both notices, Treasury and IRS intend to issue proposed regulations implementing the 40 percent tax. The proposed regulations will provide further opportunity for comment, including an opportunity to comment on the issues addressed in the preceding notices.

Agencies Release Updated Static Mortality Tables for Defined Benefit Plans for 2016

On July 31, the Treasury Department and Internal Revenue Service (IRS) issued Notice 2015-53 regarding updated static mortality tables for defined benefit pension plans for 2016. The Notice specifies updated mortality tables to be used for purposes of calculating pension funding requirements, benefit restrictions, lump-sum calculations, Pension Benefit Guaranty Corporation (PBGC) premium payments, and other related purposes.

The updated tables for 2016 do not reflect the Society of Actuaries' (SOA) RP-2014 Mortality Tables Report and the MP-2014 Mortality Improvement Scale published late last year. Those reports are controversial because many observers believe they overstate mortality improvement, and would thus inflate funding liabilities, lump sums, and PBGC premiums.

IRS Revises Determination Letter Program for Individually Designed Qualified Plans

On July 21, The Internal Revenue Service (IRS) released Announcement 2015-19, significantly paring back the Employee Plans Determination Letter Program for individually designed defined contribution and defined benefit qualified retirement plans. Effective January 1, 2017, the IRS will eliminate the staggered five-year remedial amendment cycles for these plans because of limited agency resources.

The program will instead focus on submissions of initial plan qualification and qualification upon plan termination. For certain individually designed plans participating in remedial amendments on the current five-year cycle, a transition rule indicates the extension of this period may be moved but will end no later than December 31, 2017. Lastly, the IRS requests comments on specific issues related to the outlined changes that will be due by October 1, 2015.

Of particular note, Announcement 2015-19 states that, with its release, the IRS will no longer accept “off-cycle” determination letter applications except for new plans as defined in Section 14.02(2) of Revenue Procedure 2007-44 and for terminating plans. An “off-cycle” submission of an amendment would be one occurring at any time other than during the 12-month period ending on January 31 of the last year of the plan’s remedial amendment cycle. This loss of flexibility for sponsors to address remedial plan amendments and the resulting increased risk to plan qualification may be addressed in the future by the IRS “providing model amendments, not requiring certain plan provisions or amendments to be adopted if, and for so long as, they are not relevant to a particular plan…or expanding plan sponsors’ options to document qualification requirements through incorporation by reference.”

Other limited circumstances in which the IRS would accept “off-cycle” plan determination letters may be determined going forward. Announcement 2015-19 requests comments on four related issues: (1) other changes that could be made to the remedial amendment period for individually designed plans; (2) additional considerations related to the current interim amendment requirement; (3) suggestions for guidance to plan sponsors converting individually designed plans to pre-approved plans; and (4) suggestions of modifications to other IRS programs in order to facilitate the changes outlined in 2015-19.

This change will shift more burden to sponsors in ensuring plan qualification, particularly when there are plan amendments and it increases compliance challenges for companies, particularly with respect to mergers and acquisitions.

PBGC Proposes Changes to Annual Financial, Actuarial Information Reporting Requirements

On July 27, the Pension Benefit Guaranty Corporation (PBGC) published a proposed rule to amend its Annual Financial and Actuarial Information Reporting regulation under section 4010 of ERISA and incorporate applicable provisions from the 2012 changes to law made by the Moving Ahead for Progress in the 21st Century (MAP-21) Act and the Highway Transportation and Funding Act of 2014 (HATFA).

The proposed regulation will change the financial information filing requirements that defined benefits plan sponsors must follow. ERISA Section 4010 authorizes the PBGC to require certain underfunded defined benefit plans to report on specific financial and actuarial information. The

agency said the changes were needed because the current rule "results in critical information not being reported. As a result, PBGC's ability to timely intervene to protect potentially troubled plans, participant benefits, and the pension insurance system is significantly undermined."
Under current law, "4010 disclosures" must be filed regarding any defined benefit plan (as measured on a controlled group basis) that is less than 80 percent funded, or has missed contributions or with funding waivers of greater than $1 million.

Under the proposed rule, the requirement to file based on the 80 percent funding threshold would be waived if underfunding is less than $15 million, but only for plans of 500 or fewer participants. The requirement to report based on missed contributions, or on the basis of a funding waiver of more than $1 million, is waived if those amounts were reported to the agency in accordance with its regulation under ERISA Section 4043.That provision of ERISA requires the reporting of a variety of corporate and plan events, by the due date for the Section 4010 filing. In order to avoid the requirement to file, large defined benefit plans could consider making additional contributions or waiving their credit balances.

The proposed effective date of the change would be for information years beginning after December 31, 2015. The proposed regulation invites comments due to the PBGC by September 25, 2015.

Trustees Unveil Reports on Social Security, Medicare Trust Funds

The Trustees of the Social Security and Medicare Trust Funds released the 2015 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance (OASI) and Federal Disability Insurance (DI) Trust Funds and the 2015 Medicare Hospital Insurance (HI) Trust Fund report on July 22.

The combined cost of Social Security and Medicare in 2014 was 8.5 percent of GDP, up from 8.4 percent in 2013. The Trustees project an increase to 11.4 percent of GDP by 2035 and to 12.2 percent of GDP by 2089. Medicare's relative cost (3.5 percent of GDP) is expected to rise gradually from 71 percent of the cost of Social Security (5.0 percent of GDP) in 2015 to about 97 percent by 2089.

Additionally, the reports notes:

- The Social Security Disability Insurance Trust Fund is projected to be insolvent by late 2016 and urgently requires corrective action to avoid reductions and interruptions to benefit payments to 10.9 million disabled Americans.
- The combined OASDI funds will be depleted by 2034, an improvement from last year's report by one year.
- The Medicare Trust Fund will be depleted by 2030, which is the same time frame as was projected last year. A significant portion of Medicare funding must, however, be kept automatically solvent by statutory design through general revenue transfers.

Again this year, the Trustees concluded their report by noting, "Lawmakers should address the financial challenges facing Social Security and Medicare as soon as possible. Taking action sooner rather than later will permit consideration of a broader range of solutions and provide more time to phase in changes so that the public has adequate time to prepare."

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.