BENEFITS INSIDER
A Member Exclusive Publication

Volume 156, March 1, 2016 (covering news from February 16-29, 2016)

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 2
Nothing to report in this issue. 2

RECENT REGULATORY ACTIVITY 2
Fiduciary Rule Update: Senate Committee Releases Report 2
IRS Proposes New SBC Templates, Instructions, Related Materials 2
DOL Moves to Enforce Paid Leave Requirements for Federal Contractors 3

RECENT JUDICIAL ACTIVITY 4
Supreme Court Upheaval: Implications for Benefits Cases? 4

RECENT LEGISLATIVE ACTIVITY

Nothing to report in this issue.

RECENT REGULATORY ACTIVITY

Fiduciary Rule Update: Senate Committee Releases Report

With the Obama Administration getting closer to finalization of its regulatory project expanding fiduciary duty for providers of investment advice, Senator Ron Johnson (R-WI), chairman of the Senate Homeland Security and Governmental Affairs Committee, released a troubling report detailing the Labor Department's process in handing down its proposed fiduciary rule.

The U.S. Department of Labor's (DOL) proposed regulations would broadly expand the definition of "investment advice" by extending fiduciary status to a wider array of advice relationships than is done by the existing rules. The DOL has submitted its final rule to the White House Office of Management and Budget (OMB), meaning that the rule could be finalized in the next few weeks.

Johnson's report, The Labor Department's Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers, was based on correspondence between the DOL and the Security and Exchange Commission, among other parties. The report paints a very contentious process within the executive branch of the federal government and strongly suggests that the rollout and justification of the rule was flawed. Based on the contents of the report, it appears likely that the rule will be finalized without significant changes from what was initially proposed.

While the report is unlikely to prompt any formal action by the legislative branch, it may compel lawmakers to put pressure on DOL and OMB to extend its review of the rule.

IRS Proposes New SBC Templates, Instructions, Related Materials

With the release of a formal notice and updated collateral materials, the U.S. Department of Labor moved closer to finalizing the last remaining elements of the Summary of Benefits and Coverage (SBC) notice requirements under the Affordable Care Act (ACA).

The SBC is a brief document, to be provided by group health plans and health insurance coverage in the group and individual markets, intended to provide consumers with consistent and comparable information regarding health plan benefits and coverage. Final regulations implementing these requirements were issued in June 2015, while finalization of related documents and forms was left for later (as indicated in a Frequently Asked Questions document released by DOL in March 2015.)

On February 25, the DOL issued revised versions of the templates, instructions and related materials, based on consultation with the National Association of Insurance Commissioners (NAIC) and other stakeholders:

- Summary of Benefits and Coverage (SBC) Template | MS Word Format
- Sample Completed SBC | MS Word Format
- Instructions for Completing the SBC - Group Health Plan Coverage
- Instructions for Completing the SBC - Individual Health Insurance Coverage
- Why This Matters language for "Yes" Answers
- Why This Matters language for "No" Answers
- HHS Information For Simulating Coverage Examples
- HHS Coverage Example Calculator and Related Information
- Uniform Glossary of Coverage and Medical Terms

According to the earlier FAQ document, these documents "will apply to coverage that would renew or begin on the first day of the first plan year (or, in the individual market, policy year) that begins on or after January 1, 2017 (including open season periods that occur in the Fall of 2016 for coverage beginning on or after January 1, 2017)." However, the DOL has informally stated that the effective date will be April 2017, instead of January, which will give plans more time to adopt the changes. The DOL is expected to issue guidance to that effect.

A **formal DOL notice and information collection request** accompanying the release of these documents requests approval of the documents by the White House Office of Management and Budget and solicits public comments through March 28.

DOL Moves to Enforce Paid Leave Requirements for Federal Contractors

As part of President Obama's stated policy goal to improve paid leave for all workers, the U.S. Department of Labor (DOL) is moving to require all federal contractors to provide paid leave to their employees.

DOL released **a notice of proposed rulemaking** on February 25, requiring parties that contract with the federal government to "provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care." The rule effectively codifies the president's September 7, 2015, Executive Order, which aimed to "improve the health and performance of employees of federal contractors and bring benefits packages at federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees."

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 or allow paid leave for private sector workers.

In the meantime, California, Connecticut, Oregon and Massachusetts 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 and cities to study the matter further.

Common features of these state mandates include payroll taxes to finance the program, qualification and permitted leave standards and benefit amounts. However, many of these mandates have unique features and multi-state employers find the lack of uniformity to be a significant administrative challenge.

IRS Advises Form 5500, 5500-SF Filers to Skip New Compliance Questions
The 2015 Form 5500 annual return/report includes a series of new, additional compliance questions for filers, though the agencies have already stated that the new compliance questions will be optional for the 2015 plan year. The agency has now asked filers not to answer these compliance questions.

The Form 5500 series is used to satisfy annual reporting requirements under ERISA and the Internal Revenue Code. In revised instructions for Form 5500, released on February 24 by the U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC), filers are explicitly advised not to answer these new questions (because the questions had not been approved by the OMB):

At the bottom of Page 1 and into Page 2, the instructions state:

“New Lines 4o, 4p 6c, and 6d were added to Schedules H and I. The IRS has decided not to require plan sponsors to complete these questions for the 2015 plan year and plan sponsors should skip these questions when completing the form.

"New Part VII (IRS Compliance Questions) was added to Schedule R for purposes of satisfying the reporting requirements of section 6058 of the Code. The IRS has decided not to require plan sponsors to complete these questions for the 2015 plan year and plan sponsors should skip these questions when completing the form.”

RECENT JUDICIAL ACTIVITY

Supreme Court Upheaval: Implications for Benefits Cases?

The death of U.S. Supreme Court Justice Antonin Scalia, and the apparent congressional gridlock over whether (and how) to replace him in 2016, will have significant repercussions for pending and potential cases heard and decided by the high court – including cases with implications for employer-sponsored benefit plans.

As has been widely reported, Senate Majority Leader Mitch McConnell (R-KY), who controls the agenda in that chamber, has said that he will not schedule a Senate vote to confirm a new justice in the final year of President Obama’s tenure. If this strategy holds, the court will be limited to eight justices for more than a year, assuming a new

president would make a nomination shortly after taking office next January. The eight remaining justices are considered to be evenly split ideologically on a number of issues, making multiple four-to-four votes on a range of legal matters a distinct possibility. Given these circumstances, it is important to remember:

- If the votes are equally divided on a case, the Supreme Court would likely affirm the ruling of the circuit court of appeals from which the case arises. The Supreme Court judgment would have no precedential weight and any split in the circuit courts of appeal that had prompted the court to hear the case would remain unresolved. It is very possible in such an instance that the Supreme Court would again agree to hear the case if the same question were presented in the future, after a ninth justice is confirmed. Alternatively, the court could refrain from issuing any judgment at all in a case that is divided four-four, and simply schedule the case for re-argument after a ninth justice is confirmed. A third possibility, in some cases at least, is that the justices will be able to form a majority around a narrower holding than was previously contemplated. The justices' votes are not "final" until the court's decision is issued.

- Justice Scalia's passing could have an impact on whether or not the Supreme Court will grant *certiorari* (i.e. agree to hear a case) in certain instances. At least four justices need to agree to review a case. Where Justice Scalia would have been the required fourth justice to do so, the case will not be heard. There are likely to be at least a few employee benefits cases in the coming months that the Supreme Court will be asked to agree to consider.

- Cases for which oral arguments have already been held during the Supreme Court's current term, but in which no decision has yet been rendered, will not need to be heard again (though, as noted above, the justices may opt to have some re-argued). If Justice Scalia was assigned to write the majority opinion in a case that is pending, that opinion will be assigned to a different justice.

The most significant employee benefits case currently pending before the Supreme Court is *Gobeille v. Liberty Mutual Insurance Company*, for which the Court heard oral arguments on December 2, 2015. In that case, the U.S. Court of Appeals for the Second Circuit held that ERISA preempts a Vermont law that requires all health plans, including self-insured plans, to file informational reports (including claims data) for the state's all-payer claims database.

The Court is expected to render a decision in *Gobeille v. Liberty Mutual* by June 2016, but if Justice Scalia's passing affects the disposition of the case, its resolution will be subject to the possibilities discussed above – that is, a non-precedential judgment of affirmance or re-argument.