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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 GOP Task Forces Working on Policy Proposals Addressing Benefit Plans

Several task forces formed by Republican leaders in the U.S. House of Representatives are developing policy proposals for release later this year, with at least some likely to be released prior to the Republican National Convention in mid-July. A few of the task forces will make recommendations regarding employer-sponsored health and retirement plans.

While Congress will not pursue broad policy reform for the remainder of 2016, the proposals advanced by these task forces are intended – in tandem with the ultimate official Republican campaign platform – to set forth an overarching policy philosophy and game plan for the next Congress and a potential Republican presidential administration. Depending on the details, it is possible efforts could be made to consider select elements of the task force proposals prior to the end of this year.

The six task forces, organized by Speaker of the House Paul Ryan (R-WI), are:

- National Security
- Tax Reform
- Reducing Regulatory Burdens
- Health Care Reform
- Poverty, Opportunity, and Upward Mobility
- Restoring Constitutional Authority

These task forces are currently seeking input from rank-and-file Republican members and public stakeholders. The following groups are likely to address employee benefit matters:

Health Care Reform
The Health Care Reform Task Force has been asked to offer a plan to repeal and replace the Affordable Care Act (ACA) "with a patient-centered system that gives patients more choice and control, increases quality, and reduces costs."

Based upon previously-released GOP "repeal-and-replace" proposals, as well as discussions with those working on the current task force effort, the House of Representatives GOP's vision is likely to consider giving more authority to states to pursue health reform initiatives and, from a financing perspective, to curtail (or eliminate) the tax exclusion for employees of employer-sponsored health coverage and to make available tax credits to individuals to purchase coverage.

The Health Care Reform Task Force consists of Budget Committee Chairman Tom Price (R-GA), Education and the Workforce Committee Chairman John Kline (R-MN), Energy & Commerce Committee Chairman Fred Upton (R-MI) and Ways & Means Committee Chairman Kevin Brady (R-TX).

Tax Reform
The Tax Reform Task Force has been asked to outline a plan for reducing tax rates, removing "special interest carve-outs" and making the tax code simpler and fairer.

This group could possibly address the employer-sponsored health insurance coverage tax exclusion (although it appears more likely to be handled under the auspices of the Health Care Reform Task Force). The Tax Reform Task Force is expected to address incentives for employer-sponsored retirement plans. If the task force elects to follow a "dynamic scoring" approach (which, unlike the "static scoring" method that Congress has traditionally used, forecasts the economic reactions to incentives created by policy) it should help demonstrate the value of employer-sponsored retirement plans.

The Tax Reform Task Force is staffed by Brady, whose Ways and Means Committee holds jurisdiction over all tax legislation.

Poverty, Opportunity, and Upward Mobility
The Poverty, Opportunity, and Upward Mobility Task Force is developing proposals that aim to "strengthen our safety net and reform educational programs," and help people transition from welfare to work.

Health and retirement policy is likely to be addressed in this task force as well, particularly in relation to health and financial wellness programs, lifetime income options and the interplay between the employer-sponsored system and entitlement programs such as Social Security, Medicare and Medicaid.

In addition to Brady, Kline and Price, Agriculture Committee Chairman Mike Conaway (R-TX) and Financial Services Committee Chairman Jeb Hensarling (R-TX) also serve on this task force.

Reducing Regulatory Burdens
The Reducing Regulatory Burdens Task Force has been asked to design a regulatory system that "reduces bureaucracy and eases the burden on small businesses and job creators, while still protecting the environment, public safety, and consumer interests."

The Reducing Regulatory Burdens Task Force consists of Upton, Hensarling, Conaway, Judiciary Committee Chairman Bob Goodlatte (R-VA), Natural Resources Committee Chairman Rob Bishop (R-UT), Oversight & Government Reform Committee Chairman Jason Chaffetz (R-UT), Science, Space, and Technology Committee Chairman Lamar Smith (R-TX), Small Business Committee Chairman Steve Chabot (R-OH) and Transportation & Infrastructure Committee Chairman Bill Shuster (R-PA).

House Committee Presses DOL Secretary on Fiduciary Project

U.S. Department of Labor (DOL) Secretary Thomas Perez appeared before a U.S. House of Representatives Education and the Workforce Committee hearing on March

16, where he was asked numerous questions about the ongoing regulatory project to redefine "fiduciary" under ERISA.

DOL proposed regulations, which are expected to be finalized very shortly, 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 a final rule to the White House Office of Management and Budget (OMB), meaning that the rule could be finalized imminently.

During discussion of the DOL's current policies and priorities, a number of lawmakers raised concerns about the proposal:

- Committee Chairman John Kline (R-MN) asserted that the fiduciary rule will cause many low-and middle-income families to lose access to affordable retirement advice and result in fewer small businesses offering retirement plans. He touted the Strengthening Access to Valuable Education and Retirement Support (SAVERS) Act (H.R. 4294) and the Affordable Retirement Advice Protection (ARAP) Act (H.R. 4293) as a preferable alternative and "a strong foundation to address a shared priority if the [DOL] will abandon its flawed, partisan proposal."

- Ranking Democratic member Bobby Scott (D-VA) asked when the final rule would be completed and asked Perez why the bipartisan bills referenced by Kline are insufficient. Perez responded he hopes to bring the rule "to conclusion" as soon as OMB completes its review, sometime in the near future. He described the "inclusive process" that led to the final rule and said the department has moved in a very deliberate way. He said that H.R. 4294 and H.R. 4293 move the status quo "backwards" and he believes the DOL needs to move forward.

- Health, Employment, Labor, and Pensions (HELP) Subcommittee Chairman Phil Roe (R-TN) expressed his disappointment with the DOL's opposition to the bipartisan bills. Roe said the bills will make the best interest standard a reality without prohibiting advice and the DOL proposal will make it more difficult for working families to save for retirement. Roe quoted a recent Washington Post editorial (which stated that the proposed exemption is unworkable), a recently released U.K. Financial Conduct Authority study (which concluded that steps need to be taken to make provision of advice and guidance to the mass market more cost effective) as well as a Morningstar report (which recently estimated the DOL rule would cost $2.4 billion every year in compliance costs and said wealth management firms would no longer serve low-income savers holding low-balance IRAs).

- Representative Matt Salmon (R-AZ) commented that he has never seen a proposed rule that sparked as much constituent outcry as the fiduciary rule. He expressed concern that lower-income investors will not be to obtain affordable investment advice and said he hopes that DOL is taking that into

consideration. Perez assured him that there is a shared interest in making sure that everyone has access to retirement advice.

- Representative Tim Bishop (R-MI) discussed comments that were sent to DOL regarding variable annuity contracts. He said that many of those comments suggested keeping variable annuities within prohibited transaction exemption 84-4 that has been in effect for several decades. He said if this is not something that the DOL is considering, it is important that the final rule clarify the treatment of variable annuities under the best interest contract exemption and permit the use of commissions and sales of proprietary products without imposing unnecessary conditions.

Senate Committee Approves Mental Health Bill with Enhanced Parity Enforcement

Bipartisan legislation to reform mental health treatment was unanimously approved by the Senate Health, Education, Labor and Pensions (HELP) Committee on March 16, 2016, including an amendment that would further strengthen the enforcement of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

The Mental Health Reform Act (S. 2680) is sponsored by HELP Committee Chairman Lamar Alexander (R-TN), HELP ranking Democratic member Patty Murray (D-WA) and Senators Bill Cassidy (R-LA) and Chris Murphy (D-CT). The version approved by the committee was a "manager's amendment," updated from the previous draft version of the legislation. The text of the manager's amendment is not yet available.

Along with the manager's amendment, the committee approved an amendment offered by Senator Elizabeth Warren (D-MA) to strengthen enforcement of the mental health parity law. According to a description read aloud by Alexander, it would:

- Direct the office of the Inspector General of the U.S. Department of Health and Human Services to issue "compliance program guidance" providing examples of compliance and non-compliance with existing mental health parity laws. The guidance would be designed to "provide health plan patients and law enforcement with clear examples of how the [MHPAEA] should be applied and enforced."

- Require HHS to issue new guidance with examples of methods health plans may use for disclosing information to patients and making coverage determinations.

- Require HHS to produce an action plan for improved state and federal coordination of enforcement of existing mental health parity laws.

Currently there is no timetable for consideration of the measure on the Senate floor.

Legislation Would Permit Limited Nontaxable Student Loan Repayment Benefit

Bipartisan legislation introduced in the U.S. Senate and House of Representatives would allow employers to provide workers with a nontaxable student loan repayment benefit of up to $5,250 per year.

Under current law, employer contributions to student loan repayment are counted as taxable income. The Employer Participation in Repayment Act (S.2457), introduced in the Senate by Mark Warner (D-VA) and the Employer Participation in Student Loan Assistance Act (H.R. 3861), introduced in the House by Representative Rodney Davis (R-IL), would amend Internal Revenue Code Section 127 to allow up to $5,250 per year in employer contributions toward student debt to be considered as nontaxable income. S. 2457 and H.R. 3861 have been referred to the Senate Finance Committee and the House Ways and Means Committee, respectively, for further consideration. The measures are not expected to be seriously considered this year.

RECENT REGULATORY ACTIVITY

ERISA Advisory Council to Examine Plan-to-Plan Transfers, Cybersecurity in 2016

In a March 16 open meeting, the ERISA Advisory Council (EAC) decided on two discussion topics for 2016: plan-to-plan transfers of retirement assets and cybersecurity for retirement and health plans.

The EAC is a group of benefits experts established by Congress and appointed by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy. Final reports from prior years are available on the EAC website. For the second year in a row, the EAC decided to examine just two topics at the meeting, rather than their customary three.

The chair and vice chair, respectively, of the EAC for the 2016 term will be Mark E. Schmidtke, shareholder of Ogletree, Deakins, Nash, Smoak & Stewart, and Jennifer Kamp Tretheway, retired managing director of investment program solutions with Northern Trust Asset Management.

During the first portion of the meeting, Assistant Secretary Phyllis Borzi of the DOL's Employee Benefits Security Administration (EBSA) spoke to the group about some of the DOL's current initiatives, including:

- The forthcoming fiduciary project, which she anticipates will require substantial follow-up and subregulatory guidance, and EBSA's desire to help people comply with the final rule.

- Revisions to the Form 5500 Annual Return/Report, which EBSA will be updating in an effort to make it more useful and user-friendly.

- State-based retirement plan initiatives and the recent DOL guidance designed to streamline adoption of such arrangements. Borzi anticipated that EBSA plans on having the proposed regulation finalized by the end of the year.

- Disability claims proposed regulations, which she described as applying Affordable Care Act rules to disability claims.

- The DOL's forthcoming multi-year study on retiree behavior, which will focus on financial literacy.

The EAC announced that its first set of hearings will take place June 7-9.

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 before the IRS explicitly advised filers 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.

PBGC Finalizes Changes to Annual Financial, Actuarial Information Reporting Requirements

On March 22, the Pension Benefit Guaranty Corporation (PBGC) released final regulations amending the Annual Financial and Actuarial Information Reporting requirements for defined benefit plan sponsors under Section 4010 of ERISA. The new rules incorporate funding rule changes imposed by applicable provisions of the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012 and the Highway Transportation and Funding Act (HATFA) of 2014.

ERISA Section 4010 authorizes the PBGC to require certain underfunded defined benefit plans to report on specific financial and actuarial information. 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 either missed contributions or funding waivers of more than $1 million. Section 4010 provides a waiver from reporting if the aggregate underfunding (the "4010 funding shortfall") of pension plans in a controlled group does not exceed $15 million.

According to the final rule, changes are needed "to better balance the burden of reporting with PBGC's need for the information and to target those plans with the highest risk and exposure to PBGC and the pension insurance system." The new rule modifies the reporting waiver under the current regulation tied to aggregate plan underfunding of $15 million or less to be based on non-stabilized interest rates. In addition, the final rule adds new reporting waivers for smaller plans (with fewer than 500 participants) and for plans that must file solely on the basis of either a statutory lien resulting from missed contributions over $1 million or outstanding minimum funding waivers exceeding the same amount.

The final rule does, however, require that PBGC provide "alternate methods of compliance" to reduce the burden of 4010 reporting for all filers. The first filings under the new regulation will be due April 17, 2017. The e-4010 module of the e-filing portal will be updated to reflect these changes later this year.

RECENT JUDICIAL ACTIVITY

DOL Revises Argument in Support of 'Stock Drop' Cases, Offers Insight into Fiduciary Approach

In an amicus ("friend of the court") brief filed with the U.S. Court of Appeals for the Fifth Circuit, the U.S. Department of Labor broadened its rationale for "stock drop" lawsuits against plan sponsors, outlining an expansive vision of a sponsor's fiduciary duty under ERISA.

Under "stock drop" lawsuits, plaintiffs typically allege that a defined contribution plan or Employee Stock Ownership Plan (ESOP) sponsor should be held liable for investment losses when the employer's stock price declines or performs below expectations. One such case is *Whitley v. BP*, currently under consideration in the Fifth Circuit after the U.S. District Court for the Southern District of Texas allowed the plaintiffs to amend their complaint based on the U.S. Supreme Court's landmark *Fifth Third Bank v. Dudenhoeffer* decision, in which the high court indicated that in order to have a viable stock drop case based on inside information, the plaintiffs must allege that there was action the fiduciary could have taken which would not violate securities laws and that a prudent fiduciary could not determine whether it would likely do more harm than good for the plan.

In a separate Supreme Court decision in *Harris et al. v. Amgen et al.* in January, the high court maintained that "stock drop" lawsuits must clear a high standard to be considered valid. The *Amgen* ruling sends a powerful message that plaintiffs must fully

satisfy the requirement that they "plausibly allege an alternative action that the defendant could have taken" before the lawsuit can proceed.

The DOL's latest brief in *Whitley v. BP* attempts to accommodate the Supreme Court's rulings while still advocating for an expansive view of fiduciary duty. The brief indicates that the fiduciaries could have (1) disclosed the information to the public if they were aware of it, (2) encouraged those who do have the information to go public, and/or (3) freeze stock sales and purchases (blackout period). Under securities law, the latter action would require not only notice to participants but notice to the public including the reason for the freeze. This latter action would likely result in a falling stock price when participants are precluded from selling the stock. The Securities and Exchange Commission (SEC) filed its own *amicus* brief with the court, essentially affirming that the DOL's suggested approach would not violate securities laws.

The DOL focus on expanding fiduciary duties is also apparent in its multi-year regulatory project changing the definition of fiduciary. As noted earlier in this issue, the DOL is imminently expected to finalize regulations that 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.