***BENEFITS INSIDER***
***A Member Exclusive Publication***

**Volume 161, May 18, 2016** (covering news from May 2-17, 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

### House Tax Subcommittee Solicits Tax Reform Ideas from Lawmakers, Including Proposals Affecting Retirement Plans, Stock Compensation, Student Tuition/Loan Assistance

At a "member day" hearing hosted by the U.S. House of Representatives Ways and Means Subcommittee on Tax Policy on May 12, more than 30 House lawmakers offered a wide range of proposals to amend the tax code.

This committee action represents just one avenue for developing a comprehensive tax reform plan. The Tax Policy Subcommittee – formerly known as the Select Revenue Measures Subcommittee – is expected to hold a separate "member day" hearing in the near future specifically addressing health care tax policy.

Speaker of the House Paul Ryan (R-WI) has established a set of task forces to set forth overarching objectives and processes for the next Congress. This effort includes task forces on Tax Reform and Health Policy, both staffed by Ways & Means Committee Chairman Kevin Brady (R-TX), among others.

At the May 12 hearing, Brady expressed his support for an "open and transparent process" by which the subcommittee and full committee can consider other lawmakers' ideas and ultimately bring them to the floor for consideration.

Among the proposals offered to the committee, the following related to employee benefits.

- Rep. Vern Buchanan cited the Retirement Security Act (H.R. 557), introduced with Rep. Ron Kind (D-WI), which would promote employer sponsorship of, and employee participation in, defined contribution plans by encouraging open multiple employer plans and providing an alternative safe harbor for automatic enrollment and escalation contributions, among other provisions. (An identical bill (S. 266) has been introduced in the Senate.)

- Rep. Dave Brat (R-VA) suggested consideration of his Universal Savings Account Act (H.R.4094) establishing "Universal Savings Accounts," which would allow anyone 18 years of age or older to contribute up to $5,500 (after tax) annually to a publicly managed account and use the tax-free withdrawals for any purpose at any time.

- Rep. George Holding (R-NC) lauded the existing, newly permanent provision that allows taxpayers age 70 ½ and older to make a tax-free distribution from an IRA of up to $100,000 to a charitable organization and simultaneously satisfy the minimum required distribution rules. He announced a measure (the Grow Philanthropy Act, H.R. 4907) that would add donor-advised funds to the list of eligible charitable organizations.

- On a related note, Reps. Peter Roskam (R-IL) and Kevin Cramer (R-ND) described the Legacy IRA Act (H.R. 5171), which would eliminate the current law taxation of IRA transfers to a Charitable Life Income plan.

- Rep. Dave Reichert (R-WI) touted the Promotion and Expansion of Private Employee Ownership Act (H.R. 2096), cosponsored with Rep. Ron Kind (D-WI), which would eliminate barriers to the establishment of a new S-corporation Employee Stock Ownership Plan (ESOP) or the expansion of the employee-ownership stake in an S-corporation. (A Senate companion bill, S. 1212, has also been introduced.)

- Rep. Dana Rohrabacher (R-CA) urged the subcommittee to consider the Expanding Employee Ownership Act (H.R. 4577), a measure to expand opportunities for employees to earn employer stock, which Rohrabacher likened to "ESOPs on steroids."

- Rep. Sam Johnson (R-TX) discussed his Servicemember Retirement Improvement Act (H.R. 4381), which would allow members of the Ready Reserve of a reserve component of the Armed Forces to make the maximum allowable contribution ($18,000 in 2016) to their Thrift Savings Plans without limiting the amount such members may contribute to a retirement plan based upon other employment. The bill also doubles the maximum allowable contribution amount to the Thrift Savings Plans of federal employees in the Ready Reserve.

- Rep. Lynn Jenkins (R-KS) announced the introduction of the 529 and ABLE Account Improvement Act (H.R. 5193), also cosponsored with Kind, which would facilitate savings in 529 and Achieving a Better Life Experience (ABLE) plans. Section 529 plans provide tax-advantaged savings for educational costs, while ABLE accounts allow eligible individuals to save on a tax-favored basis for expenses such as education, medical and dental care, community support services, employment training and support.

- Similarly, Rep. Robert J. Dold (R-IL) announced the Help for Students and Parents Act (H.R. 5191), which would also exclude from income tax employer contributions to a worker's 529 account and provides a tax credit for employers that make such contributions. The measure also excludes from income tax the amount an employer contributes to repayment of a worker's student loan (up to $5,250) and provides a tax credit to employers based on the amount they contribute.

- Reps. Rodney Davis (R-IL) and Scott Peters (D-CA) each also promoted similar bills to promote employer student loan repayment programs. Davis' Employer Participation in Student Loan Assistance Act (H.R. 3861) and Peters' Student Loan Repayment Assistance Act (H.R.1713) would both extend the tax exclusion for employer-provided educational assistance to include payments of qualified

education loans paid to either an employee or a lender, though the details for each bill differ somewhat.

## RECENT REGULATORY ACTIVITY

### EEOC Issues Final Wellness Regulations under ADA, GINA

On May 16, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued long-awaited final wellness plan regulations under Title I of the Americans with Disabilities Act (ADA) and under Title II of the Genetic Information Nondiscrimination Act (GINA).

The American Benefits Council has prepared a detailed summary of the two final rules. In addition to the final regulations themselves, the EEOC also released:

- A news release announcing the issuances
- A question-and-answer document on the ADA rules
- A question-and-answer document on the GINA rules

While the final regulations provide important guidance as to how employer wellness programs can comply with the ADA and GINA, there are areas where the regulations do not align with existing HIPAA wellness plans rules.

Both the ADA and GINA regulations were published in the Federal Register on May 17, 2016. The EEOC previously issued proposed regulations with respect to ADA and GINA on April 20, 2015, and October 30, 2015, respectively.

The regulations' new notice requirements and rules regarding the use of financial inducements will apply to plan years beginning on or after January 1, 2017. According to the EEOC, the rest of the provisions in the final regulations clarify existing obligations and apply both before and after the publication of the final regulation.

#### *ADA Final Regulations*

The final ADA rule addresses the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations under the ADA. Such inquiries or medical examinations would include medical questionnaires, health risk assessments (HRAs) and biometric screening.

The incentive limits in the final rule apply regardless of whether the wellness program is:

1. offered only to employees enrolled in an employer-sponsored group health plan,
2. offered to all employees whether or not they are enrolled in such a plan, or
3. offered as a benefit of employment where an employer does not sponsor a group health plan or group health insurance coverage.

As described more fully in the detailed summary, the final rules addressing Title I of the ADA cover:

- Application to wellness programs involving a disability-related inquiry or medical examination
- "Reasonable design" of the program
- Voluntary nature of the program
- Access to group health plan coverage
- Alignment of new ADA incentive limitations with HIPAA's rules examinations
- Calculation of incentive limitations
- Incentives for tobacco cessation programs
- Enhanced notice requirement
- Confidentiality requirements
- Application of other EEOC-enforced nondiscrimination rules
- EEOC interpretation of the ADA's statutory "bona fide benefit plan" safe harbor

***GINA Final Regulations***

The GINA final regulations resolve a longstanding question regarding the extent to which an employer may offer an incentive to an employee for the employee's spouse to provide information about the spouse's health status on a health risk assessment (HRA). The regulations clarify that employers may provide a limited inducement to an employee whose spouse provides current or past health status information as part of a wellness program.

GINA's statutory text (and related implementing regulations) defines "genetic information" to include medical information with respect to a "family member" – the latter of which was defined by Congress to include an individual's "spouse." There has been ongoing uncertainty as to whether providing a financial incentive to a spouse to complete an HRA regarding the spouse's own medical information could constitute genetic information to the employee/individual. The final regulations make clear that such practices generally will not give rise to a GINA violation so long as the requirements of the final rule are satisfied.

The GINA final rule regarding the use incentive limitations in connection with spousal HRAs is applicable for plan years beginning on or after January 1, 2017. The guidance states that other parts of the rule that are clarifications of existing obligations, such as provisions requiring confidentiality of current or past health status information about employees' spouses and other genetic information about employees and their family members, already apply to wellness programs.

As described more fully in the detailed summary, the final rules addressing Title II of the GINA cover:

- Application to wellness programs whether or not they are offered as part of a group health plan
- "Reasonable design" requirements
- Maximum incentive limitations for employee incentives
- Access to group health plan coverage
- Financial incentives for use with child HRAs

- Financial inducements for spouse to provide his or her own genetic information, including genetic tests
- Information regarding tobacco use
- Notice and authorization rules
- Waivers of confidentiality protections

## HHS Finalizes ACA Nondiscrimination Rules

In final regulations released on May 13, the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) formally extended a range of nondiscrimination provisions to "all health programs and activities" that receive federal financial assistance (FFA) through HHS (including Medicaid and Medicare), as well as insurers that market insurance policies in federally-facilitated and state-based health exchanges.

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the ground of race, color, national origin, sex, age, or disability under "any health program or activity, any part of which is receiving Federal financial assistance … or under any program or activity that is administered by an Executive agency or any entity established" under Title I of the ACA. The statutory provisions of Section 1557 have been in effect since 2010 when the ACA was enacted. In addition to the general prohibitions against nondiscrimination, the proposed regulation included several specific prohibitions including discrimination based on gender identity discrimination as a form of sex discrimination and discrimination against individuals with limited English proficiency.

While ACA section 1557 generally does not apply directly to employers (unless they are receiving FFA), the proposed rule included language in the preamble that was of particular concern to sponsors of self-funded plans that use TPA services from health insurance issuers. The proposed regulations indicated OCR's intent that if an issuer is receiving FFA generally, Section 1557 would apply to its services as a third party administrator (TPA) for self-insured employer-sponsored group health plans – even if the entity is not receiving FFA with respect to such TPA services.

Employer plan sponsors had expressed strong concerns that OCR's proposed interpretation would have the effect of indirectly regulating self-insured employer-sponsored plans –plans which are not themselves the recipients of FFA. While noting support for the public policy goals of the nondiscrimination laws, the comment letter requested that final regulations not extend the requirements of Section 1557 to a TPA's administration of a self-insured plan, arguing that applying Section 1557 to such TPA services would be a broad regulatory overreach that is not supported by the statute or congressional intent.

The preamble to the final regulation responds to these and other commenters' concerns regarding the application of the regulations to TPA services. According to the preamble, TPA services are not excluded from the final rule, however, specific procedures to govern the processing of complaints against third party administrators were adopted in

the final rule. OCR clarified that Section 1557's coverage of a third party administrator under the rule does not extend to the coverage of an employer providing a group health plan that is being administered by the third party administrator. The rule addresses employer liability separately from that of issuers that receive federal financial assistance. (Under Section 1557, an employer is liable for discrimination in its employee health benefit programs only if the employer is principally engaged in health services, health insurance coverage, or other health coverage, or otherwise satisfies one of the criteria set forth in existing regulations).

The preamble states that OCR recognizes that third party administrators are generally not responsible for the benefit design of the self-insured plans they administer and that ERISA (and likely the contracts into which third party administrators enter with the plan sponsors) requires plans to be administered consistent with their terms. Thus, if a plan has a discriminatory benefit design under Section 1557, a third party administrator could be held responsible for plan features over which it has no control.

Based on these comments, the preamble indicates that OCR is adjusting the way in which it will process claims that involve alleged discrimination in self-insured group health plans administered by third party administrators that are covered entities under Section 1557. Fundamentally, OCR will determine whether responsibility for the decision or other action alleged to be discriminatory rests with the employer or with the third party administrator. Thus, where the alleged discrimination is related to the administration of the plan by a third party administrator that is a covered entity, OCR will process the complaint against the third party administrator because it is that entity that is responsible for the decision or other action being challenged in the complaint.

For example, where a third party administrator denies a claim because the individual's last name suggests that she is of a certain national origin or threatens to expose an employee's transgender or disability status to the employee's employer, OCR will proceed against the third party administrator as the decision-making entity. In contrast, if the alleged discrimination relates to the benefit design of a self-insured plan – e.g., where a plan excludes coverage for all health services related to gender transition -- and where OCR has jurisdiction over a claim against an employer under Section 1557 because the employer falls under one of the categories above, OCR will typically address the complaint against that employer. The preamble further states that, as part of its enforcement authority, OCR may refer matters to other federal agencies with jurisdiction over the entity.

The provisions of the final rule will generally be effective on July 18, 2016, 60 days after publication, as OCR previously proposed. However, the final rule extends the effective date for some health insurance issuers and group health plans: If provisions of the rule require changes to health insurance or group health plan benefit design (e.g., cost sharing or covered benefits), the rule will be effective on the first day of the first play year (in the individual market, policy year) beginning on or after January 1, 2017. This finalized timing provides some relief for health insurance issuers and group health

plans, allowing them additional time to make any necessary changes to their benefit design and cost sharing structures.

### IRS Finalizes Removal of Rollover Allocation Rule for Roth Plans

In **final rules** released on May 17, the Internal Revenue Service (IRS) formally eliminated the rollover allocation rule from designated Roth regulations, generally allowing taxpayers to choose how to split after-tax contributions between traditional and Roth Individual Retirement Accounts (IRAs) whenever after-tax and pre-tax amounts are simultaneously disbursed to multiple destinations.

Under the final rules, effective January 1, 2016, pre-tax contributions may be rolled to a traditional IRA and after-tax contributions to a Roth IRA, regardless of whether the distribution is a direct rollover or 60-day rollover. Although the final rules are effective January 1, 2016, plans can choose to apply the new rule for distributions made on or after September 18, 2014.

### IRS Finalizes Rules for Multiemployer Pension Plans Seeking to Suspend Benefits; Rejects Central States Application

The Internal Revenue Service (IRS) finalized its regulations implementing a key element of the Multiemployer Pension Reform Act (MPRA) on May 5, establishing rules for the suspension of pension benefits.

The MPRA, enacted in 2014, multiemployer defined benefit pension plans in "critical or declining" funding status are permitted to "suspend" benefits – thereby reducing the benefits payable to plan participants and beneficiaries – under certain conditions. The final regulations address one specific limitation under the MPRA, relating to the "suspension of benefits under any plan that includes benefits directly attributable to a participant's service with any employer that has withdrawn from the plan in a complete withdrawal, paid its full withdrawal liability, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries equal to any benefits for such participants and beneficiaries reduced as a result of the financial status of the plan."

Under the MPRA, employers within a distressed multiemployer plan are distinguished by three tiers:

- Subclause I: employers that withdrew from a plan without paying the full withdrawal liability.
- Subclause III: employers with "make-whole" agreements, under which the employer assumes liability for benefits.
- Subclause II: employers that do not fall under subclauses I or III.

The final rules affirm that a multiemployer plan seeking to suspend benefits would first have to cut benefits for Subclause I retirees to the maximum extent permissible. Plans

could then cut benefits for Subclause II retirees. Subclause III retirees could face cuts, but they would have to be equal to or less than decreases for Subclause II retirees. In important and related news, the U.S. Treasury Department has rejected a benefit suspension application submitted by the Central States, Southeast and Southwest Areas Pension Plan, a large multiemployer plan covering approximately 400,000 truckers, construction and other types of service workers.

In a May 6 letter, Treasury ruled that the proposed suspensions "are not reasonably estimated to allow the Plan to avoid insolvency" as required under the MPRA. The letter also noted that the proposal failed to satisfy the prevailing requirements that the suspensions be "equitably distributed across the participant and beneficiary population" and "written so as to be understood by the average plan participant."

### PBGC Revises Civil Monetary Penalties

On May 13, the Pension Benefit Guaranty Corporation (PBGC) published an interim final rule updating the maximum daily amount of penalties that may be assessed when plans fail to provide PBGC with certain required information (e.g., reportable event filings, 4010 filings, certain multiemployer plan notices).

The new maximum amounts are $2,063 for penalties under ERISA Section 4071 penalties and $275 for penalties under Section 4302. The increases apply on and after August 1, 2016.

Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, these rates must now be updated annually to account for inflation.

As PBGC noted in announcing the changes, "when information penalties are assessed, PBGC takes many factors into account when determining the amount of penalty to assess. … In most cases, when PBGC assess an information penalty, it is for an amount significantly less than the maximum permitted by regulation."

## RECENT JUDICIAL ACTIVITY

**Nothing to report this issue**