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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, which provides its core content, and is edited by Christopher Smith, employee benefits attorney and Principal of Flexible Benefits Systems, Inc., csmith@fbsi.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

House Approves Repeal of PPACA; GOP Unveils Measure to Replace PPACA

The U.S. House of Representatives approved a measure, **H.R. 596**, to repeal the Patient Protection and Affordable Care Act (PPACA) by a party-line vote of 239-186 on February 3. The vote is largely symbolic, since President Obama has announced that he will veto the bill, if it is approved by the Senate and presented to him for signature. But the vote gives GOP House members – especially freshman representatives who campaigned on a platform of repealing the law – the opportunity to cast a vote in favor of repeal.

What is noteworthy about H.R. 596 is the inclusion of new language setting forth the standards for "replacement" health care reform legislation. According to the bill, the House committees of jurisdiction would be directed to report legislation that would:

1. foster economic growth and private sector job creation by eliminating certain policies and regulations.
2. lower health care premiums through increased competition and choice.
3. preserve a patient's ability to keep his or her health plan if he or she likes it.
4. provide people with pre-existing conditions access to affordable health coverage.
5. reform the medical liability system to reduce unnecessary and wasteful health care spending.
6. increase the number of insured Americans.
7. protect the doctor-patient relationship.
8. provide the States greater flexibility to administer Medicaid programs.
9. expand incentives to encourage personal responsibility for health care coverage and costs.
10. prohibit taxpayer funding of abortions and provide conscience protections for health care providers.
11. eliminate duplicative government programs and wasteful spending.
12. avoid the acceleration of the insolvency of entitlement programs or tax increases.

An amendment to H.R. 596 would delay repeal of the PPACA until 180 days after enactment of the bill, presumably intended to give Congressional committees time to report "replacement" legislation complying with some or all of the 12 points above.

Senator Ted Cruz (R-TX) introduced a virtually identical PPACA repeal measure in the U.S. Senate on February 2, with 44 co-sponsors. Leaders in that chamber have not announced a timetable for its consideration. While it possible that some Democratic Senators might support such a measure, it is very doubtful there would be enough Democratic support to overcome a procedural objection to the bill.

The introduction of true "replacement" legislation would establish the Republican leadership's vision for a reformed health care system as well as the starting position for possible reforms of PPACA.

To that end, shortly after the House approval of H.R. 596, Republican leaders in the U.S. Senate and House of Representatives released a proposal to replace PPACA.

The Patient Choice, Affordability, Responsibility, and Empowerment (Patient CARE) Act was unveiled on February 5 by its chief authors, Senate Finance Committee Chairman Orrin

Hatch (R-UT); Senator Richard Burr (R-NC), a member of the Finance and Health, Education, Labor and Pensions (HELP) Committee; and House Energy and Commerce Committee Chairman Fred Upton (R-MI). (A two-page summary and comparison chart are also available.)

The Patient CARE Act attempts to fulfill many of the principles outlined for "replacement" legislation in H.R. 596. The measure would eliminate the individual and employer mandates, impose medical liability reforms, revise the age rating rules and transition Medicaid to a "capped allotment" system.

Very significantly, the proposal would impose new limits on individuals' federal income tax exclusion on the value of employer-provided health insurance coverage. For employees with benefits exceeding certain annual thresholds (initially set at $12,000 for individuals and $30,000 for families, indexed for inflation plus one percentage point for perpetuity), the excess would be treated and taxed as regular income for the employee. (Importantly, the proposal maintains the employer deduction, so employers "continue to have incentive to provide quality coverage to their employees.") This approach is a change from the version floated in the previous Congress, in which the exclusion was capped at 65 percent of the average plan value.

According to the new proposal, this change will "help lower the cost of health coverage" and "is biased in favor of individuals who work for large companies."

In lieu of PPACA's system of subsidies, the Patient CARE Act would provide a tax credit that could solely be used for the purchase of health care coverage, targeted at employees of small businesses or those who cannot obtain coverage through a large employer. Low-income individuals (those with annual income up to 300 percent of the Federal Poverty Level, rather than 400 percent under PPACA) would also be eligible to receive an age-adjusted, advanceable, refundable tax credit to buy health coverage or health care services.

The proposal includes measures to "expand and strengthen consumer-directed health care," allowing Health Savings Account funds to be used to pay premiums for HSA-qualified and COBRA policies, for the first time. Additionally, restrictions on veterans, service members, and individuals receiving care through the Indian Health Service would be removed.

The proposal retains some of the market reforms enacted as part of PPACA, including the prohibition on lifetime limits and adult-child coverage to age 26. Coverage of those with pre-existing conditions would be enforced through a new "continuous coverage" standard, in which an individual could not be denied coverage based on a preexisting condition if they were continuously enrolled in a health plan.

States would still be permitted to sponsor a health insurance exchange if they wished, but the GOP proposal does not allow for federal exchanges.

Legislative text for the Patient CARE Act is not yet available.

Meanwhile, in the Senate, Finance Committee Chairman Orrin Hatch (R-UT) and Senate HELP Committee Chairman Lamar Alexander (R-TN) introduced the **American Job Protection Act (S. 305)**, a bill to repeal the PPACA's employer "shared responsibility" provisions.

The "shared responsibility" employer mandate, under Internal Revenue Code Section 4980H, which took effect on January 1, requires employers with at least 50 full-time (or equivalent) employees to offer health coverage that satisfies affordability and minimum value requirements to their full-time employees or pay a penalty if even one full-time employee receives a premium tax credit for health coverage obtained through a health insurance exchange. (Under transition relief for 2015, the employee threshold is 100; after 2015, the threshold is 50 employees.)

"Until we have a Republican president and can repeal Obamacare, the responsible thing to do is repeal the employer mandate – one of several steps we can take to repair the damage Obamacare has done," Alexander said in a joint news release unveiling the bill.

S. 305 has 26 additional cosponsors, all Republicans. Action on the bill, in committee or on the Senate floor, has not yet been scheduled.

Congressional Committee Hearings Examine President's Budget in Detail

Following the release of President Obama's **Fiscal Year 2016 federal budget proposal** on February 2 (see story under "Recent Regulatory Activity," below), various congressional committees held hearings to examine the Obama administration's budget priorities in more detail. Members of the president's cabinet were present to provide testimony and answer questions.

Member statements, witness testimony and (in some cases) video recordings are available on the committees' hearing pages:

U.S. Senate Finance Committee

- Hearing with the Internal Revenue Service (IRS) Commissioner John Koskinen
- Hearing with U.S. Department of Health and Human Services (HHS) Secretary Sylvia Mathews Burwell
- Hearing with U.S. Department of the Treasury Secretary Jacob Lew

U.S. Senate Budget Committee

- Hearing with U.S. Office of Management and Budget (OMB) Director Shaun Donovan

U.S. House of Representatives Ways and Means Committee

- Hearing with Treasury Secretary Jacob Lew

U.S. House of Representatives Budget Committee

- Hearing with OMB Director Shaun Donovan

Throughout the committee hearings, committee members and the witnesses discussed several recurring themes concerning employee benefits issues.

Lawmakers expressed concern about the ramifications of the upcoming *King v. Burwell* case before the U.S. Supreme Court, which calls into question the legality of federal subsidies for individuals obtaining health coverage in federally facilitated insurance exchanges under the Patient Protection and Affordable Care Act (PPACA). The high court will hear arguments in early March, with a decision expected in June.

Senate Finance Committee Chairman Orrin Hatch (R-UT) voiced concerns about the case and asked each witness whether the administration has a contingency plan in case the court rules against the legality of federal exchange subsidies. While Hatch posed the question in his opening statement to each witness, neither Koskinen nor Lew discussed the matter. However, the issue was brought up repeatedly during HHS Secretary Burwell's hearing before the Senate Finance committee. Burwell maintained that the administration believes that it is implementing PPACA as the law intended and that she is currently focusing on the upcoming February 15 deadline for health care open enrollment. Several other senators pressed her on the issue, including senators John Cornyn (R-TX), Dean Heller (R-NV) and Tim Scott (R-SC). Hatch closed his questioning on the issue by stressing that without any guidance to insurers, a ruling invalidating the subsidies in federal exchanges would be extremely disruptive.

Other health care issues discussed were health care payment reform and the use of technology and telehealth. When questioned during the Senate Budget hearing about the payment reform models for Medicare and Medicaid included in the budget, OMB Director Donovan noted that the data indicates that there will be large savings, but that the data is too preliminary to have reliably included a projected savings figure in the budget.

In the Senate Finance hearing with Burwell, Sen. John Thune (R-SD) brought up the advances that have been made in telehealth, but noted that the regulatory environment has not kept pace. Burwell responded that it's an area HHS plans to add to the delivery system reform discussion and that they hope to be moving forward with the regulations.

Several lawmakers also discussed the budget proposals addressing retirement savings. Ranking Democratic member of the Senate Finance committee Ron Wyden (D-OR) argued that the retirement proposals for tax changes will help families, but emphasized that comprehensive tax reform would be the most effective way to help families. During the House Ways and Means hearing, Rep. John Lewis (D-GA) asked what was in the budget that would help more Americans save and prepare for retirement. Lew said that the budget creates incentives for employers to set up 401(k) plans, assists with the administrative burdens through tax credits, strengthens the *my*RA program and expands automatic enrollment, which behavioral economics have shown make employees more likely to save. Lewis followed up by asking if Americans are saving more or less, to which Lew responded that as the economy continues recovering, Americans save more, but that the incentives are intended to continue increasing retirement savings and security.

The question of the fiduciary definition under ERISA was also discussed during the House Budget hearing. Rep. Tom Cole (R-OK) noted the significant bipartisan concerns about the ERISA fiduciary rule; he stated that he hoped that OMB would commit to a full review and economic analysis of the impact of the rule to ensure the concerns have been addressed. Donovan agreed that it needed to be looked at but did not provide a timeframe.

Additional hearings on the President's budget proposal may be scheduled in the coming weeks and months, especially as lawmakers in the House assemble appropriations measures to fund government operations.

Senate Finance Committee Examines 1986 Tax Reform Act as it Considers 2015 Reform Effort

Former lawmakers emphasized that bipartisanship and a comprehensive approach were critical to achieving successful tax reform in 1986 when they spoke at a hearing of the U.S. Senate Finance Committee on February 10.

The hearing, *Getting to Yes on Tax Reform: What Lessons Can Congress Learn from the Tax Reform Act of 1986?*, examined the environment surrounding the development and passage of the Tax Reform Act of 1986. That measure contained numerous and sweeping changes to the tax treatment of employer-sponsored retirement and health benefit plans.

Chairman Orrin Hatch (R-UT) recently released an analysis, Comprehensive Tax Reform for 2015 and Beyond, outlining various issues that he intends to examine during the effort to reform the tax code, including those relating to employer-sponsored benefits. Both Hatch and ranking Democratic member Ron Wyden (D-OR) emphasized the need for tax reform in their opening statements at the hearing. Wyden also stressed that, as with the Tax Reform Act of 1986, bipartisanship will be key to tax reform's success.

Two former senators who served on the Finance Committee at that time and played key roles in writing the legislation, described the events leading to the measure's passage as well as the issues on which they focused. The committee heard testimony from:

- Former Senator Bob Packwood (R-OR) who served as chairman of the Finance Committee during the Tax Reform Act of 1986's passage. During his testimony, he emphasized the importance of bipartisanship in getting tax reform to pass and stated that the best way to achieve tax reform is to include everything in "one grand bill," not by considering separately the "individual" and "corporate" provisions of the Internal Revenue Code.

- Former Senator Bill Bradley (D-NJ) also served as a member of the Finance Committee during the Tax Reform Act of 1986. He outlined the principles he considers crucial to tax reform success: efficiency, equity, fairness and simplification. Both he and Packwood noted the importance of having presidential support in achieving tax reform.

During the question-and-answer session, Packwood noted that he would have misgivings about only attempting business tax reform and Bradley echoed Packwood's comment about the need to consider together corporate and individual tax provisions. In response to a question on whether reform should be on a revenue-neutral basis (i.e. do not use tax reform to reduce the Federal deficit), Packwood agreed it should be, adding that combining individual and business tax reform allows for more "wiggle room" in achieving revenue neutrality.

Wyden (who succeeded Packwood when he resigned from the Senate in 1995) asked whether achieving tax reform through the "normal process," requiring 60 votes in the Senate for passage, would be better than passing a measure through the Budget Reconciliation process, which only requires 51 votes. Packwood agreed that the normal process would be best, as it has much more credibility.

In response to a question about moving to a consumption tax, Packwood stated that it is inevitable but noted the future danger of the ease with which Congress could raise the rate.

The Joint Committee on Taxation, which serves as a resource to both the Senate Finance Committee and its counterpart in the House of Representatives, the Ways & Means Committee, submitted a report, *Background Information on Tax Expenditure Analysis and Historical Survey of Tax Expenditure Estimates*, to the committee prior to the hearing. The report discusses the concept and measurement of tax expenditures (i.e. provisions of the Internal Revenue Code that account for lost tax revenue). The report is intended to help both policymakers and the public understand the size of government, how and where government resources are used and the tax and economic policy consequences that accompany various legislative choices. The report includes historical data on tax expenditures, including estimates of tax expenditures over time and the latest estimates of the largest individual and corporate tax expenditures.

In related news, the committee also recently announced the launch of five bipartisan tax working groups within the committee in an effort to facilitate congressional consideration of comprehensive tax reform in the 114th Congress. The full rosters for these working groups are now public. The "Savings and Investment" working group, which will cover retirement savings policy, will be made up of:

- Mike Crapo (R-ID), *Co-Chair*
- Sherrod Brown (D-OH), *Co-Chair*
- Richard Burr (R-NC)
- Johnny Isakson (R-GA)
- Dean Heller (R-NV)
- Tim Scott (R-SC)
- Benjamin Cardin (D-MD)
- Bob Casey (D-PA)
- Mark Warner (D-VA)
- Robert Menendez (D-NJ)

It is currently unclear which, if any, working group will examine health benefits tax policy. It may possibly be shared by the Individual Income Tax and Business Income Tax groups or simply will be considered at the full committee level.

RECENT REGULATORY ACTIVITY

President Obama FY 2016 Budget Analysis: Summary of Retirement and Health Plan Proposals

President Obama's **Fiscal Year 2016 federal budget proposal**, released on February 2 by the White House Office of Management and Budget (OMB), includes a number of provisions that would substantially affect employer-sponsored benefit plans.

To some extent, especially when the Congress and White House are controlled by different parties – the president's budget is largely a political and philosophical statement. The budget is not solely focused on proposing how much money should be spent on various governmental programs and activities. It also articulates new policy ideas. Given the significant differences on many matters between Republicans and Democrats, most bold new policy ideas are likely to meet resistance from the GOP-controlled Congress. However, several items in the budget could ultimately be considered separately as federal revenue offsets for separate legislation or as stand-alone measures.

The president is requesting just over $4 trillion for the operation of the government in Fiscal Year 2016, which begins October 1, 2015. Consistent with prior years, the president's proposal suggests an approach to tax reform largely aimed at eliminating "loopholes" and minimizing deductions for high-income individuals.

Tax Reform
Most notably, as in the past, the FY 2016 budget proposes reductions in the value of itemized deductions and other tax preferences to 28 percent for high-income earners. This limit would

apply to all itemized deductions as well as other tax benefits, such as tax exclusions for retirement contributions and employer-sponsored health insurance.

In addition, the proposal would increase the capital gains and dividend rate to 28 percent (inclusive of the net investment income tax) and implement the "Buffett Rule," requiring wealthy millionaires pay at least 30 percent of their income (after charitable giving) in taxes.

The budget also specifically addresses a number of other retirement and health benefit initiatives. It is worth noting that the OMB's Analytical Perspectives supplement to the budget proposal identifies the "exclusion of employer contributions for medical insurance premiums and medical care" as the largest income tax expenditure in the federal budget (nearly $2.67 trillion over 10 years). If we combine the tax deferrals for 401(k) plans and the tax exclusion for employer-provided pension contributions and earnings, the total foregone tax ($1.53 trillion over ten years), would be No. 2 on the list. The significant revenue effects of these tax preferences makes the tax incentives for employer-sponsored benefits a lucrative target for tax reform as part of a larger budget or deficit reduction deal.

Retirement Savings

- As previewed in a January 17 Fact Sheet, the president's proposal would limit the total accumulation of benefits in tax-preferred retirement plans and IRAs. Contributions to, and accruals of additional benefits in, tax-preferred retirement plans and IRAs would – according to the Obama Administration – be capped at "about $3.4 million, enough to provide an annual income of $210,000 in retirement," under the rationale that "While tax-preferred retirement plans are intended to help middle class workers prepare for retirement, loopholes in the tax system have let some wealthy individuals convert these accounts into tax shelters." The budget lists this line item under the heading "Proposals to address high-income tax avoidance" and estimates a ten-year revenue gain of $26 billion over ten years. This proposal is described in more detail on Page 168 of the U.S. Treasury Department's "Green Book" Summary document.

- The centerpiece of the president's agenda for "Strengthening Retirement Security" is once again the mandatory automatic enrollment of workers without access to a workplace retirement plan in an Individual Retirement Account (IRA). Employers that have been in business for at least two years and have more than 10 employees, and do not currently offer a retirement plan, would be required to automatically enroll employees in an IRA. This proposal is described in more detail on Page 135 of the Treasury "Green Book".

- To support this effort, the proposal also provides tax credits for auto-IRA adoption, as well as for small businesses that choose to offer employer plans or switch to auto-enrollment. Employers with 100 or fewer employees could claim a temporary non-refundable tax credit of up to $1,000 per year for three years, with an additional non-refundable credit of $25 per enrolled employee up to $250 per year for six years.

  Additionally, the current "start-up" credit would be increased to $1,500 per year for three years (and up to a fourth year under certain circumstances). Small employers who already offer a plan and add auto-enrollment would be eligible for an additional a $1,500 tax credit.

- To increase employee access to workplace retirement plans, the proposal would require employers who offer retirement plans to allow employees who have worked at least 500 hours per year for three years or more to make voluntary contributions to the plan. Employers would not be required to offer matching contributions.

- The proposal sets aside $6.5 million for the U.S. Department of Labor (DOL) to support "State Retirement Savings Initiatives," like those in which states have created automatic retirement accounts for workers in the private sector who do not otherwise have access. Noting that "concerns about potential conflicts with the Federal law that governs employee benefit plans have slowed those efforts," the budget also gives DOL waiver authority to allow a limited number of states to implement their own programs.

- The president's budget proposes to generate $19 billion over ten years through measures to "Improve Pension Benefit Guaranty Corporation (PBGC) solvency." The proposal itself is not specific about such measures, although the official PBGC budget request "proposes to give the PBGC Board the authority to adjust premiums in both its single-employer and multiemployer programs and directs PBGC to take into account the risks that different sponsors pose. ... Premium increases would be split between the single-employer and multiemployer programs proportionately based on the size of the deficit in each program after making adjustments for the expected long-term effects of the law Congress passed in December 2014 to shore up the multi-employer system.

- The proposal prohibits so-called "stretch IRAs," meaning that non-spouse beneficiaries of deceased IRA owners and retirement plan participants (that do not meet certain conditions) would be required to take inherited distributions over no more than five years. Such a prohibition could unintentionally raise certain problems, particularly for defined benefit plans.

- The budget proposal includes a host of changes to the minimum required distribution (MRD) rules, which generally require participants in tax-favored retirement plans to begin receiving distributions shortly after attaining age 70½. The budget proposal provides circumstances under which an individual would be exempt from the MRD rules (namely, those with account balances of $100,000 or lower). The proposal would also harmonize the application of the MRD rules for holders of designated Roth accounts and of Roth IRAs by generally treating Roth IRAs in the same manner as all other tax-favored retirement accounts. Individuals would not be permitted to make additional contributions to Roth IRAs after they reach age 70½.

- Non-spouse beneficiaries of IRAs and qualified plans would be allowed to roll their distributions over within 60 days. This treatment would be available only if the beneficiary informs the new IRA provider that the IRA is being established as an inherited IRA.

- The proposal would expand the exception from the 10-percent additional tax to cover more distributions to long-term unemployed individuals from an IRA (in excess of the premiums paid for health insurance) and to include distributions to long-term unemployed individuals from a 401(k) or other tax-qualified defined contribution plan.

- The budget proposal repeals – for publicly traded companies only – the deduction companies can currently take for employer stock dividends paid to the plan. Rules allowing for immediate payment of an applicable dividend would continue as would rules permitting the use of an applicable dividend to repay a loan used to purchase the stock of the publicly traded corporation.

- The budget proposal seeks to give the Internal Revenue Service (IRS) new authority to require electronic filing of information that is relevant only to employee benefit plan tax requirements, so that it can be electronically filed with the Form 5500 that is filed with the DOL.

- The budget proposal establishes reciprocal reporting under the Foreign Account Tax Compliance Act (FATCA), expanding accounting and reporting requirements by certain financial institutions.

Health Care

- The budget proposal provides resources to continue supporting implementation of the Patient Protection and Affordable Care Act (PPACA), including the Health Insurance Marketplace, premium tax credit and cost-sharing assistance, and increasing federal support to states expanding Medicaid coverage for newly eligible low-income adults.

  Under a specific provision of the budget proposal, the IRS will ramp up enforcement efforts to "address noncompliance," including oversight of various fees, tax credits and the individual and employer responsibility provisions of PPACA. According to the Treasury Department's Budget in Brief, this initiative includes a $60.8 million initial investment in traditional revenue-producing activities that are expected to annually produce additional enforcement revenue of $181.7 million.

  Also, under an information technology (IT) initiative in the budget, the Internal Revenue Service (IRS) will implement PPACA's refundable tax credit for investment in enhanced technology infrastructure and applications support.

- As in prior years, the proposal calls upon Congress to "strengthen the Medicare and Medicaid programs through reforms that expand health coverage in Medicaid, encourage high-quality and efficient care, and continue the progress of reducing cost growth." This is accompanied by a "delivery system reform agenda" to: (1) modify health care payment structures to reward providers for optimal care, (2) support practice redesign and create better capacity to improve care delivery; and (3) improve access to information to encourage data-driven decision-making by consumers, providers, and businesses. The Obama Administration has set a 2016 goal of making 30 percent of Medicare payments through alternative payment models.

- The budget retains a modified version of last year's proposal for income-related Medicare premiums. Specifically, the proposal would impose premium increases for beneficiaries in Medicare Parts B and D and impose a surcharge on Part B premiums for new beneficiaries and those that purchase near or full first-dollar Medigap coverage.

- The budget proposes a program to align employer group waiver plan payments with average Medicare Advantage plan bids.

- The proposal would modify the tax credit provided to qualified small employers for non-elective contributions to employee health insurance. Specifically, the proposal would expand the group of employers who are eligible for the credit to include employers with up to 50 full-time equivalent employees and would begin the phase-out at 20 full-time equivalent employees.

- The budget includes $30 million for an "Effective Health Insurance Initiative" to develop evidence about how changes in health insurance benefit packages affect health care utilization, costs, and outcomes. This project, which the Obama Administration promotes as an example of its commitment to incorporating evidence and evaluation into policy solutions, will use a randomized controlled trial study to examine how modern health insurance plans can be redesigned to maximize health status and quality, while minimizing unnecessary costs.

Other Issues

- As in the previous year's budget proposal, the president recommends a program to "increase certainty with respect to employer classification." The proposal would permit the IRS to require prospective reclassification of workers who are currently misclassified as "independent contractors" and whose reclassification has been prohibited under current law. The reduced employment tax liabilities for misclassification provided under current law would be retained, except that lower penalties would apply only if the service recipient voluntarily reclassifies its workers before being contacted by the IRS or another enforcement agency and if the service recipient had filed in a timely manner all required information reporting the payments to the misclassified workers. (Under certain circumstances, penalties would be waived.) The Department of the Treasury and the IRS also would be permitted to issue generally applicable guidance on the proper classification of workers under common law standards.

- With regard to family leave issues, the budget also establishes a $35 million "State Paid Leave Fund" within DOL to provide competitive grants that would help states cover the start-up costs of launching paid-leave programs. The proposal also offers support to as many as five states that wish to launch paid leave programs, under which states would be able to apply for competitive grants to cover startup and ongoing administrative costs as well as 50 percent of benefit costs for three years. The grants could be used to cover family, parental, and medical leave programs that provide up to 12 weeks of benefits.

Republicans responded to the president's budget with opposition, as Speaker of the House of Representatives John Boehner (R-OH) said it "contains no solutions" and House Ways and Means Committee Chairman Paul Ryan (R-WI) calling the president's approach "simply unacceptable."

Treasury Suggests Possible Flexibility on Use of Stand-Alone HRAs for Purchase of Health Coverage

In a February 3 hearing of the U.S. House of Representatives Ways and Means Committee to discuss the White House's recent budget proposal, U.S. Treasury Secretary Jack Lew expressed a willingness to take a closer look at current guidance prohibiting the use of Health Reimbursement Arrangements (HRAs) for purchasing individual coverage.

In this hearing, Representative Charles Boustany (R-LA) expressed concern about Notice 2013-54 , issued by the Internal Revenue Service (IRS) in September 2013, which stated that an employee cannot use funds from a stand-alone HRA to purchase individual health insurance on a tax-favored basis. Under this guidance, an HRA can only be made available to employees who are enrolled in qualifying employer-sponsored major medical coverage; otherwise the employer could be subject to a penalty.

"Why would Treasury institute this kind of a draconian penalty?" Boustany asked Lew. "That seems to belie the sentiment that you're trying to help small businesses and working families." Lew responded, "Our objective, and the objective of the Affordable Care Act, is to make sure that affordable health care is available to all, and I believe that the provisions that you're referring to are not consistent with that. I'd be happy to follow up with you."

In 2014, Boustany introduced the Small Business Healthcare Relief Act, which would prevent small businesses from being penalized for providing monetary assistance to their employees to purchase insurance on the individual market on a pre-tax basis (such as in an HRA). Senator Charles Grassley (R-IA) recently offered (and then withdrew) similar language as an amendment in the recent Senate Finance Committee markup of the Hire More Heroes Act.

IRS Releases Final Forms and Instructions for PPACA Information Reporting

The Internal Revenue Service (IRS) has finalized the forms and instructions to be used by applicable large employers and insurers for reporting information regarding health care coverage and "minimum essential coverage" as required under the Patient Protection and Affordable Care Act (PPACA).

The forms are to be used to fulfill the requirements specified in final regulations implementing the reporting of minimum essential coverage (MEC) under Section 6055 of the Internal Revenue Code) and the reporting of health insurance coverage under Section 6056 of the Internal Revenue Code. The requirements are effective for 2015, with the first required reporting due in 2016. These reporting requirements were delayed for 2014 under previously issued Notice 2013-45 transition relief (though the IRS encouraged voluntary reporting for coverage in 2014).

Code Section 6055 requires 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 1095-B: Health Coverage** is to be used to fulfill this requirement, while **Form 1094-B** is to be used for transmitting Form 1095-B.

The IRS has also finalized the **instructions for filing Forms 1094-B and 1095-B**.

An employer that sponsors an insured health plan will not report as a provider of health coverage under Section 6055; the health insurance carrier is responsible for reporting that coverage.

Code Section 6056 requires every applicable large employer (generally, an employer that employed on average at least 50 full-time employees or equivalents) to 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 1095-C: Employer Provided Health Insurance Offer and Coverage** is to be used to fulfill this requirement, while **Form 1094-C** is to be used for transmitting Form 1095-C. An applicable large employer that provides self-insured coverage is subject to the reporting requirements of both sections 6055 and sections 6056. As discussed in previous IRS Frequently Asked Questions (FAQs) on Information Reporting by Health Care Providers (Section 6055) (No. 27), such employers will combine section 6055 and 6056 reporting on Form 1095-C.

The IRS has also finalized the **instructions for filing Forms 1094-C and 1095-C**.

New IRS Fact Sheet Summarizes Employer 'Shared Responsibility' Payments under PPACA

The Internal Revenue Service issued a new **fact sheet** in question and answer format, containing basic information on the two different types of "shared responsibility" payments for which employer plan sponsors may be responsible under Section 4980H. The document is a description of current law and does not contain any new guidance or information.

While the document is labeled as "Types of Employer Payments and How They Are Calculated," the document refers only to the shared responsibility payments and not to any other taxes or fees imposed by PPACA.

The document describes the two different employer payments (or "penalties") under 4980H:

(1) the payment for failure to offer minimum essential coverage (MEC) and
(2) the payment for failure to offer affordable minimum essential coverage that provides minimum value.

For each type of payment, the fact sheet describes which employers will owe the payment and how the payment will be calculated. For the first type of payment described above, the fact sheet describes applicable transition relief for 2015. For the second type of payment described above, the fact sheet provides examples of how the payment would be applied under certain scenarios. The document provides several examples for how payments will be calculated for failure to offer minimum essential coverage.

The fact sheet also describes the IRS' assessment and collection process, noting that "employers will not report or include an employer shared responsibility payment with any tax return they may file. Instead, based on information from the employer and from employees' tax returns, the IRS will calculate the potential employer shared responsibility payment and contact the employer to inform it of any potential liability."

The fact sheet further explains that the employer will then have an opportunity to respond before any assessment or notice and demand for payment is made.

An employer will not be contacted by the IRS regarding an employer shared responsibility payment until after their employees' individual income tax returns are due for that year – which would show any claims for the premium tax credit. If, after the employer has had an opportunity to respond to the initial IRS contact, the IRS determines that an employer is liable for a payment, the IRS will send a notice and demand for payment to the employer. That notice will instruct the employer how to make the payment. The fact sheet states that the IRS will adopt procedures to ensure that employers receive certification when one or more employees receive the premium tax credit for purchasing coverage through the Marketplace.

These reporting requirements are effective for 2015, with the first required reporting due in 2016.

The fact sheet also explains what an "offer of coverage" is and confirms that employer shared responsibility payments are not deductible for federal income tax purposes.

IRS Issues RFI on Benefit Suspensions in Multiemployer Pension Plan Provisions

On February 13, the Internal Revenue Service (IRS) issued a proposed rule and request for information on future guidance to implement the multiemployer defined benefit plan suspension provisions included in the Consolidated and Further Continuing Appropriations Act (H.R. 83), enacted in December 2014.

As previously reported, the measure that passed Congress contained a number of provisions to permanently address the funding crisis threatening the multiemployer pension plan system, including the addition of a new status called "critical and declining status" for multiemployer defined benefit plans. A plan is considered in critical and declining status if it is projected to become insolvent anytime in the "current plan year or any of the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds two to one or if the funded percentage of the plan is less than 80 percent)."

Under the new law, sponsors of multiemployer defined benefit plans in critical and declining status are generally permitted to "suspend certain benefits following the provision of specified notice, consideration of public comments, approval of an application for suspension, and satisfaction of other specified conditions (including a participant vote)."

The IRS notice invites public comments for information on future guidance that would address implementation of the benefit suspensions, including:

- How future guidance should address actuarial and other issues, including duration.
- How a plan sponsor could identify which benefits are based on a disability, as reductions based on disabilities are prohibited.
- Practical issues to be considered for participants who have and have not retired.
- Satisfying the requirement that notices of the proposed suspension are distributed to plan participants and beneficiaries concurrently with the submission of the application for approval.

Comments are due by April 6.

New FAQ Guidance Addresses Supplemental Excepted Benefits

The latest "frequently asked questions" (FAQ) document relating to the Patient Protection and Affordable Care Act (PPACA), released jointly by the U.S. departments of Labor (DOL), Health and Human Services (HHS) and Treasury on February 13, clarifies whether health insurance coverage that supplements group health coverage by providing additional categories of benefits can be characterized as supplemental excepted benefits. According the FAQ, the departments have become aware of health insurance issuers selling supplemental products that provide a single benefit and that this type of coverage is being characterized as an excepted benefit.

As explained in the FAQ, most provisions of ERISA, the tax code and the Public Health Service Act do not apply to excepted benefits, as defined under those laws. One category of excepted benefits is supplemental excepted benefits, if they are provided under a separate policy, certificate, or contract of insurance and are either: Medicare supplemental health insurance (also known as Medigap), TriCare supplemental programs, or "similar" supplemental coverage provided to coverage under a group health plan. Regulations provide that similar supplemental coverage "must be specifically designed to fill gaps in primary coverage, such as coinsurance or deductibles." In addition to these requirements, prior guidance set forth additional criteria for determining whether supplemental coverage is similar to Medigap or TriCare and therefore qualifies as an excepted benefit.

According to the FAQ, the agencies intend to propose regulations clarifying the circumstances under which supplemental insurance products that do not fill in cost-sharing under the primary plan are considered to be specifically designed to fill gaps in primary coverage. Specifically, the agencies intend to propose that coverage of additional categories of coverage would be considered to be designed to "fill in the gaps" of the primary coverage only if the benefits covered by the supplemental insurance product are not an essential health benefit (EHB) in the state where it is being marketed. If any benefit in the coverage is an EHB in the State where it is marketed, the insurance coverage would not be an excepted benefit.

The FAQ also sets out circumstance under which the agencies will not initiate an enforcement action pending publication and finalization of proposed regulations.

DOL Seeking Input on Updating Regulatory Process

Pursuant to the White House's Executive Order 13563 (issued in 2011) and Executive Order 13610 (issued in 2012), in which President Obama directed his administrative agencies to improve the regulatory review process and review existing significant regulations to identify whether any regulations may be made more effective or less burdensome, the U.S. Department of Labor (DOL) is soliciting "ideas" on "how the Department can improve any of its significant regulations by modernizing, modifying, redesigning, streamlining, expanding, or repealing them."

The comment request follows a previous March 24, 2011, RFI issued by the DOL for public input on reducing regulatory burden.

The president's executive orders specifically set forth a goal of creating a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation" while using "the best, most innovative, and least burdensome tools to achieve regulatory ends."

Comments in response to the solicitation must be received by February 25 through an Internet portal specifically created for this comment request. The solicitation includes a number of specific questions about the DOL's regulatory approach and the general public will be able to "vote" on others' ideas.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.