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WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides much of its core content.

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Articles in this Edition

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RECENT JUDICIAL ACTIVITY

Council Files Amicus Brief in Milofsky v. American Airlines

The American Benefits Council, joined by the ERISA Industry Committee, has filed an amicus (friend of the court) brief with the U.S. Fifth Circuit Court of Appeals in the case of *Milofsky v. American Airlines*. The case concerns a group of participants whose benefits were transferred from one 401(k) plan to another and who allege that they were misinformed of when those transfers would occur, resulting in a decline in the value of those accounts.

The joint brief supports the Fifth Circuit Court's earlier decision in favor of the defendant, which was vacated so that the case could be reheard by the entire court; the district court also ruled in favor of the defendant. The joint brief argues that individual participants can not seek damages for losses to the plan under Section 409 of ERISA for what amounts to individual losses based on alleged individual misrepresentations. Participants can only recoup losses under Section 502(a)(2) when the fiduciary breaches a duty to the plan itself – not just a duty to one or more participants – and the damages sought would benefit "the plan as a whole."

The U.S. Department of Labor has also weighed in on this case, urging that the court reverse the lower court decision and rule for the plaintiffs.

The Council previously submitted a similar amicus brief in *In re Schering-Plough Corporation ERISA Litigation*, a U.S. Third Circuit Court of Appeals case that involved a drop in the price of employer stock offered as an investment option under the plan.

Council Files Amicus Brief in PBM Disclosure Case

On October 6, the American Benefits Council, along with America's Health Insurance Plans, filed an amicus (friend of the court) brief in Pharmaceutical Care Management Association (PCMA) v. District of Columbia. The brief asks the District of Columbia Circuit Court of Appeals to uphold an injunction granted last December against the District of Columbia legislation known as the AccessRx Act. The Act seeks to regulate Pharmaceutical Benefit Managers (PBMs) by imposing certain fiduciary duties and also requires PBMs to disclose trade secret information, including all financial terms and arrangements between the PBM and manufacturers or labelers of prescription drugs. While employers want PBMs to be transparent with regard to discounts earned on behalf of their own plan participants, there is concern that the District of Columbia law could inappropriately lead to the release of information that would impede the ability of PBMs to serve their employer customers. In addition, the law represents an erosion of preemption protections provided under ERISA. The trial court judge found that if enforced, this "could have the unintended effect of actually driving the PBM business and its attendant benefits out of the District of Columbia."

The amicus brief stresses that the ERISA system and market forces should be allowed to operate. Particular emphasis is placed on the cost savings PBMs can achieve for employer-sponsored health plans.

Court Rules for Directed Trustee in United Lawsuit
On October 12, a federal judge granted summary judgment to State Street Bank & Trust Company, indicating that the directed trustee of the United Airlines Corporation Employee Stock Ownership Plan was not liable for losses suffered by participants when the value of the employer stock in the plan dropped due to the financial difficulties and anticipated bankruptcy filing of United. The lawsuit was filed in the Northern District of Illinois by employees who alleged that State Street should have begun selling the stock in 2001. United announced in August 2002 that it might seek bankruptcy protection and State Street notified the plan's fiduciary committee of its fiduciary duties in September. The fiduciary committee began selling the stock nine days later.

The court appeared to rely heavily on the opinion of the court in a similar summary judgment order filed in the *In re WorldCom, Inc*. case. The Illinois court stated "We agree with the court's reasoning in *In re WorldCom, Inc.* that 'a directed trustee's knowledge that a company's stock price and profits were declining and that the company was undergoing a restructuring is not sufficient to find a breach of a fiduciary duty where the trustee continued to invest plan funds in the company's stock as directed.'" The judge in the WorldCom case relied on a Field Assistance Bulletin issued by the Department of Labor (DOL) following a request from Groom Law Group, supported by a letter from the American Benefits Council.

RECENT REGULATORY ACTIVITY

Hurricane Relief
Minimum Funding, COBRA/HIPAA Deadlines Extended
On October 28, the Internal Revenue Service (IRS), the Department of Labor's Employee Benefits Security Administration and the Pension Benefit Guaranty Corporation clarified that employee benefits plan sponsors and administrators affected by Hurricane Katrina now have until February 28, 2006 to make minimum funding contributions to their plans — or apply for waivers — if the original deadline was between August 29, 2005 and February 27, 2006. In IRS Notice 2005-84, the agencies formally stated that the minimum funding deadline, which had originally been extended to October 31 in IRS Notice 2005-60, was automatically extended to February 28 by the Katrina Emergency Tax Relief Act of 2005, which was passed by the House and Senate on September 21 and signed into law by President Bush on September 23. The IRS notice formalizes the informal statements IRS representatives had made to the Council concerning the deadline extension.

Similarly, COBRA/HIPAA relief has been extended. The Department of Labor and Internal Revenue Service have published new guidance extending previously issued relief intended "to help participants, beneficiaries, qualified beneficiaries, and claimants directly affected by Hurricane Katrina who might encounter problems in exercising their health coverage portability or continuation coverage rights, or in filing or perfecting a benefit claim."

Specifically, it provides that group health plans, disability and other welfare plans, pension plans, and health insurance issuers must disregard the period from August 29, 2005, until February 28, 2006, when determining certain coverage periods and notification/timing dates under HIPAA and COBRA. The original guidance included an end date of January 3, 2006. However, the Katrina Emergency Tax Relief Act of 2005 (KETRA) provided that any relief granted by the U.S. Secretary of Treasury would apply for a period ending not earlier than February 28, 2006. This new guidance confirms that the extension will apply to the HIPAA/ COBRA guidance previously issued by both the Departments of Treasury and Labor.

DOL Launches Contact Site

The U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) has created a specific area on its Web site designed to provide updated contact information on employers and employee benefit plan sponsors whose operations were disrupted by hurricanes. The system is intended to provide vital contact information to participants and their families, DOL staff, as well as many other support organizations assisting victims of the hurricanes who are seeking to obtain vital information related to their retirement or health benefits.

The Web-based searchable database has been populated with existing contact information from Form 5500s previously filed with EBSA by employee benefit plans located in the affected disaster areas (the database currently includes plans located in the Hurricane Katrina, Hurricane Rita, and Hurricane Wilma disaster areas). As plans report new/updated contact information, that information will be entered into the database. Plan sponsors can call EBSA's toll-free number, 1-866-444-EBSA (3272), to report changes. In order to prevent an unauthorized individual from providing incorrect information, EBSA will require plan officials who contact them to provide their new contact information in writing by fax or mail to the national office. The form for providing this information is also located on the Web site.

President's Tax Panel Proposes Dramatic Reform, Changes for Benefits Plans

On October 18, the President's Advisory Panel on Federal Tax Reform met and agreed to recommend to the Secretary of the Treasury two alternative proposals for reform of the tax code: (1) a simplified income tax proposal, and (2) a modified progressive consumption tax proposal. Both proposals would entail significant changes to employee benefits programs.

Under the simplified income tax proposal, the current six individual income tax brackets would be replaced by four brackets (15%, 25%, 30%, and 33%), and the standard deduction, personal exemption and child tax credit would be replaced with a family credit of $1,650 for individuals, $3,300 for married couples, and $2,800 for single, heads of households. In addition, a credit would be given for each child. The earned income tax credit and refundable child credit would be replaced with a new work credit.

The proposal also recommends capping tax-free employer-provided health insurance at $11,500 for families and $5,000 for single individuals, with the amount indexed to the consumer price index. Under current tax policy, employees pay no tax on the value of their employer-sponsored health coverage and employers are allowed to deduct the full expense of their health premium contributions.

The panel is also considering limiting the amounts taxpayers could deduct for home mortgage expenses which, combined with limits on tax preferences for health benefits, are reportedly being eyed as offsets for recommended reductions in the alternative minimum tax (AMT).

This proposal would also:

- create a "Save at Work Account" to replace all current employer-provided plans including 401(k)s, 403(b)s, and salary reduction simplified employee pension plans (SARSEPS) (although it was not clear, the fact that only these three plans were listed may indicate that they are referring only to defined contribution plans);
- simplify nondiscrimination rules;
- provide for automatic enrollment, automatic placement in a diversified investment, and automatic rollover into a new plan if a person leaves a job before retirement;
- replace all current retirement accounts outside of employment – including deferred compensation, cash value life insurance, annuities and IRAs – with a "Save for Retirement" account, permitting individuals to save up to $10,000 annually for retirement; and
- Create an additional "Save for Family" account to replace health savings accounts, 529 college savings plans, flexible savings arrangements (FSAs), and Coverdell education savings accounts (ESAs), also allowing up to $10,000 in savings annually.

The progressive consumption tax proposal for individuals, according to panelists, is the equivalent of an unlimited Roth IRA – no tax on savings or capital income. The proposal provides for three individual income tax brackets of 15%, 25%, and 35%. It would allow an exclusion for a portion of employer-provided health insurance ($8,400 for families and $4,000 for singles) and a deduction for those without such insurance.

A detailed summary of the meeting and the proposals, courtesy of the Benefits Group of Davis & Harman, is available on the Council web site. The American Benefits Council previously submitted a comment letter to the panel in April.

IRS Announces Pension Plan and Health Savings Account Limits for 2006
On October 14, the Internal Revenue Service (IRS) released Revenue Procedure 2005-70, containing dollar limitations for pension plans for Tax Year 2006, reflecting cost-of-living adjustments. These limitations apply to benefits and contributions to qualified retirement plans and health savings accounts. In most cases, cost-of-living hikes and scheduled increases (through the EGTRRA tax relief act of 2001) have triggered increased limits. A summary release of the limits is also available on the IRS web site.

RECENT LEGISLATIVE ACTIVITY

Health Provisions Move Forward in Budget Bill
The Senate Finance Committee has completed consideration of a package of amendments to Medicare and Medicaid (Senate Finance Committee explanation of the Chairman's Mark available here) designed to achieve $10 billion in savings over the next five years. The Committee's proposals are now expected to be considered by the full Senate starting Tuesday, November 1 after having been consolidated with recommended deficit reduction measures from several other committees which together would achieve approximately $35 billion in federal savings.

In a letter to the Senate Finance Committee, the American Benefits Council supported provisions in the legislative package which would reform Medicare payments to health providers by establishing a pay-for-performance program to give higher reimbursement to health care providers that meet or exceed quality and efficiency measures. Health providers who fail to reach performance thresholds — to be set by the Secretary of Health and Human Services (HHS) — or fail to report performance data to the Secretary would receive lower payments from Medicare. Public disclosure of detailed information on providers' performance would be gradually phased in under the new payment program, giving consumers and other private health care purchasers much greater comparative information on health care providers than is presently available.

The Council also is seeking to modify provisions in the Senate bill which would give states broader authority to require employers and health plans to provide any eligibility and claims data requested by a state (to enhance third-party payment recovery efforts for individuals covered by Medicaid who are also covered by other sources of private coverage). The broad language in the bill would require each state to provide assurances to the HHS Secretary that the state has laws in place that can require any eligibility and claims data it may consider necessary from private payers. This information may be requested of (1) employers, (2) insurers or (3) other parties the state considers to have a legal responsibility to pay the health claims of a Medicaid recipient under statute, contract or other agreements. Currently, under similar payment recovery authority for Medicare, the government must enter into voluntary agreements with private payers to share their full eligibility and claims files and payers may otherwise only be compelled to provide such data when Medicare seeks payment for specific services already provided to a Medicare beneficiary.

The Council also urged that the Senate not include provisions approved by the Finance Committee which would reduce funding for Medicare Advantage plans — the private health plans serving Medicare beneficiaries — and cautioned that health plans will only remain in the Medicare marketplace if they are confident that the government is a reliable business partner. The Council also expressed concern that employers must have confidence in the stability of the plans serving Medicare beneficiaries as they consider contracting with Medicare Advantage plans to serve the health needs of their retirees.

The House of Representatives is also working on a comprehensive deficit reduction package which is expected to achieve $50 billion in savings over a five year period. Third party liability recovery provisions identical to those already approved by the Senate Finance Committee are included in the House measure that was crafted by the House Energy and Commerce Committee. The Council also wrote to that House panel urging that the liability recovery provisions be narrowed to minimize the compliance burdens on employers and insurers from individual States seeking health coverage eligibility and claims files. The House of Representatives is expected to consider its budget package starting November 7, after which only about ten days remain in the current session of Congress unless it is extended following the upcoming Thanksgiving holiday. If Congress recesses at Thanksgiving and does not return again until January, as the leaders in both bodies say is their intent, the budget measures will need to be completed when Congress returns to work in 2006.

House Committee Approves PBGC Premium Increase; Thomas, Boehner Send Letter on Cash Balance Plans

On October 26, the House of Representatives Education and the Workforce Committee approved by voice vote Pension Benefit Guaranty Corporation (PBGC) premium increases as part of the FY2006 budget bill. The measure would raise flat-rate premiums from $19 to $30 per plan participant per year for plan years beginning after 2005, and index future premiums to increases in wages. In addition, the measure would allow the PBGC itself to increase premiums by up to 20 percent from the prior year's level “if the corporation determines that such an increase is necessary for the operation of the plan termination insurance program.” The PBGC-proposed increase would take effect unless Congress adopts a joint resolution expressly opposing it. The bill requires that the PBGC provide Congress with a description of the methodology and assumptions it uses for any proposed increase.

In his opening statement at the committee mark-up, Chairman John Boehner (R-OH) reiterated his commitment to comprehensive pension reform this year, as well as to the need to strengthen the PBGC. He also stated that passage of comprehensive reform legislation (such as the Pension Protection Act (H.R. 2830) approved by the Committee on June 30) would supercede any premium increases enacted through the budget process. In response to comments made by Ranking Minority Member George Miller (D-CA), the Chairman expressed his disappointment at the methodology used by the PBGC and the Congressional Budget Office (CBO) in assessing the affect of the Pension Protection Act on the PBGC.

The Senate Committee on Health, Education, Labor and Pensions (HELP) approved a similar budget provision that would raise PBGC premiums from $19 to $46.75 per participant per year. Both the House and Senate measure would also allow the PBGC to impose a special premium of $1,250 per plan participant (for the first three years) for companies emerging from bankruptcy that had terminated their pension plans during the bankruptcy proceedings.

In addition to broad defined benefit pension funding reforms, both the Pension Security and Transparency Act (S. 1783) – which is still pending in the Senate – and H.R. 2830 also contain important provisions addressing the legitimacy of hybrid or "cash balance" plans. On October 26, Boehner joined House Ways and Means Chairman Bill Thomas (R-CA) in issuing a "dear colleague" letter to all House of Representative offices urging support for these provisions. The Boehner/Thomas letter makes a strong case on behalf of cash balance plans. The bill is expected to be considered soon by the Ways and Means Committee.

Broad Funding Bill Still Pending

The Senate has yet to schedule a floor vote on S. 1783, which was temporarily shelved amid discussions of an amendment by Senator Mike Dewine (R-OH). DeWine's amendment would provide for three-year smoothing of assets and interest rates as was provided under the Defined Benefit Security Act passed by the HELP Committee — rather than over 12 months as prescribed in S. 1783 — and replace the at-risk liability trigger with the trigger used by the HELP Committee bill, i.e. whether a plan is below 60 percent funded.

Addressing this topic, the American Benefits Council has sent a letter to all Senate offices urging the Senate not to give up on pension reform legislation. Since action on S. 1783 has stalled, there have been some suggestions that Congress might not have time to complete work on broad legislation. These suggestions were given further weight by assertions by both the Congressional Budget Office and the PBGC that both the Senate and House bills would make the agency's deficit worse, rather than better.

The Council's letter notes that in addition to dealing with new funding rules for single employer plans, the legislation contains provisions dealing with hybrid pension plans, multiemployer plans and special issues concerning airlines, and all of these matters must also be addressed by Congress.

Multiemployer Bill Introduced
On October 5 Senator Rick Santorum (R-PA) introduced the Multiemployer Plan Funding and Deduction Reform Act (S. 1825), which provides specific funding rules for multiemployer pension plans. The bill is designed as a companion to S. 1783.

Sanders Introduces Hybrid Plan Bill Mandating Choice at Retirement
On October 7, Representative Bernie Sanders (I-VT), joined by a number of Democrats, introduced the Pension Benefits Protection Act (H.R. 4052), addressing hybrid pension plans. The bill is very similar to the Pension Benefits Protection Act (S. 1304), introduced in the Senate by Tom Harkin (D-IA) in June. Sanders also introduced a similar bill in 2003.

H.R. 4052 would require employers who convert traditional defined benefit plans to hybrid plans to offer participants who have attained age 40 or have 10 years of service the better of the two formulas at retirement ("choice at retirement"). The bill would also require that all participants receive a benefit that is at least the sum of the participant's benefit under the old plan provisions plus the participant's benefit under the new hybrid formula ("A+B formula" or "no wear away"). The House bill would apply the requirements to all conversions regardless of whether they occurred before, on, or after the date of enactment. S. 1304, by contrast, would exempt conversions that received a determination letter from the Internal Revenue Service.

The American Benefits Council continues to monitor developments in the hybrid plan area and will work to oppose both the Sanders and Harkin bills. The Council is vigorously pursuing comprehensive clarification of hybrid plans' legitimacy, in the form of stand-alone legislation as well as in the context of the pension funding reform debate.

Hurricane Regulatory Relief Bill Includes Loans/Distribution Provisions
On October 6, Representative Bobby Jindal (R-LA) introduced the Hurricane Regulatory Relief Act (H.R. 3975), a bill that contains provisions relating to education and occupational safety and health as well as the loan and distribution provisions from the Pension Flexibility for Displaced Workers Act (H.R. 3862) introduced by House of Representatives Education and the Workforce Committee Chairman John Boehner (R-OH) in September. Jindal was joined on the bill by Boehner and several other members of the House of Representatives. Jindal's bill was referred to Boehner's Committee.

The only apparent change made to the provisions from H.R. 3862 appears to be the addition of victims of Hurricane Rita as well as Hurricane Katrina victims as eligible for the relief. The Boehner bill (now Title III of H.R. 3975) would give the U.S. Department of Labor (DOL) the authority to issue guidance that would make it easier for some Hurricane Katrina (and now Rita) victims to receive loans and distributions from their retirement plans. The legislation would allow the DOL to prescribe – by notice or otherwise – a waiver, suspension or exemption from any provision of Title I of ERISA if the Secretary of Labor determines it is appropriate to facilitate the distribution or loan of assets from a retirement plan affected by one of the two Hurricanes. The potential waiver, etc. can be applied to service providers or any other person dealing with the plan.

Older Workers Bill Introduced in Senate

On October 6, Senator Herb Kohl (D-WI) introduced The Older Worker Opportunity Act (S. 1826), a bill designed to assist older workers who want to continue working. Among other provisions, the bill would provide a tax credit to employers who offer flexible or phased work schedules and meet certain requirements. In order to qualify for the tax credit of up to 40 percent of the first $6,000 in wages paid annually to each older worker in the flexible of phased work program, the employer must provide health insurance to these workers on the same basis, including paying the same percentage of the cost of health insurance, as it does for full-time employees. The bill would also require employers seeking the credit to:

- allow these employees to continue to participate in the employer's defined benefit and defined contribution plans,
- eliminate the option of suspending retirement benefits from a defined benefit plan with a suspension of benefits notice, and
- calculate final average earnings (for plans that use final average earnings) so that it is no less than such earnings before the participant entered the program.

The bill would also extend COBRA health coverage from 18 to 36 months (or until eligible for Medicare) for older workers (currently at least age 62) who lose health coverage due to a reduction in work hours.

New Automatic Enrollment Bill Introduced in Senate

On October 4, Senators Rick Santorum (R-PA) and Robert Bennett (R-UT) introduced the 401(k) Enhancement Act: Encouraging Retirement Savings (S. 1819), a bill addressing automatic enrollment/acceleration in retirement plans. The bill generally would provide the following: (1) 404(c) protection for default investments selected under regulatory guidance that would include investments that include a mix of asset classes consistent with long-term capital appreciation, (2) relief from state wage withholding laws, and (3) a safe harbor that would allow plans that meet the requirements to avoid non-discrimination and top heavy testing. Both the default investment and state wage withholding relief provisions apply to all automatic enrollment plans, regardless of whether they meet the safe harbor requirements. In addition, the default investment guidance would be expansive enough to include defined contribution plans that are not designed to be automatic enrollment plans.

The bill's safe harbor would require automatic enrollment for new employees (not existing employees) for at least 3 percent of compensation, increased by 1 percent per plan year (with no provisions for timing the increases to correspond with compensation increases). The safe harbor employer contribution provisions would require a 50 percent match of the first 6 percent of compensation deferred by the employee or a non-elective 3 percent contribution for all non-highly compensated employees. No special vesting would be required.

In other automatic enrollment developments, one of the amendments expected to be offered to the Pension Security and Transparency Act (S. 1783) was crafted by Senators Jeff Bingaman (D-NM) and Gordon Smith (R-OR) who both introduced bills earlier this year. Bingaman had previously introduced the Save More for Retirement Act (S. 875) and Smith had previously introduced the Retirement Security for Life Act (S. 381). The amendment is expected to more closely resemble S. 875. The pension bill stalled before the Columbus Day recess, but may be considered in November.