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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.

Articles in This Edition

RECENT REGULATORY ACTIVITY

Deadlines Extended for Some Hurricane Katrina Victims

On February 17, the Treasury Department (Treasury) and the Internal Revenue Service (IRS) released Notice 2006-20, which postpones certain deadlines for taxpayers in the regions in Louisiana and Mississippi most severely affected by Hurricane Katrina. The relief provides a further postponement. The Notice, which extends the deadline beyond the current February 28 extension to August 28, was published in the Federal Register on March 6.

The relief applies to any individual or business that either had the principal residence or place of business in the covered disaster area on August 29, 2005, or whose necessary records or tax professional/practitioner's office is located (or was located as of August 29, 2005) in the covered disaster area. In some circumstances, individuals visiting the area as relief workers or those injured or killed would be covered by the relief.

The additional relief will automatically be provided to affected taxpayers in Cameron, Jefferson, Orleans, Plaquemines, St. Bernard, St. Charles, and St. Tammany parishes in Louisiana, and Hancock, Harrison, and Jackson Counties in Mississippi. Taxpayers in additional parishes and counties (including some in Alabama) may request the extension relief by marking returns and other documents with "Hurricane Katrina" in red ink.

On February 24, the Pension Benefit Guaranty Corporation (PBGC) announced an extension of Hurricane Katrina disaster relief until August 28, 2006, for the same affected taxpayers covered by the Treasury's and the IRS's Notice discussed above. The previous deadline had been February 28, 2006. Disaster relief for other Hurricane-affected areas, including areas affected by Hurricanes Rita and Wilma, was not extended.

The PBGC-announced extension applies to the Form 5500 series returns as well as the filing of Form 1 or Form 1-EZ, relating to PBGC premiums and the payment of PBGC premiums. As in the original extension, the PBGC will waive late payment penalties for the delayed premium payments, but applicable interest charges will still apply. Delays were also granted for filings and distributions related to plan terminations and a number of other reports and notices. More details of the extension are available on the PBGC disaster relief page.

As in the original extension, the relief applies to plans where the person responsible for meeting a PBGC deadline (for example, a plan administrator or plan sponsor) was located in the aforementioned parishes and counties, or the company cannot reasonably obtain information or other assistance needed to meet the deadline from a service provider, bank, or insurance company that was located in the designated area.

HHS Releases Final Regulations for HIPAA Enforcement

On February 16, the U.S. Department of Health and Human Services (HHS) published final regulations establishing unified enforcement procedures for HIPAA's privacy rule and other administrative simplification provisions. The final regulations amend existing rules regarding HHS investigations and imposition of civil money penalties and clarify bases for liability, grounds for waiver, conduct of hearings and the appeal processes.

The final regulations, which took effect March 16, 2006, include several significant changes to the rule as proposed by HHS on April 18, 2005. The regulations:

- Permit covered entities 90 days to request a hearing, rather than 60 days;
- Eliminate the use of variables in determining the number of violations of an identical requirement or prohibition. Instead, the number of violations will be based on the nature of the covered entity's obligation to act or not act under the provision violated, such as an obligation to act within a certain time;
- Allow the administrative law judge to review the number of violations as determined by HHS as part of his or her review of the civil money penalty; and
- Make members of an affiliated covered entity jointly and severally liable unless it is established that another member of the affiliated covered entity was responsible for the violation.

Also, although HHS may use statistical sampling to calculate the number of violations committed by a covered entity, according to the regulations it must provide the entity with a copy of the study or report with the agency's notice of intent to impose a penalty.

SEC Releases Proposed Rules on Disclosure of Executive Compensation

On January 27, the Securities and Exchange Commission (SEC) issued proposed rules for annual proxy disclosure of executive compensation. These rules aim to provide a central information source for investors on annual compensation for corporate executives and would apply to the CEO, CFO and the three highest-paid executives as well as some highly paid non-executives (based on total amount of compensation). There are also separate reporting requirements applicable to directors.

The new rules require a summary compensation table, including the value of any perquisites exceeding (in the aggregate) $10,000. The rules would require disclosure of all nonqualified deferred compensation and all qualified (both defined benefit and defined contribution) retirement benefits in tabular form. There is also a separate required equity compensation table. The rules require a narrative provision as well, explaining the exact nature of the executive compensation. The narrative provision must contain a description of any material factors necessary to understanding the plans disclosed in the tables, including any perquisites. There may also be some employer concern that the new rules would require the maintenance of records in a different manner than the U.S. Treasury Department's recent nonqualified deferred compensation rules.

RECENT LEGISLATIVE ACTIVITY

President's FY 2007 Budget Proposals Include HSA Improvements, Renewed Call for Retirement Savings Funds

President Bush's Fiscal Year 2007 budget, released February 6, 2006, includes proposals to encourage more individuals to purchase health savings accounts (HSAs) and high deductible health care coverage, as well as several important improvements to HSAs recommended to encourage more employers to offer these new consumer-directed health plan designs to their employees. The President's recommendations to improve HSAs are estimated to reduce federal tax revenues by $59.1 billion over the next five years and increase by 50 percent the projected number of individuals participating in HSAs, from an estimated level of 14 million individuals to 21 million in 2010. The proposals include:

- An above-the-line deduction and a credit for payroll taxes paid (up to 15.3 percent) for high deductible insurance premiums offered in conjunction with HSAs intended to place individually purchased insurance coverage on an "equal footing" with coverage obtained through an employer;
- An increase in the amount that may contributed to HSAs, up to the out-of-pocket spending limit for an HSA-qualified high deductible health plan, and a credit for payroll taxes paid (up to 15.3 percent) on HSA contributions; and
- A refundable health insurance tax credit for premiums paid on high deductible health plans for lower income individuals to help them purchase catastrophic coverage. This credit would cover up to 90 percent of the cost of a high deductible insurance premium up to $1,000 for individuals and up to $3,000 for families.
- Other proposals to make HSAs more flexible and accessible include allowing employers to make higher contributions to HSAs for those with chronic health conditions, allowing HSA participants, such as early retirees, to use funds from their HSAs to make tax-free payments for non-group health insurance premiums for high deductible health coverage, and permitting employers to convert balances in employer-controlled health reimbursement arrangements to employee-owned HSAs. In addition, if two spouses both have HSAs and are over age 55, they could each make "catch up" contributions into a single HSA of either spouse. Other more technical changes to HSAs are also included in the Administration's proposals.

Also, while not directly proposing any changes to current tax provisions which favor employer-sponsored health coverage, the Administration criticized the health tax incentives under current law. Specifically, the Treasury Department's documents issued on February 6 to coincide with the release of the President's FY 2007 budget proposals state that "current tax incentives in the tax code encourage people to insure against predictable and routine expenses (and not just unpredictable, large-scale expenses) and, thus, are less sensitive to the cost of the health care they consume." The Treasury Department documents also claim that current tax preferences for health coverage are flawed because "they are generally not available to the uninsured or to individual insurance purchasers" and may promote job-lock.

On retirement policy, the 2007 budget continued to reflect the Administration's policies as outlined in prior budgets and other Bush Administration proposals. In the area of hybrid plans, the budget would require a five-year "hold harmless" period for plans converted from traditional plans to cash balance plans so that benefits earned by a participant under the cash balance plan would have to be at least as valuable as the benefits the participant would have earned under the traditional plan as if the conversion had not occurred. In addition, there could be no wearaway of normal or early retirement benefits for any participant at any time. However, the budget proposal would clarify the legal status of cash balance plans under age discrimination rules and eliminate the "whipsaw" problem by permitting a lump-sum distribution of the account balance so long as the plan does not credit interest in excess of a market rate of return.

The budget proposal would also provide for permanent extension of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (both pension and non-pension provisions) and consolidate defined contribution plans that permit employee deferrals or after-tax employee contributions into Employer Retirement Savings Accounts, which would be available to all employers and be subject to rules similar to the existing rules for 401(k) plans except that plan qualification rules (including nondiscrimination rules) would be simplified. Another provision would also consolidate current law IRAs into Retirement Savings Accounts, which would be similar to current-law Roth IRAs with after-tax contributions and tax-free distributions after age 58, or in the event of death or disability. The budget proposal would also establish Lifetime Savings Accounts that would allow tax-free distributions for any purpose at any time, with contributions limited to $5,000 per year.

Retirement Bill Is in Conference; Side-by-Side Summaries Available

The Pension Security and Transparency Act (S. 1783), passed by the Senate on November 14, 2005, and the Pension Protection Act (H.R. 2830), passed by the House on December 15, 2005, is currently the subject of a congressional conference to hammer out the differences between the two bills. Both bills contain single- and multi-employer defined benefit plan funding reform provisions, defined contribution plan provisions including those addressing automatic enrollment, and language intended to clarify the legal status of hybrid pension plans on a prospective basis.

The American Benefits Council has side-by-side charts — comparing H.R. 2830, S. 1783, the Bush Administration's initial proposal and current law — for each of the legislation's subject areas:

- Side-by-side chart on retirement bill funding provisions
- Side-by-side chart on retirement bill defined contribution plan provisions
- Side-by-side chart on retirement bill hybrid plan provisions and
- a detailed two-page brief on hybrid plan designs covering both legal and legislative precedents for hybrid plan legitimacy.

House Approves Budget Bill Conference Report; PBGC Premiums to Rise Immediately

On February 1, the House of Representatives again approved the conference report of the FY 2006 budget reconciliation bill (Deficit Reduction Act, H.R. 4241/S. 1932) by a vote of 216-214. The bill was then sent to President Bush for his signature. The Senate passed this version of the report on December 21, but during that vote a technical point of order – unrelated to benefits policy – was raised and the conference agreement needed to be modified. This resulted in the House having to approve the legislation a second time.

Of immediate significance to plan sponsors is the change in pension insurance premiums to the Pension Benefit Guaranty Corporation (PBGC) now effective in 2006. For calendar year plans, the first premiums were due on February 28, 2006. Flat-rate premiums will increase from $19 to $30 per participant per year and are automatically indexed to wage inflation in the future. A special premium of $1,250 per plan participant is also imposed for the first three years after companies that had terminated their pension plans and turned them over to the PBGC emerge from bankruptcy. This provision is also applicable to distress terminations outside bankruptcy. This "special premium," written to expire in 2010, is effective for terminations after 2005, but plans of employers that entered into bankruptcy before October 18, 2005, are exempt from the premium. The bill imposes an increase in the flat-rate premium for multiemployer plans from $2.60 to $8.00 per participant per year. Separate, final pension funding reform legislation now under consideration by Congress may include changes to the variable rate premium.

The final budget conference agreement does not contain the provision in the original House bill that would have allowed the PBGC itself to increase premiums by up to 20 percent from the prior year's level "if the [PBGC] determines that such an increase is necessary for the operation of the plan termination insurance program." The PBGC-proposed increase would have been imposed unless Congress adopted a joint resolution expressly opposing it.

RECENT JUDICIAL ACTIVITY

American Benefits Council and Other Employer Groups File *Sereboff v. MAMSI* Amicus Brief

On February 24, the American Benefits Council joined with the National Association of Manufacturers and America's Health Insurance Plans in filing an amicus (friend-of-the-court) brief with the U.S. Supreme Court in the case of *Sereboff v. Mid Atlantic Medical Services, Inc. (MAMSI)*. This case concerns a company's subrogation rights under ERISA, under which an employer plan or insurer is entitled to recover amounts it paid for the cost of benefits it provided to a claimant, and for which a third party has been found liable. The underlying question is whether subrogation claims constitute equitable relief, which is permissible under ERISA, or legal relief, which is not.

In this case, the federal district court in Maryland and the Fourth Circuit Court of Appeals have all held in favor of MAMSI. Their rulings agreed that the remedy sought by MAMSI was equitable in nature. The Supreme Court is expected to hear oral arguments in March and issue a decision later in the year.

Appeals Court Hears Arguments in Cash Balance Case

On February 16, the Seventh Circuit Court of Appeals heard oral arguments in *Cooper et al. v. IBM*, a class-action case concerning an IBM cash balance plan as it relates to the age discrimination provisions of ERISA. In July 2003, the U.S. District Court for the Southern District of Illinois ruled in favor of the plaintiffs, contrary to the legislative history of ERISA, U.S. Treasury Department regulations, and several other federal court cases. In September of 2004, IBM reached an agreement with the plaintiffs in the case. Under that agreement, IBM retained its right to appeal the prior court decision on the cash balance aspects of the suit.

During the oral argument, the judges posed questions examining further the position of IBM and the business community about the time value of money – a concept detailed in an amicus brief filed by the American Benefits Council (along with the ERISA Industry Committee) in November 2005. The judges will now deliberate the case and could reach a decision as early as spring 2006.