

CURRENT DEVELOPMENTS

ASSOCIATION OF EMPLOYEE BENEFITS PLANNERS

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A. IRS News

1. Notice 2008-108 – The IRS has updated its Cumulative List with all required changes for retirement plans applying for a determination letter under Cycle D.
2. Notice 2008-98 – The IRS has extended the deadline for governmental plans to apply for a determination letter from Cycle C to Cycle E. This will apply only for this EGTRRA round of determination letters. Future determination letters will still be due under Cycle C for governmental plans. If a governmental plan has already applied for an EGTRRA determination letter by November 7, 2008, the plan can withdraw the application and can re-file in Cycle E.

B. Department of Labor Issuances

1. Field Assistance Bulletin 2008-04 – The DOL has issued guidance in a question and answer format on the fidelity bond requirement of Section 412 of ERISA. The DOL clarified that third-party administrators do have to acquire fidelity bonds if they have the discretionary authority to distribute plan assets or if they have access to plan assets (i.e., they handle plan assets). Note that the Pension Protection Act increased the bond level from \$500,000 to \$1,000,000 if a plan holds employer securities (however, this does not impact plans whose employer securities are held through mutual funds that are not managed by the employer). The guidance also clarifies that plan committee members need a bond if they make final benefits decisions or investment decisions with respect to plan assets.

C. Court Decisions

1. Gagliano v. Reliance Standard Life Ins. (4th Cir. 2008). This case involves a claim for benefits in which a plan violated the claims procedure requirements of ERISA. The plan in the second level of review raised a reason for denial that was not raised on the initial level of review. The participant was not given an opportunity to appeal the new ground for denial. The court held that this violation of the claims procedure rules does not justify an award of benefits as the remedy. The claimant was simply given a new opportunity for an appeal. This creates a split in the circuits with the Sixth Circuit.

2. *Vaught v. Scottsdale Healthcare Corp. Health Plan* (9th Cir. 2008). This is another claims procedure opinion. In this case, a plan treated a letter complaining about the sufficiency of the explanation of benefits as an inadequate appeal. Accordingly the plan denied the claim for failure to appeal. The court held that the plan had improperly denied the plaintiff's right to appeal and permitted the plaintiff to raise a new issue (i.e., a new reason that the benefits denial was improper) in court. The court did not remand the case for a new appeal. Instead, the court allowed the plaintiff to pursue its remedies in court.

3. *Hobbs v. Baker Hughes Oilfield Operations*, (5th Cir. 2008). The employer sent a life insurance conversation application to the wrong address. The court held that this was not a breach of fiduciary duty. Even if the error had been a breach of fiduciary duty, the court said that reinstatement of benefits would not have been appropriate equitable relief, thereby reinforcing its prior decision in the *Amschwand* case, which was denied review in the Supreme Court earlier this year.

4. The Supreme Court is currently deciding the *AT&T v. Hulteen* case, in which pre-1979 pregnancy leaves may have to be retroactively counted as service in determining the plaintiffs' entitlements to defined benefit pensions.

D. CMS

1. CMS has posted on its website a 136-page guide on the mandatory Medicare secondary payer reporting that will commence in January of 2009. Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 imposed reporting requirements on "responsible reporting entities." This reporting will require health plans to self-identify potential Medicare secondary payroll violations. A "responsible reporting entity" is "an entity serving as an insurer or third-party administrator for a group health plan . . . and, in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary." The website is www.cms.hhs.gov/MandatoryInsRep/Downloads/Section1111GHPUserGuideV1510-15-08Final.pdf

E. Major Year-End Deadlines

1. 409A compliance for deferred compensation plans
2. 403(b) plans compliance with the final 403(b) regulations
3. 415 regulations if a plan wants to operationally change its operation from its current 415 language in 2008. (Otherwise, the 415 amendments can await adoption until the due date, including extensions, for the employer's 2008 tax return.)
4. Adopt the amendment to add a qualified contribution arrangement or an eligible automatic contribution arrangement if such a contribution type will be used in 2009.