

CURRENT DEVELOPMENTS

Association of Employee Benefit Planners of New Orleans

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1. COLAs Leave Plan Limits Virtually Unchanged for 2010 (IR 2009-94)

- www.irs.gov/newsroom/article/0,,id=214321,00.html
- Avoids concerns that negative inflation would result in lower limits in 2010
- Social Security wage base also unchanged at \$106,800
- HSA limits do increase – now \$3,050 and \$6,150 contribution limits for single and family; Max deductibles \$1,200 and \$2,400; Max out of pocket \$5,950 and \$11,900. Rev Proc 2009-29.

2. RMD Waiver Guidance and Sample Amendments (Notice 2009-82)

- Provides transition relief through November 30, 2009 for a plan that is not operated in accordance with its terms with respect to waived RMDs and certain related payments
- Sets out rollover relief with respect to waived RMDs and certain related payments, including an extension of the 60-day rollover period to November 30, 2009 for certain of the distributions
- Answers questions regarding the waiver of 2009 RMDs

3. Automatic Contribution Arrangements (ACAs) and Model Amendments (Notices 2009-65, 66 and 67; Rev Rul 2009-30)

- Notice 2009-65: Includes two sample amendments for sponsors who want to add automatic contribution features to 401(k) plans. One includes the 90-day withdrawal provisions; the other does not. Both accommodate either a flat contribution rate or automatic increases. The amendments are created for prototype plans and the IRS notes that adopting the amendments will not cause a plan to lose reliance on a prototype sponsor's opinion letter.
- Notice 2009-66 & 67: Address ACAs in SIMPLE IRAs
- Rev Rul 2009-30: Explains how escalator features (annual increases tied to salary increases) can be included in a plan that has automatic enrollment, and notes that the auto increase timing does not need to be tied to the first day of each plan year.

4. **Contributing vacation days and other PTO to a 401(k)**
 - Rev Rul 2009-31 allows a plan to allow (or require) participants to convert unused year-end paid time off to a dollar-equivalent 401(k) contribution.
 - Rev Rul 2009-32 allows similar treatment of unused paid time off at termination.
 - In both cases, the employee is not taxed until withdrawal.
5. **New 402(f) “Safe Harbor Tax Notices” – Notice 2009-68**
 - There are two model notices – one for distributions of amounts that were contributed on a pre-tax basis and one for Roth distributions.
 - Plans with a Roth feature will need to distribute both or customize their own.
6. **Guidance on Rollovers from Qualified Plans to Roth IRAs – Notice 2009-75**
 - Guidance on the taxable amount for a rollover from an eligible plan to a Roth IRA
7. **ERISA Advisory Council (15 members appointed by the Secretary of Labor) will not recommend adding Stable Value funds as QDIAs**
8. **IRS seeking comments on Determination Letter process: <http://tinyurl.com/l4rgwr> OR http://www.surveymonkey.com/s.aspx?sm=EL2r2msS3KJI07X_2fq67w6w_3d_3d**
 - Requirements for interim and remedial amendments
 - Staggered timing of the filing cycle for new and restated plans
 - Determination letter procedures, including the time to obtain approval from IRS
 - Experiences with IRS personnel who review plan submissions
9. **IRS Issues Regulations on Post-PPA Funding Target, Target Normal Cost, Valuation Date and Plan Asset Valuation; also Final Regs on At-Risk Rules**
 - Results of these determinations govern whether plans are subject to limitations on benefit increases, payment of lump sums, and other restrictions.
 - Guidance addresses how plans must determine their funding target percentages and other measures.
 - 300+ pages of guidance
10. **3rd Circuit upholds provision in a Union CBA under which the union agreed to indemnify an employer for withdrawal liability. *Pittsburgh Mack Sales v. IUOE Local No. 66* (Case No. 07-3938, 2009)**
 - May provide an option for employers leery of agreeing to contribute to a union pension.
11. **The World According to TARP? Stephen Tackney opined at a recent ABA conference that TARP restrictions may eventually reach executive comp in the entire financial sector**

12. Let the 409A Audits Begin!

- A blog by Michael Melbinger (Winston & Strawn) references a recent IRS Information Document Request (IDR) that includes 15 questions on 409A (though only 6 are reported on the blog). www.tinyurl.com/yg6a95a

13. GINA gives Wellness Programs the Cold Shoulder

- The Genetic Information Nondiscrimination Act of 2008 (“GINA”) amended ERISA, the PHS Act, the Code and the Social Security Act to prohibit discrimination in health coverage based on genetic information.
- Title I of GINA prohibits a group health plan from collecting genetic information prior to enrollment, and also prohibits the use of genetic information for underwriting purposes.
- Title II of GINA provides that an employer may collect Genetic Information as part of a wellness program as long as:
 1. the employee has given “prior, knowing, voluntary, and written authorization”;
 2. only the employee (or dependant) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results; and
 3. individually identifiable genetic information is used only for providing health or genetic services and is not disclosed to the employer except in aggregate terms.
- On October 1, the DOL, Centers for Medicare and Medicaid Services (“CMS”) and IRS released interim final rules under Title I of GINA, published in the Federal Register on October 7, 2009 (74 Federal Register 51,664). The rules describe the statutory prohibitions against plans or issuers collecting genetic information for “underwriting purposes” or prior to or in connection with enrollment; define “underwriting purposes;” and clarify that, if an individual seeks a benefit under a plan or coverage, the plan or coverage may limit or exclude the benefit based on whether the benefit is medically appropriate, and such determination is not within considered “underwriting purposes”).
- “Underwriting purposes” is defined broadly as including, with respect to group health plan coverage, rules for and determinations of eligibility, computation of premium or contribution amounts, and application of preexisting condition exclusions. “Underwriting” is broader than just activities relating to rating and pricing a group policy and includes changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing a health risk assessment or participating in a wellness program.
- Wellness programs that provide rewards for completing health risk assessments that request genetic information, including family medical history, violate the prohibition against requesting genetic information for “underwriting purposes.”

- Plans and issuers can collect genetic information through health risk assessments in certain circumstances, such as when no rewards are provided, and if the request is not made prior to or in connection with enrollment. A plan or issuer can also provide rewards for completing a health risk assessment as long as the health risk assessment does not collect genetic information. Numerous examples in the regulations illustrate permitted and prohibited health risk assessments.
- The ERISA Industry Council (“ERIC”) suggested that the following alternatives would comply with the new regulations. Employers can offer employees:
 - a financial incentive to complete health-risk assessment forms that ask no questions about family medical history, even though the assessments will be less valuable than they would be if they included family medical history;
 - no financial incentive to complete health-risk assessment forms that ask questions about family medical history, provided they do not ask employees to complete the assessments until after the effective date the employees are enrolled in a group health plan;
 - two health-risk assessments: one that offers employees a financial incentive to complete the forms but requests no family medical history, and another in the form of an addendum that requests family medical history but clearly states that employees can leave the addendum blank and still receive a financial incentive for filling out the first part; or
 - a financial incentive paid outside of the health plan, and therefore subject to tax, to complete health-risk assessment forms that ask for information about family medical history.

14. EEOC Questions whether mandatory Health Risk Assessment is compatible with ADA

An employer's requirement that all employees complete a health risk assessment in order to participate in an employer-funded health reimbursement arrangement likely violates the ADA, according to an August 10, 2009, EEOC Opinion Letter. Employers may ask only disability-related questions and require employees to undergo medical examinations if job-related and consistent with business necessity. The health risk assessments at issue required employees to answer over 100 questions in categories such as family history, self care, personal health, women's health, older adult health, nutrition choices, physical activity, and alcohol and tobacco use.

The response noted that “...requiring employees to complete a health risk assessment that includes many disability-related inquiries—such as questions about how often they feel depressed; whether they ever have been told that they have certain conditions, such as asthma, cancer, heart disease, or diabetes; how many different prescription medications they currently take ...; or how much alcohol they drink ...—as a prerequisite to obtaining reimbursement for health expenses does not appear to be job-related and consistent with business necessity,” the EEOC wrote. The letter concluded that “...even if the health risk assessment could be considered part of a wellness program, it is not voluntary because it penalizes any employee who does not complete the questionnaire by making him or her ineligible to receive reimbursement for health expenses.”

15. Employers should be ready to understand, implement reform changes

At an ALI-ABA conference on October 8, 2009, Bill Sweetnam opined that health care reform legislation will create several areas of concern for practitioners and employers, such as:

- Requirements that a health plan be “qualified” and what this means for their plans.
- Employer and employee mandates, and the penalties involved.
- Subsidies for low-income employees, and the source thereof.
- Taxes on Cadillac (clunker?) health plans (Senate Finance-approved legislation contains a 40 percent excise tax on insurance premiums in excess of \$8,000 for individuals and \$21,000 for families).
- Reporting health care benefits – likely to be via Form W-2.

16. HHS Secretary Kathleen Sebelius said in an Oct. 2 letter to lawmakers that regulations for the 2008 mental health parity law will be out in January 2010. Other Welfare Plan issues for 2010 include GINA, Michelle’s Law, and HIPAA.

17. Look for 125 Plan Final Regs to be effective in 2011 at the earliest.

- At an ABA seminar on October 19, 2009, Kevin Knopf (Office of Benefits Tax Counsel) said that cafeteria plan regulations would not be effective until 2011 at the earliest. He noted that “the last proposed regs on cafeteria plans were out for 27 years and never went final...” *BNA Daily Tax Report, 10/20/09*

18. Phyllis Borzi has laid out some of EBSA’s new enforcement priorities:

- Fees of pension consultants and service providers.
- ESOP valuation – whether ESOPs and their participants are overpaying for Company stock – as well as fiduciary self-dealing and conflicts of interest
- Bankrupt and financially distressed plan sponsors.
- Multiple employer welfare arrangements (MEWAs).

19. Ms. Borzi Favors revision of ERISA remedies as part of health care reform.

- Borzi said at an ABA seminar on October 19 that it would be a “tragedy” if health care reform is passed without addressing remedies available under ERISA.
- However, she hopes that legislators will not toss out the regulatory certainty that plan sponsors and benefits attorneys count on today. “When the dust settles, I think it should be clear, and I’m hopeful that it will be clear, that those of you who represent ERISA plans or who sponsor ERISA plans will still be subject to the same regulatory regime,” she said. *BNA Daily Tax Report, 10/20/09*

20. When Fiduciaries go bad:

- **Hitachi HR Manager Sentenced To Prison in \$6 Million Fraud**

NEW YORK—A former senior manager of human resources of Hitachi America Ltd. was sentenced to 57 months in prison for defrauding the company's health and welfare plan of more than \$6 million. Dowd was responsible until March 2008 for managing employee benefit programs, including the company's group health and welfare plan.

In 1997, he opened an unauthorized bank account in the name of a “Hitachi Group Insurance Health and Welfare Trust.” Between 2000 and early 2008, Dowd deposited almost \$8 million in checks from insurance companies, health care providers, and others, they charged. The checks were made payable to the plan, Hitachi America, or a corporate affiliate, they said. From that account, Dowd withdrew at least \$1 million for credit card purchases, at least \$2 million in cash for himself, some \$42,000 for a Lexus automobile, and some \$625,000 for a house in Vero Beach, Fla. He remitted only \$1.5 million back to the company, they said.

In addition to the prison term, Dowd was ordered to serve three years of supervised release and pay \$7.5 million in restitution, prosecutors said.

- **Take Michael Vick off your short list of Fiduciaries**

The DOL obtained a judgment requiring NFL quarterback Michael Vick and his company, MV7 LLC, to repay more than \$400,000 in restitution to MV7's pension plan. The order also requires Vick to forfeit any rights to pension benefits under the plan. In addition, he agreed to pay a civil monetary penalty to the DOL, according to a department news release.

Prior to his conviction on dogfighting charges, Vick ran a celebrity marketing company (MV7). The company sponsored a pension plan for nine employees, including Vick. Vick was the trustee but withdrew over \$1 million from the plan in violation of his fiduciary duties. The department argued in a filing in the bankruptcy court that Vick's violations of ERISA constituted “fraud, defalcation, or embezzlement” under the Bankruptcy Code and as such the \$1.35 million taken from the plan was a nondischargeable debt.

The DOL also filed a civil lawsuit alleging that Vick violated his duties as trustee of the MV7 plan by making a series of prohibited transfers from the plan for his own benefit (to help pay criminal restitution imposed on Vick and to pay Vick's bankruptcy attorney).

The consent judgment requires him to repay at least \$416,461 in restitution to the pension plan and permanently bars Vick from serving in a fiduciary capacity to any ERISA plan.