

## **CURRENT DEVELOPMENTS**

### **ASSOCIATION OF EMPLOYEE BENEFITS PLANNERS**

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#### **I. Retirement Plan News**

##### **A. Internal Revenue Service Guidance**

1. Annual IRS Published Guidance
  - a. Rev. Proc. 2010-4 on EP/EO letter rulings
  - b. Rev. Proc. 2010-5 on EP/EO technical advice
  - c. Rev. Proc. 2010-6 on EP determination letters
  - d. Rev. Proc. 2010-8 on user fees
  - e. Notice 2009-98—new cumulative list
2. Notice 2009-97 was issued on December 11, 2009 to extend the deadline to amend plans for certain narrow aspects of the Pension Protection Act and WRERA:
  - a. The deadline for amending single-employer defined benefit plans to meet the requirements of §§ 401(a)(29) and 436, relating to funding-based limits on benefits and benefit accruals under single-employer plans;
  - b. The deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5), relating to vesting and other special rules applicable to these plans;
  - c. The deadline for amending applicable defined contribution plans, within the meaning of § 401(a)(35)(E), to meet the requirements of § 401(a)(35), relating to diversification requirements for certain defined contribution plans;
  - d. This notice also provides limited relief from the anti-cutback requirements of § 411(d)(6) for amendments that are adopted by the extended deadline

for amending a plan to meet the requirements of §§ 401(a)(29) and 436. In addition, this notice provides that limited § 411(d)(6) relief is expected to be granted for amendments that are adopted by the extended deadline for amending a plan to meet the requirements of § 411(b)(5) once final regulations under §§ 411(a)(13) and 411(b)(13) are issued.

3. Announcement 2010-3 grants automatic approval for certain funding method changes if those changes result from a change in valuation software used to determine plan liabilities or a change in enrolled actuaries and business organizations providing actuarial services to a plan.
4. Announcement 2009-89 asks practitioners to want to file 403(b) plan documents for opinion letters on prototype plans and for determination letters on individual plans until the IRS can issue final revenue procedures to provide guidance. This announcement provides a remedial amendment period and reliance for plans that adopted good faith written plans by the deadlines set forth in Notice 2009-3.
5. Notice 2010-15 provides guidance on HEART Act changes in 20 Q&A's, particularly how to operate a plan if the employer opts to offer the optional survivor and disability credits with respect to military service, such as when vesting credits must be provided, clarification that differential wage payments do NOT have to be counted as compensation for purposes of determining plan contributions, and permission to treat in-service distributions that qualify as qualified reservist and distributions of elective deferrals to be so treated (and thereby escape the six-month suspension and 10% excise tax of HEART).

## **B. DOL Guidance**

1. Multiple issuances provide guidance on the new E-FAST electronics filing of forms 5500, which is mandatory for 2009 returns. The E-FAST system is now live. The guidance includes six user guides on the DOL's web site. Other guidance in the form of FAQs explains how to file delinquent or amended returns from prior years. The IRS newsletter from Fall of 2009 addresses the fate of Schedule SSAs, which will now be a stand-alone filing apart from the Form 5500. The DOL and the IRS have also informally provided tips on proper completion of Schedule C, which has received criticism from an internal governmental audit of the efficacy of the filing.
2. DOL Reg. 2510.3-102 providing a narrow seven-business-day safe harbor for delinquent deposits of participant contributions into trusts has been finalized. The safe harbor only applies to plan with fewer than 100 participants at the start of the plan year.

## **II. Welfare Plans**

### **A. COBRA Premium Subsidy Extension**

In the Department of Defense Appropriations Act for Fiscal Year 2010, the ARRA COBRA premium subsidy was extended through February 28, 2010, meaning that the subsidy is available to those who are involuntarily terminated from employment at any time between September 1, 2008 and February 28, 2010. Additionally, the maximum period during which the subsidy is available was extended from nine months to 15 months. A new notification obligation was created. Notices must have been provided by February 17, 2010 to three groups: 1) those who are eligible for the subsidy on or after October 31, 2009, 2) those whose termination (voluntary or involuntary) occurred on or after October 31, 2009, and 3) those getting COBRA notices for a qualifying event after December 19, 2009.

- a. DOL issued model notices on its web site
- b. DOL has also updated its forms and guidance on applying for expedited review of a denial of a COBRA subsidy

### **B. Mental Health Parity Regulations**

Mental Health Parity Regulations have been jointly issued by DOL, HHS and IRS under the Wellstone-Domenici Mental Health Parity Act of 2008. The law applies to health plans that cover more than 50 employees for plan years that begin after October 3, 2009 but the regulations do not apply until plan years that begin on or after July 1, 2010. The interim final regulations provide guidance on how to determine parity between mental health/substance abuse benefits and other health benefits. Parity is required on aggregate lifetime and annual limits and with respect to financial requirements and treatment limitations and non-quantitative treatment limitations (like administrative exhaustion requirements). Also definitions must be consistent with generally recognized independent standards. These parity rules only apply to the mental health or substance abuse disorder benefits covered under the plan; they do not mandate such coverage.

### **C. HITECH**

Most compliance with HITECH (Health Information Technology for Economic and Clinical Health Act), which is an expansion of the HIPAA privacy and security rules, must commence on February 17, 2010.

- a. Business associates to covered entities now are directly subject to HIPAA and must implement all safeguards required of business associates or they can be directly subject to fines and discipline by CMS.

- b. HITECH also imposed new security breach notification obligations upon covered entities and business associates.
- c. HITECH imposed new restrictions on use of protected health information, particularly for marketing.
- d. HITECH gave participants new rights to restrict the use of their protected health information

**D. COBRA Penalties**

IRS issued a new Form 8928 to report and pay excise taxes for failures to comply with HSA comparability, COBRA, HIPAA and other mandates under IRC §§ 4980B, 4980D, 4980E, 4980G.

**E. CHIP Notice**

DOL issued a model CHIP Notice to tell health plan participants that premium assistance may be available for those who may be under applicable earnings limits. This is an annual notice.

**F. MSP Reporting**

CMS has updated its Medicare Secondary Payer Mandatory Reporting User Guide and clarifies that reporting of employer-funded health reimbursement arrangements is required.

**III. Executive Compensation**

- A. The IRS published guidance on its 409A voluntary correction program. IRS Notice 2010-6.