

ASSOCIATION OF EMPLOYEE BENEFIT PLANNERS OF NEW ORLEANS

LEGISLATIVE UPDATE

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Presented by:

Dwayne O. Littauer

The Kullman Firm

1100 Poydras Street

1600 Energy Centre

New Orleans, LA 70163

Telephone: (504) 596-4102

Facsimile: (504) 596-4189

E-mail: dl@kullmanlaw.com

HEALTH & WELFARE PLANS

1. HIPAA Enforcement Regulations to HITECH Act Penalty Revisions.

- a. On October 30, 2009, the Department of Health and Human Resources (HHS) issued an interim final regulation to conform HIPAA's enforcement regulations to statutory revisions made by the Health Information Technology for Economic and Clinical Health (HITECH) Act, which was part of the American Recovery and Reinvestment Act of 2009 (ARRA). It:
 - i. Increases civil monetary penalties for HIPAA's privacy and security violations.
 - ii. Amended HIPAA's enforcement regulations to incorporate the HITECH Act's changes that became effective February 18, 2009 (but does not make amendments to the HITECH Act enforcement provisions that are not yet effective).
- b. The HITECH Act established four categories of violations and four corresponding tiers of penalties. For violations after February 18, 2009, the tiers are:
 - i. Covered entity did not know (and with the exercise of reasonable diligence would not have known) of the violation: not less than \$100 or more than \$50,000 per violation (not more than \$1,500,000 for identical violations in a calendar year).
 - ii. Was due to reasonable cause but *not* willful neglect: not less than \$1,000 or more than \$50,000 per violation (not more than \$1,500,000 for identical violations in a calendar year).

- iii. Was due to willful neglect and *corrected* within a 30-day period after the covered entity knew, or should have known, about the violation: not less than \$10,000 or more than \$50,000 per violation (not more than \$1,500,000 for identical violations in a calendar year).
- iv. Was due to willful neglect and *not corrected* within a 30-day period after the covered entity knew, or should have known, about the violation: not less than \$50,000 per violation (not more than \$1,500,000 for identical violations in a calendar year).
- c. For violations due to reasonable cause and not willful neglect that are corrected timely, HHS has discretion to waive the penalty if it would be excessive relative to the violation.
- d. The interim final rule became effective November 30, 2009.

2. COBRA Subsidy.

- a. **Reimbursement.** If employer's payroll tax liability is not enough to cover the 65% COBRA premium subsidy, the IRS will issue a refund. Employers may not transfer their liability for the 65% premium subsidy to the insurer. IRS Information Letter 2009-0173 (August 25, 2009).
- b. **End of Subsidy.** The Employee Benefit Security Administration (EBSA) posted new Q&As on its website concerning COBRA that begins on or after January 1, 2010 and COBRA that begins before that date. <http://www.dol.gov/ebsa/faqs/faq-cobra-arra.html>.

3. COBRA Subsidy Audits.

- a. The IRS reportedly is already conducting COBRA subsidy audits.
- b. For each person for whom the employer claimed the subsidy the IRS is asking for:
 - i. Each individual's request for the COBRA subsidy,
 - ii. A copy of the insurance premium invoice to the employer, and
 - iii. Proof that the employee paid the premium.

4. FTC Delays Enforcement of Red Flag Identity Theft Rules.

- a. The Federal Trade Commission (FTC) delayed enforcement of identity theft red flag rules from November 1, 2009 until June 1, 2010. This is the second postponement.

- b. These rules require financial institutions and creditors with covered accounts to implement written identity theft prevention programs to detect the warning signs of identity theft in day-to-day operations and to reduce the risk of identity theft.
- c. It is unclear how these rules apply to employee benefit plans, such as health flexible spending accounts with debit cards.
- d. This delay also follows the House of Representatives' approval of a bill that would exempt from the rule's coverage any health care, accounting, or legal practice with 20 or fewer employees, as well as certain other businesses.

RETIREMENT PLANS

- 5. **PBGC Maximum Insurance Benefit for 2010.** On October 27, 2009, the Pension Benefit Guaranty Corporation (PBGC) announced the maximum insurance benefit for participants in underfunded pension plans terminating in 2010 will remain at \$54,000 per year for those who retire at age 65 (i.e., no change from the 2009 amount). The amount is higher for those who retire later and lower for those who retire earlier or elect survivor benefits.
- 6. **IRS delays Phased Retirement Rules rule for public pension plans.** The Internal Revenue Service (IRS) has given sponsors of state and local government pension plans a second extension from January 1, 2011 until January 1, 2013 to comply with an IRS rule that defines the "normal" retirement age for a pension plan. Notice 2009-86.
- 7. **Cash Balance Plans.** The IRS delayed by one year the deadline for cash balance and other hybrid pension plans to bring their plans into compliance with the Pension Protection Act of 2006 (PPA) requirement that the plan's interest-crediting rate not exceed a "market rate of interest." IRS Announcement 2009-82.
 - a. For calendar year plans, the new deadline is December 31, 2010.
 - b. Plans that are amended to change the interest-crediting rate this year (after November 10, 2009 and on or before the last day of the 2009 plan year) are permitted to provide 204(h) notices up to 30 days *after* the effective date of the amendment. Normal 204(h) notice rules apply to amendments after the 2009 year.
 - c. Regulations on what constitutes a market rate of interest under PPA will be issued "in the near future."
- 8. **PBGC Final Regulations on USERRA Benefits.** The PBGC published a final rule November 17, 2009 amending the agency's benefit payments regulation to implement provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

- a. The final rule provides that so long as a servicemember is reemployed within the time limits set by USERRA, even if the reemployment occurs after the plan's termination date, the PBGC will treat the servicemember as having satisfied the reemployment condition as of the termination date.
 - b. This will ensure that pension benefits of reemployed servicemembers will generally be guaranteed for periods up to the plan's termination date.
 - c. The final rule takes effect on December 17, 2009.
 - d. The regulation applies only to reemployments under USERRA initiated on or after December 12, 1994.
 - e. Once the final rule is effective, PBGC will begin adjusting final benefit determinations of affected participants and make back payments with interest.
9. **EBSA Withdraws Investment Advice Regulations.** The EBSA withdrew the final rule on the provision of investment advice under the Employee Retirement Income Security Act's prohibited transaction provisions.
 - a. Public comments had raised sufficient doubts as to whether the conditions of the final rule and the class exemption associated with the rule could adequately protect the interests of plan participants and beneficiaries.
 - b. EBSA indicated the rules did not protect against potential conflicts of interest.
 - c. This followed the EBSA prior delay of the effective and applicability dates of the final investment advice rules from November 18, 2009, until May 17, 2010, to allow additional time for the Department to complete its analysis of questions of law and policy concerning the rules.
 - d. The EBSA intends soon to propose a revised rule limited to the application of the statutory exemption relating to investment advice.
10. **204(h) Final Regulation Amendments.** The IRS issued final amendments to the section 204(h) regulations November 24, 2009. They address plan amendments that may be required because of:
 - a. Rules limiting benefits and benefit accruals for single-employer plans with certain funding shortfalls, in general based on a plan's adjusted funding target attainment percentage (AFTAP), or
 - b. Pension Protection Act special funding rules for plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline.
11. **IRS Allows Truncated Social Security Numbers on Certain Statements.** IRS Notice 2009-93 created a pilot program allowing filers of information returns to truncate an

individual payee's nine-digit identifying number on paper payee statements for calendar years 2009 and 2010 if the filers meet certain requirements:

- a. The identifying number is a social security number, IRS individual taxpayer identification number, or IRS adoption taxpayer identification number;
- b. The identifying number is truncated by replacing the first five digits of the nine-digit number with asterisks or Xs (for example, a social security number 123-45-6789 would appear on the paper payee statement as ***-**-6789 or XXX-XX-6789); and
- c. The truncated identifying number appears on a paper payee statement for calendar year 2009 or 2010.
- d. This applies only to paper payee statements in the Form 1098 series, Form 1099 series, and Form 5498 series.

12. PBGC Proposed Rule on Reportable Events and Certain Other Notification Requirements.

- a. On November 23, 2009, the PBGC issued a proposed rule to conform the PBGC's reportable events regulation under ERISA section 4043 and a number of other PBGC regulations to statutory changes made by the Pension Protection Act of 2006.
- b. The rule would also eliminate most of the automatic waivers and filing extensions currently provided under the reportable events regulation and make other amendments to the regulation.
- c. The rule would create two new reportable events based on PPA provisions dealing with funding-based benefit limits and with asset transfers to retiree health benefits accounts.

13. Covered Compensation. The IRS issued covered compensation tables for 2010 (concerning Social Security integration under Code section 414(l)). Rev. Rul. 2009-40.

14. Pension Protection Act. Amendments due by December 31, 2009 for calendar year plans.

15. 403(b) Plans. Plan documents that conform with the 403(b) regulation are required by December 31, 2009.

16. IRS Suspends GUST Applications for Pre-Approved Defined Benefit Plans. On February 22, 2010, the IRS will temporarily stop accepting applications for determination letters for defined benefit plans that are filed on Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans for the GUST program.

- a. These restated pre-approved plans will be submitted to the IRS for a determination letter (if needed) using Form 5307 during a period of approximately two years, which the IRS expects to announce early in 2010.
- b. The temporary hiatus in accepting Form 5307 applications is to allow the IRS to prepare to receive the applications submitted by adopters of these restated pre-approved plans.

17. **Inflation Adjusted Limits.** IRS Notice 2009-94 gives inflation adjusted limits, such as under section 415. Many of these were previously released in October.

OTHER

18. **FMLA Changes.**

- a. On October 28, 2009, President Barack Obama signed the Fiscal Year 2010 National Defense Authorization Act (“2010 NDAA”), which amends the Family Medical Leave Act (“FMLA”) to expand on the military family member leave amendments enacted by President Bush on January 28, 2008 (revised FMLA regulations implementing the 2008 changes were effective January 16, 2009).
- b. **Caregiver Leave.** The January 2009 regulations included the Military Caregiver Leave provisions, which provided eligible employees up to 26 workweeks of leave during a single 12-month period to care for a servicemember with a serious injury or illness incurred in the line of duty while on active duty.
 - i. The regulations stated that Military Caregiver Leave applied only to family members of current members of the Armed Forces, Guard, or Reserves.
 - ii. The 2010 NDAA extends this leave period to family members of veterans for up to five years after a veteran leaves service, if the servicemember develops a service-related injury or illness that was incurred, or in the case of an existing injury was aggravated, while on active duty.
 - iii. The definition of serious injury or illness was expanded to include injuries or illnesses that existed before a servicemember's active duty began and were aggravated by service in the line of duty on active duty in the Armed Forces.
- c. **Exigency Leave.** The January 2009 regulations also included the Qualifying Exigency Leave provisions, which provided eligible employees up to 12 weeks of leave due to a “qualifying exigency” arising from the employee’s spouse, child, or parent having been called up to active duty.

- i. This leave period applied only to family members of retired members of the regular armed forces, retired Reserve, Ready Reserve, Select Reserve, Individual Ready Reserve, or the National Guard.
- ii. The 2010 NDAA extends this leave period to family members of active-duty servicemembers as well.
- iii. Some of the definitions changed. Family member must be in "covered active duty" rather than "active duty" and the definition of "contingency operation" was deleted. "Covered active duty" means:
 - A. for members of a regular component of the Armed Forces, duty during deployment to a foreign country; and
 - B. for members of a reserve component, duty during deployment to a foreign country under a call or order to active duty pursuant to specified provisions of federal law.
- d. **Regulations.** The 2010 NDAA directs the Department of Labor to issue regulations on these amendments.
- e. **Effective Date.** Because the law did not contain an effective date for these changes, they likely took effect immediately upon the President's signature.

19. Form 5500's.

- a. **Schedule C.** EBSA issued supplemental frequently asked questions about the 2009 Schedule C (service provider fees). <http://www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html>. Some of the issues covered in the new FAQs include reporting of:
 - i. Gifts, entertainment and other non-monetary compensation
 - ii. Compensation to hedge fund investment managers
 - iii. "Look-through" investment funds
 - iv. Mutual fund redemption fees
 - v. ERISA fee recapture accounts
- b. **Electronic Form 5500.** A plan administrator may not give its PIN to a third party administrator or other Form 5500 preparer, who can then use it to sign the Form 5500 filing before submitting it electronically. Q33 of EBSA Frequently Asked Questions: EFAST2 All-Electronic Filing System (Nov. 2009). <http://www.dol.gov/ebsa/faqs/faq-EFAST2.html>.

- 20. 409A Document Correction Program.** At a recent American Bar Association meeting, IRS Senior Counsel Stephen Tackney said the IRS will be announcing a program allowing one last chance to correct 409A document failures (amendments were required by December 31, 2008). Plan sponsors will have to attach information about their corrections to their tax returns for the year and affected participants must attach the same information to their personal returns.
- 21. Section 423 Employee Stock Purchase Plans.**
- a. Final Section 423 Regulations.** On November 16, 2009, the IRS released final regulations governing employee stock purchase plans.
- i.** There is no tax to the employee and no deduction by the employer at the time the option is exercised under an employee stock purchase plan if the Section 423 requirements are met.
 - ii.** Among the requirements are that (1) the purchase price is at least 85% of the fair market value of the stock at the time the option is granted or exercised (whichever is less), and (2) the employee holds the stock for at least two years from the date of grant and one year from the date of exercise.
- b. Reporting Requirements on Incentive Stock Options and Employee Stock Purchase Plans.** The IRS released final regulations on reporting requirements for incentive stock options and employee stock purchase plans.
- i.** The reporting requirements apply when the employee transfers stock to a third party (not when the company transfers the stock to the employee).
 - ii.** Prior reporting requirements are unchanged (such as the requirement to report when an employee recognizes taxable income on exercising an option).