

LISKOW & LEWIS

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AEBP LEGISLATIVE UPDATE

HEALTH AND WELFARE BENEFIT PLANS

April 26, 2010

COBRA Subsidy – Where Does This Stand?

On March 2, 2010, the “Temporary Extension Act of 2010” was signed into law. Extended COBRA Subsidy for one month through March 31, 2010 and made certain other clarifying and substantive changes. Most important substantive change provided that a reduction in hours followed by an involuntary termination of employment is a COBRA Subsidy qualifying event (within certain dates and periods).

Then, the Continuing Extension Act of 2010 was enacted on April 15, 2010. Extends the eligibility period for the COBRA Subsidy for two months through May 31, 2010, and provides for certain extended election procedures and new notice requirements.

For information about the extension, including a fact sheet explaining the new law, see DOL website:

<http://www.dol.gov/ebsa/COBRA.html>

<http://www.dol.gov/ebsa/newsroom/fscobrapremiumreduction.html> (See Attached)

The “talk” is that additional extensions will likely be enacted ... for involuntary terminations through December 31, 2010.

CHIP Notice – Premium Assistance For Employer Coverage - under Medicaid and the Children’s Health Insurance Program (CHIP) for States that offer premium assistance.

Initial notice is due by May 1, 2010 for Plan Years that begin between February 4 and April 30. Other Plans will need to provide the Notice prior to their next Plan Year start date. Thereafter, notices must be distributed before the start of each Plan Year.

The model form is available at <http://www.dol.gov/ebsa/chipmodelnotice.doc>

LOUISIANA – Medicaid
Website: http://www.la.hipp.dhh.louisiana.gov
Phone: 1-888-342-6207

[Employers are required to notify each employee of potential opportunities currently available for premium assistance in the state where they reside. New HIPAA Special Enrollment Right also added.]

Mental Health Parity Regulations Became Effective on April 3, 2010

DOL, IRS and Department of Health and Human Services (HHS) jointly released interim final regulations implementing provisions of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) on February 2, 2010, and the regulations are effective April 3, 2010. They apply to noncollectively bargained Plans for Plan Years that begin on or after July 1, 2010, and to collectively bargained Plans as of the first day of the first Plan Year beginning on or after the later of: (a) the date on which the last of the collective bargaining agreements in effect on October 3, 2008 (without extensions) terminates or (b) July 1, 2010.

HIPAA Privacy and Security: HHS Announces Delay in Enforcement of HITECH

March 15, 2010 Announcement:

HHS will delay enforcement of certain HITECH provisions that become effective February 17, 2010, because rulemaking is not complete: (a) business associate liability; (b) limits on the sale of PHI - protected health information, marketing and fundraising communications; and (c) individual rights to access electronic medical records and restrict the disclosure of certain information. However, HHS will enforce the requirements related to breach notification and increased civil monetary penalties, because related regulations have been issued.

Case Law – Two Interesting Cases:

ERISA Pension Anti-Cutback Violation Due to Amendment of Health Plan

Battoni v IBEW Local Union No. 102 Employee Pension Plan 2010 WL 395823 (3rd Cir. 2010).

Code section 411(d)(6) anti-cutback violation under Pension Plan when the employer amended its retiree medical benefit plan to make retiree medical benefits available only to those pensioners who do not elect a lump sum payment from the Pension Plan. Pensioners claimed

that the medical plan amendment effectively imposed a new restriction on the Pension Plan's lump sum distribution option in violation of 411(d)(6). The court agreed.

Severance Pay and FICA Tax -- Back in Muddy Waters

United States v. Quality Stores, Inc., 105 AFTR 2d 2010-533 (W.D. Mich. 2010).

Federal district court affirmed a bankruptcy court decision that certain types of severance payments are not "wages" and, therefore, not subject to FICA taxes. The court held that the severance payments were "supplemental unemployment compensation benefits" and were a form of wage-replacement benefits as opposed to remuneration for services. Scope is not clear. Decision will likely be appealed.

Health Care Reform

The Patient Protection and Affordable Care Act of 2010 (P.L. 111-148, signed on March 23).

Health Care and Education Reconciliation Act of 2010 (P.L. 111-152, signed on March 30).

DOL Health Care Reform Information Website <http://www.dol.gov/ebsa/healthreform/>

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RETIREMENT PLANS

April 26, 2010

I. Internal Revenue Service Guidance

- A. Looming Deadline for Restatement of IRS Pre-Approved Defined Contribution Plans. Employers using pre-approved defined contribution plans must adopt restated plan terms by April 30, 2010.
- B. Pre-Approved Defined Benefit Plans. Announcement 2010-20 provides that employers using pre-approved defined benefit plans that were restated for EGTRRA and that received a favorable determination letter, must adopt the EGTRRA-approved plan by April 30, 2012. The IRS will also accept applications for individual determination letters submitted by adopters of these pre-approved plans starting on May 1, 2010.
- C. IRS Interest Rates. The IRS has updated the weighted average interest rate, yield curve, and segment rates. Notice 2010-24.

II. Department of Labor Guidance

- A. 403(b) Reporting and Coverage. DOL Field Assistance Bulletin 2010-01 answers many frequently asked questions on the new 403(b) Form 5500 reporting requirements and ERISA safe harbor issues. In particular, it supplements Field Assistance Bulletin 2009-02, further explaining when an annuity contract or custodial account is not required to be included in Form 5500. It also addresses the scope of the safe harbor regulation at Labor Reg. 2510.3-2(f), which allows 403(b) plans to avoid Title I of ERISA, specifically with regard to the effect of optional features, such as participant loans; discretionary determinations by a third party administrator; and offering a choice of 403(b) vendors and investment products.

- B. New Proposed Regulations on Investment Advice. DOL issued a new set of proposed regulations to replace the withdrawn final regulations on the statutory exemption for the provision of investment advice to individual account participants and beneficiaries. The new proposed regulations are largely the same as those withdrawn, except that the new proposed regulations (1) do not allow fiduciary advisors (in addition to their employees, agents, and representatives individually) to receive compensation or financial or economic benefits that vary based on the investments selected; (2) do not allow “off-model,” individualized advice be given if a person asks for more advice after receiving the computer model advice; (3) require computer models avoid investment recommendations within an asset class on the basis of a factor that cannot confidently be expected to persist in the future. The proposed regulations also confirm that the statutory investment advice exemption does not disturb existing administrative exemptions covering investment advice or current programs that comply with the prohibited transaction rules. Prop. Labor Reg 2550.408g-1; Prop. Labor Reg. 2550.408-2.
- C. Final Regulations Regarding ERISA 502(c)(8) Penalties for Multiemployer Plans. DOL has finalized proposed regulations that establish procedures for assessing civil penalties under ERISA 502(c)(8) for the failure of a multiemployer plan to adopt a funding improvement plan if in endangered status or meet the benchmarks under that plan, or to timely adopt a rehabilitation plan if in critical status. The final regulations adopt the proposed regulations almost verbatim, except that they establish procedures for hearings regarding penalty assessments before an administrative law judge. Labor Reg. 2560.502c-8; Labor Reg. 2570.160 through Labor Reg. 2570.171.
- D. Final Regulations Regarding Requirement that Multiemployer Plans Furnish Actuarial, Financial, and Funding Information. DOL has, with some clarifying changes, finalized rules implementing the requirements of ERISA 101(k) under which the plan administrator of a multiemployer plan must, upon written request, furnish within 30 days, a copy of certain actuarial, financial, and funding-related documents. The regulations describe the charges a plan administrator may impose and the documents covered by the disclosure requirement. Labor Reg. 2520.101-6; Labor Reg. 2520.104b-30.
- E. Additional Guidance on Filing Annual Reports through EFAST2. DOL updated its EFAST2 frequently asked questions to provide that Form 5500-SF, the short form for small employers, may not be used for any 2008 or prior plan year return/report. If filing or amending a 2008 or prior plan year return, the correct prior year paper version must be used and filed with the IRS. The frequently asked questions also provide that once registered on EFAST, an individual should receive a confirmation email and provides procedures if such an email should not be received. Finally, the DOL provided an exact time for filings to be made – midnight in the plan administrator’s time zone – and procedures if a filer attempts to submit a return on time but is not successful before the deadline. EFAST2 FAQ 4a, 16a, and 35a.

- F. Reporting of Certain Traditional Annuities as Fully Allocated Contracts – In ERISA Opinion Letter No. 2010-01A, the DOL found that the TIAA-CREF “traditional annuity,” which provides a guaranteed principal and a guaranteed rate of return is not a “fully allocated contract” entitled to special treatment for purposes of reporting plan assets on Form 5500 under Labor Reg. 2520.104-44(b)(2). The DOL will not require past Form 5500 filings be amended to properly account for the annuities, but the ruling will apply for plan years beginning on or after January 1, 2009.

- G. Enforcement Data. EBSA has posted data about closed cases that resulted in a penalty assessment under the Deficient Filer program, the Late Filer program, and the Non-Filer program, beginning in 2009. The website will be updated quarterly. The site is <http://ogesdw.dol.gov/index.php>.

III. United States Supreme Court Guidance

- A. *Conkright v. Frommert*, 599 U.S. ____ (2010), 2010 WL 1558979: Generally, courts must defer to the administrator’s discretionary authority to interpret plan terms, unless the court finds the interpretation to be unreasonable. Overruling a decision of the Second Circuit, the Supreme Court held this principle applies even with respect to an administrator’s second attempt to interpret the same plan provisions.