



EMPLOYEE BENEFITS UPDATE

2012 On The Horizon – Employee Benefit Plan Action Items

Now that the fourth quarter of 2011 has begun, employers should review their employee benefit plans for changes that are required or desirable later this year and in 2012. This summary briefly highlights key year-end and 2012 action items for employee benefit plans that an employer should consider when conducting its review. Whether a plan amendment or other employer action is necessary with respect to an item described below will depend on a number of factors, including the employee benefit plan's current design.

Health and Welfare

Internal Claims and Appeals and External Review Processes

The Patient Protection and Affordable Care Act (“PPACA”) imposes new rules for internal claims and appeals and external review processes on “non-grandfathered”¹ group health plans. On June 24, 2011, the Treasury Department (“Treasury”), the Department of Labor (the “DOL”) and the Department of Health and Human Services (“HHS”) jointly issued amended interim final regulations further explaining these rules.² The agencies have extended the deadline for compliance with many of the new requirements until plan years beginning on or after January 1, 2012.³ Employers should revise their plan terms and summaries to reflect the new claims procedures, if they have not done so already. For calendar year plans, the regulations require, among other things, that non-grandfathered group health plans contract with at least two independent review organizations by January 1, 2012 and with at least three independent review organizations by July 1, 2012.

W-2 Reporting of Health Care Coverage Cost

PPACA originally required employers to report on Form W-2 the cost of an employee's employer-provided group health plan coverage beginning this year (*i.e.*, on Forms W-2 issued in January 2012). Form W-2 reporting of health care coverage cost was subsequently made voluntary for 2011.⁴ The Internal Revenue Service (“IRS”) has issued interim guidance that is generally applicable beginning with 2012 Forms W-2 and has provided additional transition

¹ Our prior client [update](#), “Grandfathered Health Plans,” dated August 4, 2010, describes the conditions that must be satisfied in order for a group health plan to maintain grandfathered status.

² Treasury Regulation § 54.9815-2719T; DOL Regulation § 2590.715-2719.

³ DOL Technical Release No. 2011-01 (3/18/2011).

⁴ IRS Notice 2010-69, 2010-44 I.R.B. 567 (10/12/2010).

relief for smaller employers until 2013.⁵ Accordingly, larger employers should begin considering how they will determine and track the cost of employer-provided group health plan coverage for 2012 to be reported on each employee's Form W-2 issued in January of 2013.

Summary of Benefits and Coverage and the Uniform Glossary

Effective March 23, 2012, PPACA requires all group health plans to provide participants with an easy-to-understand summary of benefits and coverage and a copy of a uniform glossary of commonly used terms upon initial and annual enrollment. The proposed regulations jointly issued by Treasury, the DOL and HHS on August 22, 2011 with respect to this requirement contain a template for the summary.⁶ We anticipate additional guidance will be issued with regard to this requirement in the near future. In the meantime, employers may want to review the proposed regulations with their legal counsel to best position themselves to comply with this upcoming disclosure requirement.

Temporary Tax on Self-Funded Plans

PPACA imposes a temporary tax on all group health plans for plan years ending on or after October 1, 2012 (*i.e.*, the 2012 plan year for calendar year plans). The tax is equal to \$1 (\$2 for plan years ending after September 20, 2013) times the average number of covered lives under the plan. The tax expires for plan years ending after October 1, 2019 and is subject to adjustment based on projected increases in national health expenditures. Treasury guidance is expected soon.

Loss of Grandfathered Status

Employers whose group health plans will lose their grandfathered status under PPACA in 2012 should ensure that their health plan documents are brought into compliance with PPACA. For example, grandfathered plans currently are not required to cover adult children under age 26 if the child is eligible under another employer-provided plan (other than a plan available to the child's parent). If the plan loses its grandfathered status, however, it would need to be amended to cover adult children even if they are eligible under another plan.

Retirement

Service Provider and Participant Fee Disclosure Rules

In an effort to provide greater transparency regarding retirement plan fees, the DOL has issued two fee disclosure regulations which require action soon by service providers and plan sponsors. Specifically, in 2010, the DOL issued the following regulations:

- an interim final regulation requiring certain retirement plan service providers receiving \$1,000 or more in direct or indirect compensation to disclose comprehensive information about their fees and potential conflicts of interest to plan sponsors;⁷ and

⁵ Notice 2011-28, 2011-16 I.R.B. 656 (3/29/ 2011). Employers who file fewer than 250 Forms W-2 for 2011 are not required to report the cost of an employee's employer-provided group health plan coverage until further guidance is issued and in no event before 2013 (*i.e.*, on Forms W-2 issued in January 2014).

⁶ Treasury Regulation § 54.9815-2715; DOL Regulation § 2590.715-2715.

⁷ DOL Regulation § 2550.408b-2(c).

- a final regulation requiring plan sponsors to disclose information about plan and investment costs to participants who direct their own investments.⁸

Pursuant to DOL final regulations issued on July 19, 2011, the deadline for complying with these regulations was extended until 2012. Service providers now must provide fee disclosures to plan fiduciaries by April 1, 2012, and calendar year plans must provide fee disclosures to participants by May 31, 2012. In addition, beginning on August 14, 2012, and relating to the second quarter of 2012, plans must provide a quarterly disclosure to participants describing the fees and expenses actually deducted from their accounts during the quarter. These regulations are two parts of the DOL's three-pronged approach on fee disclosure, with the first part requiring the reporting of plan fees on Schedule C to a retirement plan's Form 5500 annual report.

Certain Defined Benefit Plan PPA Amendments

Section 436 of the Internal Revenue Code ("Code"), which was added to the Code by the Pension Protection Act of 2006 ("PPA"), imposes certain restrictions on a defined benefit plan if its funded status is less than 80%, such as restrictions on lump sum payments and amendments that increase plan benefits. In late 2009, the IRS issued final regulations under section 436 of the Code. In addition, the IRS also issued PPA-related proposed regulations applicable for cash balance and other hybrid defined benefit plans in 2010 (*e.g.*, addressing market rate of return limits on interest credits under cash balance plans). Last year, the deadline for amendments to comply with these regulations generally was extended until December 31, 2011.⁹ Although unclear, because the IRS has not issued any additional guidance on these regulations since then, an additional extension may be forthcoming before year-end.

Suspension of Minimum Required Distributions in 2009

At the beginning of the economic recession in 2008, Congress allowed employers to amend their qualified retirement plans to suspend for 2009 the minimum required distributions payable to participants who had attained age 70½. Employers that suspended minimum required distributions in 2009 must amend their plans by December 31, 2011, if they have not already done so.

Cycle A Determination Letter Filings

In accordance with the IRS's staggered determination letter procedure, employers with an employer identification number ending in either 1 or 6 should prepare and submit a determination letter application for each of their individually designed plans by January 31, 2012. Prior to submission, plans should be amended to incorporate all of the items listed in the IRS 2010 Cumulative List,¹⁰ and an amendment and restatement, or working copy, of the plan should be included with the submission.

Other Discretionary Amendments

- **In-Plan Roth Conversions:** An employer may also wish to amend its plan to permit in-plan Roth conversions of pre-tax money by participants now allowed under the Small Business Jobs Act enacted last year. Plans that permitted such conversions during 2010 must be amended by December 31, 2011.

⁸ DOL Regulation § 2550.404a-5. Our prior client [update](#), "Service Provider Fee Disclosure Rules: Interim Final Regulation Under Section 408(b)(2) of ERISA," dated July 29, 2010, describes in greater detail the plan sponsor fee disclosure requirements.

⁹ Notice 2010-77, 2010-51 I.R.B. 851 (11/30/2010).

¹⁰ Notice 2010-90, 2010-52 I.R.B. 909 (12/13/2010).

- **Design Changes:** In addition, employers should update their employee benefit plans for any design changes implemented this year, if they have not already done so. Also, if an employer has approved design changes for 2012, the employer should consider incorporating those changes into the plan document now. This is particularly true if the design change results in less favorable terms for participants and beneficiaries, such as a reduction in future benefit accruals, which generally must be adopted in advance of the effective date of the change and following advance notice in certain circumstances (such as in the case of a defined benefit plan).
- **Best Practices – Statute of Limitations, Venue and Legal Fees:** Employers may wish to consider incorporating into their benefit plans a plan-specific limitations period for filing a lawsuit involving the plan, a required forum for legal actions and legal fees restrictions to impose desired limitations on legal proceedings.

This summary does not contain an exhaustive list of changes which may be required for your employee benefit plan by year-end or in 2012. If you have any questions regarding this summary, please contact your regular Sidley Austin contact or any member of the firm's Employee Benefits group for more information.

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