EMPLOYEE BENEFITS DEVELOPMENTS MARCH 2012

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Employee Benefits

RULINGS, OPINIONS, ETC.

New Guidance Regarding Form W-2 Health Coverage Cost Reporting

In Notice 2012-9, the Internal Revenue Service (IRS) restates its prior guidance (issued in the form of Notice 2011-28) on W-2 reporting of the cost of employer-sponsored health coverage. Notice 2012-9 supersedes Notice 2011-28. For employers that are subject to the W-2 reporting requirement, the new rule is effective this year for W-2 forms to be issued in January 2013.

Here are a few of the noteworthy items in the restated guidance:

- The standard for determining whether dental or visionbenefits are subject to the new reporting requirement is the same as the standard for determining whether dental or vision benefits are excepted benefits under HIPAA (and therefore exempt from the health care reform mandates contained in the Affordable Care Act). Dental and vision benefits are excepted benefits for the purposes of HIPAA if 1) the dental or vision benefits are offered under a separate contract of insurance (self-insured plans do not appear to qualify even if offered under a separate administrative services agreement), or 2) participants have the right to decline coverage and, if they elect coverage, they must pay an additional premium for the coverage. Employers must report the cost of coverage under a dental or vision plan if the plan does not fit into one of these categories.
- Employers are not required to report the cost of coverage under an employee assistance program (EAP), wellness program, or on-site medical clinic if the employer does not charge a Consolidated Omnibus Budget Reconciliation Act (COBRA) premium for the coverage.
- The new guidance clarifies 1) how to calculate the reportable amount if only a portion of the coverage under the plan constitutes coverage under a group health plan, 2) how to calculate the reportable amount when coverage extends over the payroll period, including December 31, and 3) the application of the exception for certain hospital indemnity or other fixed indemnity insurance offered by an

employer on an after-tax basis.

Now is the time for employers to begin developing a compliance approach. The following important issues, among others, will need to be resolved:

- Is the employer subject to the reporting requirement? Included in this category are state and local governmentalentities (e.g., school districts and towns) and churches and other religious organizations. Employers that were required to file fewer than 250 W-2s for the preceding calendar year are not subject to the reporting requirement until further notice.
- Which employer-sponsored plans are subject to the reporting requirement and how will the cost of coverage be calculated and reported?

IRS Notice 2012-9 contains detailed guidance. Any member of the Hodgson Russ Employee Benefits Practice Group can address any questions employers may have.

Form 8955-SSA: New Clarification

In the July 2011 issue of Employee Benefits Developments, we reported on developments surrounding Form 8955-SSA, which replaced Form SSA (formerly filed as part of the annual 5500 filing) and is used by plan administrators to report the names of participants who have separated from service with deferred vested benefits. The information regarding deferred vested benefits is passed on to the Social Security Administration (SSA) and is used to generate government-provided reminders of deferred benefits available from an employer plan. There is an electronic filing system for the separate filing of Form 8955-SSA, though the forms may also be filed on paper.

Form 8955-SSA requires filers to respond to a question as to whether the plan administrator has provided an individual statement to each participant required to receive a statement. The presence of this question on the Form 8955-SSA suggests a renewed interest from the Internal Revenue Service (IRS) in having plan administrators comply with the individual statement requirement—a requirement that has been in place for many years. This question on Form 8955-SSA also raises concerns as to whether benefit statements and other documents provided to participants could be used to satisfy the individual statement requirement. Many plan administrators have not provided a specific separate notice for compliance with the individual statement requirement. In response to these concerns, the IRS published an FAQ that provides plan administrators with guidance for complying with the individual statement requirement.

A plan administrator may answer "yes" to the question on delivery of individual statements if the required information was furnished in a timely manner to participants in other forms of documentation such as benefit statements or distribution forms. A separate statement designed specifically to satisfy this requirement is not required. A plan administrator may answer "yes" to the question if the statements or other documentation issued to the participants include the following information: the name of the plan; the name and address of the plan administrator; the name of the participant; and the nature, amount, and form of the deferred vested benefit to which the participant is entitled. For purposes of completing Form 8955-SSA, the plan administrator's notice to the plan participant does not need to include the participant's social security number, the codes on page two of Form 8955-SSA used to identify previously reported participants, or any information regarding any benefits that are forfeitable if the participant dies before a certain date.

Stock Option Claim May Go Forward Despite Release of Claims on Termination

An Illinois court recently allowed a stock-option claim by two former employees to go forward even though one of the employees signed a release of claims at the time of his termination. The plaintiff-employee who signed the release was awarded stock options under the company's performance incentive plan. Under the terms of the plan, a terminated employee had three months to exercise his options before they expired. At the time of the plaintiff's termination, the company was in the middle of a partial blackout period related to the restatement of its financial reporting with the Securities and Exchange Commission (SEC). All current and former employees were prevented from exercising their stock options during the blackout period.

As part of a severance agreement negotiated with the company upon his termination, the plaintiff signed a waiver and release of all claims arising out of his employment. Three months later, his options expired unexercised in accordance with the plan terms.

Despite repeated assurances to the plaintiff that the company was "working on" a resolution for the inability of employees to exercise their options, more than a year passed before the company made a cash settlement offer to those current and former employees whose options had expired during the blackout period. The plaintiff rejected the settlement offer and pursued his breach of contract claim against the company.

The company argued that the plaintiff's claims are barred under the release he signed as part of his severance agreement. The court rejected this argument, noting that the injury arose only after the expiration of his options, three months after he signed the release and left his employment. Although the claims of breach arose out of the plaintiff's employment with the company, the court held that the plaintiff's claims did not exist until after the execution of the release, which only covered claims arising on or before he signed the release. In permitting the case to go forward, the court also pointed to language in the release, which did not unambiguously demonstrate the plaintiff's intent to release any stock option claims, and to ongoing communications between the plaintiff and the company following his termination that raise questions as to the intention of either party to release or bar claims relating to the stock options. *(Rawat v. Navistar Int'l Corp.*, NDIL 2012)

Fourth Circuit Upholds Expiration Terms of Stock Option Grants

In another case dealing with expired stock options, the U.S. Court of Appeals for the Fourth Circuit upheld a lower court's dismissal of a former executive's stock-option claim, ruling that his options properly expired under the terms of the company's long-term incentive plan (LTIP) three months after his retirement. From 1999 through 2004, the executive received annual stock option grants under the LTIP. All were explicitly subject to the rules of the LTIP, which stated that vested options "may be exercised within three months from the date of termination (but in no case later than ten years from the date of grant)." At the time of his retirement in February 2005, the executive was vested in 72,000 of his 110,000 options. However, he did not attempt to exercise any of his options until May 2007. At that time, he was informed that all of his 110,000 stock options were cancelled by the company three months after his retirement.

In his appeal of the district court's dismissal of his claim against the company, the executive argued that a final 1999 version of his employment agreement permitted him to exercise stock options for up to ten years from the date he received them, regardless of his retirement date. The executive contested the district court finding that the individual annual stock grants effectively modified this final employment agreement. Although the executive could not produce a copy of the written agreement, the Fourth Circuit followed the district court in assuming "the veracity and accuracy" of his alleged final employment agreement in reaching a decision.

The Fourth Circuit held that, under California law, an offer of stock options to an employee constitutes an offer for a unilateral contract, which is accepted if the employee continues his or her employment after the offer. According to the Fourth Circuit, the executive unequivocally accepted each stock option grant from 1999 to 2004, knowing that each grant was expressly governed by the LTIP terms and rules and that the LTIP terms explicitly required him to exercise his options within the lesser of three months from the date of his termination or ten years from the date of grant. The executive's continued employment following the grants therefore constituted acceptance of the terms. Moreover, because the rule in California is that consideration is inherent when stock options are granted to an employee who continues in that employment with knowledge of the grant, the executive may not argue that the option grants lacked the consideration necessary to modify his prior employment agreement. The Fourth Circuit concluded that the stock-option grants modified any prior agreement to the contrary, and that the executive was only permitted to exercise his stock options within three months of his retirement date. Finally, the Fourth Circuit rejected the executive's argument that the LTIP term "may be exercised" should be interpreted to mean that he may, but was not required to exercise his options within three months from the date of his retirement. (*Porkert v. Chevoron Corp.*, 4th Cir. 2012)

Benefits Administrator Fails to Demonstrate that Proper COBRA Notice Was Furnished

The U.S. District Court for the Southern District of Indiana recently ruled that a group of former employees is permitted to continue as part of a class action lawsuit against their former employer contending they did not receive timely notice of their rights to purchase continuing health care coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). The employer sought to have the group of employees excluded from the class action because, the employer argued, they received COBRA notices in a timely manner after the qualifying event.

To succeed in excluding this group of former employees from the lawsuit on a summary judgment motion, the employer needed to show there was no genuine issue of material fact as to whether the employer "caused the notice to be sent in a good-faith manner reasonably calculated to reach the former employees." In attempting to meet this burden, the employer offered a declaration from its benefits administrator regarding the administrator's standard operating procedures for COBRA notification. The benefits administrator stated that the former employees were mailed a COBRA notice with their final paycheck and a contemporaneous entry was made in the recordkeeping system indicating whether the employee received a notice regarding general medical benefits, dental benefits, or both.

The district court denied the employer's summary judgment motion to exclude the former employees from the lawsuit because the benefit administrator's procedure was limited to the medical and dental benefits and did not include an indication regarding whether notice was sent regarding vision or health care spending accounts. Because the recordkeeping procedures for tracking COBRA notices did not include the vision and healthcare spending account benefits, the court could not conclude as a matter of law that the group of former employees was adequately notified.

This case illustrates the importance of not only providing a timely COBRA notice but also of having procedures in place to adequately demonstrate that a proper notice was furnished. (*Pierce v. Visteon Corp.*, SDIN 2011)

Supplemental Life Insurance Benefit Denied Because Evidence of Insurability Condition Not Met

The U.S. Court of Appeals for the Second Circuit, reversing a district court decision, ruled in favor of a life insurance company in denying supplemental life insurance benefits to a designated beneficiary.

Under the terms of the life insurance certificate, to receive supplemental benefits, the employee had to submit evidence of insurability satisfactory to the insurer. If the insurer determined that the evidence of insurability was satisfactory, the supplemental benefit would become effective on the date identified by the insurer in writing, so long as the employee was actively at work on that date. In this case, the employee submitted the insurance forms on April 1, 2008. However, the employee died on April 8, 2008, before the insurer stated in writing that the employee's supplemental life insurance was in effect.

This case highlights the importance of communicating to participants the conditions and limitations that may cause their coverage effective date to be delayed. (*Knopick v. Metropolitan Life Insurance Co.*, 2nd Circuit 2012)

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