EMPLOYEE BENEFITS DEVELOPMENTS JULY 8, 2011

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Employee Benefits

RULINGS, OPINIONS, ETC.

Agencies Issue New FAQs Regarding PPACA Implementation

Once again the Departments of Labor, Health and Human Services, and the Treasury have issued a set of frequently asked questions (FAQs) regarding the implementation of the Patient Protection and Affordable Care Act (PPACA). This recent guidance, the sixth in a series of FAQs that the agencies have published, focuses on grandfathered plan issues. As we have covered in previous publications, grandfathered plans are exempt from certain aspects of PPACA. Generally, a plan must not reduce benefits or employer contributions toward the cost of benefits for a plan to maintain its grandfathered status. Below is a summary of some of the most broadly applicable issues addressed by the recent guidance.

Anti-Abuse Rule: Bona Fide Employment-Based Reasons

The interim final regulations provide that a plan will not lose its grandfathered status if, for a bona fide employment-based reason, employees are transferred from one grandfathered plan to another, even if the transferred employees would recognize a reduction in benefits or a higher cost under the new plan. The first of the new FAQs includes a list of five situations that would be considered bona fide employment-based reasons. The non-exhaustive list includes the following situations:

1. When a benefit package is being eliminated because the issuer is exiting the market
2. When a benefit package is being eliminated because the issuer no longer offers the product to the employer (for example, because the employer no longer satisfies the issuer's minimum participation requirement)
3. When low or declining participation by plan participants in the benefit package

makes it impractical for the plan sponsor to continue to offer the benefit package
4. When a benefit package is eliminated from a multiemployer plan as agreed on as part of the collective bargaining process
5. When a benefit package is eliminated for any reason and multiple benefit packages covering a significant portion of other employees remain available to the employees being transferred

If an employer transferred employees from one grandfathered plan to another pursuant to one of the situations listed above, the guidance provides that the transferee plan would retain its grandfathered status.

Increased Drug Costs

The new guidance also provides that a plan will not lose its grandfathered status if a drug offered by the plan is reclassified in a more expensive tier because a generic alternative becomes available. Under these circumstances, the movement of the name brand drug into a higher cost-sharing tier would not cause the plan to lose its grandfathered status.

Effective Date of Loss of Grandfathered Status

The FAQs clarify that if a plan adopts an amendment that causes it to lose its grandfathered status, the effective date of the loss of status will be the effective date of the amendment. The date the amendment was signed is irrelevant.

This recent guidance reflects the agencies' continued commitment to provide guidance regarding the implementation of PPACA. As we approach the effective dates for other PPACA provisions, we expect that the agencies will publish additional guidance. Stay tuned.

All the DOL FAQs on the new health care law can be found by clicking on the FAQs tab at the DOL Employee Benefit Security Administration website at www.dol.gov/ebsa.

DOL Reviewing Electronic Disclosures for Participants

In an announcement issued in the April 7, 2001, Federal Register, the DOL issued a request for information in connection with its review of the use of electronic media to provide employee plan participants with required notices and other disclosures. The announcement includes a useful summary of current rules issued by the DOL, IRS, and SEC under various disclosure rules. The DOL review follows a January 2011 Executive Order that has a goal of meeting regulatory requirements through the most innovative and least burdensome tools available.

Current rules on using e-mail and other Internet-based systems to provide required plan communications include a 2002 DOL safe-harbor rule for electronic delivery of summary plan descriptions and other plan disclosure requirements, a 2000 IRS regulation regarding delivery of notices and consents in connection with retirement plan distributions, 2003 rules applicable to notices on plan amendments that reduce future accruals, and SEC rules issued in 2007 and 2009 regarding the delivery of proxy materials and mutual fund prospectus delivery.

The 2002 DOL rule allows for electronic delivery of plan disclosures if the plan administrator takes appropriate measures calculated to ensure actual receipt of information by participants and the protection of personal information. Electronically delivered documents must be furnished in a manner consistent with paper delivery of documents, notice must be provided to participants or beneficiaries that a paper version is available, and the paper version must be furnished on request. The DOL rules apply to two categories of recipients: 1) participants who are able to access electronic documents at a location where the participant is reasonably expected to perform job duties and 2) participants and beneficiaries who have consented to receive documents electronically. Under the IRS rules, plan administrators must take appropriate measures to ensure actual receipt of required plan information and must provide a clear statement of the individual's right to receive a paper version of the notice or consent form. Again, participants may consent to the electronic delivery of notices or the plan administrator must advise participants that a written copy of the notice is available at no additional charge, and participants must be effectively able to access the electronic medium used to provide the notice. Similarly, the SEC guidelines allow for posting of proxy materials and prospectuses on the Internet as long as individuals are provided with a notice of the availability of the proxy materials.

The DOL request for information published in the Federal Register includes a set of inquiries being reviewed by the DOL in its examination of existing rules. Plan administrators can confirm compliance with electronic media disclosures by reviewing the DOL summary (http://s.dol.gov/E2) or the basic regulations issued by the three agencies or by checking with counsel on the appropriate use of electronic media. (29 CFR Part 2520; published in Vol. 76, No. 67, Federal Register of April 7, 2011)

401(k) Plan Fiduciaries Possibly Liable for Stock Fund Mismanagement and Excessive Recordkeeping Fees

In March 2010, we reported on a federal district court case in which the court ruled in favor of plan fiduciaries and the plan recordkeeper following the commencement of a lawsuit claiming mismanagement of unitized company stock funds and payment of excessive fees to the plan recordkeeper and the plan trustee. After a review of the plan's process in selecting and retaining its service providers and in operating a company stock fund within the plan's investment selections, the district court granted summary judgment in favor of the defendants. The district court concluded that the unitized company stock fund was prudent and consistent with industry practice, that the plan adequately advised participants of the risks of investment in company stock and of the fees connected with all plan investments, that plan fees and expenses were regularly monitored and were consistent with industry averages, and that the arrangement with the plan trustee was standard in the industry and did not result in excess fees to the plan trustee. Plaintiffs in the case appealed the district court ruling, and the Seventh Circuit Court of Appeals recently issued a ruling that reversed the district court's rulings with respect to the unitized stock fund and the reasonableness of the recordkeeping fees. With the respect to the unitized company stock fund issue, the Seventh Circuit reversed the district court's grant of summary judgment, concluding that while the fiduciaries discussed moving away from a unitized stock fund to purchases of actual stock, the record does not support a conclusion that that defendants ever made a decision to retain the unitized stock fund. The Seventh Circuit sent the case back to the lower court for further consideration of the issue. On the recordkeeper fee issue, the Seventh Circuit ruled, after considering both the opinions of defendants' consultants and the opinions of plaintiffs' expert (along with other admissible evidence), that a trier of fact could reasonably conclude that defendants did not satisfy their duty to ensure that the recordkeeper's fees were reasonable. Accordingly, the Seventh Circuit reversed the grant of summary judgment on this issue and remanded it for further proceedings.

Cases involving 401(k) plan mismanagement and 401(k) fees have generally favored plan sponsors and plan fiduciaries. Whether this case represents a significant setback for plan sponsors and plan fiduciaries in these types of cases is as yet unclear. (*George v. Kraft Foods Global Inc.*, 7th Cir. 2011)

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