EMPLOYEE BENEFITS DEVELOPMENTS APRIL 2010

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Practices & Industries

Employee Benefits

RULINGS, OPINIONS, ETC.

Department of Labor Issues More Guidance and Relief for 403(b) Plans

The U.S. Department of Labor (DOL) has issued Field Assistance Bulletin (FAB) 2010-01 to address two areas of concern that have arisen for 403(b) plans under the new financial reporting requirements for Form 5500 and the application of new Internal Revenue Service (IRS) regulations.

The first area covered under the FAB is the expansion of guidance contained in Field Assistance Bulletin 2009-02 addressing reporting relief for Form 5500 filings. FAB 2010-01 expands on the guidance in FAB 2009-02 relating to certain qualifying pre-2009 contracts that are not considered plan assets for purposes of Form 5500 reporting. Some clarifications provided in the new FAB are as follows:

- A contribution made in 2009 but relating to 2008 deferrals will not take the contract out of the pre-2009 relief category.
- Loan repayments are treated as contributions, and if the employer forwards the loan repayments to the contract, the pre-2009 relief is lost. However, if the employee makes payments directly to the contract issuer, the pre-2009 relief is not lost.
- Providing information to the contract holder regarding whether an employee is terminated from employment will not result in loss of relief, but the employer making any discretionary determinations such as qualification of hardship distributions or qualification for plan loans would result in loss of the pre-2009 relief.
- Exchanges of contracts after 2008 (which would involve employer involvement under new IRS regulations) will result in loss of the pre-2009 relief for those funds.
- An employer can exclude from the financial statement contracts that otherwise qualify for the pre-2009 relief even if the contract is actually known to and

identifiable by the employer.

FAB 2010-01 also provides guidance on the so-called "safe-harbor" exemption from coverage under the Employee Retirement Income Security Act of 1974 (ERISA) for certain 403(b) arrangements. Given the increased involvement by employers in 403(b) plans under the new IRS regulations, qualifying for this relief from ERISA (and Form 5500 reporting) has been an area of increased focus. Under the FAB, the DOL indicated the following:

- Loans and hardship distributions may be allowed under a safe-harbor arrangement as long as the contract issuer is making the decision and not the employer. An employer may limit its plan to 403(b) providers who agree to make such discretionary determinations. If the employer selects a third-party administrator to make those identified discretionary decisions, the safe-harbor relief is not available.
- To qualify for the safe-harbor exemption, the arrangement must offer a reasonable choice of investments to employees. The FAB describes certain situations where, on a facts and circumstances basis, limiting the availability to one provider offering a menu of investment choices may qualify for the safe-harbor exemption.
- The employer's retention of the right to discontinue providers who do not comply with the Internal Revenue Code would not result in loss of the safe-harbor exemption.

COBRA Subsidy Extended Through May 31, 2010

The Continuing Extension Act of 2010, which was signed into law on April 15, 2010, extends the Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy eligibility period through May 31, 2010. Under the new Continuing Extension Act, individuals involuntarily terminated between September 1, 2008, and May 31, 2010, may be eligible for the COBRA premium subsidy for a period of up to 15 months. Plan administrators should update their COBRA election notices to reflect the new subsidy eligibility period. Also, because the prior subsidy eligibility period extension ended on March 31, 2010, plan administrators should be sure to notify (or re-notify) individuals who were involuntary terminated on or after April 1 of their potential eligibility for the subsidy. Although the act is the third extension of the COBRA subsidy eligibility period
in the last five months, it is likely not the last. Stay tuned.

DOL Issues Model CHIP Notice

Most states sponsor premium assistance programs that subsidize premiums for employer-sponsored group health plan coverage provided on behalf of targeted low-income families.[1]

The states that offer such assistance use Medicaid or State Children's Health Insurance Program (SCHIP) funds for this purpose.[2] To ensure that employees are aware of the available premium assistance opportunities, employers must provide employees with a CHIP Notice that includes certain information regarding the premium assistance programs available in their state.

Model Notice

On February 4, 2010, the DOL published a model CHIP Notice employers may use to satisfy their new notice obligations under CHIPRA:

- Model CHIP Notice - Word Version
- Model CHIP Notice - PDF Version

The CHIP Notice includes information regarding potential opportunities for premium assistance in the 40 states that currently offer such assistance, including how to apply for assistance. Employers may modify the notice so that it references only the state or states in which the employer maintains a group health plan; however, employers should do so only if it is certain it will have no employees in those states. The DOL plans to publish an up-to-date list of states each year.

Employers Required to Provide Notice

An employer must provide a CHIP Notice if it "maintains" a group health plan in a state that offers premium assistance under a Medicaid or state child insurance health plan for the purchase of group health plan coverage. An employer maintains a group health plan in a state if employees who reside in that state are eligible for coverage under the employer's group health plan.

Example 1

An employer headquartered in New York has employees in New York, Maryland, Delaware and Pennsylvania. The employer's medical plan is available to employees who reside in those states. For purposes of the CHIP Notice, the employer maintains a group health plan in each state. Because New York and Pennsylvania currently sponsor premium assistance programs, the employer is subject to the CHIP Notice requirement.

Who Must Receive Notice

A group health plan must provide a CHIP Notice to each employee who (a) is eligible for coverage under the employer's plan, and (b) resides in a state that provides premium assistance under a Medicaid or state child insurance health plan. As noted, there are 40 states that currently provide such assistance, including New York. Many employers will choose to provide the CHIP Notice to all employees, including employees who reside in a state that does not provide premium assistance, to avoid the time and effort associated with identifying the employees to whom notices must be provided and reduce the risk of noncompliance.

Example 2

Assume the same facts as Example 1. The employer must provide a CHIP Notice to employees in New York and Pennsylvania because New York and Pennsylvania offer premium assistance programs. CHIP Notices need not be provided to employees who reside in Maryland and Delaware because these states do not currently offer premium assistance under a Medicaid or child health insurance plan.

Notice Deadline

The new notice must be provided to employees by May 1, 2010, or, *if later*, the first day of the first plan year following February 4, 2010.

First Day of Plan Year	Notification Due Date
January 1, 2010	January 1, 2011
February 4, 2010, through May 1, 2010	May 1, 2010
After May 1, 2010	First day of the next plan year

The CHIP Notice must be provided on an annual basis. Employers will need to check the DOL Web site before providing a CHIP Notice to be sure it includes all applicable states that offer premium assistance.

How to Provide the Notice

Many employers will provide the CHIP Notices via first-class mail. Employers that maintain ERISA group health plans should comply with DOL regulations pertaining to electronic notification if CHIP Notices are going to be furnished electronically. CHIP Notices may be provided *with* initial enrollment materials, open enrollment materials and summary plan descriptions (SPDs) if they are provided by the CHIP Notice deadline, and are separately and prominently displayed. The “separate and prominent” requirement would seem to prohibit the inclusion of the CHIP Notice as part of a benefits enrollment guide or SPD.

Penalties

A violation of the CHIP Notice requirement can result in an excise tax under the Internal Revenue Code of $100 per day for each day of noncompliance per individual. For plans that are subject to ERISA, an additional $100 per day penalty can be assessed.

DOL Issues Final Rule on Underfunded Multiemployer Pension Plans

The Employee Benefits Security Administration of the DOL has issued a final rule establishing a civil penalty of $1,100 per day against the plan sponsor of a multiemployer plan for failure to establish required mandatory funding improvement and rehabilitation plans as required under the statute. These civil penalties were enacted under the Pension Protection Act of 2006 and require certain actuarial calculations of a plan’s funding status to determine whether the plan is in “endangered status” or “critical status” under the new funding rules. Plans that are poorly funded as determined under these rules are required to provide notification to participants, beneficiaries, and government agencies of the endangered or critical status of the plan and to develop a funding improvement plan or a rehabilitation plan as required. If these steps are not taken, a civil penalty of up to $1,100 per day may be levied against the plan’s sponsor. (Final rules under 29 Code of Federal Regulations parts 2560 and 2570, published February 26, 2010, in the Federal Register)

CASES

Change in Retiree Medical Benefits Does Not Violate ERISA

CUNA Mutual sponsored a retiree health benefit plan covering both its union and non-union employees. Originally, retirees paid only 60 percent of the premium and CUNA paid 40 percent. Additionally, CUNA had a sick leave account where unused sick leave days could be converted into a non-cash account used to pay the retiree's portion of the health insurance premium. In 2008, CUNA amended the plan to provide that it would no longer pay any portion of the retiree premium and that for the non-union employees the non-cash accounts could no longer be used to pay premiums. The retirees sued, claiming that the changes made by CUNA violated ERISA and state law. The Western District Court of Wisconsin ruled in favor of CUNA's motion to dismiss the lawsuit. The District Court found that CUNA had not created vested benefits under ERISA because it properly indicated in all documents and communications that it reserved the right to modify, change, or terminate the plan. Additionally, with respect to the sick leave accounts, the court found that these were not plan assets, that the ability to modify the policy was reserved by CUNA, and that the policy falls within the scope of ERISA and was not subject to state law claims. This case, like many others, indicates that by careful drafting of plan documents and employee communications, employers can retain the right to modify benefits and terms of welfare plans. (Sullivan v. CUNA Mutual Insurance Society, W.D. Wis., 2010)

Retention of Corporate Limited Liability

Corporations are formed, in part, to limit the exposure of individual shareholders to liabilities of the corporation. In any closely held business venture, the protection of personal assets is an important objective of sound legal planning. In order to maintain this protection, it is important to operate a corporation in a proper manner and to observe the formalities of doing business in a corporate form. Similar considerations apply to operating a business as a limited liability company (LLC) or a limited partnership (LP).

A recent federal court case illustrates the importance of these points and also shows that exposure to personal liability can be limited where the corporate form was not used as a subterfuge or in a deceptive or fraudulent manner. The Eighth Circuit Court of Appeals issued a ruling protecting the individual shareholders of a corporation that failed to make contributions to union pension and welfare funds that were agreed to in collective bargaining. In this circumstance, the corporation and the individual shareholders had intermingled funds and various activities in a manner that would not reflect good corporate practice in protecting against personal liability. The union benefit funds argue that the "corporate veil" should be pierced or ignored and that the individual shareholders should be held liable for the unpaid contributions because the individuals had blurred the distinction between corporate activities and personal assets. The plans were victorious in a district court ruling. However, the appeals court ruled that in order to hold the individuals liable, the plans had to show both that the corporation and personal assets had been intertwined inappropriately and that the corporation was used as a subterfuge to avoid liability or to perpetrate a fraud against the plans. This second element was found to be absent in this case, and the court ruled in favor of the individuals. (*Carpenters District Counsel of Kansas City Pension Fund v. JNL Construction Co.*, *8th Cir.*, 2010)

[1] At the present time, the following 10 states do not offer premium assistance: Connecticut, Delaware, Hawaii, Illinois, Maryland, Michigan, Mississippi, Ohio, South Dakota, and Tennessee.

[2] The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), signed into law on February 4, 2009, markedly increased CHIP allotments and reduced barriers for states to provide premium subsidies for the purchase of employer-sponsored coverage.