EMPLOYEE BENEFITS DEVELOPMENTS JUNE 2008

Hodgson Russ Newsletter
June 20, 2008

Practices & Industries

Employee Benefits

2009 HSA/HDHP Limits Released

To be eligible to contribute to a health savings account (HSA), an individual must be covered by a qualified high-deductible health plan (HDHP). An HDHP is a high-deductible health plan that meets certain requirements, including minimum deductible and out-of-pocket limits. The IRS has released the statutory HSA contribution maximums, and HDHP minimum deductible and out-of-pocket limits for 2009.

Final IRS Regulations Address Late HSAs and Accelerated HSA Contributions
Recently issued final IRS regulations provide guidance on employer comparable contributions to Health Savings Accounts (HSAs) where an employee has not established an HSA by December 31and in instances where an employer accelerates contributions for the calendar year for employees who have incurred qualified medical expenses. The final regulations adopt the provisions of previously issued proposed regulations without substantive revision. *(IRS Reg. §54.4980G-O, 73 Fed. Reg. 20794)*

Late HSAs
Unless contributions to an HSA are made under the terms of an employer's cafeteria plan, employers who contribute to HSA accounts are required to make comparable contributions on behalf of HSA-eligible employees. To be comparable, HSA contributions must be made to all HSA-eligible employees in the same employment category with the same level of coverage in either the same dollar amount or same percentage of the HDHP deductible.

How can an employer meet this requirement if an employee fails to establish an HSA prior to the end of the year or fails to notify his or her employer that an HSA has been established?

Under recently finalized IRS regulations, an employer will not fail to satisfy the comparability requirement where a contribution is not made because an employee has not set up an HSA or has failed to notify the employer that one has been established provided the employer satisfies prescribed notice and contribution requirements.

- Notice must be furnished to all eligible employees who, as of December 31 of a given year, have not established an HSA or notified the employer that one has been established. The notice, which must be furnished by January 15 of the following year, must explain that comparable employer contributions will be made for the prior year on behalf of each employee who, by the last day of February, both establishes an HSA and notifies the employer that one has been established.

- The employer must make a comparable contribution on behalf of each eligible employee who establishes an HSA and provides timely notice to the employer. The contribution is due by April 15 and must include reasonable interest.

The regulations provide sample language that employers may use to prepare their own notices.

Acceleration of Employer Contributions
Under the final regulations, an employer may accelerate all or part of its contributions to the HSAs of employees who have incurred qualified medical expenses provided it does so on an equal and uniform basis for all eligible employees. Employers must establish reasonable, uniform methods and requirements for accelerated contributions and the determination of medical expenses.

Participant Not Entitled to Windfall Due to Ministerial Error in Preparing Pension Estimate
A plan participant began working for Company 1 in 1976. In 1993, Company 1 was acquired by Company 2, and the pension plans of the two companies were merged at the end of 1995. The plan participant received an estimate ($1,047 per month) from Company 2 of the participant's pension under Company 1's plan, and was advised in writing that he would receive his Company 1 pension "in addition to" his benefit under Company 2's plan for service on and after January 1, 1996. The plan participant's position with Company 2 was subsequently eliminated. In connection with the job elimination, the participant met with a human resources representative and received an estimate of his pension under Company 2's plan of $2,832 per month, which was based on his 1976 hire date with Company 1. The participant also used an online pension estimator that generated a pension estimate of $2,914 a month, based on the 1976 hire date. The participant turned down another job offer with Company 2, he says, in reliance on the higher-than-expected pension estimates. In 2002, the participant received a new benefit statement that correctly showed that his Company 2 pension would be based solely on the years he worked for Company 2, which dropped that pension amount down to $789 a month. The participant sued, claiming that Company 2's "misrepresentations" were in breach of its fiduciary duty to the participant under the Employee Retirement Income Security Act of 1974 (ERISA). He requested equitable relief under ERISA § 502(a)(3) and specifically asserted that he should be entitled to a Company 2 pension that accounted for both his years at Company 2 and Company 1. The federal appeals court that heard this case held there was no breach of fiduciary duty and that the employee was not entitled to larger Company 2 pension benefits, as erroneously estimated before retirement, because the human resources representative in question was not a plan fiduciary, the human resources representative lacked authority to modify pension plan terms and was neither a named nor a functional fiduciary of plan. The court also held that the case does not provide suitable facts to support an estoppel claim because it was unreasonable for the plan participant to rely on informal communications that contradicted clear plan terms. The court stated that nothing in ERISA entitles the participant to a windfall when a ministerial employee makes a mistake in an estimate, a mistake of which the participant is or should have been aware because of Company 2's clear and accurate ERISA disclosures. (*Livick v. Gillette*, 1st Cir 2008)

DOL Releases Retirement Plan Video
The Department of Labor (DOL) has released a new online video to provide small employers and accountants with information on the use of Simple IRAs, SEPs (Simplified Employee Pensions) and 401(k) plans. The video uses case studies and interviews with four different employers and their accountants to promote the use of these retirement savings vehicles. The video as well as a companion booklet can be viewed online, and the video is also available as a DVD. The video can be found in the DOL Web site. Click on "For Small Employers" under the "Compliance Assistance" heading at www.dol.gov/ebsa.

State Court QDRO Decision Not Reviewable in Federal Court
A recent decision out of the U.S. Court of Appeals for the 1st Circuit illustrates the length to which some domestic relations order litigants can take their disputes. It also illustrates that there are limits to court challenges. In this situation, a plan participant was divorced. The state court awarded a portion of the participant's account balances in his employer's qualified pension plans to the participant's ex-spouse. The ex-spouse's attorney worked with the plan administrators using the plans' model forms to create domestic relations orders. Exercising its retained jurisdiction in the matter of the domestic relations orders, the state court then held a hearing at which the participant asserted objections to the issuance of the orders. After modifications were made to the orders, they were entered by the court and served on the plans. The participant raised objections with the plan administrator under the plans' procedures in their determination of the qualified status of the domestic relations orders. The plan administrator concluded that the orders were qualified domestic relations orders (QDROs) and so advised the parties. At this stage, the participant filed a federal court action to enjoin the plan from following the QDROs and asserted that the qualified status of a domestic relations order can only be established judicially in the federal courts. In rejecting this position, the 1st Circuit Court of Appeals affirmed a district court decision and ruled that state and federal courts have concurrent jurisdiction to review a plan's qualification of a domestic relations order and that the participant in this case had his day in court in the state proceeding. The federal lawsuit was dismissed. (*Geiger v. Foley Hoag LLP Retirement Plan, et al.* 1st Circuit, 2008)

IRS Proposes Regulations on Minimum Required Contributions for Defined Benefit Plans
The Pension Protection Act of 2006 (PPA) created new funding requirements for defined benefit plans and made changes to the minimum funding requirements. The IRS has issued another in a series of proposed regulations to implement these new PPA rules. Under the proposed regulations, the amount of minimum required contribution for a plan that is not in an at-risk funding status is determined by comparing the value of plan assets to the plan's funding target for the plan year. If the value of plan assets is less than the funding target, the required contribution is equal to the sum of the target normal cost plus any applicable shortfall and waiver amortization installments. If the value of plan assets equals or exceeds the funding target, the required contribution for that plan year is equal to target normal cost reduced by any excess. The proposed regulations would apply to plan years beginning in 2009. Employers are permitted to rely on the proposed regulations for plan years beginning in 2008. The sponsors of defined benefit plans should discuss with their plan actuary the effect of the proposed regulations on required contributions and how to best comply with the new funding regulations. (*IRS Prop. Reg §1.430(a)-1, 73 Fed. Reg. 20203*)

DOL Provides Additional Guidance regarding QDIAs
In October 2007, the Department of Labor (DOL) published final regulations regarding qualified default investment alternatives (QDIAs) that would provide relief from certain fiduciary responsibilities under the Employee Retirement

Income Security Act of 1974 (ERISA). The DOL has issued Field Assistance Bulletin 2008-03 which provides additional guidance under the regulations. Some highlights of the bulletin are as follows:

- The fiduciary relief granted to QDIAs will extend to all assets invested in the QDIA without regard to whether the investment was made as a result of a default investment or an affirmative election. It will also extend to assets invested in the QDIA prior to the effective date.

- Further guidance on the means for providing the required notice is provided. Until additional guidance is issued, a prospectus may be used to provide the description of the QDIA and its features. Additionally, the QDIA notice may be combined with notices for qualified automatic contribution arrangements, eligible automatic contribution arrangements, or other 401(k) safe harbor plans.

- A plan is permitted to have more than one QDIA.

- The QDIA fiduciary relief will apply to Section 403(b) plans covered by ERISA.

- The grandfathered stable value fund QDIA requirements were modified to eliminate the requirement that the fund be guaranteed by a state or federally regulated financial institution and to only require that the stable value fund be primarily invested in products that are backed by state or federally regulated financial institutions.