

## **CURRENT DEVELOPMENTS**

### **ASSOCIATION OF EMPLOYEE BENEFITS PLANNERS**

**February 7, 2011**

**Katherine Conklin  
McGlinchey Stafford, PLLC**

#### **I. Retirement Plan News**

##### **A. Internal Revenue Service Guidance**

1. New Requirements for Tax Return Preparers. FAQs updated for Notice 2011-6. The notice provides guidance about the implementation of new Treasury regulations governing tax return preparers on the requirement to obtain a preparer tax identification number; forms that qualify as tax returns or claims for refund; and interim rules that apply to certain PTIN holders during the implementation phase.
2. New Submission Period for Individually Designed Plans and Pre-Approved DC Plans. Cycle A submission period for determination letter applications and opinion and advisory letter applications for most pre-approved plans begins on February 1, 2011.
3. New Cumulative List. Notice 2010-90 contains the new cumulative list, which must be used for Cycle A plans.
4. New User Fees. Use current Form 8717 to submit new user fees beginning February 1, 2011.
5. PPA Amendment Deadline Extension. Notice 2010-77 (issued in late December 2010) further extends the deadline for amending qualified defined benefit plans to meet certain requirements of the Code that were added by the Pension Protection Act of 2006 (PPA '06) and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010). This extension relates primarily to cash balance-type defined benefit plans and applies to IRC Sections 401(a)(29) and 436 relating to benefit restrictions, 411(a)(13)(B) relating to 100% vesting in a hybrid plan, and 411(b)(5) relating to special age discrimination rules, including a safe harbor test and conversion requirements, for hybrid plans. The deadline for adopting an interim or discretionary plan amendment for these Sections is extended to the last day of the first plan year that begins on or after January 1, 2011.
6. 409A Compliance. Notice 2010-80 notice provides additional relief for nonqualified deferred compensation plans covered under Section 409A. This notice also expands the types of plans eligible for relief under Notice 2010-6, provides an additional method of correction and transition relief under Notice 2010-6 for certain plan document

failures relating to payments at separation from service, and modifies the correction reporting requirements in Notice 2008-113 and Notice 2010-6.

7. Pre-Approved IRA Documents. Rev. Proc. 2010-48 provides guidance to drafters and users of pre-approved IRAs. Section 3 provides guidance to drafters and users of prototype IRAs, including rules for when documents must be submitted to the Internal Revenue Service and for new user fees for individual retirement annuities. Section 4 provides guidance to users of the Service's model IRAs and describes the availability of new model individual retirement annuities. Rev. Procs. 87-50 and 98-59 modified.

8. Priority List for Guidance. The latest priority list for 2010-2011 includes final regulations on the suspension or reduction of safe harbor contributions under IRC Sections 401(k) and (m), guidance on eligible combined defined benefit and 401(k) plans under Section 414(x), guidance on reporting requirements for retirement plans, guidance on issues involving lifetime income from retirement plans, a EPCRS update, and guidance on governmental plan status under Section 414(d) and church plan ruling requests under 414(e).

## **B. DOL Guidance**

1. Definition of Fiduciary. The U.S. Department of Labor's Employee Benefits Security Administration will hold a public hearing on March 1, 2011 and if necessary, March 2, 2011, on the proposed regulation amending the definition of the term "fiduciary."

2. Fee Disclosures. On 10/14/2010, the DOL issued a final rule to improve transparency of fees and expenses to workers with 401(k)-type retirement plans. The final regulation requires plan fiduciaries to: (a) Give workers quarterly statements of plan fees and expenses deducted from their accounts, (b) Give workers core information about investments available under their plan including the cost of these investments, (c) Use standard methodologies when calculating and disclosing expense and return information to achieve uniformity across the spectrum of investments that exist in plans, (d) Present the information in a format that makes it easier for workers to comparison shop among the plan's investment options, (e) Give workers access to supplemental investment information in addition to the basic information required under the final rule.

## **II. Welfare Plans**

### **A. New Law**

1. TAA Premium Subsidy Extension. In the Omnibus Trade Act of 2010, the 80% health coverage tax credit for certain eligible individuals under the Trade Assistance Act and the Alternative Trade Adjustment Act was extended for six weeks through 2/12/2011.
2. EGTRRA Welfare Benefits Extensions. In the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, the expiring provisions of EGTRRA were extended for two additional years for transit/car pooling benefits, adoption benefits, employer-provided child care, DCAP/Dependent Care Tax Credits and educational assistance benefits. (Note, PPA took care of extending expiring retirement plan provisions.

### **B. IRS Guidance**

1. Small Business Health Care Tax Credit. IRS Notice 2010-82 provides guidance on the credit, including how to determine employees taken into account, who is an employer, hours of service, the uniformity requirement on the employer share of health costs, and the inapplicability of self-funded arrangements for the credit.
2. Priority List for Guidance. The latest priority list for 2010-2011 includes final regulations on the cafeteria plan rules, guidance on the applicability of Section 162(l) with respect to the health insurance costs of self-employed individuals, how to calculate the COBRA premium, the interaction of Sections 4980G and 125 with respect to comparable employer contributions to HSAs, W-2 reporting on aggregate cost of health coverage, the premium assistance credits under Section 36B for those who buy insurance through an exchange, employer-provided cell phones, and Section 152 concerning the definition of a dependent.
3. Delayed Enforcement of 105(h) to Insured Plans. In Notice 2011-1, the IRS announced that compliance with the non-discrimination rules of Section 105(h) to insured plans would not be enforced and the effective date will be delayed until regulations or other guidance is issued.
4. FSA and HSA Debit Cards for OTC Drugs. In Notice 2011-5, guidance was issued on how to use these types of debit cards for over-the-counter drugs, which are not a permissible reimbursement item now except for certain exceptions, such as when they are prescribed.
5. W-2 Reporting of Health Costs. The new Form 2011 W-2 has a code (DD) that can be used for Box 12 reporting of the cost of employer-provided health coverage. This is merely optional in 2011.

**C. Other Agency Guidance**

1. HHS Guidance on Annual Limit Waivers. Guidance was issued on 12/9/2010 on how to apply for a waiver from the annual limit restrictions of health care reform, including model language for notices to participants.
2. HHS Proposed Regulations on Unreasonable Health Rate Increases. Proposed Regulations were issued on PHSA Section 2794, which requires a process for the disclosure and review of unreasonable rate increases by health insurers.
3. Joint Agency FAQs on Health Care Reform, Mental Health Parity and Wellness Program Nondiscrimination Requirements. Guidance in the form of FAQs on these topics were issued jointly by the IRS, DOL and HHS. For health care reform, these FAQs include guidance on preventative care, automatic enrollment, dependent coverage of adult children, and grandfathered health plans.