

# LISKOW & LEWIS

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## LEGISLATIVE UPDATE

### HEALTH AND WELFARE BENEFIT PLANS & EXECUTIVE COMPENSATION

#### 1. Health Care Reform

- a. Litigation Update. The Supreme Court granted review of certain of the health care reform lawsuits. Specifically, the Court has said it will consider the following questions: (1) whether suits challenging the individual mandate must be dismissed as premature under the tax anti-injunction act, as the tax has not yet been enforced; (2) whether Congress exceeded its powers in enacting the individual mandate; (3) if the individual mandate is unconstitutional, whether it can be severed from the remainder of health care reform; and (4) whether the requirement that states expand Medicaid coverage or forfeit their Medicaid funding is unduly coercive. Oral argument is expected to be in the spring of 2012.
- b. Deadline for Summary of Benefits and Coverage Postponed. A new FAQ by the DOL, Treasury, and HHS provides that a final rule on the summary of benefits and coverage will be released “as soon as possible.” Until then, plans do not have to comply with the proposed rule’s March 23, 2012 applicability date. The final rule will provide a new applicability date and will give plans plenty of time to comply. The FAQ is available at <http://www.dol.gov/ebsa/faqs/faq-aca7.html>.
- c. DOL Authority Over MEWAs. Health care reform legislation authorized the DOL to issue cease and desist and seizure orders to MEWAs without prior notice or hearing under certain circumstances. The DOL today issued two new proposed rules to facilitate the implementation of this authority. Pursuant to the proposed rules, MEWAs would be required to register with the DOL, the DOL would be able to issue cease and desist orders when it appears that fraud is taking place or there is an immediate danger to the public safety or welfare, and the DOL could seize assets from a MEWA when there is probable cause that the plan is in a financially hazardous condition. These proposed rules will be published in tomorrow’s Federal Register.

#### 2. HIPAA Privacy and Security Rules

- a. New HIPAA Regulations Anticipated Before Year-End. Since 2009, HHS has been working on updating its HIPAA privacy and security rule regulations. The project was pushed back by health care reform, but HHS officials have said that new regulations will be out by the end of 2011, to go into effect likely in May of 2012.

- b. Pilot Audit Program. HHS is piloting an audit program to assess compliance with HIPAA privacy and security rules. HHS will perform up to 150 audits of covered entities beginning in November 2011 and ending in December 2012. A wide range of covered entities will be audited, including group health plans. According to HHS, this pilot audit program is primarily intended as a compliance improvement activity to be used by HHS to determine the types of technical assistance that should be developed and the types of corrective action that are most effective. But, if an audit report indicates a serious compliance issue, HHS has stated that it may initiate a compliance review to address the problem. More information about the program can be found at <http://www.hhs.gov/ocr/privacy/hipaa/enforcemnet/audit/index.html>.

### 3. **Mental Health Parity Rules**

With the FAQs on the summary of benefits and coverage, the DOL, Treasury, and HHS, posted several FAQs on implementing the Mental Health Parity and Addiction Equity Act of 2008 with respect to *nonquantitative* treatment limitations (e.g., plan methods used to determine usual, customary, and reasonable fee charges; standards limiting benefits based on medical necessity or appropriateness; and standards for provider admission to participate in a network). To provide guidance on whether certain nonquantitative limitations meet the parity rules, the departments issued FAQs addressing several factual scenarios. The FAQs are available at <http://www.dol.gov/ebsa/faqs/faq-aca7.html>.

### 4. **Notable Health & Welfare Benefit Plan Cases**

- a. Asset Purchase Agreement's Amendment of Health Plan. In *Evans v. Sterling Chemical, Inc.*, 2011 WL 4837847 (5th Cir. 2011), the Fifth Circuit held that any provision of a corporate agreement could amend an ERISA plan, even if the agreement was not expressly intended to be an amendment. In order for a corporate agreement to amend an ERISA plan, the only requirements are that: (1) the agreement be written, (2) it contain a provision directed to an ERISA plan, and (3) the plan amendment formalities are satisfied. The court further held that the plan formality requirement was met by virtue of a company's Board of Directors' authority to amend its health plan and that Board's approval of the APA.
- b. Plan Subrogation/Reimbursement Rights Under ERISA. In *US Airways, Inc. v. McCutchen*, 2011 WL 5557411 (3rd Cir. 2011), the Third Circuit held that, under ERISA 502(a)(3), an ERISA health plan was not entitled to full reimbursement of medical expenses it incurred on behalf of a participant but was limited by equitable principles to "appropriate" relief, despite plan language providing for full reimbursement from amounts paid for claims by third parties. The court held that the plan could not recover the full cost of the participant's medical expenses when, although the participant recovered a gross amount that exceeded the medical expenses from a third party, after reduction for legal costs, the recovery was less than the medical expenses.

### 5. **Nonqualified Deferred Compensation Guidance Update**

An IRS official has said the Service intends to issue a set of rules under Section 457(f) followed shortly thereafter by "income inclusion" rules under Section 409A before the end of June 2012. Because the 409A regulations are related to the 457(f) in many ways, the IRS is working concurrently on both areas so that they are coordinated.

## 6. **Employer's Deduction for Bonus Pool Arrangements**

Revenue Ruling 2011-29 describes a bonus pool arrangement in which the total amount of bonuses for employees was determined by the end of the year and paid in the early part of the next year. Reversing its prior position, the IRS ruled that an accrual method employer can deduct such bonuses in the first year, even if it is not able to identify the specific bonus recipients and bonus amounts payable to each by the end of the first year. However, to be deductible in the first year, any bonus amount attributable to an employee who has forfeited his right to the bonus cannot revert to the employer but must be reallocated among other eligible employees. The IRS cautioned that any change in an employer's treatment of bonuses in accordance with this revenue ruling must satisfy the "change in accounting method" rules.

## **REMINDERS FOR 2012**

### 1. **Health and Welfare Plans**

- a. Annual Limit Requirement. Employer-sponsored group health plans may limit reimbursements for essential health benefits for plan years beginning on or after September 23, 2011 but before September 23, 2012 up to \$1,250,000.
- b. Claims and Appeals Procedures for Non-Grandfathered Plans. Health care reform's enhanced internal claims and appeals and external review procedures became effective January 1, 2011. In March and June of 2011, the DOL issued additional guidance, which revised these rules and eased certain of the compliance requirements. *See* DOL Technical Release 2011-01 (March 18, 2011), DOL Technical Release 2011-02 (June 22, 2011), and amended interim regulations (June 24, 2011). Non-grandfathered plans should ensure their claims procedures are consistent with the most recent guidance.
- c. W-2 Reporting of the Cost of Employer-Sponsored Group Health Plan Coverage. The requirement that the cost of employer-sponsored group health plan coverage be reported on W-2s takes effect beginning with the Form W-2 issued for the 2012 calendar year. Employers should ensure the appropriate information is captured by their payroll systems.
- d. HIPAA Compliance. As the HHS has ramped up enforcement efforts and the penalties for noncompliance have been dramatically increased, plan sponsors may wish to review their HIPAA compliance efforts and determine whether their practices need to be updated.

### 2. **Non-Qualified Deferred Compensation**

- a. Formally Amend 409A Plans Providing for Payment on a Release of Claims. Employers have until December 31, 2012 to formally amend their deferred compensation plans to remove provisions relating to payments upon releases of claims in accordance with Notice 2010-80.
- b. Attach 409A Operational Failure Correction Statement to Tax Return. Although employees are not required to attach a statement to their 2011 tax returns identifying the correction of certain operational defects that occurred in 2011, employers are.

Note: Correction of certain 409A document failures relating to “linked” plans and the timing of payments received by the employer must be corrected by December 31, 2011.

**Unless expressly stated otherwise above, nothing contained in this memo was intended or written to be used, or can be used by or relied upon by any taxpayer for the purpose of avoiding penalties that may be imposed on such taxpayer under the Internal Revenue Code of 1986, as amended. No one, without our express prior written permission, may use any part of this memo relating to any Federal tax matter to support the promotion or marketing of any Federal tax transaction(s) or matters or in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Any taxpayer should seek advice based upon the taxpayer’s particular circumstances from an independent tax advisor with respect to any Federal tax transaction or matter contained in this memo.**