

# EMPLOYMENT LAW UPDATE

*Healthcare; 401(k) Plan Fee Disclosures  
and Fiduciary Responsibilities;  
& Other Recent Changes*

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# TOPICS FOR DISCUSSION

- Healthcare
- 401(k) Plan Fee Disclosures and Fiduciary Responsibilities
- Fair Labor Standards Act
- Data Privacy Issues

# HEALTHCARE: AFFORDABLE CARE ACT.

- ***National Fed. of Independent Business v. Sebelius***, 567 U.S. \_\_\_\_ (June 28, 2012)

– Issues:

- Individual Mandate
- Medicaid Expansion

– US Supreme Court only decides whether Congress has Constitutional power to enact the challenged provisions; NOT whether the Act embodies sound policies.



# HEALTHCARE: AFFORDABLE CARE ACT.

- *National Fed. of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (June 28, 2012)
  - **Changes are triggered** based on:
    - Whether or not the plan is Grandfathered; and
    - Start date of the Plan - On or before:
      - Sept. 23, 2010;
      - Aug. 1, 2012; and
      - Jan. 1, 2014.
  - **CAUTION:** Can Lose Grandfathered Status



# HEALTHCARE

## Employer Shared Responsibility Excise Tax

Shared Responsibility Provisions of Affordable Care Act (§4980H)

- What?

- Employers must provide “minimum essential” health care coverage for their full-time employees or pay an annual penalty.
- 2 types of Penalties:
  - Play OR Pay; and
  - Play AND Pay.



- When Applied?

- Applies to employers that employed an average of at least 50 full-time (or full-time equivalent) employees on business days during the preceding calendar year)
  - Works on average of at least 30 hours per week.

# HEALTHCARE

## Employer Shared Responsibility Excise Tax

Shared Responsibility Provisions of Affordable Care Act (§4980H)

- Play Or Pay.
- When Applied?
  - An employer that fails to offer health coverage to its full-time employees and their dependents is subject to a nondeductible “Play OR Pay” penalty if an full-time employee enrolls for coverage through an Exchange and qualifies for the premium tax credit or reduced cost-sharing.
- Penalty?
  - \$2K for each full-time employee over 30.



# HEALTHCARE

## Employer Shared Responsibility Excise Tax

Shared Responsibility Provisions of Affordable Care Act (§4980H)

- Play And Pay
- When Applied?
  - Applies if a large employer offers its full-time employees (& their dependents) the opportunity to enroll in coverage but the coverage does not provide a “minimum value” or is “unaffordable” and 1 or more full-time employees receive subsidized coverage through an Exchange.
- Penalty?
  - Penalty is \$3K for each full-time employee receiving subsidized coverage through an Exchange.



# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon: Increased Medicare Tax.*

- Starts in 2013.
- Rate is 0.9%.
- Applies to Married filing Jointly filers with combined wages, other compensation & self employment income of more than \$250,000.
- Employer withholding begins, per employee, on wages in excess of \$200,000 in a calendar years.
- Employers are not required to notify affected employees.





# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon: Sur-Tax on Unearned Income of Higher Income Individuals.*

- Starts in 2013.
- Medicare Contribution Tax.
- Rate is 3.8%.
- Applies to lesser of:
  - Net Investment Income;
  - Excess of modified adjusted gross income over \$250,000 for married filing jointly.



# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon:* **Higher Threshold for Deducting Medical Expenses.**

- Taxpayers under age 65 can deduct unreimbursed medical expenses that are more than 10% of adjusted gross income.
- 7.5% continues to apply through 2016, IF taxpayer or spouse is 65 before Dec. 31, 2012.



# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon:* **Reduced Limit on Flexible Spending Account (“FSA”) Balances.**

- Health FSA contributions by employees will be limited to \$2,500 per year starting in the 2013 plan year.
- NOT applicable to dependant care assistance (day care) benefits.
- Grace Period amounts that remain after the 2012 plan year for up to 2 ½ months are not affected.



# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon: W-2 Reporting.*

### – Who's Affected?

- Applies to employers that were required to file 250 or more W-2 forms in the prior year;
- Applies to 2012 W-2s that are distributed to employees starting in 2013.

### – What's Required?

- Report total cost of group health benefit plan coverage;
- Box 12, Code DD
- Informational only/Reported cost is not taxable;
- Employee coverage only is reported.

2012 W-2 Wage and Tax Statement



# HEALTHCARE: AFFORDABLE CARE ACT.

## On the Horizon: W-2 Reporting.

- **Any Exceptions?** W-2 reporting does NOT apply to:
  - “Excepted Benefits” (*e.g.*, accident, disability income, supplemental liability & workers compensation insurance).
  - Stand-alone dental & vision plans;
  - HRA, HSA, & Health FSA amounts.
  - Employee Assistance Plans, Wellness Programs, & On-site medical clinics IF the employer does not charge a premium.

2222			4 Employer's social security number			OMB No. 1545-0048		
3 Employer identification number (EIN)				1 Wages, tips, other compensation		7 Federal income tax withheld		
6 Employer's name, address, and ZIP code				3 Social security wages		4 Social security tax withheld		
				8 Medicare wages and tips		6 Medicare tax withheld		
				7 Social security tips		8 Allocated tips		
9 Control number				10 Dependent care benefits				
5 Employer's first name and initial			Last name			SSN		
f Employer's address and ZIP code				11 Nonqualified plans		2a		
				13 Sickness, accident, or injury		2b		
18a Sick				14 Other		2c		
				15		2d		
16 State wages, tips, etc.				17 State income tax		18 Local income tax		
19 State income tax				20 Local income tax		21 Unemployment tax		

From **W-2** Wage and Tax Statement 2012 Department of the Treasury - Internal Revenue Service

Copy 1 - For State, City, or Local Tax Department



# HEALTHCARE: AFFORDABLE CARE ACT.

## On the Horizon: W-2 Reporting.

### – Total Costs Include:

- Employer Portion;
- Employee Portion;
  - Pre-Tax;
  - After-Tax.

### – Cost of Coverage:

- Any reasonable method that is applied consistently for all employees who terminate employment during the year.

2222		Employee's social security number		OMB No. 1545-0008		
b Employer identification number (EIN)		1 Wages, tips, other compensation		2 Federal income tax withheld		
c Employer's name, address, and ZIP code		3 Social security wages		4 Social security tax withheld		
		5 Medicare wages and tips		6 Medicare tax withheld		
		7 Social security tips		8 Allocated tips		
d Control number		9		10 Dependent care benefits		
e Employee's first name and initial Last name		11 Nonqualified plans		12a		
		13 <input type="checkbox"/> Factory employee <input type="checkbox"/> Retirement plan <input type="checkbox"/> Holiday pay		12b		
		14 Other		12c		
				12d		
f Employee's address and ZIP code						
15 State Employer's state ID number		16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

Form **W-2** Wage and Tax Statement  
Copy 1—For State, City, or Local Tax Department

2012

Department of the Treasury—Internal Revenue Service



# HEALTHCARE: AFFORDABLE CARE ACT.

## *On the Horizon: Summary of Benefits & Coverage*

### – Translations May be Required.

- Plans and Issuers must provide notices in a culturally and linguistically appropriate manner when 10 % or more of the population residing in the claimant's county are literate ONLY in the same non-English language, as determined by the American Community Survey data published by the U.S. Census Bureau.



# HEALTHCARE: AFFORDABLE CARE ACT.

## Exchange Notices

Employers are required to provide employees written notice of the exchanges **on or before Mar. 1, 2013**





# HEALTHCARE: AFFORDABLE CARE ACT.

## Exchange Notices

### – What should the Exchange Notice Include?

- Info. about the existence of the Exchange, including a description of the Exchange services & how an employee may contact the Exchange;
- If the Employer's share of the cost of coverage is less than 60 %, a statement that the employee may be eligible for premium tax credits & cost-sharing reductions if purchasing coverage through the Exchange.
- If the Employee buys coverage from the Exchange, a statement that the he/she will lose the employer contributions which is excludable from income tax.

#### NOTICE

THANK YOU  
FOR NOTICING THIS  
NEW NOTICE

YOUR NOTICING IT  
HAS BEEN NOTED

AND WILL BE REPORTED TO THE AUTHORITIES



# HEALTHCARE

- **Agencies Issue New Guidance affecting Employers**
  - IRS' New COBRA Audit Guidelines;
  - IRS' New “Full-Time Employee” Definition; &
  - U.S. Dept. of Labor, Health & Human Services, and the US Treasury's 90-Day Waiting Period Limitation Under the Affordable Care Act.



# HEALTHCARE: COBRA



- **IRS's New COBRA Audit Guidelines**

- Incorporates changes to laws affecting COBRA (*e.g.*, HIPPA & FMLA)
- Provide general overview of Requisites, limitations, exceptions, & excise tax.

- **New IRS Enforcement Approach**

- *E.g.*, Employee ineligible for COBRA due to “gross misconduct” termination?, Auditor can still find employee COBRA *eligible* if employee was awarded unemployment compensation benefits and/or won any proceedings re: his termination.



# HEALTHCARE

## IRS' New Guidance on Shared Responsibility & "Full-Time Employee"

- "Full-Time" Employee Definition

- one who works an average of at least 30 hours per week in any given month.

- Uncertainty?

- How are the hours calculated & applied to "Variable-Hour" & "Seasonal" Employees?

- IRS Notice 2012-58's "Safe Harbor" Method



# HEALTHCARE

## IRS Notice 2012-58's "Safe Harbor" Met

HIGH PAYING  
SEASONAL JOBS



### – For Ongoing Employees

- Look back at standard measurement period (3-12 months)
- Full-Time?
  - Stability Period = at least 6 consecutive calendar months that is no shorter in duration than the standard measurement period.
- Not Full-Time? Treat employee as not full-time

### – For New Variable & Seasonal Employees

- Variable Hr. Employee if, on start date, it cannot be determined that he/she is expected to work at least 30 hrs. per week
- Employer can use the "Lock back" option (above) without being subject to §4980H's payment penalty for failing to offer coverage .



# HEALTHCARE

## **90-Day Waiting Period Limitation Under §2708 of the Public Health Service Act, the Affordable Care Act.**

- Temporary Guidance in Effect until End of 2014;
- If Plan Year starts on or after Jan. 1, 2014, a group health plan or health insurance issuer offering group health ins. coverage shall NOT apply any waiting period that exceeds 90 days.
- **Exception.**



# HEALTHCARE

## 90-Day Waiting Period Limitation Under §2708 of the Public Health Service Act, the Affordable Care Act.

### – Exception.

- Newly-hired or Variable-Hour Employees. Employers can still require a set No. of work hrs. before employee is eligible for health coverage as long as coverage is effective no later than 13 months after employee's start date.



# 401(k) PLANS: BACKGROUND

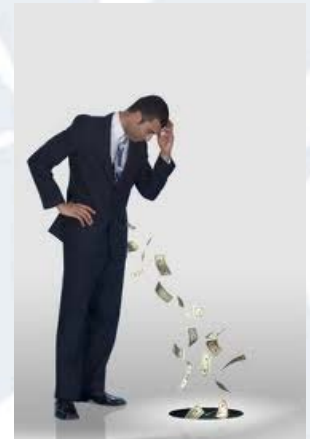
- **401(k) Plans = Tools** Employees use to fund their own retirements.
- 401(k) Plans have become the **most prevalent form of retirement tool in the US** – with more than 500,000 401(k) plans covering approximately 60 million Americans.





# 401(k) PLANS: BACKGROUND

- §406 (a) of the Employee Retirement Income Security Act (“ERISA”) of 1974 makes it an **Prohibited Transaction** to pay a party in interest/plan service provider with plan assets.
- ERISA §408(b)(2) **Exemption IF:**
  - Service is necessary;
  - Reasonable Contract/Arrangement;
  - No more than reasonable compensation is paid.



# 401(k) PLANS: BACKGROUND

- **Fiduciary Duty under ERISA §408(b)(2).**
  - Obligated to document and monitor *all* the fees being charged to their company's 401(k) plan & formally determine if the fees are reasonable relative to the services being delivered.
- **Consequences.**
- **Unenforced.**
  - In part because 401(k) Plan Providers & Servicers were not required to disclose their fees.



# 401(k) PLANS



## Consequence of Non-enforcement.

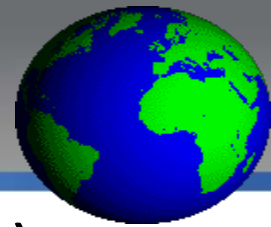
- Plan participants & sponsors erroneously think plan is free or reasonable.

## A New World.

- Amended ERISA §408(b)(2) Fee Disclosure Regulations.
  - PURPOSE. Provide Plan Sponsors & Trustees with all the info. needed to determine reasonableness of the plan's total fee structure.



# 401(k) PLANS

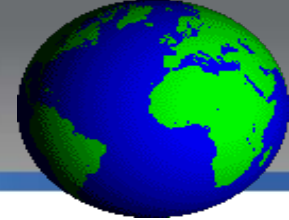


## A New World: Amended ERISA §408(b)(2).

- Plan Providers must disclose the fees they charge and the compensation they are earning from plans they service by July 1, 2012.
- Plan Sponsors' Disclosure Responsibilities
  - August 30, 2012 – Plan Facts & Investments
  - November 14, 2012 – Quarterly Fee Statements
- Failure to disclose by:
  - Plan Provider
  - Plan Sponsor



# 401(k) PLANS



## A New World: Amended ERISA §408(b)(2).

- Plan Sponsors must:
  - Determine which Service/Plan Providers should be providing disclosures;
  - Document receipt of disclosures on or before July 1, 2012;
  - Confirm received disclosures have sufficient info. to properly evaluate fees;
  - Notify via mail, all service providers who either failed to deliver their disclosure by July 1, 2012 or who delivered an insufficient disclosure

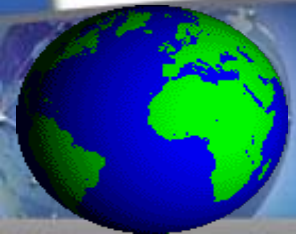


PLAN  
SPONSOR  
(employer)

# 401(k) PLANS

## A New World: Amended ERISA §408(b)(2).

- (cont.) Plan Sponsors must:
  - Compile and aggregate fee data contained in the disclosures
  - Make a formal and documented determination that fees are reasonable



# 401 (k) PLANS

## **Amended ERISA §408(b)(2).**

*“Failure to determine in detail what your fees are by definition, precludes you from concluding they are reasonable.”* – WithumSmith + Brown

- **What your Fees are Comprised of.**

- Marketing Expenses;
- Investment fees, &
- Administrative Expenses.



# 401 (k) PLANS



## Investment Fees May Include:

- Referring Broker Investment Advisor Fee
- Annual Investment Advisor Fee
- Continuing Investment Advisor Fee





# 401(k) PLANS: Amended §408(b)(2)

## Administrative Expenses May Include:

- **1.** Investment management; **2.** Bookkeeping / recordkeeping fees (all direct and indirect); **3.** Administrative fees; **4.** Accounting ; **5.** Auditing;
- **6.** Actuarial services; **7.** Appraisal; **8.** Banking; **9.** Consulting
- **10.** Custodial; **11.** Insurance; **12.** Investment advisory - probably included in investment fees; **13.** Legal; **14.** Brokerage; **15.** Valuation; **16.** TPA fees;
- **17.** Custodial and documentation fees; **18.** Fees because of acquisition, sale, transfer or withdrawal from investment contract;
- **19.** Annual operating expenses (expense ratio) if the return is not fixed
- **20.** Other fees – wrap, mortality, and expense fees; **21.** Any fees rebated back by fund companies to the Plan’s record keeper; **22.** IRA rollover fees
- **23.** Loan maintenance / Safeguarding fees; **24.** Loan origination fees
- **25.** Distribution fees; **26.** Withdrawal fees.

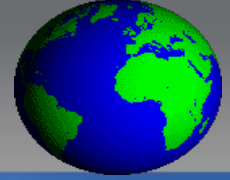
# 401 (k) PLANS

## Amended ERISA §408(b)(2).

- Failure to ensure Reasonableness of Fees.
  - Potential Penalties
    - Personal liability for fiduciaries;
    - Prohibited Transaction disclosures & Penalties;
    - Loss of Tax Exempt status of the Plan;
    - Disgruntle Plan Participants.



# 401(k) PLANS



## A New World: Amended ERISA §408(b)(2).

- Communicating With Participants
  - Below-average Expenses & Fees
    - Tout your diligence re: the plan & underlying fees charged.
  - Fees/Expenses in Excess of Industry Benchmarks
    - Disgruntle, Hostile employees → Serious Legal Issues.
    - Publicize effort to improve the plan



# 401(k) PLANS: Strategies for Communicating

## EXCESSIVE Fees/Expenses to Participants

1. **Don't Hide.** Identify Likely Reaction/Perception & Address it in the Communication with Plan to fix it.



- [www.brightscope.com](http://www.brightscope.com) - *"For the average 401k participant, the 7 point difference . . . could equate to 5 additional years of work [or] up to \$103,600 in lost retirement savings."*



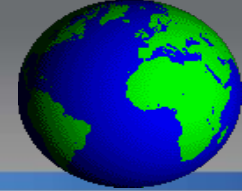
2. **Know you Audience.** Prepare multiple communications/presentations suitable for audience.

3. **Use Layman's Terms.** Not financial jargon/concepts that are confusing.

4. **Use Most Effective Media.** In person, email, written.



# 401 (k) PLANS



## Amended ERISA §408(b)(2).

- **Means of Compliance.**
  - ERISA permits outsourcing to execute the administrative elements of the compilation, documentation, benchmarking, and analysis reporting requirements implicit in §408(b)(2).
  - Plan Sponsors still on the Hook



# 401(k) PLANS: Amended §408(b)(2).

- **Fiduciary Duties**

- Loyalty, Prudence, & Disclosure
- When fail to doc. decision & rationale for it → strong evidence failed to fulfill duty of loyalty, or prudence.

- **3 Types of Possible Litigation.**

- Excessive Fees.
- Professional Investment Management Gone Wrong.
- Acting in the Sponsor's, rather than the Participants' Best Interest.



# 401 (k) PLANS: Amended §408(b)(2).

- **36.9 Million Dollar Lesson**
- **Issue:** Court considered whether fees in a large 401 (k) plan were excessive. *Tussey v. ABB*, No. 2:06-CV-04305, 2010 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012)
- **Fiduciary Duty Breached.**
  - ABB fiduciaries never:
    - calculated the amount of the recordkeeping fees;
    - investigated the market price for similar recordkeeping services & did not benchmark the cost of recordkeeping fees *before* entering into the revenue sharing arrangement with Fidelity;
  - When ABB fiduciaries finally did benchmark the cost of recordkeeping, they:
    - ignored their own consultant's conclusion that fees were too high.
    - Plan provider received as much as 100% for recordkeeping services through revenue sharing arrangements which was far in excess of a reasonable recordkeeping fee



# FAIR LABOR STANDARDS ACT

- **Background.**

- Sets minimum wage, overtime pay, recordkeeping, & youth employment standards.

- **Exempt Employees.**

- Commissioned Sales Employee
  - Computer Professionals
  - Drivers, Driver's Helpers, Loaders, & Mechanics;
  - Farmworkers;
  - Salesmen, Partsman, & Mechanics;
  - Seasonal & Recreational Establishments;
  - Executive, Administrative, Professional & Outside Sales Employees





# FAIR LABOR STANDARDS ACT

- **WHY It MATTERS?**

- Collective OR Class Actions are Common.
- Bankruptcy.

- **Recent Trends in Cases.**

- Misclassifications.

- Independent Contractor v. Employee

*The misclassification of employees as independent contractors is an alarming trend, . . . . Too often, misclassified employees are deprived of overtime and minimum wages, and are forced to pay taxes that their employers are legally obligated to pay.* - U.S. Dept. of Labor, Wage & Hour Div., News Release.



# FAIR LABOR STANDARDS ACT

- **Half Million Dollars.**

- \$478,000 in back wages & liquidated damages &
- \$22,000 in Civil Money Penalties



- **Issue/Facts.**

- Hawkins Tree & Landscaping (Employer) misclassified workers as independent contractors;
- failed to pay workers overtime for hours worked over 40 hours in a week
- failed to provide adequate records of hours worked, &

- **Result.**

- Consent judgment award damages and orders employer to retain a CPA accounting firm to conduct bi-annual audits of its pay practices to determine FLSA compliance.

# DATA PRIVACY



- **Data Law Security Mandates.**
- **What Type of Info. is Covered.**
  - For Employers (Multi-national or US based), **highly sensitive personal identifying information** is collected for every employee and stored in **human resources databases.**
- **What's At Risk.**
  - Threat of HR data breaches has serious legal & practical implications & risks for employees and employers alike.
  - Penalize those with lax security causing breach.

# USA LAW

- **Data Privacy.**
  - **Data Breach Notice.**
    - Who? What? When?
  - What obligations exist for multi-national employers when human resources (personal) data about employees has been leaked in various countries.
- **USA, Europe, & Beyond.**



# DATA PRIVACY LAW



- **Data Breach: USA**

- 47 States with Data Security Breach Notification Law, some create a private right of action.
  - A chart of each state's laws is available at:  
<http://www.ncsl.org/issues-research/telecom/security-breach-notification-laws.aspx>
- The notification laws of the jurisdiction where each victim resides applies.

# DATA PRIVACY LAW: USA

- **USA's Data Breach Notice.**
  - Most USA States Require database owners to notify affected “customers” (*i.e.*, employees) of a breach;
  - Some require Notice be given to the state’s attorney general or credit bureaus.
- **What should you do . . .**
  - If US-based & most affected employees are US residents?



# DATA PRIVACY LAWS

- **What should you do if data leak in other countries?**
  - Always ask:
    - Which jurisdiction's laws control?
    - Any express Breach Notification obligations?
      - If yes, what are the requirements? (*e.g.*, is there a mandate to notify DPA and/or affected data subject?).
    - Notify all affected worldwide?
      - If yes, required to notify gov. agency?



# DATA PRIVACY LAW



- **EUROPE**

- Form of Data Processing. arguably require data collectors notify DPAs & data subjects. E.g., data breach is per se violation of general data law which, by law, must be reported.
- **CAUTION.** Notice could → Lawsuit(s).
  - European states impose heavy penalties for widespread data-law violations, e.g., sloppy/ illegally-lax data security that allegedly causes a breach. AND
  - DPAs and affected data subjects **can sue** for illegally-lax data security.



# THE END.

## Any Questions?

