Benefits Update

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Will You Be Ready For 2013?

By Callan Carter (San Francisco) and Patricia Harris (Atlanta)

2013 will mark not just the start of a new calendar year, but also new compliance obligations for employee benefits professionals. Now is the time to review your employee benefit plans and take the steps necessary to ensure continued compliance in 2013. We have outlined a number of key provisions impacting welfare, benefit, and retirement plans below, including some that may need to be implemented prior to 2013. Will you be prepared?

Health Care Reform

A Summary of Benefits and Coverage (SBC) must be provided to all group health plan enrollees by the first day of the first annual open enrollment period beginning on and after September 23, 2012. This means that if your group health plan is operated on a calendar year basis, you must provide SBCs to enrollees as part of your upcoming annual open enrollment period for coverage that takes effect January 1, 2013.

Health FSAs must be redesigned for the 2013 plan year to limit annual account balances to $2,500. In addition, employers must begin reporting the aggregate cost of employer-sponsored health coverage provided to employees in 2012 on Form W-2 reporting required to be sent out by January 31, 2013.

Ensure that your group health plan SPDs have been properly amended to reflect the updated claims procedures and the new definition of dependent, as mandated by the Patient Protection and Affordable Care Act of 2010 (PPACA).

Group Health Plans, Generally

The Women's Health and Cancer Rights Act of 1998 (WHCRA) requires group health plans to provide an annual written notice to participants and beneficiaries of the availability of medical and surgical benefits under the plan with respect to mastectomy and breast reconstruction. Including the WHCRA notice as part of your open enrollment materials is one way to fulfill your annual notice obligations.

Sponsors of group health plans must notify employees annually concerning the availability of state premium assistance through Medicaid or the Children's Health Insurance Program (CHIP). The CHIP Reauthorization Act of 2009 imposes this notice requirement, which can be met by including the DOL's model "Employer CHIP Notice" as part of your annual open enrollment materials. For calendar year plans, the Employer CHIP Notice must be provided no later than January 1, 2013 .

Qualified Retirement Plans

If you sponsor a Safe Harbor 401(k) Plan, you must prepare and distribute the annual safe harbor notice to all eligible employees for the 2013 plan year by December 1, 2012.

401(k) plans operated on a calendar year basis must provide participants and beneficiaries with an annual written notice about the qualified default investment alternatives offered under the plan by December 1, 2012. This notice cannot be provided as part of an SPD or SMM.

Single-employer defined benefit (DB) plans operated on a calendar year basis must be amended by no later than December 31, 2012 to comply with Section 436 of the Tax Code to restrict benefit accruals, distributions from, and amendments to an underfunded DB plan. The IRS has released Section 436 model amendment language that can be used when drafting the required plan amendment.

January 31, 2013 marks the end of the second five-year remedial amendment cycle and deadline for filing of a determination letter request for a Cycle B plan. To preserve reliance on the plan's continued tax qualification, plan sponsors of Cycle B plans (meaning sponsors with an EIN ending in digits 2 or 7, and sponsors of multiple employer plans) need

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Are You Using "Culturally Appropriate" Language?

By Callan Carter (San Francisco)

The Patient Protection and Affordable Care Act (PPACA) requires group health plans to distribute four-page plan summaries to enrollees. These Summaries of Benefits and Coverage (SBCs) are subject to a "culturally and linguistically appropriate" standard, meaning that when the SBC is distributed to an enrollee at an address in a county where, according to the federal government, at least 10% of the citizens are fluent only in the same non-English language, the summary must include a prominent offer of language assistance in that non-English language.

Non-grandfathered plans must also satisfy this culturally and linguistically appropriate standard with respect to the plan's claims and appeals process.

The offer of language assistance need only be a single sentence, but it must clearly indicate how to access the language services provided by the plan. In addition, the plan must provide oral language services (such as a telephone number) that include answering questions about the document in the relevant non-English language and must supply a copy of the document in the relevant non-English language, upon request.

For a list of affected counties, by state, see the HHS website at http://www.cciio.cms.gov/resources/factsheets/clas-data.html.

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Deadline to Correct 409A-Covered Documents Involving Employee Releases Is December 31, 2012

By Callan Carter (San Francisco)

Internal Revenue Code Section 409A governs deferred compensation, which includes, with some exceptions, practically all agreements or plans in which an agreement is made in one year to pay an amount in a later year. Its most common form is a non-qualified deferred compensation plan in which the employer makes an unfunded promise to pay a dollar amount to the employee at a later time (termination of employment, specific age, etc.)

Section 409A is a relatively new Code provision, and after the regulations were finalized, the IRS issued some further guidance which provided tax relief for those deferred-compensation arrangements that were out of compliance with the final regulations.

One such publication is IRS Notice 2010-80, which modified the relief for correction of certain failures of a deferred compensation plan or agreement covered by Internal Revenue Code Section 409A. One of the changes was an expansion of the correction program for payments at employee separation from service, subject to the requirement that the departing employee sign a release of claims or similar document (such as a non-compete agreement or non-solicitation agreement).

If your 409A-covered employment agreements, separation agreements, deferred compensation plans, or arrangements include a requirement that the employee sign a release of claims in order to receive the benefit, you must act before December 31, 2012, to amend this language to comply with the provisions of IRS Notice 2010-80 or risk application of 409A's excise taxes upon later separation payments.

Many separation plans and agreements include a provision that require the departing employee to sign a release of claims to be eligible for the separation benefit. The IRS has stated that this release requirement gives the employee too much flexibility with regard to receipt of taxable income and could allow an employee to affect the year in which the separation benefit is received and taxed, which violates IRC 409A. As such the IRS has put restrictions on these provisions to try to eliminate employee flexibility. The correction of this 409A violation is relatively simple, requiring a plan amendment to establish less-flexible payment dates.

If your 409A-covered plan or agreement includes a release requirement, we recommend you have it reviewed by one of the attorneys in our Employee Benefits Practice Group as soon as possible so that any necessary amendments can be completed by December 31, 2012.

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FSA Rules Changing

By Sandra Mills Feingerts (New Orleans)

Beginning in 2013, employee pre-tax contributions to a flexible spending account (FSA) will be limited to $2,500. In the past, companies could impose their own limits on these employee contributions. Here's what you need to know:

The limit applies based on your cafeteria plan's plan year. It is first applicable to plan years beginning in 2013. For the majority of companies, this means it becomes effective January 1, 2013, and the open enrollment materials for 2013 have to be changed to incorporate the limit.

If a cafeteria plan utilizes the 2 ½ month grace period that allows for a carryover of amounts credited to the FSA in one year but not used in that year, these carryover amounts do not reduce the $2,500 limit.

Any company contributions made to the cafeteria plan – so called "flex credits" - are not subject to any limit and don't count toward the $2,500.

The $2,500 is indexed for inflation, like so many other limits on benefits.

The cafeteria plan has to be amended no later than December 31, 2014 to reflect the new limit.

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to ensure that their plans have timely adopted all interim and discretionary amendments and that determination letter requests are submitted to the IRS no later than January 31, 2013.

Additional Medicare Tax

Beginning in 2013, certain employees may see an increase in the amount of payroll taxes withheld from their wages. This is because a second Medicare tax, one the IRS refers to as an "Additional Medicare Tax," will begin being assessed on individuals earning more than $200,000 or married couples filing jointly earning more than $250,000.

Currently, employers are required to withhold 1.45% in Medicare taxes directly from an employee's wages and to make a "matching" employer contribution equal to 1.45%. Self-employed individuals must pay 2.9% of their earnings in Medicare tax, which represents both an individual and employer contribution. Note that under current tax law, all wages are subject to Medicare tax.

The Additional Medicare Tax rate will add 0.9% to the amount that some individuals will have to pay in 2013. The additional 0.9% will kick in only when the wages paid to an individual for the 2013 calendar year go above $200,000. It should be noted that this is an additional tax that will apply only to individuals – there is no employer matching requirement.

The IRS has confirmed that employers have the obligation to withhold the Additional Medicare Tax from an employee when the employee's wages or compensation exceed $200,000. The employee may, however, get a refund of the Additional Tax if the combined wages of the employee and spouse do not exceed $250,000 when filing a joint return.

And remember to be sure to also consider all forms of compensation when determining when an employee's wages exceed $200,000 and trigger the Additional Medicare Tax. For example, the imputed cost of group-term life insurance coverage in excess of $50,000, noncash fringe benefits and receipt by an employee of third-party sick pay should be factored in the determination. The IRS also expects to release revised Forms 941 and 943 in the future.

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