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2012 Year-End Action Items for Employee Plans

Services

Employee Benefits & Executive Compensation

Labor & Employment

Employers should be aware of some important year-end action items relating to health and welfare plans and qualified retirement plans. Several notification obligations require immediate attention to satisfy deadlines on or before December 1, 2012. Other items involve plan amendments that must be adopted on or before December 31, 2012. Finally, some items require vital planning prior to or in early 2013.

I. Health and Welfare

Summary of benefits and coverage. The Affordable Care Act (ACA) requires that health plan participants receive a "summary of benefits and coverage" (SBC) before enrollment or re-enrollment. Employers and the insurer of an insured group plan are required to provide the SBC during the first open enrollment period beginning on or after September 23, 2012. SBCs must also be delivered to individuals hired on or after the first day of the first plan year beginning on or after September 23, 2012 (January 1, 2013, for calendar year plans). The Department of Labor (DOL), the Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS) jointly issued a sample template that employers may use. The guidance issued by the agencies includes a safe harbor that allows electronic delivery of the SBC based on different criteria than the general criteria applied to the electronic delivery of other disclosures required by the Employee Retirement Income Security Act (ERISA). Links to the guidance and resources, including an explanation of how to complete the template, can be found here.

Action item: Employers need to confirm that their insurer or third-party administrator is preparing the SBC, and if not, prepare the SBC themselves so that they can begin providing them to enrollees in connection with open enrollment and to new hires in accordance with the applicable effective date.

Employers should consider utilizing electronic delivery based on the safe harbor criteria and draft employee communications accordingly.

Health plan FSAs capped at $2,500 for 2013. The ACA limits annual contributions to a health plan flexible spending account (FSA) offered under an Internal Revenue Code Section 125 Cafeteria Plan (Cafeteria Plan) to a maximum of $2,500 effective as of the first day of the first plan year beginning on or after January 1, 2013. Consequently, the effective date for calendar year plans will be January 1, 2013, and the first day of the plan year after January 1, 2013, for non-calendar year plans. The IRS issued guidance that extended the deadline to adopt amendments implementing the $2,500 limit until December 31, 2014, but the cap will go into effect in 2013. Therefore, employers should notify employees about the new limit during open enrollment for 2013 plan years. For more information, please see our June 6, 2012, alert: "IRS Extends Deadline, Clarifies Effective Date for New Annual Limit on Healthcare Flexible Spending Account Contributions."

Action item: Employers who have not already implemented the new health plan FSA annual maximum and communicated the change to employees need to act now to ensure employees can plan for 2013 deferrals.

Form W-2 reporting. Most employers who issued more than 250 W-2s for 2011 (i.e., in January 2012) are required by the ACA to report the aggregate cost of health coverage for the 2012 calendar year in Box 12 of the 2012 Form W-2s (i.e., W-2s issued in January 2013). The IRS website summarizes what must be reported and how to calculate the cost of coverage. In addition, the IRS issued Notice 2012-9 that includes frequently asked questions regarding this reporting requirement, which employers can rely on.

Action item: Covered employers need to calculate the aggregate cost of health coverage and prepare to report the figure on employee Form W-2s in January 2013. If your payroll process does not calculate this cost automatically, you should work with your payroll department or provider to ensure that the aggregate cost of health coverage can be calculated by January 2013.

Notice to employees regarding state insurance exchanges. The ACA amended the Fair Labor Standards Act to require that all employers issue notices to employees about health benefit exchanges and some of the consequences that might result from an employee's decision to purchase a qualified health plan through the exchange in lieu of employer-sponsored coverage. Although the ACA requires this notice to be issued by March 1, 2013, there is no guidance or model notice available. Accordingly, it is likely that the March 1, 2013, deadline will be pushed back because of delays in implementing the state exchanges.

Action item: Employers need to be aware of this upcoming requirement and anticipate some additional guidance and/or a model notice soon.

Preparation for 2014 provisions of Affordable Care Act. Beginning January 1, 2014, employers with 50 or more full-time employees will be subject to penalties if they fail to offer health coverage to "full-time employees (and their dependents)" or offer coverage that is either unaffordable or does not provide certain required minimum coverage. "Full-time employee" for this purpose is defined as an employee who works an average of 30 or more hours per week. In order to determine whether current seasonal employees and those employees who do not work a fixed schedule average of 30 hours, the IRS permits employers to look back at the service of those employees over the last three to 12 months.

If the employee is determined to have averaged 30 or more hours per week over that time period (the "measurement period"), then the employer must offer coverage for a period of time (the "stability period") no shorter than the measurement period. For example, if the employer uses a 12-month measurement period, then the stability period must be at least 12 months. Employers must offer coverage to full-time employees as of January 1, 2014, to avoid penalties. Penalties will be calculated using measurement periods that occur in 2013 and, therefore, employers, especially employers in high risk industries (e.g., lodging; restaurant and food service; retail; janitorial and cleaning service; and non-unionized manufacturing) need to begin planning immediately to analyze costs and determine the best method of compliance with the 2014 provisions of the ACA.

> **Action item:** Employers need to act now to determine how the potential penalties will affect the cost of providing health coverage. This analysis should consider multiple variables, including the cost of providing the coverage required by the ACA, the cost of the penalties associated with providing inadequate coverage or not providing coverage, possible reclassification of employees, tax implications and employee relations issues. Lack of planning, especially for employers in high risk industries, could result in penalties and compliance costs in 2014 that are not sustainable.
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> Additionally, employers that have seasonal and non-fixed schedule employees should act now to decide how long a measurement period they should use to calculate whether an employee achieved full-time status and ensure that the hours worked during the measurement period are accurately tracked.

HIPAA Compliance. HHS has begun auditing covered entities for Health Insurance Portability and Accountability Act (HIPAA) compliance, including employer-sponsored group health plans. The agency posted an audit protocol on its website for employer compliance purposes. For more information on the audit protocol issued by HHS, see our August 1, 2012, alert: "HIPAA Privacy, Security and Breach Notification Audit Protocol Released."

> **Action item:** Because of possible penalties for noncompliance, all employers with employer sponsored group health plans should revisit and ensure full HIPAA compliance.

II. Retirement

Plan amendments. It is important to review your plan documents for required amendments before the end of the year. Plan sponsors should be aware of the following:

Governmental plans. If your governmental plan has not yet been amended for the Worker, Retiree and Employer Recovery Act of 2008 (WRERA) (e.g., 2009 required minimum distribution waivers and non-spouse beneficiary rollovers) or the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) (e.g., survivor death benefits and differential wage payments related to qualified military service), the deadline to adopt the amendments is the end of the first plan year beginning on or after January 1, 2012 (December 31, 2012, for calendar year plans).

Defined benefit plan amendments.

Benefit restriction provisions of PPA. The deadline to adopt the benefit restriction provisions applicable to defined benefit plans that were added by the Pension Protection Act of 2006 (PPA) is the end of the first plan year beginning on or after January 1, 2012 (December 31, 2012, for calendar year plans). Most plan sponsors adopted PPA amendments in 2009 but may not have included the benefit restriction provisions because the IRS delayed the deadline to adopt those provisions. Last year the IRS published a sample amendment that plan sponsors may adopt to comply with the PPA benefit restriction provisions. Regardless of whether or not a plan sponsor has amended its plan to comply with the benefit restriction provisions, the plan sponsor may want to adopt the IRS model language to save time, effort and expense during the IRS determination letter process or in the event of an audit.

Amendments for MAP-21. The Moving Ahead for Progress in the 21st Century Act (MAP-21) may require a plan amendment in 2012 if you adopted a PPA amendment that named the segment rates to be used in determining funded percentages as the MAP-21 rates for 2012. If this amendment is necessary for 2012, it must be adopted by December 31, 2012.

Discretionary amendments to qualified retirement plans. Generally, discretionary amendments must be adopted by the end of the plan year in which they are implemented (December 31 for calendar year plans). In addition, discretionary design changes for 2013 that result in a reduction of benefits may need to be adopted in 2012 to avoid a prohibited cutback of accrued benefits.

Puerto Rican plans. Plans covering Puerto Rican workers must be amended or restated to comply with the qualification provisions of the 2011 Puerto Rican Internal Revenue Code on or before the first plan year beginning on or after January 1, 2012 (December 31, 2012, for calendar year plans). Most of these provisions were effective January 1, 2011, and operational compliance has been required since January 1, 2011, even though amendments are not required until the end of the 2012 plan year.

> **Action item:** Contact us to prepare any necessary amendment(s) to your plan. Amendments may be required to be executed on or before December 31, 2012. If you are unsure as to whether or not your plan needs to be amended, please contact us as soon as possible.

Plan restatements and determination letters for Cycle B filers. IRS procedures require each individually designed qualified plan that is maintained by an employer with an employer federal tax identification (ID) number ending in 2 or 7 (or all individually designed multiple employer plans regardless of the employer federal tax ID number) to file in Cycle B and to file a restated plan by January 31, 2013. The deadline for requesting a determination letter with respect to a restated plan in Cycle B is also January 31, 2013.

> **Action item:** Contact us immediately if you would like our assistance with Cycle B restatements or filings.

401(k) safe harbor notices. Annual safe harbor notices must be provided to participants by December 1 of each year for calendar year plans.

> **Action item:** Prepare to provide notices to participants by December 1, 2012 (this is a Saturday and employers should plan accordingly).

401(k) automatic enrollment notices. Required annual notices for automatic enrollment arrangements must be provided to participants by December 1 of each year for calendar year plans.

> **Action item:** Prepare to provide notices to participants by December 1, 2012 (this is a Saturday and employers should plan accordingly).

Qualified default investment alternatives for participant-directed plans. Participant notices for plan sponsors who desire safe harbor relief from fiduciary liability for qualified default investment alternatives must be provided by December 1 of each year for calendar year plans.

> **Action item:** Prepare to provide notices to participants by December 1, 2012 (this is a Saturday and employers should plan accordingly).

Contact Information

Please contact your Husch Blackwell attorney or a member of the Employee Benefits & Executive Compensation practice group if you have questions or if we can assist in any way.

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