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2011 Year-End Action Items for Employee Plans

Service

Employee Benefits & Executive Compensation

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Employers should be aware of some important year-end action items relating to health and welfare plans, qualified retirement plans and non-qualified deferred and executive compensation. Several notification obligations require immediate attention to satisfy deadlines on or before December 1, 2011. Other items involve plan amendments that must be adopted on or before December 31, 2011.

I. Health and Welfare

Claims Review Procedures. In June 2011, the departments of Labor, Treasury and Health and Human Services released a long-anticipated amendment to the interim final rule governing the claims and appeals process under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. Additionally, the agencies published separate guidance – in the form of Technical Releases and Guidance – that addressed the external review processes for insurers and self-funded group health plans. These rules do not apply to grandfathered plans.

One of the important changes relates to the standards for the federal external review process for self-funded group health plans that are subject to ERISA. Under an interim policy, the Department of Labor and the Internal Revenue Service will not take enforcement action against such a plan if it either complies with a state external review process that meets certain standards (a list of compliant states is available online), or meets the federal external review standards. The new guidance provides that a self-funded group health plan that is subject to the federal external review process must contract with at least two independent review organizations by January 1, 2012, and with at least three independent review organizations by July 1, 2012.

> **Action Item**: If you sponsor a non-grandfathered, self-insured ERISA group health plan, you should determine whether you are required to contract with at least two independent review organizations by January 1, 2012, to meet the federal external review standards, and you should comply with any applicable requirement.

Many of the recent important regulatory and judicial developments affecting health and welfare plans will be addressed in a subsequent alert.

II. Retirement

Suspension of Calendar Year 2009 Minimum Required Distributions. The Internal Revenue Code requires certain participants in retirement plans who are over 70½ to take yearly minimum required distributions (MRDs). As a response to the economic turmoil in late 2008, the Worker, Retiree and Employer Recovery Act of 2008 (WRERA) amended the Internal Revenue Code to waive MRDs solely for the 2009 calendar year for defined contribution plans (e.g., 401(k) and 403(b) plans). Plan sponsors had four choices: (1) continue to make MRDs without giving participants the choice to suspend their MRDs; (2) continue to make MRDs unless participants elected to suspend their MRDs; (3) automatically suspend MRDs for all participants without giving participants the choice to continue their MRDs; or (4) automatically suspend MRDs for all participants unless participants elected to continue their MRDs. An amendment to reflect the plan's administrative practice is due by the end of the first plan year beginning on or after January 1, 2011 (December 31, 2011 for calendar year plans).

> **Action Item**: Contact your service provider to confirm the plan's administrative practice and contact us to prepare an amendment to your plan. While some plans may not technically need an amendment, we recommend adopting an amendment to streamline future IRS determination letter reviews and audits.

Plan Restatements and Determination Letters for Cycle A Filers. IRS procedures require each individually designed qualified plan maintained by an employer with an employer federal tax ID number ending in 1 or 6 to file in Cycle A and to file a restated plan by January 31, 2012. The deadline for requesting a determination letter with respect to a restated plan in Cycle A is also January 31, 2012.

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

Funding-Based Restrictions on Defined Benefit Plans. The Pension Protection Act of 2006 (PPA) amended the Internal Revenue Code and ERISA to impose funding-based restrictions on benefit payments and limit certain plan amendments if the funding of a non-governmental defined

benefit pension plan fell below a certain level. Late last year the IRS extended the deadline to amend defined benefit plans to comply with this change until the last day of the 2011 plan year.

> **Action Item**: Most plans have already been amended for this change, but calendar year defined benefit plans that have not been amended to incorporate these funding-based restrictions should be updated by December 31, 2011.

Roth Conversions. Effective September 27, 2010, the Small Business Jobs Act permitted in-plan Roth conversions for 401(k), 403(b), and governmental 457(b) plans that allow Roth contributions. IRS rules require plans that permitted such conversions during 2010 to be amended no later than December 31, 2011. Plan sponsors that wish to implement in-plan Roth conversions in 2012 must take certain steps, operationally and otherwise, to ensure that conversions are properly implemented. Click here to read our alert on in-plan Roth conversions for more details.

> **Action Item**: Contact us to prepare an amendment if your plan permitted in-plan Roth conversions in 2010 or 2011. In addition, please contact us if you would like our assistance implementing in-plan Roth conversions for 2012. Board resolutions authorizing the conversions, participant communications, amendments to distribution forms and 1099-R issues must be addressed prior to implementation.

Service Provider and Participant Fee Disclosure Rules. The Department of Labor (DOL) issued two sets of regulations relating to fee disclosures, which affect all retirement plans. One set requires plan administrators to disclose information about plan and investment fees and expenses to plan participants who direct their own investments. Plan administrators are required to disclose general fee information and provide participants with detailed quarterly statements describing the fees actually deducted from their accounts in accordance with the DOL's Model Comparative Chart. Calendar year plans must disclose general fee information by May 31, 2012, and issue the first quarterly statement (covering the second quarter) by August 14, 2012. The other regulations require service providers receiving $1,000 or more in compensation to disclose fee and conflict of interest information to plan fiduciaries. These disclosures must be made by April 1, 2012.

> **Action Item**: Plan sponsors should review their plans' fee structures and work with their service providers to identify which fees need to be disclosed. In order to meet their fiduciary duties, plan fiduciaries should also amend service provider contracts to require disclosures and develop procedures to review service provider disclosures to ensure that fee and expense structures are prudent.

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 2012 that result in a

reduction of benefits may need to be adopted in 2011 to avoid a prohibited cutback of accrued benefits.

> **Action Item**: Amendments for discretionary changes implemented in 2011 must be prepared and adopted on or before December 31, 2011. Amendments for discretionary design changes in 2012 that result in the reduction of benefits may need to be adopted before January 1, 2012.

FASB Reporting Requirements About an Employer's Participation in a Multiemployer Pension Plan. The Financial Accounting Standards Board (FASB) issued Accounting Standards Update No. 2011-09, "Compensation—Retirement Benefits—Multiemployer Plans (Subtopic 715-80): Disclosures about an Employer's Participation in a Multiemployer Plan." This guidance requires additional disclosures relating to multiemployer pension plan contributions and the status of the multiemployer pension plans. In addition to disclosing the aggregate amount of contributions made by the employer, employers must now include:

The total employer contributions made to each significant plan;

A statement describing whether the employer's contributions represent more than 5 percent of total contributions to any given plan;

A statement identifying which, if any, plans the employer contributes to that are subject to a funding improvement plan;

The expiration dates of the collective bargaining agreements and any minimum funding arrangements; and

The most recent certified funded status of the plan.

The FASB Update applies to the first fiscal year ending after December 15, 2011, for public companies and December 15, 2012, for nonpublic companies.

> **Action Item**: Public company employers participating in multiemployer pension plans should consult with their accountants regarding multiemployer plan disclosures for their 2011 financial statements.

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**: Notices must be provided to participants by December 1, 2011.

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: Notices must be provided to participants by December 1, 2011.

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: Notices must be provided to participants by December 1, 2011.

III. Non-Qualified Deferred and Executive Compensation

Correcting Document Failures for Non-Qualified Arrangements Subject to Section 409A. In 2008 and 2010 the IRS published a limited corrections program for certain errors associated with non-qualified deferred compensation arrangements subject to Section 409A of the Internal Revenue Code. The guidance allowed many 409A errors to be corrected without penalty provided that certain action was taken by December 31, 2010. While many errors can still be corrected for reduced penalties, the guidance extended the grace period to correct two types of errors without penalty until December 31, 2011: (i) linked arrangements — deferred compensation arrangements in which the amount deferred, or the time or form of payment, is determined pursuant to, or affected by, the terms of another deferred compensation arrangement such that one or both of the arrangements violate 409A; and (ii) arrangements where payment is contingent on payments to the employer (e.g., accounts receivable), but the payments are not made in accordance with an objective nondiscretionary schedule in violation of 409A. Further, the guidance provided that arrangements in which the time of payment depends on employee action (e.g., execution of a non-compete or severance agreement) can be corrected if certain steps are taken before December 31, 2012.

Action Item: Taking advantage of these opportunities to correct errors can minimize or eliminate the otherwise onerous 409A penalties imposed on employers and other service providers. We recommend that all employers review any arrangements that are subject to 409A to take advantage of the extended correction periods if applicable.

2012 Institutional Shared Services Proxy Voting Policies. Institutional Shared Services (ISS) recently published updates to its benchmark proxy voting policies for 2012. Among other topics, the policies address company responses to 2011 say-on-pay votes and say-on-pay frequency votes, evaluation of executive pay practices, and recommendations on proxy access proposals. The policies also introduce a new methodology to evaluate the extent to which shareholder return is aligned with executive pay through both quantitative and qualitative analysis.

Action Item: To the extent a public company wishes to align its practices with ISS policies, it should consider the ISS policy revisions and their impact on the company's policies.

Contact Info

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

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