LEGAL UPDATES PUBLISHED: NOVEMBER 15, 2013

2013 Year-End Action Items for Employee Plans

Service

Employee Benefits & Executive Compensation

Employers should be aware of important year-end action items relating to qualified retirement plans and health and welfare plans. Several notification obligations require immediate attention to satisfy deadlines on or before Dec. 2, 2013. Other items involve plan amendments that must be adopted on or before Dec. 31, 2013. Finally, some items require vital planning prior to or in early 2014.

I. Retirement

These are the required annual notices and year-end deadlines for employers:

401(k) safe harbor notices. For safe harbor plans, annual safe harbor notices must be provided to participants at least 30 days (and no more than 90 days) before the beginning of each plan year.

Action item: Prepare to provide notices to participants by Dec. 2, 2013, for a calendar year plan.

401(k) automatic enrollment notices. For plans that have automatic enrollment, annual notices for automatic enrollment must be provided to participants at least 30 days (and no more than 90 days) before the beginning of each plan year.

Action item: Prepare to provide notices to participants by Dec. 2, 2013, for a calendar year plan.

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 at least 30 days before the beginning of each plan year.

Action item: Prepare to provide notices to participants by Dec. 2, 2013, for a calendar year plan.

Defined benefit plan annual funding notice. Funding notices must be provided to participants within 120 days after the end of the plan year for large plans and by the due date of the Form 5500 for small plans (100 or less participants).

Action item: Prepare to provide notices to participants by the appropriate due date.

Voluntary Correction Program for 403(b) Plans. Notice 2009-3 provided a Dec. 31, 2009, deadline to adopt a written plan document for 403(b) plans. The recently restated Employee Plan Compliance Resolution System (EPCRS) expanded the VCP program to allow 403(b) plan sponsors to correct the failure to timely adopt a written 403(b) plan document. If a VCP submission involves only a failure to adopt a written 403(b) plan document and it is submitted before Dec. 31, 2013, the compliance fee will be reduced by 50 percent.

Action item: Contact us immediately if you would like to adopt a 403(b) plan document in time to qualify for the 50 percent compliance fee reduction.

Plan restatements and determination letters for Cycle C filers. IRS procedures categorize each individually designed qualified plan that is maintained by an employer with a federal employer tax identification number ending in 3 or 8 (or all individually designed multiple employer plans regardless of the employer federal tax ID number) in Cycle C. Cycle C plans are required to be restated by Jan. 31, 2014. The deadline for requesting a determination letter with respect to a restated plan in Cycle C is also Jan. 31, 2014. Governmental plans also are assigned to Cycle C but may opt to restate their plans by Jan. 31, 2016, as if they were in Cycle E.

Action item: The IRS will no longer accept "working copies" (draft plans incorporating plan amendments), so plan sponsors submitting in Cycle C should begin working on preparing restatements. Contact us immediately if you would like our assistance with Cycle C restatements or filings.

Year-end plan amendments. Plan sponsors should be aware of the following:

Funding-based restrictions on distributions and accruals. Recent IRS guidance extended the deadline to adopt amendments relating to restrictions on distributions with respect to defined benefit plans and to benefit accruals under Internal Revenue Code Section 401(a)(29) and 436. For most calendar year plans, the deadline has been extended to Dec. 31, 2013.

Action item: Contact us immediately to prepare any necessary amendment(s) to your plan.

Discretionary amendments to qualified retirement plans. Generally, discretionary amendments must be adopted by the end of the plan year in which they are implemented (Dec. 31 for calendar year plans). In addition, discretionary design changes for 2014 that result in a reduction of benefits may need to be adopted in 2013 to avoid a prohibited cutback of accrued benefits.

> **Action item:** Contact us to prepare any necessary amendment(s) to your plan. Amendments may be required to be executed on or before Dec. 31, 2013. If you are unsure as to whether your plan needs to be amended, please contact us as soon as possible.

II. Retirement Future Planning

Impact of *U.S. v. Windsor* on qualified retirement plans. In *U.S. v. Windsor*, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which defined "marriage" for federal law purposes as "only a legal union between one man and one woman as husband and wife." Thus, same-sex couples who are lawfully married under state law must be afforded the same federal rights and protections as lawfully married opposite-sex couples. The IRS, Department of Labor (DOL) and Department of Health and Human Services (HHS) have taken a "place of celebration" approach to same-sex marriage, meaning that a same-sex marriage that validly occurs in a state or foreign jurisdiction that recognizes same-sex marriage is recognized as valid regardless of whether the couple moves to a state that does not recognize same-sex marriage. *Windsor* has no impact on nonmarital relationships, such as domestic partnerships and civil unions.

Based on guidance to date, same-sex spouses must be accorded spousal treatment under provisions required by federal law, such as qualified joint and survivor annuities, preretirement spousal death benefit coverage and qualified domestic relations orders (QDROs). With respect to determination letters, the IRS has stated that it will not rule on plan language related to DOMA or *Windsor*.

> **Action item:** Plan sponsors should carefully review their plan language, administrative procedures and participant records to ensure they are compliant with *Windsor* and subsequent guidance. Contact us immediately for assistance in reviewing or amending your plan language and procedures.

Upcoming plan amendments. Plan sponsors should be aware of the following:

Cash balance and hybrid plans. Last year the IRS issued guidance on adopting amendments relating to interest and market rate of return regulations implemented under the Pension Protection Act of 2006. In Notice 2011-85 and Notice 2012-61, the IRS extended the deadline for adopting the amendments to the last day of the plan year before the plan year when the interest and market rate of

return regulations become effective. The IRS has not indicated when the regulations will become effective.

> **Action item:** Employers need to be aware of this upcoming requirement and anticipate additional guidance from the IRS.

Plans that cover Puerto Rican employees. These plans must be amended or restated to comply with the qualification provisions of the 2011 Puerto Rican Internal Revenue Code on or before the deadline for the employer to file a Puerto Rican income tax return for the taxable year beginning on or after Jan. 1, 2013. The deadline is April 14, 2014, for an employer with a calendar taxable year.

> **Action item:** Contact us to prepare any necessary amendment(s) to your plan. If you are unsure whether your plan needs to be amended, please contact us as soon as possible.

III. Health and Welfare

These are the required annual notices and year-end deadlines for employers:

HIPAA privacy notices. The Health Insurance Portability and Accountability Act (HIPAA) requires all covered entities to provide updated patient privacy notices, which state the patient's rights over the data and how the data can be used and shared. Employers who choose to post the notice online were required to post an updated notice by Sept. 23, 2013. However, employers who choose to send paper copies of the notice must do so by Nov. 23, 2013. HHS issued a model privacy notice, which can be found here.

> **Action item:** If you sponsor a self-insured plan, including a health flexible spending account (FSA), and have not issued an updated privacy notice, you should do so in paper form no later than Nov. 23, 2013. Plan sponsors are encouraged to use the model notice and modify the language accordingly.

COBRA notices. The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide qualified beneficiaries with an election notice within 14 days of the plan administrator's receipt of notice of a qualifying event. The election notice must include a description of the individual's rights to continuation coverage and instructions on making an election. The DOL recently issued an updated model notice that includes information about the Affordable Care Act (ACA) healthcare exchanges. The updated model notice can be found here.

> **Action item:** Plan sponsors should consider using the model notice and modify the language accordingly.

Health FSA carryover amendments. Recent IRS guidance allows cafeteria plans to be amended to permit "carryovers" of up to $500 of unused health FSA amounts remaining at the end of the plan year to pay or reimburse medical expenses incurred during the following plan year. The carryovers will not count against the $2,500 annual limit on health FSA salary reductions. Generally, a carryover amendment must be adopted by the last day of the plan year from which amounts may be carried over (Dec. 31 for a calendar year plan). However, the IRS has stated that employers have until the last day of the plan year that begins in 2014 to retroactively adopt a carryover amendment for the 2013 plan year. A health FSA cannot have both a grace period and a carryover. The IRS guidance said that an amendment to eliminate a grace period provision must be adopted by the end of the plan year from which amounts may be carried over (e.g., by Dec. 31, 2013, to eliminate the grace period in 2014 for 2013 salary reductions). The guidance cautioned that nontax law may not allow a grace period to be eliminated for the plan year in which the amendment is adopted.

> **Action item:** Amounts unused up to $500 in 2013 can be carried over to 2014, which could impact year-end and open enrollment elections by employees. Contact us immediately for plan amendments for 2013 or 2014. If you plan to apply the carryover rule, you should immediately discuss the option with your service provider and communicate the carryover rule to employees.

Cafeteria plan midyear election transition relief. In connection with the implementation of the ACA's individual healthcare exchanges, the IRS issued guidance providing transition relief for noncalendar year cafeteria plans allowing midyear election changes absent a change in status event. The recent guidance provides that employers of any size offering cafeteria plans with a plan year beginning in 2013 may allow employees to revoke, modify or commence salary reduction elections with respect to accident and health coverage, without regard to whether the employee experienced a change in status event. The transition relief requires a plan amendment, which can apply retrospectively to the 2013 plan year if the amendment is made by Dec. 31, 2014.

> **Action item:** The primary purpose of the transitional relief is to allow employees to revoke salary reduction elections in order seek healthcare coverage on the ACA exchanges but may provide employers with an opportunity to allow midyear election changes for other purposes. Contact us immediately if you are interested in amending your plan to implement the transitional relief.

HIPAA wellness programs. Beginning Jan. 1, 2014, health contingent wellness programs linked to a group health plan must comply with new rules to avoid being considered discriminatory under HIPAA. The new rules require the following:

Individuals must be eligible for the *full* reward at least annually.

For nontobacco programs, the total reward cannot exceed 30 percent of the total premium. For tobacco programs, the reward cannot exceed 50 percent of the total premium. Special rules apply to the calculation of the applicable percentage for plans with combined tobacco and nontobacco programs.

The program must be "reasonably designed" to promote health or prevent disease. Thus, the program cannot be overly burdensome, a subterfuge for discrimination based on a health factor, or highly suspect in the method chosen to promote health and prevent disease.

For activity only wellness programs, the program must provide a reasonable alternative for those for whom the program is unreasonably difficult or medically inadvisable. The sponsor is permitted to require a physician's certification as to the difficulty or inadvisability of the activity.

For outcome-based programs, the program must provide a reasonable alternative for anyone who failed to meet the initial standard based on a measurement, test or screening. The sponsor is not permitted to require a physician's certification as to the difficulty or inadvisability of the activity.

For both categories of health-contingent programs, the employer must provide a reasonable alternative disclosure in its plan materials. The disclosure must include the plan administrator's contact information and a statement that personal physician recommendations will be accommodated.

> **Action item:** In order to avoid penalties for noncompliance, employers need to review their wellness programs to ensure that they are in compliance with the new rules before the Jan. 1, 2014, effective date.

IV. Health and Welfare Future Planning

Impact of *U.S. v. Windsor* on Health and Welfare Plans. The current IRS guidance provides that (i) the value of same-sex spouse's health insurance is no longer imputed income for federal income tax purposes (although it could be treated as state taxable income depending on the state); (ii) individuals who paid taxes on the value of employer-provided same-sex spouse health insurance, or premiums paid for such coverage, may file refund claims for 2013 and prior years; and (iii) employers may file refund claims to recover Federal Insurance Contributions Act (FICA) taxes associated with same-sex spouse health benefits for 2013 and prior years. Both the IRS and DOL have indicated that they will issue further guidance soon.

> **Action item:** Plan sponsors should review their health and welfare plans to ensure that eligibility for same-sex spouses and other nontraditional relationships is consistent with the plan sponsor's intent. Plan sponsors should also review their payroll processes to ensure that coverage for same-sex spouses is nontaxable for purposes of federal law. Finally, plan sponsors should begin preparing the documentation required to file FICA tax refund claims, as applicable.

Preparation for 2014 provisions of the Affordable Care Act. The implementation of the "employer mandate" – in addition to information reporting of minimal essential coverage and information reporting by applicable large employers on health insurance coverage offered under employer-sponsored plans – has been postponed until January 2015. Despite this delay, other healthcare reforms instituted pursuant to the ACA demand employer attention prior to Jan. 1, 2014, as described in our Sept. 19, 2013, alert: Don't Let the Delay Fool You – Healthcare Reform Is Alive and Well.

> **Action item:** Despite the delay for employer shared-responsibility penalties, many employer mandates required by the ACA provisions are effective Jan. 1, 2014. Accordingly, plan sponsors should review their plans, make any necessary amendments to ensure compliance and avoid penalties, and contact us to discuss alternatives.

Contact Information

For information on these or other employee benefits items, please contact your Husch Blackwell attorney or one of our Employee Benefits & Executive Compensation attorneys.