Solid Benefit Guidance, LLC
EMPLOYEE BENEFITS

HR AND BENEFITS UPDATE

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COBRA AS AMENDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). The Act contains legislation that amends the Consolidated Omnibus Budget Reconciliation Act (COBRA). Employees who lose group health plan coverage due to involuntary termination will now be eligible for a 65% federal subsidy payment toward the cost of their COBRA premiums. The termination must occur between September 1, 2008 and December 31, 2009. The employee will pay 35% of the premium cost under the plan's normal payment procedures. The entity that receives the 35% payment (ex.- employer, multiemployer, or insurer) is then entitled to receive the 65% subsidy as either a payroll credit or refund payment.

Eligible employees may receive the subsidy up to nine months or until the individual becomes eligible for another group health plan or Medicare. The subsidy applies to both federal COBRA and similar state continuation coverage. The subsidy applies to all group health plans offered through continuation coverage except for health FSA coverage.

Within 60 days of the Act's enactment date, the group health plan must send a notification to those individuals who were involuntarily terminated since September 1, 2008 and who would be eligible for the subsidy payment. Those who are not currently continuing coverage through COBRA would be given a new election period that ends 60 days after the date of the notice. The coverage would be effective on the first period of coverage following the enactment date. The period of coverage for most plans is monthly. Thus, the first period of coverage following the enactment date will typically be March 1, 2009. If the COBRA election will result in a gap of 63 days or more, the gap in coverage shall be disregarded for purposes of pre-existing condition exclusions. The maximum period of coverage under COBRA is not extended. The 18-month period of coverage would continue to be counted from the original qualifying event.

The Department of Labor and Health and Human Services are expected to release a model notice within 30 days of the Act's effective date. Going forward, a plan's COBRA Election Notice should be revised to include an explanation of the eligibility, provisions, and conditions of the subsidy program.

For additional information, including more details about the required notification, please contact our office for the document *Compliance Update: COBRA as Amended by the American Recovery and Reinvestment Act of 2009.*

RETIREMENT PLANS - LITIGATION UPDATE: PRUDENT PROCESS LEADS TO FIDUCIARY VICTORIES

As the 2008 calendar year wound to a close, two high-profile excessive fee lawsuits reached their respective conclusions. The courts in both cases, Kanawi v. Bechtel Corp. (Bechtel) and Braden v. Wal-Mart Stores, Inc. (Wal-Mart), ruled in favor of plan fiduciaries.

In the Bechtel decision, the court focused on whether plan fiduciaries met their duty of loyalty pursuant to ERISA Section 404(a) regarding their selection of mutual funds and payment of fund management fees. The court ruled that the plaintiff failed to prove that payment of the fees was imprudent. The court's decision was largely based on the fact that the committee met regularly to review plan investment performance and utilized the advice of third party consultants. Ultimately the court bolstered the standard of prudence being one of conduct rather than performance.

Similarly, the court in the Wal-Mart case concluded that the plaintiff failed to prove that the plan fiduciaries breached their responsibilities, resulting in $60 million in unnecessary expenses. The judge characterized the plaintiff's case as "conclusory allegations, without any factual support." The major thrusts of the plaintiff's case were that the majority of the funds available in the plan charged 12b-1 fees and that most of the funds were actively managed (verses index funds). The court based almost all of its rulings on the plaintiff's failure to provide any evidence of fiduciaries' failure to conduct prudent investment research, fiduciaries' failure to meet regularly, or that fees were unreasonable. In the end the court reasoned that the mere existence of less expensive investment options alone is insufficient evidence of fiduciary failure.

The lesson here is that as a plan fiduciary, following a prudent process with your financial advisor when making decisions regarding your employer-sponsored plan goes a long way towards shielding yourself from employee claims regarding excessive fees or lack of fiduciary oversight.

BENEFITS COMPLIANCE FAQ

Question: Are employees allowed to change their group health plan elections due to a financial hardship or reduction in hours?

Answer: Many Americans are now finding themselves in tough economic times. However, since a Section 125 cafeteria plan provides for tax-advantaged benefits, an employee would not be permitted to change his/her election mid-year without a qualifying event. The 2007 Proposed Treasury Regulations state: "Annual elections generally must be irrevocable and may not be changed during the plan year. However, §1.125-4 permits a cafeteria plan to provide for changes in elections based on certain changes in status." Examples of qualifying events are a change in employment status, change in the number of dependents, a change under another employer plan, and significant change in cost. Unfortunately, no longer being able to afford the coverage is by itself not a qualifying event. Thus, a participant would not be able to change their pre-tax health plan election due to a financial hardship.

A reduction in hours is a qualifying event if the reduction affects the employee's eligibility for the health plan. For example, an employee who normally works 40 hours per week is reduced to a 32 hour per week schedule. Under the plan's eligibility provisions, an employee must work at least 32 hours per week to be eligible to participate. This would not be a qualifying event, because the employee's eligibility has not been affected by the reduction of hours.

Additionally, a reduction in hours can be a qualifying event if the cost to the employee significantly changes due to the reduction in hours. For example, an employee who normally works 40 hours per week is reduced to a 25 hour per week schedule. The employee is still eligible to participate in the health plan, but the cost charged to the employee has changed. The employer's policy states that employees working 30 hours or more contribute 10% of the premium cost. Employees working less than 30 hours contribute 40% of the premium cost. This would be a qualifying event, because the cost to the employee has significantly increased.

The penalty for failing to comply with the regulations can be severe. The 2007 Proposed Treasury Regulations state that a plan that fails to operate in accordance with the Section 125 requirements "is not a cafeteria plan and employees' elections between taxable and nontaxable benefits results in gross income to employees."

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