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THE CICOTTE LAW FIRM, LLC

ERISA AND EMPLOYEE BENEFITS + CORPORATE

September 2011 Newsletter

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New Guidelines for Women's Preventive Care: The Department of Health and Human Services issued new guidelines adding to the list of preventive services that must be provided to women without cost sharing.

Your Benefits Questions Answered: We are launching a new column to answer employee benefits questions of interest and importance to our readers. Questions this month involve a new COBRA mystery caused by the obligation to cover adult children and group legal services plans.

DOL Extends Fee Disclosure Deadlines

The Employee Benefits Security Administration ("EBSA") recently issued a final regulation to extend and align the deadlines for compliance with new retirement plan fee disclosure rules. *Plan sponsors and service providers should begin reviewing plan documents, service contracts, arrangements, policies, and procedures to ensure that the new requirements will be satisfied by the new deadlines.*

The new deadline for service provider disclosures to fiduciaries is April 1, 2012. One of the reasons cited by the EBSA for extending and aligning the applicability dates is to "provide plan fiduciaries an appropriate amount of time to get all required fee and investment information from their covered service providers so they can then disclose . . . complete and accurate information about retirement plan and investment costs to their workers."

EBSA intends to publish a final ERISA section 408(b)(2) regulation prior to year end, and does not expect that any changes to the interim rule will require any additional time for compliance. *Plan sponsors should watch for the new regulation and review it as soon as possible to confirm compliance strategies remain viable.*

With regard to participant disclosures, the transition rule has been modified in two ways.

First, the initial disclosures (required on or before the date a participant or beneficiary is initially able to direct his or her investments) generally must be furnished within 60 days after April 1, 2012. This will be May 31, 2012 for calendar year plans. The deadline for plans having fiscal plan years beginning after April 1 will generally be 60 days after the first day of the plan year.

Second, subsequent quarterly disclosures must be provided no later than 45 days after the end of the quarter in which the initial disclosures are required to be furnished to participants and beneficiaries. For calendar year plans, this will be August 14, 2012.

Appeals Court Rules Against Plan Administrator Attempting Recovery of Distribution Paid Out Upon Alleged Sham Divorce

The Fifth Circuit Court of Appeals recently confirmed that ERISA does not permit a plan administrator to determine that a domestic relations order ("DRO") is not qualified [i.e., refuse to pay benefits] because the DRO was obtained in an alleged sham divorce. *Plan administrators should verify that only the specific objective criteria set forth in ERISA are used in determining whether a DRO is qualified.*

Continental Airlines, Inc. ("Continental") filed suit against nine pilots and their spouses, seeking to recover benefits it paid the spouses pursuant to DROs that it claimed were based on sham divorces. The Continental Pilots Retirement Plan ("Plan") allowed a lump sum distribution only upon separation from employment or divorce after a pilot attained age 50.

Continental alleged that the pilots and their spouses obtained sham divorces to receive lump sum distributions from the Plan. Many of the Continental pilots continued to live with their ex-spouses after divorcing, never informed family or friends of their divorce, and remarried shortly after receipt of the lump sum distribution.

According to Continental, the pilots were concerned that financial trouble in the airline industry would cause the Plan to be taken over by the Pension Benefit Guaranty Corporation ("PBGC"). Under a PBGC takeover, the pilots would likely receive reduced benefits. By divorcing, the pilots were able to assign benefits to their spouses under a DRO, effectively "locking-in" the benefits without having to retire.

The court explained that Continental could only refuse to qualify a DRO for reasons specified in ERISA section 206(d)(3). A participant's good faith in obtaining a divorce is not an enumerated reason.

Continental argued the DROs violated ERISA by requiring the Plan to pay lump sum benefits while the pilots were still employed. In response the court explained, "If the divorces in this case were indeed shams, that would not mean the spouses received any type or form of benefit, or option that the Plan did not provide for; rather, they received lump-sum pension benefits, as provided by DROs issued by state courts assigning those benefits to them, at a time when the pilots were at least 50 years old, as permitted by the terms of the Plan."

The Fifth Circuit, and courts in other cases have described the determination of whether a DRO is qualified as "a straightforward matter that requires the administrator to take DROs at face value and not to engage in complex determinations of underlying motives or intent." *Plan administrators should be careful to follow the specified requirements in ERISA and the Tax Code when evaluating DROs. The* reason *a participant divorces is irrelevant.*

A plan administrator may not refuse to pay benefits due on account of a divorce where the divorce was entered solely for benefit planning purposes.

DOL Launches Smartphone App for Employees to Track Hours and Wages

The U.S. Department of Labor Wage and Hour Division ("WHD") has launched a free smartphone application to help employees independently track the hours they work and determine the wages they are owed. The app is currently available in both English and Spanish, and compatible with the iPhone and iPod Touch. Future updates may include versions for other phone platforms such as BlackBerry and Android.

The app currently permits employees to track regular work hours, breaks, and overtime for one or more employers. Other pay features that may be available in the future include tips, commissions, bonuses, deductions, holiday pay, shift differentials, and weekend pay.

The WHD also provides printable forms, in both English and Spanish, on its website for employees without a compatible smartphone to keep track of their work hours.

Employers may wish to review their wage and hour practices in light of this new DOL enforcement mechanism. (Moreover, employers may also wish to review their policies with respect to personal cell phone use during working hours!)

IRS Amends Process for Reviewing ESOP Determination Letter Applications

The IRS EP Determinations department has taken numerous steps to expedite and improve its determination letter application processing for employee stock ownership plans ("ESOPs"). Improvements include modification of the ESOP review procedures and the formation of a group of determination letter specialists dedicated to reviewing ESOPs. *Plan sponsors are not required to make any changes as a result of the modifications to the review process; however, plan sponsors and practitioners will undoubtedly benefit from a more efficient process.*

Specific modifications to the process include (i) permitting practitioners who have submitted applications for multiple ESOPs to consolidate responses to IRS requests for plan amendments if such amendments are applicable to some or all of the other pending applications; and (ii) adoption of a revised, streamlined ESOP worksheet for EP Determinations to use during the initial review stage.

The ESOP worksheet used by EP Determinations may also be used by plan sponsors and practitioners as a tool to help design ESOP documents that satisfy the applicable requirements. The following are questions included in the ESOP review worksheet:

- Does the plan document formally designate the plan as an ESOP and provide that it will invest primarily in Qualifying Employer Securities ("QES")?
- Does the plan define QES in accordance with IRC 409(l)?
- Does the plan give participants the right to direct the trustee to vote allocated securities in accordance with IRC 409(e)(3)?
- Does the plan provide that a participant has a right to demand distributions in the form of employer securities?
- Does the plan provide that an employee is entitled to diversify a portion of his/her account as required by IRC 401(a)(28)(B)?

To view the complete ESOP Review Worksheet, please visit http://www.irs.gov/pub/irs-tege/esop_worksheet_0811.pdf.

Hardship Distribution Reminders

Certain retirement plans, such as 401(k) and 403(b) plans, may permit participants to receive an in-service distribution as a result of a financial hardship. Due to the current economic conditions many plans allowing such distributions may see an increase in requests for hardship distributions. As a result, the IRS has provided some reminders to help employers and plan administrators maintain the qualified status of their plans when making hardship distributions.

A plan may only make a hardship distribution (i) if permitted by plan terms; (ii) on account of an immediate and heavy financial need of the employee and, in certain cases, of the employee's spouse, dependent, or beneficiary; and (iii) in an amount necessary to meet the financial need.

Plan sponsors and administrators should carefully review their policies and procedures for reviewing and processing hardship distribution requests to ensure that all applicable requirements are satisfied.

Before making a hardship distribution plan administrators should:

- Review plan terms including, (i) whether the plan provides for hardship distributions; (ii) the procedure an employee must follow to request a hardship distribution; (iii) the plan's definition of a hardship; and (iv) any limits on the amount and type of funds that can be distributed for a hardship from an employee's accounts.
- Obtain a statement or verification of the employee's hardship as required by the plan's terms.
- Determine that the exact nature of the employee's hardship qualifies for a distribution under the plan's definition of a hardship.
- Document, as may be required by the plan, that the employee has exhausted any loans or distributions, other than hardship distributions, that are available from the plan or any other plan of the employer in which the employee participates.
- If plan terms state that a hardship distribution is not considered necessary where an employee has other resources available (such as spousal and minor children's assets), document a lack of other resources.
- Confirm that the amount of the hardship distribution does not exceed the amount necessary to satisfy the employee's financial need (including any taxes or penalties incurred due to the hardship distribution).
- Ensure that the amount of the hardship distribution does not exceed any limits under the plan and consists only of eligible amounts. For example, a plan could limit hardship distributions to a specific dollar amount and require that they be made only from salary reduction contributions.
- If plan terms require that an employee be suspended from contributing to the plan and all other employer plans for at least 6 months after receiving a hardship distribution, inform the employee and enforce this provision.

In the event a plan fails to properly administer hardship distributions, the failure may be able to be corrected through the IRS Employee Plans Compliance Resolution System.

"Prior to making a hardship distribution plan administrators should . . . obtain a statement or verification of the employee's hardship as required by the plan's terms ."

New Guidelines and Amended Regulation Issued for Women's Preventive Care

Health Plan Coverage Guidelines

The U.S. Department of Health and Human Services ("HHS") issued new health plan coverage guidelines, adding to a previously released list of preventive care services for women. Non-grandfathered health plans will need to include these preventive services without cost sharing for plan years beginning on or after August 1, 2012.

Under insurance market rules under the Patient Protection and Affordable Care Act ("PPACA") released by HHS last year, all non-grandfathered private health plans were required to cover several evidence based preventive services such as mammograms, colonoscopies, blood pressure checks, and childhood immunizations without charging a copayment, deductible, or coinsurance. Additional women's preventive services that will also be required without cost sharing requirements include:

- Well-woman visits: Includes annual well-woman preventive care visits for adult women to obtain recommended preventive services, and additional visits if women and their providers determine they are necessary.
- Gestational diabetes screening: Screening for women who are 24 to 28 weeks pregnant, and those at risk of developing gestational diabetes.
- HPV DNA testing: Women who are 30 or older will have access to high-risk human papilloma virus ("HPV") DNA testing every three years, regardless of pap smear results.
- STI counseling, and HIV screening and counseling: Sexually active women will have access to annual counseling on HIV and sexually transmitted infections ("STIs").
- Contraception and contraceptive counseling: Women will have access to all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling. However, the guidelines *do not* include abortifacient drugs.
- Breastfeeding support, supplies, and counseling: Pregnant and postpartum women will have access to comprehensive lactation support and counseling from trained providers, as well as breastfeeding equipment.
- Domestic violence screening: Screening and counseling for interpersonal and domestic violence.

Amended Regulation

In addition to the health plan coverage guidelines, HHS, the IRS, and the EBSA issued an amended interim final regulation authorizing a religious plan exception to PPACA's required contraceptives coverage for women.

The regulation provides HHS' Health Resources and Services Administration with additional discretion to exempt certain religious employers from the HHS guidelines where contraceptives are concerned. The regulation is modeled on the most common accommodation for churches available in the majority of the 28 states that already require insurance companies to cover contraception.

Under the regulation, a religious employer is one that (i) has the inculcation of religious values as its purpose; (ii) primarily employs persons who share its religious tenets; (iii) primarily serves persons who share its religious tenets; and (iv) is a non-profit organization under Code sections 6033(a)(1) and 6033 (a)(3)(A)(i) or (iii).

Many religiously-affiliated organizations may be unable to fit the exception. The requirements to employ predominantly members of the religion and to provide services primarily to members of the religion are likely significant hurdles for many such organizations that serve a diverse population.

"New health plans will need to include these preventive services without cost sharing for insurance policies with plan years beginning on or after August 1, 2012."

Your Benefits Questions Answered

We are pleased to launch a new column that allows our clients and friends to have specific questions answered. You may submit your employee benefits related questions to *questions@cicottelaw.com*. Due to the volume of questions that may be submitted we cannot guarantee that all questions will be answered. We will select questions that are most applicable to a broad spectrum of employers and businesses.

Reader Question: Our employee recently dropped his 23 year-old dependent from our company health insurance plans, because the dependent is now covered by his own employer's health insurance. Does this constitute a COBRA qualifying event? Must we offer the dependent the option to elect COBRA coverage under our plan?

Response: First, congratulate your employee – he has a 23-year old child who appears to be at least partially self-sufficient!

If your plan is grandfathered under PPACA, then you are likely aware that, until 2014, your plan may exclude an adult child if s/he is eligible to enroll in another (non-parental) employer-sponsored group health plan. Unfortunately, we don't really know what "exclude" means! It is safe to assume you would not have needed to offer coverage under your plan if the adult child had his or her own employer coverage *before* enrolling on your plan. However, it is not clear whether the ability to "exclude" this person from your plan extends to the general obligation to make continuation coverage available. As with many issues under PPACA, there is no certain answer to this question. Consequently, the safest approach is to assume that the ability to "exclude" does not eliminate the obligation to comply with COBRA. Of course, non-grandfathered plans absolutely *must* undertake a COBRA analysis.

Voluntary relinquishment of health care coverage by a dependent who obtains his or her own employer-provided coverage is not a qualifying event enumerated in the COBRA regulations. Of course, the COBRA regulations were written pre-PPACA. Loss of status as a dependent is a qualifying event; post PPACA, this provision is likely best interpreted as a dependent child's loss of *coverage* under your plan. Consequently, the most conservative approach is to offer COBRA coverage.

Please understand that there may be room to take a more aggressive approach and not offer COBRA. Because the COBRA regulations have not yet caught up with PPACA, it is likely a technically defensible position that no qualifying event has occurred. However, from a risk management approach, offering COBRA is safer. Given that this 23 year old is employed in a job with benefits, it is likely that s/he will not elect COBRA under your plan in any event.

We'll include an article as soon as this and other COBRA questions are resolved in subsequent PPACA guidance.

Reader Question: May legal services be offered as an employee benefit?

Response: Yes. Group Legal Services plans are benefits that are generally sponsored by an employer or employee organization as part of a welfare benefit plan to provide legal services to employees as a fringe benefit. Such plans are similar to group health plans in that a participant pays a fixed amount, typically through payroll deduction, each month or year in exchange for benefits that may be used as needed. An employer may also pay all, or a portion of the premium for a legal services plan for employees.

A basic group legal plan may provide employees, their spouses, and dependents general legal advice and services such as telephone and/or office consultations, review of legal documents, and simple estate planning documents. More comprehensive plans, however, may provide coverage for real estate matters, bankruptcy, civil and criminal trials, and family law.

The American Bar Association reports that approximately 70% of U.S. households experience some event during a 12-month period that could require the use of an attorney. Offering such benefits to employees provides participants with access to an attorney who can assist in resolving potential legal issues.

About the Cicotte Law Firm

The Cicotte Law Firm is located in Kennewick, WA, and represents employers in several states in all aspects of benefits law, handling diverse employment, labor, tax and corporate matters.

The Firm's practice covers all areas relating to employee benefits, including designing "defined contribution-style" health plans (HRAs, HSAs, & FSAs), assistance with COBRA, HIPAA, ARRA, and PPACA issues, advising on fiduciary responsibilities, maintaining legal compliance with non-discrimination requirements, analyzing unusual benefit claims, representing employers in labor relations matters where pension or welfare benefits are involved, advising on the federal tax implications of complex benefits-related issues, and examining the ERISA status of compensatory arrangements.

Other practice areas vital to corporate function available at the Firm include corporate formation, corporate compliance, negotiations, mergers and acquisitions, SEC compliance, and HR liaison activities.

The Firm is also able to assist companies with licensing agreements, non-compete agreements, and nondisclosure agreements.

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