



Employers Need to Review Benefit Plans and Take Action Prior to Year End

Most employee benefit plans operate on a calendar-year basis. With December 31 fast approaching, it is important for sponsors of calendar-year plans to review them soon and, if required, take steps to amend their plans. It is also necessary to provide certain notices to plan participants before the end of the year. The following is a brief overview of the types of changes that may need to be made before December 31 for calendar-year plans and the types of employee notices that may be required.

Year-End Amendments

HEART Act. By December 31, non-governmental retirement plans should be amended for the changes brought about by the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART"), which included certain benefits provisions for those serving in the military. Some plans may have included HEART provisions in their Pension Protection Act of 2006 ("PPA") amendment signed last year. However, because additional HEART guidance was issued by the Internal Revenue Service ("IRS") in 2010, even those previously-amended plans may also require supplemental amendments before year end.

Non-Spouse Beneficiary Rollovers. The PPA permitted plan sponsors to amend their retirement plans to allow for non-spouse beneficiary rollovers. However, the Worker, Retiree, and Employer Recovery Act of 2009 mandated that non-spouse beneficiary rollovers be permitted. If a plan has not previously been amended to make this change, such action must be taken by December 31.

Employer Stock Diversification. The PPA required that defined contribution plans investing in publicly traded employer stock provide participants with the opportunity to diversify their investments. Special guidance in 2009 permitted plan sponsors to delay amending their plans for these requirements until December 31, 2010 (although many plan sponsors may have included the required language in their PPA amendments).

Roth Intra-Plan Conversions. The Small Business Jobs Act of 2010 allows plan sponsors to amend their 401(k) and 403(b) plans to permit participants in certain cases to make intra-plan conversions of their pre-tax deferral accounts into Roth accounts. Some plan sponsors may wish to amend their plans to permit these conversions in 2010 to take advantage of special tax rules available for 2010 conversions, necessitating an amendment by December 31. For more information on Roth intra-plan conversions and which employees may be eligible to make such conversions, see our October 29, 2010 Benefits Alert, [*Small Business Jobs Act of 2010: Roth Conversions for Retirement Plans*](#).

continued on page 2

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Cafeteria Plans. Cafeteria plans (sometimes referred to as flex plans or flexible benefit plans) were affected by the passage of health care reform, technically the Patient Protection and Affordable Care Act (the "Affordable Care Act"), earlier this year. Cafeteria plans with health care flexible spending accounts should be amended to end the reimbursement of non-prescribed over-the-counter drugs and to modify the definition of dependent to include children up to age 26. The IRS has issued guidance permitting the amendment regarding over-the-counter drugs to be made by June 30, 2011; however, plan sponsors may want to consider having their plan document in order before the end of the year to aid in administration. Additionally, if a plan sponsor allowed participants to make mid-year election changes to enroll children up to age 26 in a group health plan this year, then the cafeteria plan should be amended by December 31 to permit such elections.

Defined Benefit Plans. There are some additional items that only affect defined benefit plans:

PPA Funding Rules. Defined benefit plans should be amended by December 31 to incorporate the funding-based benefit restrictions enacted under the PPA (although the IRS has informally indicated that the deadline may be extended). Those restrictions generally suspend future benefit accruals and prevent the payment of certain benefits or an increase in plan liabilities for plans that are significantly underfunded.

Hybrid Plans. Hybrid defined benefit plans (including cash balance plans) must be amended by December 31 to incorporate changes in vesting, interest crediting rates and the similarly situated younger participant standard mandated by the PPA. Guidance was issued in 2009 permitting plan sponsors to postpone amending plans for these provisions until December 31.

Year-End Notices

Medicare Part D. A Medicare Part D Notice of Creditable Coverage must be provided to participants under an employer's group health plan before November 15th. This notice describes whether the prescription drug coverage offered under an employer's plan is comparable to the prescription drug coverage offered under Medicare Part D and informs participants of their rights and obligations in selecting prescription drug coverage. In many cases, an employer will be able

to obtain this notice from the insurance carrier that provides coverage and/or third-party administrative services under the employer's plan.

Health Care Reform. With the passage of the Affordable Care Act, employers who sponsor group health plans must also now provide a notice of grandfathered status, if the employer's plan is grandfathered under the new law. Group health plans must also provide a notice to all eligible employees of their right to enroll adult children up to age 26, a notice regarding the removal of lifetime limits and the right to re-enroll in the plan if the employee previously exceeded the plan's lifetime limits, and, for non-grandfathered plans, a notice informing participants of their right to select any participating provider as the participant's primary care provider (if the plan requires participants to choose a primary care provider) and right to obtain OB/GYN care without prior authorization. The employer may also be able to obtain these notices from the insurance carrier that provides coverage and/or third-party administrator of its plan.

CHIPRA. The Children's Health Insurance Program Reauthorization Act of 2009 requires employers to provide their eligible employees with an annual notice regarding premium subsidies available in certain states. If the notice has not already been provided, it should be provided by January 1, 2011.

Safe Harbor 401(k) Plans. 401(k) plans that provide safe harbor contributions to participants in order to meet discrimination testing requirements otherwise applicable to the pre-tax salary deferral elections made by the plan participants are required to provide an annual notice to participants at least 30 days before the beginning of the plan year. The deadline is December 1 for calendar-year plans. The safe harbor notice describes the safe harbor contribution to be made by the plan sponsor.

Qualified Default Investment Alternatives. Plans that invest participant assets in a qualified default investment alternative ("QDIA") must issue an annual notice to participants 30 days prior to the beginning of the plan year. The deadline is December 1 for calendar-year plans. The QDIA notice describes the QDIA, the circumstances under which a participant's contributions may be invested in the QDIA, and the participant's right to direct the investment of his/her account into another investment option under the plan.

Automatic Enrollment. If an employer's 401(k), 403(b) or governmental 457(b) plan provides for automatic enrollment of newly eligible employees, these individuals must receive an automatic enrollment

notice both before enrollment and annually thereafter. The notice requirement applies to automatic contribution arrangements, eligible automatic contributions arrangements and qualified automatic contribution arrangements. For calendar year plans, this notice must be distributed by December 1 each year.

Please note that different deadlines may apply if your plan is not based on a calendar year. If you have any questions regarding these deadlines, please contact one of the attorneys in the Employee Benefits & Executive Compensation Group of Bradley Arant Boult Cummings LLP.

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