LEGISLATIVE AND REGULATORY UPDATE

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LOUISVILLE EMPLOYEE BENEFITS COUNCIL
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IRS cellphone guidance connects favorably with employers and employees: Recent IRS guidance addresses the income tax treatment of work-related use of cellphones and similar equipment. The guidance covers arrangements where employers either provide employees with devices or reimburse employees for charges incurred using their own personal devices. In general, the standard for favorable tax treatment is that employers must provide the benefit "primarily for noncompensatory business purposes." **Full text of news release (IRS, 14 Sep 2011); Full text of Notice 2011-72 (IRS, 14 Sep 2011); Full text of Memorandum SBSE-04-0911-083 (IRS, 14 Sep 2011)**

IRS seeks input on 'governmental plan' definition: A new IRS proposal on "governmental plan" status could have a significant impact on hospitals, universities and other employers with ties to federal, state, local or tribal governments. The proposal describes what determines whether a retirement or health plan is established and maintained by an eligible government, agency or instrumentality; how a plan's status may change when a government takes over a private institution or privatizes a function; and how the plan of an Indian tribal government can qualify as a governmental plan. Comments are due by Feb. 6, 2012. Full text of ANPR on Indian tribal governmental plans (Federal Register, 8 Nov 2011); Summary of proposal (IRS, 7 Nov 2011); IRS governmental plans website

Seller may continue maintaining 'qualified replacement plan' after sale of subsidiary: A company selling a subsidiary may continue to maintain the "qualified replacement plan" holding surplus assets of the subsidiary's terminated pension plan, according to a recent IRS private letter ruling. The subsidiary had transferred pension surplus to a replacement defined contribution (DC) plan to reduce the reversion excise tax. The parent company later wanted to sell the subsidiary and transfer sponsorship of the DC plan to another controlled-group member. The IRS ruled the DC plan would still qualify as a replacement plan if it met Section 4980's requirements after the sale **(see PLR 201143034 (2 Aug 2011))**.

Summaries of benefits and coverage delayed, but no details or specific dates given: Employers have gained more time to give uniform summaries of plan benefits and coverage to individuals eligible for health plan coverage. Regulators have indefinitely delayed this health care reform and postponed employers' obligation to give 60 days' advance notice of health plan material modifications. Employers and others, including Mercer, had noted the challenges and costs of complying with the rule's proposed SBC templates by the March 23, 2012, deadline. Now, employers can wait until final SBC regulations are issued, which will include an applicability date giving "sufficient time to comply." In announcing this relief, regulators didn't offer any additional insights, such as a new date for employers to provide SBCs or changes to expect in the final rules or templates. Frequently asked questions on health care reform (DOL, 17 Nov 2011)

Mental health parity FAQs clarify requirements for nonquantitative treatment limits: New FAQs on the Mental Health Parity and Addiction Equity Act offer guidance on structuring prior authorizations and other nonquantitative treatment limits to ensure mental health/substance abuse benefits have parity with medical/surgical benefits. The FAQs clarify how the processes and factors used to administer nonquantitative treatment limits on behavioral health benefits may be "comparable to, and applied no more stringently than," those used for medical benefits, unless clinically appropriate care standards permit a difference, and include a list of factors to consider. **FAQs about mental health parity implementation (DOL, 17 Nov 2011)**

Proposed rules expand HIPAA accounting for disclosure requirements: Proposed rules would increase the burden of HIPAA-covered entities, including group health plans, to track disclosure of individuals' protected health information (PHI). The proposal also would entitle individuals to a new report showing who accessed their electronic PHI. The accounting rule would take effect 240 days after the final rule is published. The access report rule would apply Jan. 1, 2013, for DRS systems acquired after Jan. 1, 2009, and Jan. 1, 2014, for DRS systems acquired on or before Jan. 1, 2009. Full text of proposed rules on HIPAA accounting for disclosures (Fed. Reg., 31 May 2011); Full text of HHS press release on proposed HIPPA rule changes (HHS, 31 May 2011)

Designing ADEA-compliant mandatory retirement policies for executives: Employers whose succession-planning strategies include mandatory retirements must contend with the federal Age Discrimination in Employment Act (ADEA). While the law generally prohibits age-based employment terminations, mandatory retirement policies may be lawful to the extent they apply to nonemployees (such as directors and partners) or satisfy an exemption for certain top executives and policymakers. Employers are advised to consult legal counsel to ensure their policies and practices don't run afoul of the federal law or its state counterparts. Full text of EEOC regulations defining 'bona fide executive' (C.F.R., 1 Jul 2011); Full text of EEOC regulations addressing 'retirement benefit' (C.F.R., 1 Jul 2011); Full text of EEOC guidance on 'threshold issues' (EEOC, 6 Aug 2009); Full text of US Supreme Court decision in Nationwide Mut. Ins. Co. v. Darden (Leagle, Inc., 24 Mar 1992)

Deadline for pension benefit restriction amendments postponed to 2012: New IRS guidance generally gives pension plan sponsors until the end of the 2012 plan year to adopt amendments implementing PPA's funding-based benefit restrictions with relief from any anti-cutback requirements. However, sponsors filing for Cycle B determination letters (EINs 2 or 7 and multiple employer plans) before 2012 plan year-end must adopt the required amendments before submitting their filings (Cycle B filings must be submitted from Feb. 1, 2012, to Jan. 31, 2013). Plans with delayed PPA effective dates (eligible charity and cooperative plans and PBGC settlement plans) need not be amended until the end of the first plan year that Code Section 436 applies to the plan or, if later, the employer's tax-return due date (including extensions) for the tax year in which that plan year begins.

Notice 2011-96, announcing the one-year delay, also includes a sample amendment to help plan drafters reflect these benefit restrictions in their documents. Sponsors timely adopting the sample amendment have reliance that the plan document satisfies the benefit restriction rules and meets PPA anti-cutback exceptions. The sample amendment incorporates benefit restriction relief enacted as part of the Worker, Retiree, and Employer Recovery Act of 2008 and the Pension Relief Act of 2010. This legislation exempted small cashouts from accelerated distribution restrictions and provided two years of relief from restrictions on benefit accruals and Social Security level-income options. The sample amendment has three parts:

- Provisions that apply to all plans

- Provisions that apply to multiple-employer plans (including alternative provisions for post-1988 and pre-1989 multiple-employer plans)

- Optional provisions allowing participants or beneficiaries affected by lump sum restrictions to make new elections when these restrictions are partially or totally lifted, allowing participants to delay commencement of the restricted portion of the benefit when partial accelerated distribution restrictions are in effect, and providing for automatic restoration of missed accruals when benefit accrual restrictions are lifted

The IRS's review of Cycle A determination letter filings will *not* consider funding-based benefit restrictions under Sections 401(a)(29) and 436, but IRS will consider these restrictions in Cycle B filings

Applying the $115,000 threshold for determining highly compensated employees in 2012:
The IRS recently announced that the dollar threshold used to identify highly compensated employees will increase from $110,000 to $115,000 in 2012. For most plans, including calendar-year plans, this change won't affect nondiscrimination testing until the 2013 plan year. But for some noncalendar-year plans, the new $115,000 threshold will apply to nondiscrimination testing for the plan year beginning in 2012. Affected plans include qualified retirement plans, 403(b) annuities, dependent care plans, educational assistance programs and voluntary employees' beneficiary associations.

HCE threshold rises to $115,000
The dollar threshold for determining highly compensated employees (HCEs) under Code Section 414(q) will increase from $110,000 to $115,000, effective Jan. 1, 2012, the IRS announced in October. This change must be factored into nondiscrimination testing for qualified retirement plans, 403(b) programs, dependent care plans, educational assistance programs and voluntary employees' beneficiary associations (VEBAs). (Employer-sponsored medical plans aren't affected because any testing required for those plans uses a different HCE definition.) However, because the HCE determination relies on a lookback-year concept, the higher threshold won't have an immediate impact on nondiscrimination testing for most plans.

The applicable dollar threshold is determined in two steps:

- Identify the lookback year used by the plan to measure compensation (typically, the 12-month period preceding the plan year being tested)

- Apply the dollar threshold in effect for the calendar year in which that lookback year *began*

The examples below illustrate how this plays out for calendar-year plans, noncalendar-year plans electing to use a calendar-year lookback and other noncalendar-year plans. (For these examples, assume none of the individuals are 5% owners and the top-paid group election doesn't apply.)

Calendar-year plans
For calendar-year plans, the new $115,000 threshold won't affect nondiscrimination testing until the 2013 plan year. To illustrate, this example shows how a plan sponsor would determine an employee's HCE status when performing nondiscrimination testing for the 2012 and 2013 plan years:

> *Example.* Kim is a participant in a calendar-year plan during the 2012 plan year. She earned $112,000 during 2011 (the applicable lookback year). Kim is an HCE for the 2012 plan year because her compensation exceeded the $110,000 threshold in effect in 2011. Now turn the clock forward one year, so it's time to run the nondiscrimination test for the 2013 plan year. Kim is still participating and her pay remained constant at $112,000 during 2012 (the lookback year). Kim is a nonhighly compensated employee (NHCE) because her pay falls below the new $115,000 threshold in effect for 2012.

Noncalendar plans making the calendar-year data election
Some plans with noncalendar years determine HCE status using the calendar-year data election described in Notice 97-45. Employers making that election can treat the calendar year beginning within the usual lookback year as the plan's "deemed" lookback year. In this case, the new $115,000 threshold will apply when running a nondiscrimination test for the plan year beginning in 2012.

> *Example.* An employer makes the calendar-year data election when testing a plan year that begins July 1, 2012. The usual lookback year is the 12-month period beginning July 1, 2011. The calendar year beginning in that lookback year is 2012. So, the 2012 calendar year is the plan's deemed lookback year. Chris is a participant who earned $112,000 during 2012 (the deemed lookback year). Chris is an NHCE because his pay during the deemed lookback year falls below the $115,000 threshold in effect for 2012.

Employers choosing to make the calendar-year data election must reflect that choice in any plan document that contains the HCE definition. The election must be made consistently for all plans in the controlled group with noncalendar plan years, including welfare plans (such as dependent care plans) that are subject to nondiscrimination testing using the HCE definition in Section 414(q).

Other plans with noncalendar years
Some plans with noncalendar years determine HCE status by looking back to pay earned during the 12-month period preceding the plan year being tested. For these plans, the new $115,000 threshold will not affect nondiscrimination testing until the plan year that begins in 2013.

> *Example.* Assume the same facts as in the preceding example, except the employer doesn't make the calendar-year data election when testing the plan year that begins July 1, 2012. Chris earned $112,000 between July 1, 2011, and June 30, 2012 (the lookback year). Chris is an HCE because the applicable lookback year began in 2011, and his compensation during that lookback year exceeded the $110,000 threshold in effect for 2011. However, when it comes time to test the plan year that begins July 1, 2013, Chris will be an NHCE if his pay remains constant. That's because the applicable lookback year (July 1, 2012, to June 30, 2013) begins in 2012, and Chris' $112,000 compensation during that lookback year falls below the $115,000 threshold in effect for 2012.

DOL tweaks electronic delivery policy for 401(k) participant fee disclosures: The Department of Labor has reissued its interim electronic delivery policy for participant fee disclosures in 401(k)-type plans. Technical Release 2011-03R says investment-related information, such as the comparative chart of investment options, can be included "as part of" a quarterly benefit statement. The guidance also clarifies the role of continuous access websites for posting fee information but doesn't seem to offer more flexibility regarding the technical release's main conditions. The narrow scope of relief may be disappointing to some employers. Full text of Technical Release 2011-03R (DOL, 8 Dec 2011); Full text of news release on Technical Release 2011-03R (DOL, 8 Dec 2011)

PBGC proposed regulations provide some clarity for hybrid plan terminations, spinoffs: PBGC proposed regulations spell out benefit calculation rules for cash balance and other hybrid plans taken over by the PBGC following a distress or involuntary termination. The rules would also affect asset allocations for ongoing hybrid plans undergoing a spinoff and provide additional guidance that may be relevant to plans undergoing a standard termination. Comments are due by Dec. 30, 2011.