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BENEFITS BROADCAST

December 4, 2009

Stay Compliant in 2010!
Important 2009 Year-End Compliance Requirements For Employee Benefit Plans

As 2009 draws to a close, employers sponsoring employee benefit plans must be mindful of a number of compliance requirements, including requirements under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code (the "Code"). This client alert outlines separately, for both health and welfare plans and pension plans, compliance obstacles and deadlines facing plan sponsors in the future. This alert concludes with a listing of the 2010 dollar limitations for pension and retirement plans, as indexed for cost-of-living adjustments and as released by the Internal Revenue Service ("IRS").

Health and Welfare Plans -- Important 2009 Year-End and 2010 Compliance Requirements

Extension of the COBRA Subsidy Under the American Recovery and Reinvestment Act of 2009 ("ARRA")

When President Obama signed ARRA on February 17, 2009, he enacted legislation providing a 65% COBRA premium subsidy for up to nine months to eligible employees involuntarily terminated between September 1, 2008, and December 31, 2009. To date, there has been no extension of the COBRA premium subsidy beyond the above deadlines. However, White House and Congressional officials have intimated that an extension might be coming.

Special Trade Adjustment Assistance ("TAA") COBRA Rights under ARRA

The TAA program provided by the U.S. Department of Labor ("DOL") affords certain COBRA-related benefits to individuals who lose their jobs or have their wages or hours cut as a result of the shifting of production to places outside the United States. ARRA enhanced COBRA benefits in connection with the TAA program in two ways: (1) temporarily extending the duration of COBRA coverage for TAA-eligible persons, and (2) increasing the Health Care Tax Credit ("HCTC") Program's COBRA subsidy. As a result, under the ARRA's TAA provisions, a TAA-eligible individual now may continue COBRA coverage beyond the traditional 18 months of coverage, thereby maintaining COBRA coverage for as long as he or she remains a TAA-eligible individual, until December 31, 2010. Secondly, ARRA increased the HCTC Program COBRA subsidy. Traditionally, the HCTC Program subsidized a TAA recipient's COBRA premium by 65%. Under ARRA, the COBRA subsidy for TAA recipients is 80% for premiums paid for coverage periods from May 2009 through December 2010. On January 1, 2011, the HCTC premium subsidy will revert back to 65%. Employers who have or who might have TAA-eligible employees should ensure that their COBRA notices reflect these ARRA enhancements to TAA COBRA rights.

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Special Enrollment Rights and Notice Requirements Under the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA")

On February 4, 2009, President Obama signed CHIPRA into law, extending the State Children's Health Insurance Program ("CHIP," formerly called "SCHIP"), which was due to expire in March 2009. Effective April 1, 2009, CHIPRA required employers offering group health coverage to comply with certain special enrollment and notice provisions.

CHIPRA Special Enrollment Rights

CHIPRA mandates that a group health plan must permit an employee who is eligible, but not enrolled, for coverage under the terms of the plan (or a dependent of such employee if the dependent is eligible, but not enrolled, for coverage) to enroll for coverage if the employee or dependent has experienced one of the following "qualifying" events: (1) the employee or dependent has had his or her Medicaid or CHIP coverage terminated due to a loss of eligibility, or (2) the employee or dependent becomes eligible for a Medicaid or CHIP subsidy to apply to the purchase of group health plan coverage. In either case, the employee or dependent has 60 days after the "qualifying" event to request coverage under the employer's group health plan.

Employer Notice Requirements

CHIPRA also imposes two new notice requirements upon employers. First, employers must notify employees of the availability of premium assistance if such an opportunity then exists in the state where the employee resides. The DOL and the Department of Health and Human Services ("HHS") are required to develop jointly, national and state-specific model notices by February 4, 2010. These model notices will advise how an employee may contact the state of residence for additional information regarding potential premium assistance and information regarding how to apply for such premium assistance. Employers will be required to provide such notice annually, beginning with the first plan year that begins after the date the initial model notices are first issued. In all likelihood, employers will be required to send out these notices starting with plan years beginning on or after February 4, 2010.

The second CHIPRA notice requirement mandates that group health plan administrators provide the state, upon request, with information regarding the benefits available under the group health plan. States can use this information to determine the cost-effectiveness of the provision of state premium assistance for the purchase of group health plan coverage.

Michelle's Law

Michelle's Law amended ERISA, the Code, and the Public Health Service Act, effective for plan years beginning on or after October 9, 2009. Michelle's Law allows a dependent child who is enrolled as a full-time student, but loses student status and thus group health plan coverage due to a serious illness or injury, to retain group health plan coverage. The student can keep such coverage for one year from the date the medically necessary leave of absence begins unless, under the terms of the plan, coverage would otherwise terminate at an earlier date. The dependent child's treating physician must provide the plan with written certification of the medically necessary leave of absence for coverage to continue.

To date, there has not been any significant guidance issued by the DOL, HHS, or the IRS regarding Michelle's Law, and it is unclear how Michelle's Law will coordinate with COBRA continuation coverage. For now, employers offering group health plan coverage with a full-time student requirement should amend their plan documents to reflect the changes required by Michelle's Law.

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Genetic Information Nondiscrimination Act ("GINA") of 2008

Enacted on May 21, 2008, GINA prohibits discrimination based upon genetic information with respect to health coverage and employment. Under GINA, group health plans and health insurance issuers in the group or individual markets are prohibited from:

- increasing the group premium or contribution amounts based upon genetic information;
- requesting or requiring an individual or family member to undergo a genetic test; and
- requesting, reporting, or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.

In addition, GINA prohibits employers from discriminating based upon genetic information and limits employer acquisition and disclosure of genetic information. GINA is effective for plan years beginning on or after October 10, 2009. The IRS, DOL, and HHS recently issued interim final rules interpreting the group market provisions of GINA, which are effective for plan years beginning on or after December 7, 2009.

GINA has significant consequences for employers offering wellness programs -- particularly those that utilize Health Risk Assessments ("HRAs") to assist employees in identifying and mitigating health risks. Because GINA considers genetic information to include family history, employers must be careful when using HRAs that ask about family history or that pose open-ended questions that could reasonably elicit an answer containing family history information. For example, the question "Is there anything else relevant to your health that you would like us to know or discuss with you?" could reasonably elicit an answer containing family history information, and therefore, would be considered a request for genetic information. Employers must be diligent in avoiding the use of such HRAs prior to or in connection with enrollment.

GINA also prohibits group health plans from requesting, reporting, or purchasing genetic information at any time for underwriting purposes. Because, under GINA, underwriting includes data used for the computation of premium or contribution amounts, including discounts, rebates, payments in kind, or other premium differential mechanisms, employers must also be wary of the use of gift cards or other monetary incentives for participation in a wellness program or completion of an HRA that solicits family history information or any other genetic information.

Health Information Technology for Economic and Clinical Health Act ("HITECH")

Enacted as part of ARRA on February 17, 2009, HITECH has several implications for covered entities, such as group health plans ("CEs"), and business associates, such as vendors that provide services to group health plans ("BAs"), that are subject to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its rules and requirements with respect to protected health information ("PHI"). First, BAs are now subject to the same HIPAA administrative, physical, and technical security safeguard provisions (and certain privacy provisions) for the protection of PHI as CEs. Second, CEs and BAs now must comply with the HITECH breach notification rules. These rules require BAs to notify CEs and CEs to notify affected individuals, the Secretary of HHS, and, under certain circumstances, the media, in the event of a breach of unsecured PHI. Third, HITECH strengthened HIPAA's enforcement provisions.

While the various provisions of HITECH contain differing effective dates, all CEs and BAs should work diligently to become compliant with HITECH by February 17, 2010. Becoming compliant includes, but is not limited to: amending business associate agreements to reflect the new BA privacy and security responsibilities; updating the HIPAA privacy and security policies and procedures and notices of privacy practices; and implementing the breach notification rules. More information regarding the breach notification rules can be found in our September Executive Alert, which describes, in greater detail, what plans must do to comply with the breach notification rules.

Mental Health Parity and Addiction Equity Act of 2008 (the "Mental Health Parity Act")

Under the Mental Health Parity Act, a group health plan that offers coverage for mental health and substance abuse treatment must now provide coverage for such treatment that is at least equal to the coverage the plan offers for medical and surgical benefits. This law is generally effective for plan years beginning on or after October 3, 2009. While HHS guidance was expected by October 3, 2009, HHS has stated that such guidance will not be issued until at least January 2010. In the meantime, plan sponsors should make a good faith effort to adhere to the intent of the Mental Health Parity Act. For example, group health plans should revise plan documentation, including summary plan descriptions, to reflect equal coverage for medical, surgical, mental health, and substance abuse benefits.

Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act")

The HEART Act, signed into law on June 17, 2008, allows a tax-free distribution of unused benefits from a health flexible spending arrangement ("FSA") to any member of an Armed Forces reserve component who is ordered or called to active duty for a period of 180 days or more (or indefinitely). Such a distribution is considered a qualified reservist distribution ("QRD"). This law was effective immediately, permitting QRDs to Armed Forces personnel beginning June 18, 2008.

A cafeteria plan is not required to permit QRDs from its health FSA component; however, if the plan sponsor chooses to allow QRDs, it must amend its plan document. IRS guidance permits plans to be amended retroactively to provide QRDs that are requested on or before December 31, 2009. The retroactive amendment must be made by December 31, 2009, and be effective retroactive to the date of the first QRD paid under the plan (but not prior to June 18, 2008).

Red Flags Rule

The RFR requires creditors and financial institutions, as both are defined under the RFR, to implement a written program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Federal Trade Commission ("FTC") has issued guidance explaining the application of the RFR to health and welfare plans. Specifically, the RFR applies to health FSA plans that feature a debit card option to access benefits. Group health plans that offer FSAs with a debit card option should work with their third-party administrators to ensure that there is a written identity theft program in place for the protection of sensitive information. The FTC recently delayed enforcement of the RFR until June 1, 2010.

Qualified Plans -- 2009 Year-End Compliance Checklist and 2010 Internal Revenue Code Limits

As the end of 2009 approaches, it is again time to review your Company's tax-qualified pension plans for year-end amendments. The following checklists describe important 2009 year-end compliance requirements for pension plan sponsors under the Pension Protection Act of 2006 ("PPA"), Worker, Retiree, Employer and Recovery Act of 2008 ("WRERA"), and Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act"). In addition, this section concludes with select cost-of-living adjustments to key limits applicable to pension and retirement plans.

Pension Protection Act ("PPA") Amendments

PPA contained a number of changes, some mandatory and some discretionary, affecting defined benefit and defined contribution plans. While a number of PPA provisions already have taken effect and may have been adopted administratively, calendar-year plans must adopt a written plan amendment updating the plan document for PPA changes by December 31, 2009. The primary 2009 year-end amendments required under PPA are summarized in general terms below.

For Single-Employer Defined Benefit Plans

- Funding-based restrictions upon certain lump-sum payments, accelerated distributions and plant shutdown benefits, as well as freezes on future benefit accruals and prohibitions on benefit enhancements, if the plan's "adjusted funding target attainment percentage" ("AFTAP") falls below certain prescribed levels.
- Addition, in certain instances, of a qualified survivor annuity option (generally, a 75% survivor annuity).
- Rollovers by nonspousal beneficiaries, if operationally permitted by the plan.
    - Note: plans will be required to permit nonspousal beneficiary rollovers for plan years after December 31, 2009, pursuant to WRERA, below.
- Lengthening the notice and consent time periods to 180 days (from 90 days) before the participant's annuity starting date.
- Changes to certain interest rate assumptions under the plan as used for several purposes, including determining the amount of, and limit upon, lump sum distributions or other optional forms of payment.

For Defined Contribution Plans

- Accelerated vesting of non-matching employer contributions. All employer contributions made to a defined contribution plan now are subject to the same vesting schedules as matching contributions, e.g.,

a cliff vesting schedule not longer than three years, or a graded vesting schedule providing for vesting at a rate of not less than 20% per year and beginning not later than the second year.

- Addition of an automatic contribution arrangement feature (if implemented by the plan) which, if certain requirements are met, automatically satisfies certain nondiscrimination testing and is not subject to the Code's top heavy rules.

- Distributions from pension plans are permitted to commence for participants who have attained age 62 (lowest safe harbor age), but who are still working (if permitted under the plan).

- Expansion of hardship distributions to include hardship events experienced by a participant's beneficiary (if permitted by the plan).

- If permitted by the plan, addition of the "qualified reservist distribution" ("QRD") feature to the plan document, permitting eligible individuals called to active duty between September 11, 2001 and December 31, 2007 to make penalty-free withdrawals of elective deferrals from their 401(k) plan accounts, and permitting repayments of the amount of the QRD withdrawal within specified time periods following the end of the individual's active duty period.

- Addition of rollovers from the plan to Roth IRAs by certain non-high income individuals, if permitted by the plan. Taxpayers whose modified adjusted gross income exceeds $100,000 and married individuals who file separate returns are prohibited from making a rollover to a Roth IRA prior to 2010. (WRERA eliminates the income limits beginning in 2010.)

- Tax-free rollovers by a nonspousal beneficiary of a qualifying distribution from a deceased participant's eligible retirement plan into an IRA if operationally permitted by the plan.

    - Note: Plans will be required to permit nonspousal beneficiary rollovers for plan years beginning after December 31, 2009, pursuant to WRERA, below.

- Mandatory diversification provisions allowing participants to divest employee contributions and elective deferrals from an investment in employer securities into other investment options and allowing participants who have completed at least 3 years of service with the employer to diversify employer contributions from an investment in employer securities to other investment options.

- Lengthening the notice and consent time periods to 180 days (from 90 days) before the participant's annuity starting date.

Worker, Retiree, Employer and Recovery Act ("WRERA") Amendments

WRERA made certain technical corrections to PPA, and also provided relief from certain other retirement plan requirements. While plan amendments for WRERA generally are not required until 2010, employers may want to consider amending plans now for at least the plan provisions impacted by PPA. Some of the primary changes under WRERA which require or may warrant plan amendments include the items summarized in general terms below (in addition to the few notations under the PPA discussion above).

For Single-Employer Defined Benefit Plans

- Changes to the mortality table, and for small plans, changes to the applicable interest rate, used in determining applicable annual limitations for pension benefits.

- Exclusion of small dollar ($5,000 or less) lump sum cash out payments from the PPA's restrictions on lump sum payments.

For Defined Contribution Plans

- Optional suspension of required minimum distributions to participants age 70-1/2 for the 2009 calendar year.

- Income limitations and other restrictions upon rollovers from designated Roth accounts eliminated, permitting tax-free rollovers from Roth accounts regardless of income level.

- Distributions of excess deferrals no longer require "gap" earnings to be included.

- Other technical changes involving eligible automatic contribution arrangements.

For Cash Balance and Hybrid Plans

- Clarification that minimum lump sum payments calculated using the participant's hypothetical account balance or an accumulated percentage of the participant's final average compensation do not violate the rules regarding actuarial adjustments after normal retirement age, nor the minimum present value rules under Code Section 417(e).

- Requirement that the interest crediting rate for years beginning after December 31, 2007, must be at a rate greater than zero and cannot be higher than the market rate of return.

Heroes Earnings Assistance and Relief Tax Act ("HEART Act") Amendments

The HEART Act amended various provisions of the Internal Revenue Code to provide tax benefits and incentives to military personnel and their families, including the expansion of certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") as well as the addition of new benefits. Among other provisions, the HEART Act amends various rules affecting tax-qualified retirement plans. While plan amendments generally are not required until 2010, employers should remain alert to the HEART Act's provisions and administer their plans accordingly. Some of the primary changes implemented under the HEART Act include (in general terms):

- Extension of the waiver of the 10% early withdrawal penalty for qualified reservist distributions made after December 31, 2007.

- Participants receiving military differential pay are treated as active employees and the differential pay is treated as compensation for purposes of 401(k) plans, 403(b) plans, 457 plans and defined benefit plans permitting employee contributions.

- Participants receiving differential pay while on qualified active military service, and thus treated as active employees, may be treated as having been severed from employment for purposes of being eligible to receive a distribution from their plan elective deferral account. However, if such a distribution is taken, the individual may not make elective deferrals to the plan for six months following the date of distribution.

- Plan benefits must become fully-vested if a participant dies while performing qualified military service.

2010 Internal Revenue Code Limits

The IRS has issued its 2010 cost-of-living adjustments to certain dollar limitations affecting tax-qualified retirement plans. Some of the key limits are listed below. Notably, these key limits will remain unchanged in 2010.

	2009 Limit	2010 Limit
415 Dollar Limitations for Defined Benefit Plans	$195,000	$195,000
415 Dollar Limitations for Defined Contribution Plans	$49,000	$49,000
401(k) Plan Elective Deferral Limit	$16,500	$16,500
Annual Limit on Compensation	$245,000	$245,000
Key Employee Dollar Limitation (for top-heavy rules)	$160,000	$160,000
Highly Compensated Employee Limitation	$110,000	$110,000
Limit on Catch-Up Contributions to an Employer-Sponsored Plan which is not a SIMPLE Plan	$5,500	$5,500
Limit on Catch-Up Contributions to a SIMPLE Plan (Section 401(k) or Section 408(p) plans)	$2,500	$2,500

A complete listing of the 2010 limits released by the IRS can be found on the IRS' website at: http://www.irs.gov/retirement/article/0,,id=96461,00.html.

For more information or for advice on compliance with these requirements, please contact any Baker Hostetler Employee Benefits attorney.

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