

Morgan Lewis

seminar

Year-End Regulatory Update



Presenters

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Agenda

- Year-End Pension Issues
- Health and Welfare Issues
- Executive Compensation Issues

Year-End Pension Issues

Year-End Review of Qualified Plan Issues

- Cash Balance Plan Issues
- Year-End Pension Funding
- Annual Notices
- Year-End Plan Amendments
- Cycle D Filings
- Posting of 5500 Information
- 2010 Inflation-Adjusted Limitations

Cash Balance Plan Issues

- Guidance is imminent on PPA '06 requirements effective January 1, 2010
- Key guidance: “Market rate of interest”
- Plan amendments may be needed by 12/31/2009
- BUT: In most cases, a 204(h) notice to every active participant would be required by **November 15, 2009**
- Notice requires examples showing differences between old and new interest rates; will require **immediate** actuarial assistance

Year-End Pension Funding Issues

- Final regulations out under Code Sections 430 and 436 (PPA funding and benefit restriction rules)
- Many sponsors may be interested in getting their plans to 80% by January 1, 2010 to avoid benefit restrictions
- Would need “range certification” by 1/1/2010 to avoid benefit restrictions unless plan was at or above 80% on 1/1/2009 (in which case you have until 4/1/2010)
- May require action before year-end (determining assumptions to be used; determining likely AFTAP at 1/1/2010; determining additional funding needed to get to 80% and in what form (cash, employer stock))

Annual Notices – Savings Plans Safe-Harbor Notice

- Safe-Harbor Plan Notices
 - Traditional Safe-Harbor Plan Notice
 - “Wait and See” Safe-Harbor Notice
 - Provide at least 30 days but no more than 90 days prior to beginning of plan year
 - *For calendar year plans – December 1*

Annual Notices – Savings Plans

QDIA Notice

- Qualified Default Investment Alternative (QDIA) Notice
 - Applies to savings plans that invest participant contributions in a QDIA
 - Must be provided to all participants who have been or may be defaulted into the QDIA
 - Must be separate from other notices, but may be combined with a safe-harbor and/or automatic enrollment notice
 - Must be provided at least 30 days prior to the beginning of the plan year
 - *For calendar year plans - December 1*

Annual Notices – Savings Plans Automatic Enrollment Notice

- Automatic Enrollment Notice
 - Applies to plans that automatically enroll participants
 - Must describe circumstances under which contributions may be automatically made to the plan
 - Must be provided to all eligible employees
 - Distribute at least 30 days prior to the beginning of each plan year
 - *For calendar year plans - December 1*

Annual Notices – Retirement Plans: Participant Benefit Statements

- Participant Benefit Statements
 - Must be provided to vested participants who are active employees
 - Provide benefit statement every 3 years, OR
 - Provide annual notice informing participants how to obtain a benefit statement
 - *Provide by December 31*

Other Notices

- 402(f) Notice
 - Required to be provided to recipients of eligible rollover distributions
 - Updated model notices for
 - *Roth designated accounts*
 - *Non-Roth designated accounts*
 - Effective January 1, 2010, but may be used immediately

Year-End Plan Amendments

- PPA and Worker, Retiree, and Employer Recovery Act of 2008 (WRERA)
 - For single-employer plans, amendments are generally required by December 31, 2009
- Includes amending plan provisions that are inconsistent with new law requirements, even if complying language would not generally be required in plan document
- Discretionary amendments implemented administratively in 2009
- Bottom line: **Now is the time to compare operation to plan language and conform the two**

Savings Plans – Required Amendments

- Vesting of Nonelective Contributions (3-year cliff or 6-year graded)
- Gap-period earnings no longer distributable for ADP/ACP/402(g) corrections
- Diversification requirements for plans with company stock

Savings Plans - Required Amendments

- Expansion of hardship rules to medical costs/tuition of a beneficiary
- QDIA
- Qualified reservist distributions

Savings Plans - Required Amendments

- What can wait?
 - HEART Act amendments (not required until 12/31/2010 for calendar plans)
 - Required minimum distribution waivers for 2009 (amendments not required until 12/31/2011 for calendar plans)

Recent IRS Guidance - Required Minimum Distributions

- Notice 2009-82
 - Issued September 24, 2009
 - IRS Sample Amendments
 - *Amendments are generally required by December 31, 2011 for calendar year plans*
 - Rollover relief for individuals who already received a 2009 RMD
 - *Generally individuals have until later of November 30, 2009 or 60 days after the distribution was received to roll over the distribution*
 - Transition relief for plans that have not been operated in accordance with its terms through November 30, 2009

Retirement Plan – Required Amendments

- 415 limits – New interest rate and elimination of active participation requirement for high three year calculation for distributions after 12/31/2005
- Lump-sum distributions – PPA '06 changes in interest rate and mortality assumptions
- Cash-balance plans: 3-year vesting; new “market rate” rules
- PPA '06 funding-based benefit restrictions
- Qualified optional survivor annuity requirement

Savings and Retirement Plans – Required Amendments

- Rollovers
 - Direct to Roth IRAs
 - *Applies to distributions after December 31, 2007*
 - After-Tax Contributions to 403(b) Plans and Defined Benefit Plans
 - *Applies for taxable years beginning after December 31, 2006*

Savings and Retirement Plans – Required Amendments

- Non-Spouse Rollovers
 - Pension Protection Act of 2006 made non-spouse rollover to IRAs possible (permitting additional deferral of tax)
 - Important for individuals with same-sex partners/spouses
 - IRS guidance in 2007 led to confusion as to whether it was a mandatory provision
 - WREERA clarified that all plans are required to permit non-spouse IRA direct rollovers, effective for plan years beginning after December 31, 2009

Savings and Retirement Plans – Required Amendments

- Notice and Consent
 - May expand current 90-day notice and election period to 180 days
- Notice of Consequences of Failure to Defer
 - Plan amendment required if plan describes the notice requirements and does not reference this notice

Cycle D Filings

- Determination Letter Cycle Amendments
 - Cycle D is for employers with EINs that end in “4” or “9” that wish to file for a determination letter
 - *Plans must be amended to include items on the IRS’s Cumulative List*
 - *Plans must submit the determination letter application to the IRS by January 31, 2010*

Posting Your Form 5500 Filing

- Annual reports must be made available to plan participants and by the DOL
 - The Pension Protection Act of 2006 requires that, beginning with the 2008 Form 5500 filings, the DOL post on its website the actuarial pension funding information filed as part of a pension plan's Form 5500 filing
 - *This information will be searchable by EIN, PN, PY, and type of actuarial schedule*
 - If a plan sponsor maintains an intranet website for the purpose of communicating with employees only, the PPA requires that plan sponsors post the actuarial pension funding information on the plan sponsor's intranet website

2010 Pension Plan Limitations

- Although the cost of living index for the quarter ending September 20,2009 is less than the cost of living index for the quarter ending September 20,2008, this decrease in the index does not result in any reduced limitations
 - ***Limits remain unchanged for 2010***
 - **Elective Deferrals will be \$16,500**
 - **Catch-up contributions will remain at \$5,500**
 - **415(c)(1)(A) limits remain \$49,000**
 - **Annual compensation limit remains at \$245,000**
 - **Definition of key employee in a top-heavy plan remains at \$160,000**
 - **Definition of an HCE remains at \$110,000**
 - **Limitation on the annual benefit under a defined benefit plan remains unchanged at \$195,000**

Health and Welfare Issues

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Super Busy H&W Year!

- Health Care Reform + :
 - Special enrollment rules
 - Mental health parity
 - Full-time student definition
 - Dependent definition
 - COBRA
 - Genetic nondiscrimination rules
 - HITECH

Special Enrollment Rules

Children's Health Insurance Program Reauthorization Act of 2009 (CHIP)

- Creates new HIPAA special enrollment rules related to:
 - Losing eligibility for Medicaid or CHIP
 - Becoming eligible for new premium assistance
- Note 60-day period—not the usual 30

Mental Health Parity

Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008

- Full parity between mental health/substance abuse and medical/surgical benefits
 - Completes half-step taken with original MHP rules
- Not required, but must be equal when offered
- What is “predominant”?

Mental Health Parity

- Clearly applies to deductibles, copayments, coinsurance, out-of-pocket costs or “separate cost sharing requirements”
- Also visit frequency, # of visits, days of coverage or other limits on scope or duration
- Medical management techniques still permitted

Mental Health Parity

- Must mirror out-of-network medical/surgical terms
 - Is “Separate But Equal” acceptable?
- Scope of “mental health”?

Mental Health Parity

- Effective first plan year on and after 10.2.2009
- Regs delayed until 1.2010
 - Good-faith compliance in the interim
- Collective bargaining delay
- 2%/1% cost exemption
- Does not apply to plans with 50 or fewer employees
- Does not apply to retiree-only plans (unlike GINA)

Full-Time Student Definition

Michelle's Law

- Cannot terminate student coverage for up to one year when no longer full-time due to:
 - Medically necessary leave of absence with treating physician's certification
- Can still terminate coverage at maximum age
- Unclear how COBRA interrelates with new provision

Full-Time Student Definition (cont.)

- Update full-time student certifications
- Effective plan years beginning on and after 10.9.2009

Dependent Definition

Fostering Connections to Success and Increasing Adoptions Act of 2008

- Modifies Code Section 152 to change qualifying child rules
 - Must be younger than taxpayer
 - Cannot be married
 - Can be claimed by another if not claimed by parent (and income higher)
- Relevant for tax-free medical care and plan document, SPD, open enrollment and dependent audit purposes

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COBRA

American Recovery and Reinvestment Act of 2009 (ARRA)

- 65% subsidy for COBRA premiums for 9 months if medical coverage lost due to “involuntary termination of employment”
- Employers reimbursed through holdbacks from payroll tax deposits!
- Subsequent IRS releases paint expansive picture of “involuntary”

COBRA (cont.)

- Simple idea—complicated administration:
 - Second-chance elections
 - New elections
 - Revised notices
 - Modified invoices
 - New payroll interactions
 - Adverse income tax consequences to ineligible individuals

COBRA (cont.)

- 2010 Open Enrollment implications
 - New benefits
 - New dependents
- Sunsets 12.31.2009(?)
 - Congress must act by end of October since December COBRA bills go out in early November

Genetic Nondiscrimination Rules

Genetic Nondiscrimination in Health Insurance Act (GINA)

- Cannot use “Genetic Information” for hiring, firing, promotions, job assignments
- Group health plans and insurers cannot base eligibility or premium determinations on “GI”
 - Cannot request or require genetic testing

Genetic Nondiscrimination Rules (cont.)

- Cannot request, require, or purchase GI for:
 - Underwriting or enrollment
 - *Traditional health risk assessments with incentives linked to enrollment or tail-end disease management now impermissible*
- New interim final regulations issued 10.7.2009
 - Effective plan years after 12.7.2009
 - http://www.morganlewis.com/pubs/EB_GINARegulations_LF_16oct09.pdf

HITECH

The Health Information Technology for Economic and Clinical Health Act (“HITECH”)

- Affirmative Notification of Breach Requirements
- Expanded Obligations of Business Associates (BAs)
- Guidance on “Minimum Necessary” Standard
- Prohibition on Sale of PHI
- Restrictions on Marketing
- Limited Application to Personal Health Records (PHR) Vendors
- Increased Enforcement and Penalties, including application to BAs

HITECH (cont.)

- Notification of breach requirements – general rule
 - If security of “*Unsecured PHI*” is “*breached*,” CE must provide notice without unreasonable delay and within 60 days after “*discovery*” of breach:
 - *To the Impacted Individual*
 - *To the Media*
 - *To HHS*
 - If BA discovers breach, notifies CE, or notification obligation shifted through BAA

HITECH (cont.)

- Expanded obligations of BAs
 - Under ARRA (effective February 17, 2010):
 - *BAs directly subject to certain Privacy and Security Rule obligations*
 - *BAAs need to be amended to incorporate new obligations*
 - *Civil and criminal penalties now apply directly to BAs*

HITECH (cont.)

- Increased enforcement mechanisms
 - Increased HHS Audits
 - “Willful Neglect” Standard (Effective Feb. 2011)
 - Enforcement by State Attorneys General (Effective Immediately)
 - Mechanism for Individual Compensation (Effective on or after Feb. 2012)
- Increased tiered penalties

Executive Compensation Issues

409A Compliance

- New 409A audit initiative underway
- 409A correction program offers special relief for operational errors applicable to “non-insiders” (individuals who are not Section 16 persons or their equivalent) and limited relief to certain “insiders”
- Certain relief options require action by 12/31/2009
- May also be possible to correct plan document defects for non-vested deferred compensation; however, opportunity will be lost for amounts vesting in 2010 if don't act by 12/31/2009

Questions?

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