EMPLOYEE BENEFITS DEVELOPMENTS MARCH 2015

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Agency Guidance

IRS Releases Initial Guidance on "Cadillac Plan" Tax. The Internal Revenue Service recently issued Notice 2015-16, intending to initiate and inform the process of developing regulatory guidance regarding the excise tax on high-cost employer-sponsored health coverage. The Affordable Care Act added Section 4980I to the Internal Revenue Code. This provision, scheduled to become effective in 2018, states that if the aggregate cost of applicable employer-sponsored coverage exceeds a statutory dollar limit, the excess will be subject to a 40 percent excise tax. Although the effective date of this provision is still a few years away, this IRS guidance outlines some potential approaches with regard to a number of issues which may be incorporated in future proposed regulations. The issues addressed in the notice relate to the definition of applicable coverage, the determination of the cost of applicable coverage, and the application of the annual statutory limit to applicable coverage.

Applicable coverage is broadly defined to mean "with respect to any employee, coverage under any group health plan made available to an employee by an employer which is excludable from the employee's gross income under section 106, or would be excludable if it were employer-provided coverage." This includes coverage under insured and self-insured medical plans, health flexible spending accounts, health savings accounts, government plans, coverage for on-site medical clinics, retiree coverage, and multiemployer plans. The notice states that future guidance is expected to further expand this definition to include executive physical programs and health reimbursement arrangements.

The cost of applicable coverage is generally determined under the same rules that apply when determining the cost of the COBRA applicable premiums, including the use of the actuarial and past cost methods for determining cost for self-insured health plans. The notice also contains specific guidance regarding determining the cost of certain types of arrangements such as retiree coverage, health flexible spending accounts, and health savings accounts.

Finally, two annual dollar limits are described in the notice—one for an employee with self-only coverage and one for an employee with other-than-self-only coverage. The unadjusted baseline per-employee dollar limits for 2018 are $10,200 for self-only

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coverage and $27,500 for other-than-self-only coverage. Although the specific guidance regarding this tax on high-cost employer-sponsored health coverage is likely to change in the upcoming months, employers should begin to consider their plan design options so that they may continue to provide the necessary coverage and avoid this additional expense.

DOL Issues Final Regulations on Annual Funding Notice Requirements for Defined Benefit Plans. The Department of Labor (DOL) has issued final regulations regarding the annual funding notice requirement for single employer and multiemployer defined benefit plans under Employee Retirement Income Security Act of 1974 (ERISA) Section 101(f). The annual funding notice is provided to plan participants and beneficiaries to inform them of the financial status of the defined benefit plan. These final regulations generally follow the proposed regulations issued in November 2010. Some differences from the earlier proposed regulation include:

- Terminating single employer plans are exempted from furnishing the funding notice.
- Alternative methods of compliance are permitted for multiemployer plans terminating by reason of mass withdrawal.
- Rules allowing non-disclosure of material events if they first become known within 120 days of the due date for filing the notice.

The final regulations do not address certain guidance which has been issued by the DOL which modifies the required notice content to describe statutory funding relief because the relief is viewed as a temporary item. However, those DOL guidance items must be continued to be taken into account when providing notices. The final regulations are effective for plan years beginning on or after January 1, 2015, which means they apply to notices that would be first given in calendar year 2016. Plan administrators may adopt the rules contained in the final regulations at an earlier date. (ERISA Reg. § 2520.101–5 http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28049)

IRS Announces No Refunds of FICA Tax on Severance Payments. Following up on last year's unanimous decision by the U.S. Supreme Court in *United States v. Quality Stores, Inc.*, the Internal Revenue Service announced in February that it would disallow all claims for refund of Social Security and Medicare (FICA) taxes paid on severance payments, unless the payments satisfy a narrow exclusion previously carved out for certain supplemental unemployment benefits. The U.S. Court of Appeals for the Sixth Circuit had previously held that the severance payments paid to terminated employees of Quality Stores following the company's Chapter 11 bankruptcy were not wages for FICA purposes (*In re Quality Stores, Inc.* (6th Cir. 2012)). In the wake of the 2012 Sixth Circuit decision, numerous claims for refund of FICA taxes paid in connection with severance payments were filed with the IRS. Pending final resolution of the Quality Stores case, the IRS had temporarily suspended all action on claims for refund connected with severance.

With the issuance of Announcement 2015-08, the IRS is now putting to rest all claims and appeal requests based on the overturned Sixth Circuit decision that there will be no refunds of FICA taxes on claims filed by taxpayers located within the Sixth Circuit and no further action on appeal requests that were previously suspended. Claims for refund under those requests are "fully disallowed," based on the Supreme Court's ruling that such severance payments are wages for FICA tax purposes. The announcement notes, however, that if an appeal request included a different basis for the claim (such as a claim for refund of FICA taxes paid on certain fringe benefits) or concerned payments that satisfy the requirements outlined in Revenue Ruling 90-72, the request may be permitted to move forward. Under Revenue Ruling 90-72, supplemental unemployment compensation benefits that are linked to the receipt of state unemployment compensation and satisfy

certain other requirements are excludable from wages for FICA purposes. Taxpayers who may qualify for the exception are advised to contact the IRS for information on how to proceed with the appeal request for that portion of the disallowed claim. IRS Announcement 2015-08.

Cases

Court Enforces Health Plan's Anti-Assignment Clause. Three outpatient surgical centers provided medical services to a participant in a group health plan covered by ERISA. Before performing any medical services for the participant, the surgical centers contacted the plan's administrator to confirm that the services were covered under the plan. While the surgical centers understood that the services would be covered by the plan, the administrator was "vague" as to what amount would be paid by the plan for the services. The plan paid only $3,914.44 of the $180,400.00 that the surgical centers requested be paid.

As part of the participant's agreement with the surgical centers, the participant agreed to assign any rights the participant had under the plan to the surgical centers. However, the plan contained an anti-assignment provision that prohibited a participant from assigning coverage or benefits under the plan. The surgical centers were unaware of the plan's terms.

In a lawsuit brought by the surgical centers to recover benefits under the plan, the U.S. District Court for the Central District of California upheld the plan's enforcement of the anti-assignment provision, based on the existence of binding Ninth Circuit precedent holding that anti-assignment provisions in ERISA-covered welfare plans are enforceable.

The district court also dismissed the surgical centers' cause of action for promissory estoppel. In particular, the lack of any clear promise of full payment for the services rendered defeated any claim for promissory estoppel. (*Pain Mgmt. Specialists v. Blue Shield of Cal. Life & Health Ins. Co.*)