CLIENT ALERT

Employee Benefits Update

Feb.09.2009

All three branches of the Government have been busy in the employee benefits field in early 2009, taking actions that will necessarily complicate the tasks of plan administration and legal compliance going forward. The Supreme Court has redefined how plans will have to deal with benefit waivers and QDROs, Congress has added new ERISA requirements while passing child health care legislation, and the Obama Administration has put a hold on regulations that would have provided important guidance under ERISA's reporting, disclosure and prohibited transaction provisions. All this, and the economic stimulus bill (which is likely to contain significant employee benefits provisions) is yet to come! Because the actions described below have already occurred in 2009 and will likely require immediate action on the part of employers, plan sponsors and insurance companies, we are publishing this alert now rather than waiting for the passage of the stimulus package. We will, of course, continue to monitor the progress of benefits-related changes in the stimulus bills and will alert you about them upon passage.

1. ERISA Expansions in the CHIPS Act of 2009

The Children's Health Insurance Program Reauthorization Act of 2009 not only extends health coverage to millions of uninsured children, but also expands enrollment rights and reporting and disclosure obligations under ERISA-covered group health plans. The Act requires employers, plan sponsors and group health plan insurers to amend their plans to permit employees a new enrollment opportunity whenever an employee (or his or her dependent children) either loses coverage under Medicaid or a state child health assistance program (and, therefore, may need private plan coverage in order to avoid becoming uninsured), or when he or she becomes eligible for premium payment assistance under either Medicaid or a state assistance program (and, therefore, may be able to pay a portion of the coverage premium that he or she could not previously afford). The Act also requires employers to (a) provide employees with state-specific information about Medicaid or state child health care assistance programs and (b) cooperate with state requests for plan information where plan participants are enrolled in state assistance programs. While all of these new requirements are effective April 1, 2009, the Act does not require publication of model reporting and disclosure forms until 2010 at the earliest, so employers, plan sponsors and insurers will face a period of significant uncertainty in complying with these new requirements.

2. Supreme Court Decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*

Upsetting settled plan administrative practice, the Supreme Court determined that an ex-spouse in a divorce proceeding may waive his/her rights to a benefit under the former spouse's retirement plan even if that waiver is not contained in a "qualified domestic relations order" ("QDRO"). Any such waiver would, however, be valid only if it did not conflict with specific provisions in the plan documents regarding the designation and changing of beneficiaries. This "Plan Documents Rule" places a premium on specific plan provisions governing waivers or beneficiary designations. More importantly, the Court indicated that a domestic relations order that was not a QDRO, and that thus would have historically been preempted, could nevertheless be given full force and effect under federal common law. This is a novel approach to preemption that could affect plan administration and litigation in many related areas.

3. White House Regulatory Review Delays Pending ERISA Regulations

On January 20, 2009, Rahm Emanuel, the Chief of Staff to President Obama, issued a memorandum to all federal departments and agencies, directing them to withdraw or halt all new or pending regulations until the new administration has a chance to conduct a legal and policy review of each pending matter. The memorandum directs federal departments and agencies to (1) not send proposed or final rules to the Office of Management and Budget ("OMB") until the rules have been approved by an agency head appointed by President Obama; (2) withdraw all Federal Register notices (both proposed and final) that have been submitted to the Office of the Federal Register but have not yet been published; and (3) consider extending by 60 days the effective date of all rules that have already been published in the Federal Register but have not yet taken effect (if such an extension is taken, the memorandum directs that the notice-and-comment period should be reopened for 30 days). There are at least three separate employee-benefits-related regulations that have been impacted by this memorandum, all of which originated at the Department of Labor. First, two final regulations on fee disclosure to plan fiduciaries by service providers and to participants, both of which had been sent to OMB in final rule form for review and approval but had not yet been released by OMB or sent to the Office of the Federal Register by January 20, will be withdrawn to allow for review and approval by President Obama's appointees. No time frames for such review have been established, so it is unclear when we might hear more on these issues. Second, the effective date of DOL's final rule on investment advice to participants and beneficiaries, which was published in the Federal Register on January 21 and which was scheduled to be effective March 23, has been extended to May 22, and comments have been requested on the merits of rescinding, modifying, or retaining the final rule. This rule has drawn some sharp criticism, including from House Education and Labor Committee Chairman George Miller (D-Calif.), and it is unclear at this time whether it will survive in its current form. We will continue to monitor the status of these rules, as well as new rules and guidance, in what promises to be a busy year on the employee benefits front.

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