

Employee Benefits Year-End Action Items

This e-Alert lists certain new requirements affecting qualified retirement plans, 403(b) plans, and health and welfare plans that may require action by year end or early in 2010. In some cases, action is required before year end.

Qualified Retirement Plans

- **Pension Protection Act of 2006 (“PPA”) Amendments.** The PPA made a number of mandatory and optional changes affecting qualified retirement plans. These changes include (but are not limited to), for defined contribution plans: new rules regarding vesting of non-elective employer contributions, rollovers, automatic enrollment provisions, and military leave distributions; and for defined benefit plans: new rules regarding cash balance plans, required actuarial assumptions for cash-outs, benefit restrictions on underfunded plans, extended notice and consent periods for distributions, joint and survivor annuity options, and rollovers. Although most of these PPA changes became effective in 2007 or 2008, the deadline for amending plans to comply with these changes is generally the last day of the first plan year beginning on or after January 1, 2009 (i.e., December 31, 2009 for calendar year plans). This deadline applies to both individually designed plans and pre-approved plans (i.e., prototype and volume submitter plans).
- **Plan Restatements and IRS Determination Letter Filings for Certain Individually Designed Plans.** Under the IRS determination letter program, in order to have a current determination letter for an individually designed plan, the employer must restate the plan and apply for a determination letter at least once every five years, during a specific filing cycle. The applicable filing cycle generally depends upon the last digit of the sponsoring employer’s employer identification number (“EIN”), although there are some exceptions, notably for new plans, multiple employer plans, and controlled groups that have elected to have all of their plans on the same filing cycle. The current filing cycle (Cycle D) applies to plans sponsored by employers whose EIN ends in 4 or 9 and runs from February 1, 2009 to January 31, 2010. Sponsors of Cycle D plans that wish to have an IRS determination letter for the plan must restate the plan and submit it to the IRS by January 31, 2010. (Non-calendar year plans may have a later deadline.)
- **EGTRRA Restatements and IRS Determination Letter Filings for Pre-Approved Defined Contribution Plans.** The IRS requires that pre-approved plans (i.e., prototype and volume submitter plans) be amended and restated (and, if an IRS determination letter is desired, submitted to the IRS) once every six years. For pre-approved defined contribution plans, the deadline for adopting (and submitting) an amended and restated plan (generally referred to as an “EGTRRA restatement”) is April 30, 2010. (The restatement and determination letter filing deadline for pre-approved defined benefit plans has not yet been set.) Employers that maintain a defined contribution prototype or volume submitter plan and have not yet received a restated “EGTRRA” plan document or the PPA amendments referred to above for such plan should contact their plan provider.
- **Waiver of 2009 Required Minimum Distributions from Defined Contribution Plans.** Participants over age 70½ and beneficiaries of deceased participants are subject to certain IRS minimum distribution requirements. As a result of the Worker, Retiree, and Employer Recovery Act of 2008 (“WREERA”), any such minimum distributions which otherwise would have been required from a defined contribution plan for 2009 are waived. (This waiver does not apply to defined benefit plans or to minimum required distributions for 2008 that are

made in 2009.) Plan amendments to reflect this waiver are generally not required until the last day of the first plan year beginning on or after January 1, 2011.

Because the IRS did not issue guidance on how to comply with this provision until September 24, 2009, it has given plan sponsors until November 30, 2009 to change their plan operation, if necessary, to comply with this guidance. In addition, the IRS has extended the deadline for participants to roll over any 2009 required minimum distributions which have already been distributed from a defined contribution plan until November 30, 2009 (or 60 days after the distribution, if later).

- **Non-Spouse Beneficiary Rollovers.** The PPA allowed (but did not require) plans to offer non-spouse beneficiaries the option to roll over a death benefit to an “inherited” IRA. The WRERA made this change mandatory effective with the first plan year beginning on or after January 1, 2010. Plans that have not already added this provision must do so in operation by the first day of the 2010 plan year. Plan amendments adding this non-spouse rollover provision in the 2010 plan year should not be required to be adopted until 2011. However, if this provision was put into effect before the 2010 plan year, the amendment must be adopted by the last day of the 2009 plan year.
- **Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART Act”).** The HEART Act made a number of mandatory and optional changes affecting retirement plan benefits of participants on military leave, some of which are effective retroactive to 2007. Although plans must operate in accordance with these changes from their effective dates, plan amendments to comply with these changes are generally not required until the last day of the first plan year beginning on or after January 1, 2010.
- **Participant Benefit Statements for Defined Benefit Plans.** The PPA changed the content and timing requirements for participant benefit statements. In the case of a defined benefit plan, benefit statements must now be issued to active, vested participants at least once every three years unless a notice has been distributed to participants annually (beginning in 2007) informing them of the right to request a benefit statement. If this alternative notice method has not already been implemented and PPA-compliant benefit statements have not yet been distributed for a defined benefit plan, PPA-compliant benefit statements must be issued by the end of the 2009 plan year. (A delayed effective date may be available for collectively bargained plans.)
- **Intranet Posting Requirement for Defined Benefit Plans.** The PPA added a requirement that employers post certain Form 5500 information, including actuarial information in the case of a defined benefit plan (i.e., Schedule SB), on any intranet website maintained by the employer (or by the plan administrator on behalf of the employer) for the purpose of communicating with employees and not the public, in accordance with regulations prescribed by the Department of Labor (“DOL”). Employers that do not maintain such an intranet site are not subject to this requirement. The statute does not specify a deadline for this posting requirement, and the DOL has not yet issued any guidance on this requirement other than to state in the instructions to the 2008 Form 5500 that the actuarial schedule (Schedule SB) must be posted, without stating a deadline. In the absence of more specific DOL guidance, it would seem reasonable for the employer to post just the Schedule SB on its intranet within 90 days after the 5500 is filed (i.e., by January 13, 2010 for a 5500 filed October 15, 2009). An employer may choose to post the entire Form 5500, other than the Schedule SSA (which includes employee Social Security numbers).
- **New IRS Safe Harbor Tax Notice.** Plans are required to distribute a notice to participants and beneficiaries receiving eligible rollover distributions of the tax consequences of the distribution. This is sometimes referred to as a “tax notice” or “402(f) notice.” The IRS has in the past issued a “safe harbor” notice that could be used for this purpose. The IRS recently updated this safe harbor tax notice to reflect legislative changes since the last safe harbor tax notice was issued and to simplify the notice. For 401(k) plans with Roth accounts, there are now two new separate tax notices – one for Roth accounts and one for all other accounts.

Employers wishing to have a safe harbor tax notice for their plan should switch to the new notice(s) by January 1, 2010.

403(b) Plans

- **New Plan Document and Operational Requirements.** As a result of new IRS regulations, 403(b) plans must now have a written plan document and comply with a number of new operational requirements effective January 1, 2009. (A delayed effective date may be available for collectively bargained 403(b) plans.) The deadline for adopting plan amendments and conforming plan operation to comply with these new 403(b) requirements is December 31, 2009.
- **Expanded 5500 Requirements.** Effective with the Form 5500 for the first plan year beginning on or after January 1, 2009 (which generally must be filed in 2010), the rules that limited the reporting requirements for 403(b) plans have been eliminated. As a result, the Form 5500 for a 403(b) plan subject to ERISA must now report the same information as is required for qualified retirement plans (except that transition relief may be available for certain pre-2009 annuity contracts or custodial accounts to which contributions have not been made after 2008). Also, if a 403(b) plan has 100 or more participants, the Form 5500 will now generally have to be audited by an independent auditor. (Certain 403(b) plans under which there are no employer contributions are exempt from ERISA and therefore exempt from these new Form 5500 requirements.)
- **Other Operational Requirements.** The qualified plan operational requirements described above also generally apply to 403(b) plans.

Health and Welfare Plans

- **Michelle's Law.** Effective for plan years beginning on or after October 9, 2009, Michelle's Law requires almost all group health plans to extend dependent coverage for up to one year when a college student otherwise would lose eligibility because of a serious illness or injury that requires a medically necessary leave of absence or change in enrollment status (e.g., a switch from full-time to part-time student status). Plans must provide a notice describing the terms of such extension whenever any other notice regarding a requirement for certification of student status for coverage under the plan is distributed. Michelle's Law applies to almost all insured and self-insured group health plans that cover dependents and use student status to determine eligibility. Plan documents, summary plan descriptions, and other plan materials that describe eligibility for benefits should be updated by January 1, 2010 (for calendar year plans) to reflect the law's new requirements.
- **Genetic Information Nondiscrimination Act of 2008 ("GINA").** GINA generally prohibits group health plans and insurers from collecting genetic information for underwriting purposes or in connection with enrollment, and prohibits group health plans from adjusting premiums or contributions based upon genetic information. It also prohibits wellness programs from collecting genetic information (such as family medical history) as part of a "health risk assessment." Interim final regulations implementing GINA were adopted October 7, 2009 and are effective for plan years beginning after December 7, 2009. Plan sponsors should review their group health plans and procedures for compliance and should also contact their third-party plan administrators and insurers to confirm that they have not impermissibly set their rates based on genetic information and do not use genetic information for underwriting purposes. Special attention should be given to any wellness programs that include "health risk assessments" to make sure they are in compliance.
- **Mental Health Parity and Addiction Equity Act ("Parity Act").** The Parity Act was adopted in October 2008 as part of the stimulus package, and generally becomes effective for plan years beginning on or after October 4, 2009. The Parity Act generally provides that if an employer with more than 50 employees offers mental health and substance abuse disorder benefits in its group health plan, the plan cannot impose financial requirements or treatment

limitations on such benefits unless comparable limits apply to medical and surgical benefits. Plan sponsors should review their mental health and substance abuse disorder benefits to assure compliance with the Parity Act by January 1, 2010 (for calendar year plans).

- **HIPAA Notification of Privacy Breach.** On August 24, 2009, the Department of Health and Human Services (“HHS”) issued new rules regarding notification of breaches of “unsecured” protected health information under the HIPAA privacy and security rules. In the event of a breach, the covered entity must notify the individual “without unreasonable delay,” but no later than 60 days after the discovery of the breach. If the breach involves 500 or more individuals’ protected health information, the covered entity must also notify the media and HHS immediately. If fewer than 500 individuals are affected, the covered entity must log the breach and submit the log annually to HHS. This new rule took effect on September 23, 2009, and covered entities and business associates should update their HIPAA privacy policies and procedures accordingly.
- **Children’s Health Insurance Program Reauthorization Act of 2009 (“CHIPRA”).** CHIPRA reauthorized and extended the Children’s Health Insurance Program (“CHIP”) (formerly known as the State Children’s Health Insurance Program or “SCHIP”) through 2013. As part of the reauthorization, CHIPRA added a new HIPAA “special enrollment” right effective April 1, 2009. Group health plans must now permit eligible employees and dependents who are not enrolled for coverage to enroll during a 60-day special enrollment period if (i) the employee’s Medicaid or CHIP coverage is terminated as a result of loss of eligibility, or (ii) the employee or dependent becomes eligible for premium assistance subsidy under Medicaid or CHIP. Employers should update their group health plan documents and summary plan descriptions for these requirements.
- **Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART Act”).** In addition to the retirement plan changes described above, the HEART Act allows health care flexible spending account plans (“FSAs”) to offer distributions, referred to as “qualified reservist distributions” (“QRDs”), of unused account balances to certain reservists ordered or called to active duty for more than 180 days or an indefinite period. This provision became effective June 18, 2008. If an employer allowed QRDs from its healthcare FSA in 2008 or 2009, the FSA plan document must be amended by December 31, 2009. After 2009, QRDs can be offered only after the FSA has been amended to provide for them.

All Plans

- **Same-Sex Marriage.** Because federal laws (including the federal tax code and ERISA) currently do not recognize same-sex marriage, same-sex spouses cannot be treated as spouses for purposes of federal law provisions relating to spouses. Although legislation was proposed in September 2009 under which federal laws would recognize same-sex marriage, at this point it is not certain whether or when this or similar legislation will be enacted into law. Employers who have not already addressed the treatment of same-sex marriage under their benefit plans should do so now.
- **Mandatory Electronic Filing of Forms 5500.** All Forms 5500 for the 2009 plan year (which generally must be filed in 2010) will need to be filed electronically. To do so, employers will need to use either a web-based application available on the DOL’s website or approved vendor software.

This e-Alert is for informational purposes only and is not intended as legal advice. For more information about these requirements or Hughes Hubbard’s employee benefits practice, please contact any of the following attorneys:

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