

Year End Benefits Alert

Action by year-end is required for each of the following types of benefit plans:

- All *cafeteria plan documents* (including premium only plans and flexible spending account plans) must be amended or restated to comply with regulations that provide new rules for participation, employee elections and contributions (see www.ustreas.gov/press/releases/hp526.htm for details).
- Final regulations require all subject *deferred compensation arrangements* (severance plans, employment contracts, incentive compensation plans and other arrangements that defer receipt of compensation that the employer is legally obligated to pay into a subsequent tax year) to be amended or restated to comply with the provisions of Code Section 409A (see New Deferred Compensation Rules at www.benefitslawgroupofchicago.com/HTML/new-deferred-compensation-rules-2005.htm for details).
- All tax deferred annuity plans covering employees of tax-exempt organizations (*Section 403(b) plans*) must be amended or restated to comply with regulations that generally require 403(b) plans to operate more like 401(k) plans (see Benefits Bulletin “Proposed 403(b) Regulations” at www.benefitslawgroupofchicago.com for details). All existing 403(b) arrangements (including those which are ERISA-exempt) must be documented with a written plan that satisfies all applicable requirements. In addition to plan revisions, other matters involving plan service providers also require attention (see Section 403(b) Final Regulations: A Compliance Outline at www.benefitslawgroupofchicago.com/PDF/2008/403b-compliance-outline.pdf).
- Regulations proposed by the Department of Labor that are expected to be finalized before the end of this year will require specific participant fee and performance disclosures for all participant-directed *individual account plans* (that is, retirement plans which allow participants to direct the investment of their own accounts). Any failure to comply with the regulations, when finalized, will be a breach of duty by plan fiduciaries. The required participant disclosures apply generally to all fees and expenses incurred by the plan (not the plan sponsor) and

are illustrated by the Department of Labor model disclosure chart with sample information (www.dol.gov/ebsa/modelcomparativechart.doc).

- In addition to participant fee disclosures, plan administrators also must make fee and cost disclosures to the government on a new Schedule C to the Form 5500 annual report. Plan service providers (including third party administrators and recordkeepers) are required to make corresponding fee disclosures as a condition for their being able to provide services to retirement plan. These disclosures will tie into the new Schedule C to Form 5500. Existing service provider contracts will need to be amended before the end of the current plan year to require such fee disclosures and to satisfy other conditions specified in the proposed regulations (see item 3 of Section 403(b) Final Regulations: A Compliance Outline at www.benefitslawgroupofchicago.com/PDF/2008/403b-compliance-outline.pdf for some of the requirements for service provider contracts).

Required Action: Plan administrators and HR staff should be working right now with plan service providers and professional advisors to make the required changes in plan documents and service provider contracts. Formal document compliance by year-end must be the goal because retroactive plan changes may be prohibited.

Andrew S. Williams
330 N. Wabash Avenue
Suite 1700
Chicago, IL 60611
(312) 755-3145
awilliams@agdglaw.com
www.benefitslawgroupofchicago.com

Andrew S. Williams has practiced in the employee benefits and ERISA arena since ERISA was passed in 1974. He has been recognized by his peers through a survey conducted by Leading Lawyers Network as among the top 5 percent of employee benefit lawyers practicing in Illinois. He maintains a website at www.benefitslawgroupofchicago.com with additional updates, commentary and analysis of benefits and employment topics. The above material is intended for general information and promotional purposes, and should not be relied on or construed as professional advice. Under the Illinois Rules of Professional Conduct, the above information may be considered advertising material. The transmission of this information is not intended to create, and receipt of it does not create, a lawyer-client relationship.