

2011 YEAR-END COMPLIANCE CHECKLIST

Looking ahead, it is not too early for employers, benefit plan administrators, HR professionals and plan service providers to consider compliance issues that require attention by the end of 2011. There are challenging new disclosure requirements for both group health and retirement plans as well as interim amendments to retirement plan documents that need to be considered now.

The highlights of pending compliance requirements include:

Group Health Plans

In addition to the annual participant coverage notices required by the Women's Health and Cancer Rights Act (WHCRA), the notice of grandfathered plan status under PPACA (if applicable) and the Medicare Part D notice of creditable (or non-creditable) private drug coverage, new notice requirements need to be considered:

- Under PPACA (the Patient Protection and Affordable Care Act), new internal and external claims review and appeal procedures, including new participant notice requirements, will apply to non-grandfathered plans as of the end of the year. Outside Independent Review Organizations may have to be retained by that date. For employers in Kane County, Illinois (the only Illinois county currently affected by PPACA's alternative language requirement), participant notices will have to contain a notice in Spanish. Details are [here](#).
- Effective March 23, 2012, a four page (double-sided) summary of benefits and coverage ("SBC") will be required in addition to material currently included in the plan's summary plan description. A separate notice will be required for each "benefit package" offered under a group health plan even though proposed regulations do not define a separate "benefit package." Both insured and self-insured plans of private employers, governments and church plans will need to meet this requirement. The new notice must be distributed to participants and beneficiaries by the March 23 date and at initial enrollment as well as special enrollment and annual open enrollment periods. Second language requirements similar to those applicable to PPACA claims review and appeal procedures mentioned above also apply. A model notice for insured plans has been published on the Department of Labor ("DOL") website. Because the statutory requirement expressly applies to insurance companies, it is expected that they will provide the notice for employers with insured plans. For self-funded plans, third party administrators (TPAs) are likely to provide the notice, but plan administrators have the legal responsibility for compliance. A model notice for self-funded plans has not yet been published by the DOL but may be included in final regulations which have not yet been issued.

Retirement Plans

1. Update Amendments

Qualified retirement plans need to be amended by the end of the year for compliance with the optional suspension of required minimum distributions (RMDs) for 2009 in accordance with the Pension Protection Act of 2006 and, for defined benefit plans, to incorporate benefit restrictions that apply for plans that are less than 80 percent funded. Section 401(k) plans that permit Roth deferral contributions also may adopt optional provisions allowing “in-plan Roth rollovers.” All individually designed plans (those other than pre-approved plans) of employers with Federal Employer Identification Numbers ending in “1” or “6” (Cycle A filers) will want to file determination applications with the IRS by January 31, 2012 (note that the minimum “user fee” increased during 2011 from \$1,000 to \$2,500). More specific retirement plan compliance responsibilities include:

- Sponsors of Section 403(b) plans (tax-exempt and government organizations) should consider adopting an interim amendment during the current year because the pending IRS 403(b) model plan document program is not yet available.
- Cash balance and hybrid plans require their own specialized plan amendments by December 31, 2011 in order to maintain compliance with final regulations applicable to those plans.
- Sponsors of retirement plans invested in publicly traded employer securities (but not Employee Stock Ownership Plans) will need to comply with the new “diversification” requirements of Section 401(a)(35) of the Internal Revenue Code by December 31, 2011.
- Also, for some sponsors of health reimbursement arrangements (HRAs), an option to fund a new health savings account (HSA) program with a one-time “rollover” of benefits from the HRA to the HSA expires on December 31, 2011.

2. Fee Disclosure Regulations

All sponsors of ERISA retirement plans and all retirement plan service providers who receive compensation, directly or indirectly, from such plans in amounts that can be expected to exceed \$1,000 will have to comply with the provider compensation and fee disclosure rules and the participant fee disclosure rules of DOL regulations under Section 408(b)(2) of ERISA. These regulations will require virtually all existing service agreements between plans and service providers (including investment advisors, fiduciaries, as well as recordkeeping and brokerage service providers to self-directed individual account plans) to be supplemented or revised by April 1, 2012. Even accountants, actuaries, banks and insurance brokers who provide plan services and expect to receive “indirect compensation” (such as “revenue sharing”) are subject to the fee disclosure requirements.

New participant notice requirements will apply to employers with self-directed plans and will include both an initial fee disclosure and a follow-up quarterly disclosure. For calendar year plans, the initial participant fee disclosures will need to be made by May 31, 2012 (60 days after

the April 1, 2012 effective date of the regulations) and the first quarterly participant fee disclosures will be due by August 14, 2012 (this is 45 days after the end of the second quarter in which the initial disclosures are required). Remember that the fee disclosure regulations are intended in part to assist plan fiduciaries in evaluating fees charged to a covered plan. Under ERISA, those fees must be “reasonable” in amount, and plan fiduciaries have the duty to determine that any such fees are reasonable.

3. Revised Benefit Limits

Retirement plan sponsors should be aware of the new benefit limits for 2012 (unlike last year, some limits will increase):

| | |
|---|-----------|
| Contribution Limit for Defined Contribution Plans | \$50,000 |
| Maximum 401(k), 403(b) and 457(b) Contribution | \$17,000 |
| Age 50 and Older Catch-Up Contribution Limit | \$5,500 |
| Annual Benefit Limit for Defined Benefit Plans | \$200,000 |
| Maximum Compensation Limit | \$250,000 |
| Highly Compensated Employees Earning Threshold | \$115,000 |
| Key Employee Officer Compensation Threshold | \$165,000 |

Court Decisions

The *Howell* decision makes it clear, at least in those states subject to rulings of the U.S. Court of Appeals for the Seventh Circuit (Illinois, Wisconsin, and Indiana), that a properly drafted participant release signed at the time of a retirement plan distribution can relieve employers from liability for claims to additional benefits, including claims based on breach of fiduciary duty. For details, see [here](#).

Finally, the Fifth Circuit Court of Appeals decision in *Brown, et al. v. Continental Airlines, Inc., et al.* holds that COBRA administrators do not have to investigate the circumstance surrounding a participant’s divorce to see if it is a sham intended to trigger a benefit distribution to the ex-spouse that otherwise would not be permitted under the plan. The participants in *Brown* did just that, and following the distribution of 100 percent of the accrued benefits to the former spouse pursuant to an otherwise legitimate domestic relations order, they remarried. The plan administrator sued to recover the benefits, and the Court held that the sham transaction doctrine applicable under the tax and bankruptcy laws did not apply to qualified domestic relations orders (QDROs). To hold otherwise would require private entities, such as plan administrators, to make a determination requiring an independent investigation of employees’ private lives. So, for those employees who do not qualify for a hardship distribution or participant loan, they may be able to access their benefits by means of a divorce, at least in the Fifth Circuit (be sure to read the plan document in advance because qualified plans are not

required to make a distribution pursuant to a QDRO until a participant not otherwise in pay status attains age 50). However, QDRO administrators need to be careful, because there is DOL authority suggesting that administrators have a duty to disclose information about a suspect QDRO to the issuing court for its determination as to the order's authenticity. Accordingly, advice from competent counsel would be in order for any QDRO administrator confronted with allegations of a sham divorce.

Recommendations: Make sure appropriate plan amendments are formally adopted by the end of the year. For 2012, get ready for a number of new notice requirements. As to the fee disclosure regulations, plan service providers will need to supplement or replace their existing service agreements with covered plans. Also, fiduciaries of subject retirement plans should document their determination that compensation and fees charged to retirement plan participants (including management fees that reduce a fund's earnings but are not separately charged to their accounts) are reasonable in amount. Finally, the new SBC disclosure requirements, which apply to both grandfathered and non-grandfathered group health arrangements, need to be satisfied by March 23, 2012.

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 Leadings Lawyers Network as among the top 5 percent of Illinois lawyers in Small, Closely and Privately Held Business Law and Employee Benefits Law. 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.