

# Benefits Alert

December 2010

## Health Plans Get Internal Appeals Enforcement Safe Harbor

New group health plans and grandfathered plans, including self-insured plans, that lose their grandfathered status must comply with a new regulatory system for internal appeals for employees whose benefit claims are denied. However, because some plans have found that compliance with this new system is more onerous than anticipated, the federal government has issued a Technical Release that establishes an enforcement safe harbor through July 1, 2011.

### PROVISIONS SUBJECT TO THE SAFE HARBOR

Under the regs, group plans and health insurers offering

group coverage must comply with ERISA's current claims procedures for adverse benefit determinations, plus six new elements. The enforcement safe harbor encompasses three of the six elements, and applies to plans that are working in good faith to implement all six elements.

- **Notification of urgent care claims.** Under the regs, plans must notify employees of a favorable or adverse benefit determination as soon as possible, taking into account medical exigencies, but not later than 24 hours after the plan receives the claim, unless the employee fails to provide sufficient information to determine whether, or to what extent, benefits are

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covered or payable. *Contrast:* The current ERISA claims procedure, which still applies under the safe harbor, generally requires a determination not later than 72 hours after the plan receives the claim.

- **Notice requirements.** The regs require that employees receive notices that are culturally and linguistically appropri-



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## Time Is Running Out For Cafeteria Plan Amendments

**Y**ou have only until December 31, 2010, to amend your cafeteria plan to conform it to provisions contained in the health care reform law. Employers eligible for so-called SIMPLE cafeteria plans must also make amendments by that date.

### MUST-DO AMENDMENTS

New group health plans and grandfathered group health plans that are part of cafeteria plans must be amended to allow employees to continue to cover their adult children until they turn 26. The IRS has already said that cafeteria plan amendments related to pre-tax coverage, including amendments to allow health flexible spending account (FSA) plans to cover adult children until age 26, may be made retroactively, but the last day for retroactive amendments is December 31, 2010.

Cafeteria plans must also be amended to account for new restrictions on FSAs, health reimbursement accounts (HRAs), and health savings accounts (HSAs). Beginning January

1, 2011, FSAs, HRAs, and HSAs will no longer be able to reimburse employees for over-the-counter medicines, unless they have prescriptions for those items. *Break:* Amendments must be made by June 30, 2011; the amendment may be made effective retroactively for expenses incurred after December 31, 2010. Remember to communicate this change to employees, so they can adjust their 2011 pre-tax contributions.

Similarly, beginning January 1, 2013, the amount that employees can defer into their FSAs will be capped at \$2,500. You have some time for this amendment, but for efficiency's sake, you can make all amendments now.

### SIMPLE CAFETERIA PLAN AMENDMENT

Beginning January 1, 2011, the health care reform law allows employers with an average of 100 or fewer employees during either of the two preceding years to adopt SIMPLE cafeteria plans, which contain a safe harbor from non-discrimination tests. Qualified employers must

amend their cafeteria plans to conform to statutory requirements.

SIMPLE cafeteria plans must satisfy minimum eligibility and contribution requirements, and minimum flex-credit contribution requirements. Flex credits are non-elective employer contributions that are made available to employees who are eligible to participate in the SIMPLE cafeteria plan; employees use flex credits to buy qualified benefits (but not cash or taxable benefits).

The minimum eligibility requirement is met if all employees, including leased employees, are eligible to participate and are able to elect any benefit available under the plan. These employees may be excluded from participating in the SIMPLE plan.

- Employees who haven't yet turned 21 years old (or a younger age) before the end of the plan year.
- Employees who worked fewer than 1,000 hours for the preceding plan year.
- Employees who have less than one year of service as of any day during the plan year.
- Employees who are covered under a collective bargaining agreement.
- Employees who are non-resident aliens working outside

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## Health Plans Get Internal Appeals Enforcement Safe Harbor (cont.)

ate. Again, plans must comply with the notice requirements of ERISA's current claims procedure.

• **Strict compliance.** If plans fail to strictly comply with all the requirements of the internal claims and appeals

process with respect to a claim, the regs allow the employee to be deemed to have exhausted the internal claims and appeals process, regardless of whether the plan substantially complied or whether the error was *de minimis*.

The safe harbor doesn't apply to rescissions of coverage, full and fair review of adverse decisions, and conflicts of interest.

States are similarly encouraged to extend this enforcement safe harbor to group plans under their jurisdiction. ♦

## Mini-Med Plans May Get A Break From Medical Loss Ratio Rules

Under the health care reform law, group health insurers (including grandfathered plans) must provide enrollees a rebate on a pro-rated basis equal to the amount by which premium revenue spent on non-claims costs exceeds 20% in the small group market and 15% in the large group market. This is called the medical loss ratio. *Problem:* Mini-med plans, which cover part-time, seasonal, and high-turnover positions, won't be able to meet these standards because of their high expense structure relative to the lower premiums charged. *Immediate impact:* Employers with mini-med plans are in limbo, since they're now making decisions for the 2011 plan year.

### SENSITIVITY IS THE WATCHWORD

There is some concern that insurers that offer mini-med plans will simply pull their plans from the market. And there is some precedent for

this — some insurers of child-only plans recently pulled their plans, stating that the health care reform law created uncertainty regarding the ban on pre-existing condition exclusions for children under 19.

To prevent a similar occurrence, Jay Angoff, director of the Office of Consumer Information and Insurance Oversight within the Department of Health and Human Services (HHS), has acknowledged that the HHS will use its discretion to address the circumstances of mini-med plans in the soon-to-be-released medical loss ratio final regulations. The HHS, said Angoff, has already exercised discretion by granting dozens of waiver requests to grandfathered plans, including mini-med plans, that impose annual limits lower than \$750,000. Medical loss ratio methodologies will be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans, he added. ❖

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### Time Is Running Out For Cafeteria Plan... (cont.)

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The minimum contribution requirement is met if, without regard to whether employees have pre-tax deductions made from their pay, employers provide flex credits equal to at least 2% of each eligible employee's compensation (i.e., *non-elective* contributions). Alternatively, the minimum matching contribution is the lesser of 100% of em-

ployees' pre-tax contributions or 6% of employees' compensation. Eligible employees are those who aren't highly compensated employees or key employees. *Caveat:* The minimum requirements aren't met if *matching* contributions for highly compensated or key employees are made at a greater rate than matching contributions for rank-and-file employees. ❖

## IRS Rolls Out 401(k) Questionnaire

How healthy is your 401(k) plan? The IRS really wants to know. The IRS's Employee Plans Compliance Unit recently sent letters and 70-question questionnaires to a random sample of 1,200 401(k) plans. The questionnaire is designed to gauge whether these plans are using available web-based tools to ensure that they remain in compliance. *Idea:* If you're not part of the 1,200-plan random sample, you can still use the questionnaire to self-audit your plan.

### PEEKING BEHIND THE QUESTIONNAIRE

The questionnaire is completed online at a secure website. While all plan sponsors received the same questionnaire, some questions may only apply to plans with particular features. The following topics are covered:

- demographics;
- participation;
- employer and employee contributions;
- top-heavy and non-discrimination testing;
- distributions and plan loans;
- other plan operations;
- automatic contribution arrangements;
- designated Roth features;
- IRS voluntary compliance and correction programs; and
- plan administration.

### COMPLIANCE TOOLS

The IRS will report the find-

## 401(k) News: 2011 COLAs Released

Employees who want to increase their pre-tax contributions into their 401(k) accounts next year are again out of luck; the maximum pre-tax contribution remains \$16,500 for the third year in a row. In addition to the unchanged 401(k) pre-tax contribution amount, the IRS has announced that there will be no cost-of-living increases to key pension figures for 2011. Here's the rundown.

### NEW YEAR, SAME AMOUNTS

The maximum pre-tax catch-up contribution employees can make into their 401(k)

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### IRS Rolls Out... (cont.)

ings on its website and enhance its web-based products, as necessary. The web-based tools at the heart of the questionnaire include the following.

- **401(k) Checklist.** This one-page document is the cover sheet to the Fix-It Guide. Its 10 brief questions help you focus on potential areas of non-compliance.

- **Fix-It Guide.** The 58-page 401(k) Fix-It Guide identifies potential mistakes, how to find them, how to fix them, and how to avoid similar mistakes. Links provide detailed background information. ❖

accounts remains \$5,500 for those who are 50 or older during 2011. Other pension amounts are as follows.

- The maximum annual defined benefit pension remains \$195,000.

- The overall pre-tax contribution, after-tax contribution, and employer matching contribution limit for 401(k) plans (also known as the Section 415 limitation) remains the lesser of 100% of compensation or \$49,000.

- The annual salary limit for figuring contributions into 401(k) plans remains \$245,000.

- The dollar limitation used to define a key employee

in a top-heavy plan remains \$160,000.

- The dollar limitation used to define a highly compensated employee remains \$110,000.

- The dollar amount for determining the maximum account balance in an employee stock ownership plan subject to a five-year distribution period remains \$985,000; the dollar amount used to determine the lengthening of the five-year distribution period remains \$195,000.

- The minimum compensation amount for employees participating in simplified employee pensions (SEPs) remains \$550.

- The maximum amount employees can defer on a pre-tax basis into a SIMPLE retirement account remains \$11,500. ❖

### Ask The Experts

**Q.** *An employee informed me that he wanted to contribute the maximum pre-tax amount into his 401(k) plan for 2009. Our third-party administrator made a mistake, however, and deferred less than the maximum. Can he contribute now, during the last month of 2010, to make up the difference, so that he can reach the 2009 maximum contribution limit?*

**A.** No. Employees' pre-tax contributions are counted in the year they would have received the salary in cash had they not made any pre-tax contributions. For technical tax reasons, the only way employees can make pre-tax contributions is by having their employers contribute part of their pay before they have access to it. If employees already received their paychecks, they can't contribute into the plan.