

# Benefits Alert

March 2009

## Plan Documents Control Pension Distributions, Supreme Court Rules

The U.S. Supreme Court has ruled that, in determining to whom pension benefits are payable after divorce, plan administrators must stick to the distribution provisions that are contained in the plan documents. The Court also ruled that a divorced spouse can waive his/her right to a pension distribution in a divorce decree. By providing a bright-line rule to plan administrators, this decision should ease distribution issues that often arise in the aftermath of a divorce. (*Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, U.S. Sup. Ct., No. 07-636, 2009)

### ONE MAN'S VERY UNHAPPY FAMILY

The pension plan allowed employees to designate beneficiaries and provided a mecha-

nism for changing those designations. As part of a divorce settlement, the non-employee ex-wife agreed to waive her right to receive pension benefits. However, the employee, her ex-husband, never filed the appropriate paperwork with the plan to designate a new beneficiary. The employee died and the plan administrator paid the benefits to the ex-wife, in accordance with the original beneficiary designation form.

The employee's daughter later sued her mother, the company, and the plan, arguing that her mother waived her rights to the benefits, which, under ERISA, should have been payable to her as the executrix of her father's estate. The court of appeals ruled for the ex-wife, concluding that the only way she could waive her benefits was through a qualified do-

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mestic relations order (QDRO). Since no QDRO existed, there was no waiver, the lower court concluded.

### QDROS NOT THE ONLY WAY

The Supreme Court tackled two issues. First, whether the appeals court was correct in ruling that QDROs were the only mechanism by which an ex-spouse could waive pension benefits. On this question, the Court overruled the appeals



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## Cycle D Remedial Amendment Period Opens For 401(k) Plans

To maintain their tax-qualified status, plan sponsors should submit their 401(k) plans to the IRS for a favorable determination, opinion, or advisory letter, depending on the type of plan (i.e., individually designed or pre-approved). The IRS has announced that the 12-month submission cycle for Cycle D filers — sponsors of individually designed 401(k) plans whose Employer Identification Numbers (EINs) end in a 4 or a 9 — opened February 1, 2009, and will close January 31, 2010. By the same token, the 12-month submission cycle for Cycle C filers — sponsors whose EINs end in a 3 or an 8 — closed

at the end of January, 2009.

### 2008 CUMULATIVE LIST

The amendments plan sponsors must make are identified each year in a Cumulative List. The IRS warned, however, that plans must comply with *all* relevant qualification requirements, not just those on the 2008 Cumulative List. Specifically, the 2008 Cumulative List reflects changes to the 401(k) rules made by these laws.

- The Economic Growth and Tax Relief Reconciliation Act of 2001 (with technical amendments made by the Job Creation and Worker Assistance Act of 2002).
- The Pension Funding Eq-

uity Act of 2004.

- The American Jobs Creation Act of 2004.
- The Gulf Opportunity Zone Act of 2005.
- The Katrina Emergency Tax Relief Act of 2005.
- The Pension Protection Act of 2006.
- The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007.

With respect to processing Cycle D determination letter applications, the IRS stressed that it won't consider the following:

- guidance published after October 1, 2008;
- statutes enacted after October 1, 2008;
- qualification requirements first effective in 2010 or later; or
- statutory provisions that

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## Plan Documents Control Pension Distributions, Supreme Court Rules (cont.)

court and answered no, an ex-spouse can waive pension benefits in divorce decrees. *Court:* A QDRO's purpose is to designate an alternate payee; it is not a waiver document.

Having established that the ex-wife waived her right to the pension benefits in the divorce decree, the second question was whether the plan administrator had to give effect to the waiver. Again, the answer was no. *Court:* Plan administrators must act in accordance with the plan documents. A straightforward rule of hewing to the plan documents lets employers establish a uniform administrative scheme with a set of standard procedures to guide the processing of claims and the

disbursement of benefits. The cost of less certain rules would be too plain. Plan administrators would be forced to examine numerous documents that might affect the distribution of benefits and be drawn into litigation. The pension benefits, therefore, were properly distributed to the ex-wife, the Court concluded.

### WHAT TO DO NOW

So, what would happen if a waiver in a divorce decree conformed to a plan's documents? The Supreme Court acknowledged that such a situation could exist, but the answer will have to wait for another day and, presumably, another Supreme Court decision. In

the meantime, review your plan documents to determine the beneficiary designation procedure, as well as whether the plan allows ex-spouses to waive pension benefits through a divorce decree. These questions may be pertinent during this review.

- Are beneficiary designation forms easy for employees to understand and complete?
- Do employees have ready access to these forms?
- Are employees periodically reminded (e.g., in summary plan descriptions) of the paperwork necessary to designate and change beneficiaries?
- Are copies of divorce decrees requested prior to pension distributions? ♦

## CMS: Hold The Paperwork, Please

The Centers for Medicare and Medicaid Services (CMS) remind employers and employees that they don't have to provide it with copies of certificates issued under the Health Insurance Portability and Accountability Act (HIPAA) or the Medicare Modernization Act (MMA).

### HIPAA CREDITABLE COVERAGE

HIPAA generally allows health plans to deny coverage to newly enrolled employees who have pre-existing medical conditions for a period of up to 12 months. Employees can reduce or eliminate this pre-existing condition exclusion period if they prove they had prior health coverage. To facilitate this, HIPAA requires that health insurers, group health plans, and/or employers issue certificates of creditable coverage when employees' health coverage ends. The certificate indicates the date on which

their coverage ends and how long they had the coverage. While these certificates are valuable to employees, the CMS doesn't need to have a copy of this certificate.

### MMA CREDITABLE COVERAGE

The MMA imposes a late enrollment penalty on individuals who don't maintain creditable drug coverage (i.e., coverage that is at least as good as Medicare Part D coverage) for a period of 63 days or longer following their initial enrollment period for the Medicare prescription drug benefit. The MMA mandates that group health plan sponsors and employers that offer prescription drug coverage disclose to all Medicare eligible individuals with prescription drug coverage whether their coverage is creditable. Individuals should retain this document for their records. Again, the CMS doesn't want a copy of this certificate. However, group health plan sponsors and

employers must notify the CMS regarding their drug coverage by completing an online Disclosure to CMS Form. ❖

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## Thinking About An Auto-Enrollment 401(k) Plan? Well, Here's Help

Traditionally, employees enroll in a 401(k) plan and designate the amount they want to contribute. With auto-enrollment 401(k) plans, employees are automatically enrolled into the plan and must opt out to receive their full salary. Certain auto-enrollment plans, called qualified automatic contribution arrangements, encourage plan sponsors to adopt them by rolling back some non-discrimination testing. Even so, auto-enrollment plans aren't a slam dunk and don't run on autopilot. A new 14-page booklet, written by the Department of Labor (DOL) and the IRS, reviews the benefits and burdens of these plans.

### STEP-BY-STEP INSTRUCTIONS

The booklet details the requirements a qualified automatic contribution arrangement must meet, including the qualified default investment alternatives into which employees' automatic contributions must be placed until they make affirmative investment decisions themselves. Plan sponsors'

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## Cycle D Remedial Amendment Period... (cont.)

are first effective in 2009 for which it has yet to issue guidance.

The Cumulative List also identifies amendments related to the Heroes Earnings Assistance and Relief Tax Act of 2008, or the HEART Act. Plans submitted in Cycle D can be amended, at the option of the plan sponsors, to include the HEART Act's provisions related

to death benefits, benefit accruals for participants who die or become disabled while performing qualified military service, and military differential pay. *Warning:* The IRS won't consider the HEART Act in issuing determination letters for Cycle D plans, and determination letters can't be relied upon with respect to the requirements of the HEART Act. ❖

## Are Your Benefits Programs Meeting Employees' Needs?

A simple question, which isn't quite so simple to answer. A corollary is, do employees understand the total value of their compensation and benefits? The two questions are related. If employees don't know the total value of their pay packages, they're more likely to say that their benefits don't match their needs for affordable health care or provide adequate retirement funding. Moreover, at a time when salary increases may be frozen, it's to your advantage to trumpet the company's benefits.

### WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE

According to the results of a Harris Interactive/Charlton

Consulting Group survey, 51% of full-time employees think their employers pick up 30% or less of the cost of health, life, disability, and retirement benefits. At the same time, their employers know they're paying 43% of those benefits. The survey also revealed that 75% of employees who said they were satisfied with their total pay packages knew quite a bit about the cost of their benefits.

Effective communication tools can bridge this gap. An annual overall total pay package communication itemizes each employee's benefits and the employer's share, in dollars and percentages. The statement can be included with employees' W-2 forms, which

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### Thinking About An Auto-Enrollment 401(k)... (cont.)

fiduciary responsibilities are also covered.

In addition, the booklet informs plan sponsors about how to set up and operate an auto-enrollment plan, the disclosures that must be made to participants, and annual reporting duties (to the DOL, IRS, and participants who opt out of the plan).

### OOPS

Every year, the IRS inflation-adjusts the amount employees can defer into a 401(k) plan on a pre-tax basis. Other amounts are inflation-adjusted, as well. The booklet, which was released

in mid-January, doesn't reflect the 2009 inflation-adjusted figures, however. On page 5, you'll have to make these changes.

- For 2009, the overall pre-tax contribution, after-tax contribution, and employer matching contribution limit to 401(k) plans, including auto-enrollment plans, is 100% of compensation or \$49,000.

- For 2009, the most employees can defer on a pre-tax basis into a 401(k) plan is \$16,500.

- For 2009, if your 401(k) plan provides, the maximum pre-tax, catch-up contribution for employees who are 50 or older is \$5,500. ❖

they usually receive at the end of January (mark your calendar for next January).

### MANAGING CHANGE WITH COMMUNICATION

Employees' benefits, especially health care, are going through wrenching changes. A study by Towers Perrin shows that companies' credibility takes a hit if communication isn't handled well.

- 42% of employees said that benefits changes negatively impacted their trust in management.

- 23% of employees said that benefits changes could spur them to look for new jobs.

- 25% of employees said that benefits changes negatively impacted their productivity and motivation to do a good job.

A second communication tool is targeted communications that convey information regarding changes in specific benefits. Multiple platforms, including e-mail, web postings, and meetings, are often used. At the outset, it's essential to get top management to buy into the change and for them to be the face of the change for employees.

Start off your targeted communications with a candid message regarding the reason for the change (e.g., the increases in health premiums), the company's mission, and the company's commitment to employees. The best tools are geared to employee demographics. In other words, messages that work for managers may not be as effective for rank-and-file employees. Personalized web-based tools that help employees compare their benefits pre- and post-change are also effective. ❖