

# Benefits Alert

April 2011

## Health Care Reform: Some Early Results Are In

The January votes in Congress to repeal the health care reform law notwithstanding, a pair of recent surveys gauges employers' and employees' responses to the year-old law. *Bottom line:* Most employers are not considering canceling health benefits as a result of the law.

### HEALTH BENEFITS STILL A KEY RECRUITMENT TOOL

A survey of more than 1,000 employers conducted by the International Foundation of Employee Benefit Plans revealed that 87% of employers said they were continuing to offer health benefits, which they identified as a key recruitment tool. Twenty percent extended benefits to employees' adult children before they were statutorily required to do so (i.e., for plan years beginning on

or after September 23, 2010), and 75% said that extending coverage impacted their costs. Other survey results include the following.

- 42% of employers also extended dental coverage to employees' adult children; 32% extended vision coverage.

- Only 4% of employers that had plans that utilized lifetime or annual limits removed those limits before the statutory deadline of plan years beginning on or after September 23, 2010.

- 21% of employers added or increased the visibility of high-deductible health plans, and 70% of those employers linked those health plans to tax-advantaged health savings accounts.

- 66% of employers will take advantage of the health care reform law's increase in

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wellness incentives — to 30% of the total cost of coverage (i.e., employer and employee contributions), from 20%.

- 52% of employers that have retiree health plans participate in the Department of Health and Human Services's reinsurance program for early retirees.

### NO AX TO NON-MEDICAL BENEFITS

Forty-three percent of em-



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## DOL Delays 401(k) Plan Fee Disclosure Regs

**4**01(k) plan fiduciaries must act prudently in selecting third-party service providers and ensuring that those providers receive only reasonable compensation from the plan. Interim final regulations, which were to become effective July 16, 2011, require third-party providers to disclose fee arrangements and conflicts of interest to plan fiduciaries. The Department of Labor (DOL) has announced that it needs more time to review comments on the interim final regs. Consequently, the regs will become effective January 1, 2012.

### OPEN-BOOK POLICY

The regs apply to service

providers who expect to receive at least \$1,000 in compensation from 401(k) plans in connection with these services:

- fiduciary or registered advisory services;
- record-keeping or brokerage services in connection with the plan's investment options; or
- services for which providers receive indirect compensation.

### MANDATORY DISCLOSURES

Service providers must make disclosures to plan fiduciaries in writing, but the regs don't dictate any formal requirements for those disclosures. They must describe the services they'll be

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providing and all direct and indirect compensation they will receive. Direct compensation includes compensation paid directly from the plan. Indirect compensation generally consists of compensation received from a source other than the plan, the service providers, and the service providers' affiliates or subcontractors.

Regardless of whether the services are bundled or provided as part of a package, and to guard against conflicts of interest, service providers must disclose whether they are providing record-keeping services and the compensation related to those services, even if no explicit charge for record-keeping is identified in the contract. Service providers must also state whether they are providing fiduciary services

## Health Care Reform: Some Early Results... (cont.)

ployers that participated in a MetLife survey responded that in the wake of the health care reform law, non-medical benefits—disability insurance, life insurance, and dental insurance—remain important elements in their overall corporate strategy. The MetLife survey also took the temperature of employees' attitudes toward these non-medical benefits and the health care reform law.

- 10% of employers with fewer than 500 employees are planning to reduce spending on non-medical benefits; the percentage increases to 20% for employers with 500 or more employees.

- 71% of employees who had a good understanding of the health care reform law

said that non-medical benefits are key to their loyalty toward their employer; the percentage drops to 57% for employees who lacked a good understanding of the law.

On the other hand, the law may be forcing small employers—those with fewer than 50 employees—to make changes in plan design. *Note:* Plans forfeit their grandfathered status if design changes impose or increase employees' co-insurance, decrease the employer's contribution by more than 5%, eliminate benefits, or make more than minor adjustments to employees' deductibles and co-pays. Plans may increase employees' premiums without jeopardizing their grandfathered status when insurers

raise their rates.

- 45% of employers with fewer than 50 employees have yet to decide whether to make changes in plan design; the percentage drops to 18% for employers with more than 500 employees.

- Design changes are contemplated by 22% of employers with fewer than 50 employees, 28% of employers with fewer than 500 employees, and 39% of employers with 500 or more employees.

- Of employers considering increases in employees' cost-sharing, 24% are employers with fewer than 50 employees, 28% are employers with fewer than 500 employees, and 40% are employers with 500 or more employees. ♦

## The Five Common Mistakes 401(k) Plan Fiduciaries Make

**4**01(k) plans don't operate on autopilot. Under ERISA, in-house fiduciaries have ongoing responsibilities to the plan and participants. In today's hectic environment, it's easy to forget that. Unfortunately, forgetting can be expensive, since fiduciaries are personally liable for ERISA violations. *Worse:* Fiduciaries are personally liable for violations committed by other fiduciaries. You can reduce the possibility of violating ERISA by knowing the five most common mistakes plan fiduciaries make.

### MISTAKE #1 — FAILING TO ACT PRUDENTLY IN THE BEST INTEREST OF THE PLAN

The duty to act prudently in the best interests of the plan and participants is one of a fiduciary's central responsibilities under ERISA. For example, it requires expertise in a variety of areas, such as investments. Those who lack that expertise must hire a professional. Prudence focuses on the process for

making fiduciary decisions.

- Document all decisions.
- When hiring third-party service providers, ask each candidate the same questions and provide each candidate with the same information. Pay special attention to fees.
- Periodically review outside service providers' performance to ensure that they're continuing to handle the plan's investments prudently and in accordance with your contract. Read their reports, ensure that their fees are reasonable, periodically inquire about their policies and practices (e.g., trading, investment turnover, and proxy voting), and follow up on participants' complaints.

### MISTAKE #2 — FAILING TO FOLLOW THE TERMS OF THE PLAN

Following the plan document's terms is a key responsibility. Plan documents are the foundation for the plan's operation. For example, participants can't borrow from their accounts

or take hardship distributions if the plan doesn't allow for these transactions.

- Familiarize yourself with the plan documents, especially if the documents were drafted by a third party. Pay particular attention to employee vesting requirements, the plan-related expenses that can be paid from plan assets, and the expenses that must be picked up by the plan sponsor.
- Periodically review plan documents to ensure that they remain current.

### MISTAKE #3 — FAILING TO DIVERSIFY INVESTMENT OPTIONS

ERISA requires that the plan offer employees a broad range of investment choices, which must include a minimum of three options.

- Consider each plan investment as part of the plan's entire portfolio.
- Periodically review investment options to ensure that the investment mix reflects current market conditions.
- Document your evaluation and investment decisions.

### MISTAKE #4 — FAILING TO ACCOUNT FOR CONTRIBUTIONS

*Employees'* contributions must be remitted to the plan in a timely manner. Timely has a specific meaning: as soon as it's reasonably possible to segregate the contributions from the company's general assets, but not later than the 15th business day of the month following the payday.

- Determine when it's reasonably possible to segregate

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### DOL Delays 401(k) Plan Fee... (cont.)

to the plan.

Further, fiduciaries to plan investment vehicles that hold plan assets, and record-keepers and brokers who facilitate employees' investments, must disclose information relating to the plan's investments and investment options.

Finally, the regs mandate that disclosures be ongoing.

Service providers must generally report a change to their initial information as soon as practicable, but not later than 60 days after the provider is informed of the change. In addition, providers must, upon request by a plan fiduciary, disclose compensation or other information related to their service arrangements. ❖

## The Five Common Mistakes... (cont.)

employees' contributions from the general assets and advise all interested parties of that date. It could, for example, be the week after payday. What you can't do is routinely hold the money until the 15th day of the next month, unless that's the day that contributions can be segregated from general assets.

- Ensure that the plan designates a fiduciary to handle all employee and employer contributions.

Forfeitures of *employers'* contributions by employees who leave before they become vested can't be kept in a suspense account indefinitely.

- Forfeitures may be kept in a suspense account for the cur-

rent plan year only; they must be used or allocated by the end of the plan year during which they occur.

- If forfeitures are used to reduce the employer's contribution, they must be used as soon as possible.

### MISTAKE #5 — FAILING TO TIMELY PROVIDE NOTICES TO PARTICIPANTS

Changes in the law usually mean that plans must be amended. Other events may also require plans to be amended. Participants must be notified of these changes. In addition, certain situations, such as when a blackout period will occur, require special notices to

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participants. The three most common notices are summary plan descriptions (SPDs), summary of material modifications (SMMs), and summary annual reports (SARs).

- Provide SPDs to participants within 90 days of their becoming covered under the plan. Updated SPDs must be provided every five years, if changes are made to the SPD or the plan is amended. Otherwise, SPDs must be provided every 10 years.

- Provide SMMs by the 210th day after the end of the plan year in which the change is adopted.

- Provide SARs within nine months after the plan year ends, or two months after the due date for filing Form 5500. ❖

## FSA's May Reimburse Nursing Moms For Breast Pumps

The IRS has long considered breast pumps and supplies (e.g., pads) to be non-deductible personal expenses because it classified breast milk as food. The IRS has now reversed course and decided that these items qualify as deductible medical expenses. *IRS:* In addition to infant nutrition, nursing mothers' bodies are affected. *Impact:* Health flexible spending accounts, health reimbursement accounts, and health savings accounts can reimburse nursing mothers for the cost of these items. ❖

## Ask The Experts

**Q.** *An employee's spouse has developed a disabling medical condition. Even though this employee is younger than 59½, he'd like to take a distribution of his 401(k) pre-tax contributions. Can we accommodate him? If he receives a distribution, will he have to pay the 10% early withdrawal tax penalty?*

**A.** Distributions are usually allowed when the employee becomes disabled, not a spouse. However, if your 401(k) plan allows for hardship distributions, you may make a distribution to this employee. Hardship distributions are allowed when an employee, spouse, or dependent incurs an immediate and heavy financial need (e.g., disability-related medical expenses). Your plan documents will define precisely what counts as an immediate and heavy financial need. In general, the employee will be liable for the 10% tax on early distributions.