

# Benefits Alert

February 2011

## Cycle A 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 second 12-month submission cycle for Cycle A filers — plans whose sponsors have Employer Identification Numbers (EINs) ending in a 1 or a 6 — will open February 1, 2011, and will close January 31, 2012. By the same token, the 12-month submission cycle for Cycle E filers — sponsors whose EINs end in a 5 or a 0 — closed at the end of January.

### 2010 CUMULATIVE LIST

The amendments plan sponsors must make are identified each year in a Cumulative List. The IRS warns, however, that plans must comply with all relevant qualification requirements, not just those on the 2010 Cumulative List. Specifically, the 2010 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 Equity Act of 2004.
- The Pension Protection Act of 2006.

### *In This Issue*

- Cycle A Remedial Amendment Period Opens For 401(k) Plans
- HHS Has More To Say To Mini-Med Plans About Annual Waivers
- IRS Postpones Sanctions For Discriminatory Insured Health Plans
- 401(k) Plan Disclosure: Knowledge Is Power
- IRS Sets Substantiation Rules For Health FSA Debit Cards

- The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007.
- The Heroes Earnings Assistance and Relief Tax Act of 2008.
- The Worker, Retiree, and Employer Recovery Act of 2008.
- The Small Business Jobs



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## HHS Has More To Say To Mini-Med Plans About Annual Waivers

Grandfathered group health plans, including mini-med plans, that place annual limits on the dollar value of essential health benefits are restricted to imposing a \$750,000 annual limit for plan years beginning on or after September 23, 2010 (January 1, 2011, for calendar year plans). All plans may seek one-year waivers from the Department of Health and Human Services (HHS), but mini-med plans must also notify employees. The HHS has filled in details of its model notice that plans must use. It has also issued guidance that allows these plans to change insurers.

### MODEL NOTICE

For plans that have been approved for waivers for plan years that begin before February 1, 2011, or for plans that will receive waivers for plan years

that begin before February 1, 2011, notice must be provided to employees and other participants by February 7, 2011. For waiver applications covering plan years beginning on or after February 1, 2011, notice must be provided to employees and other participants as part of any informational or educational materials, such as summary plan descriptions.

Plans must insert the applicable limit and the benefits to which the limit applies into the model notice.

### CHANGING INSURERS

The HHS will generally grant annual limit waivers strictly to allow grandfathered mini-med plans to continue to offer employees coverage that existed prior to September 23, 2010. However, according to the HHS, there may be circumstances under which plans that are

granted waivers may purchase new policies after December 9, 2010, from issuers that have also obtained waivers, without jeopardizing their grandfathered status.

The criteria mini-med plans must meet in order to purchase new policies with annual limits below statutory limits after December 9, 2010, but before September 23, 2011, include the following.

- Sponsors must have offered group coverage to employees before September 23, 2010, for which the issuer had obtained a waiver from the HHS.
- The new issuer must also have obtained a waiver from the HHS.
- The new policy's annual limit can't be lower than the old policy's annual limit. *Exception:* If an issuer no longer offers the coverage the sponsor had before September 23, 2010, the sponsor may obtain a replacement policy with a lower annual limit, provided other comparable coverage with the old policy's annual limit isn't available.
- The sponsor must provide the new issuer with an attestation that the preceding criteria are satisfied. The attestation must be accompanied by a copy of the old policy.

Recent regulations allow grandfathered plans that enter into new policies, certificates, or contracts of insurance to maintain their status, provided no changes are made that would otherwise revoke its status (e.g., employees' cost-sharing goes up, benefits are cut back, or the employer's contribution is reduced). The HHS stressed that these conditions apply to mini-med plans that change issuers. ❖

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

Act of 2010.

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

- guidance it publishes after October 1, 2010;
- laws enacted after October 1, 2010;
- qualification requirements first effective in 2012 or later; or
- statutory provisions that

are first effective in 2011 for which it has yet to issue guidance.

Deleted from the 2010 Cumulative List are hurricane and disaster relief provisions, which were enacted in the 2005 Gulf Opportunity Zone Act and Katrina Emergency Tax Relief Act. However, despite their deletion, the IRS says that these provisions continue to apply, and plans must be amended for them. ❖

## IRS Postpones Sanctions For Discriminatory Insured Health Plans

Under the health care reform law, for plan years beginning on or after September 23, 2010, new insured plans and grandfathered plans that lose their status can't discriminate in favor of highly compensated employees regarding eligibility to participate in the plan, or in benefits provided

under the plan. Insured plans that fail to comply with these non-discrimination provisions are subject to excise taxes and civil lawsuits. However, thanks to the IRS, insured plans now have some breathing room.

### BREAK FOR INSURED PLANS

The IRS has announced that

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## 401(k) Plan Disclosure: Knowledge Is Power

Every 401(k) plan mails quarterly statements to participants. Final regulations now impose content requirements on those statements. *Break:* Plan administrators who reasonably and in good faith rely on information provided by a plan service provider or issuer of investment options won't be liable for the completeness or accuracy of the information they supply. The regs are generally effective for plan years beginning on or after November 1, 2011.

### ALL'S FAIR NOW

With the exception of simplified employee pensions and SIMPLE retirement accounts, the final regs cover all 401(k) plans and other defined contribution plans, not just plans that choose to comply with Section 404(c) of ERISA. Plans that are 404(c)-

compliant must, in addition to their current disclosure duties, add annual and quarterly disclosures related to fees.

As a practical matter, the compliance burden falls primarily on third-party service providers and issuers of investment options (e.g., mutual funds), since they possess the information. *Tip:* To ensure that third parties fulfill their duties, examine your own statements. *Caution:* Plan sponsors that self-administer must review their disclosure practices and decide how fees will be broken out, calculated, and disclosed.

### RULES OF THE ROAD

Plans must disclose information to employees and beneficiaries who are eligible to participate, regardless of whether they actually participate in the plan. Information must be provided prior to their

participation in the plan, and at least annually thereafter. Under a special transition rule, initial disclosures must be provided no later than 60 days after the regs take effect (i.e., January 1, 2012, for plan years beginning November 1, 2011). New hires who can participate immediately must receive the most recent annual disclosure by the date on which they can first direct their investments (i.e., the first payroll date). Information must be disclosed at least annually, and may be part of summary plan descriptions or pension benefit statements. Changes must be provided to participants at least 30 days, but not more than 90 days, prior to the effective day of the change. The following plan-related information must be disclosed.

• **General plan information**, including information about the structure and mechanics of the plan, such as how to give investment instructions, investment options, a description of any "brokerage window" or similar arrangement that

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## IRS Sets Substantiation Rules For Health FSA Debit Cards

Beginning this year, employees can receive reimbursement from their health flexible spending accounts (FSAs) for prescribed medicines, over-the-counter (OTC) items for which they have prescriptions, insulin, or items such as glasses. However, a limited exception allowed employees to continue to buy non-prescription OTC items

with debit cards linked to FSAs through January 15, 2011. The exception ran out on January 16, 2011, when employees who buy prescription OTC items with debit cards must present substantiation before receiving reimbursement from their FSAs. The IRS has broadened the categories of merchants to allow more vendors to sell prescription OTC

items, provided they comply with new substantiation rules.

### PROOF OF PURCHASE

Beginning January 16, 2011, employees may use their health FSA debit cards to buy prescription OTC items at drug stores and pharmacies, non-health care merchants that have pharmacies, and mail order and web-based vendors that sell prescription drugs. However, vendors must follow the same substantiation requirements that pharmacies currently follow when dispensing prescription drugs. ❖

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## 401(k) Plan Disclosure: Knowledge Is Power (cont.)

allows participants to select investments outside the plan-designated investments.

- **Administrative expenses**, including an explanation of fees and expenses for general plan administrative services that may be charged to, or deducted from, all individual accounts (e.g., legal, accounting, and record-keeping expenses).
- **Individual expenses**, including an explanation of fees and expenses that may be charged to, or deducted from, a participant's account (e.g., fees and expenses associated with plan loans and for processing qualified domestic relations orders).

In addition to annual disclosures, quarterly disclosures must include the dollar amount of plan-related fees and expenses that are actually charged to, or deducted from, participants' accounts, along with a description of the charged services. Quarterly pension benefit statements may be used for this

purpose.

The following investment-related information must be disclosed in a comparative format (e.g., a chart). Disclosure in pension benefit statements is sufficient.

- **Performance data**, including specific information about historical investment performance. One-, five-, and 10-year returns must be provided for investment options such as mutual funds that don't have a fixed rate of return. The annual rate of return and the term of the investment must be disclosed for fixed-rate investments (e.g., CDs).
- **Benchmark information**, which, for investment options without a fixed rate of return, includes the name and returns of an appropriate broad-based securities market index over one-, five-, and 10-year periods.
- **Fee and expense information**, which, for investment options without a fixed rate of

return, includes the total annual operating expenses expressed as a percentage of assets and as a dollar amount for each \$1,000 invested, and any shareholder-type fees or restrictions on participants' ability to purchase or withdraw from the investment. For fixed-rate investments, disclosures include information on any shareholder-type fees or restrictions on participants' ability to purchase or withdraw from the investment.

- **Internet addresses**, which participants may access to receive more current information about their investments.
- **Glossary or Internet access to a glossary**, which includes general terms to help participants understand the plan's investment options.

Model charts are included in an appendix to the regs. Plan administrators who accurately complete the model charts for each investment option will be considered to have complied with the regs. ❖