In This Issue

Willis

FOCUS On Benefits

ERISA Penalties Increase

The Department of Labor (DOL) announced higher penalties for employers and plan administrators who fail to provide information as required by federal law. The penalty amounts, which have been adjusted for inflation, will apply to violations occurring after March 24, 2003. Circumstances triggering penalties include:

Failure to provide plan materials upon request from the DOL: Plans are no longer required to file SPDs and other plan documents with the DOL. However, plans remain obligated to respond on time to DOL requests for such materials. If an employer or plan administrator fails to comply with this requirement, the penalty will be $110 per day with a $1,100 penalty cap for each DOL request (increased from $100 per day and a $1,000 penalty cap).

Failure or refusal to file Form M-1 (required for multiple employer welfare arrangements): Filers who do not file the Form M-1 as required will face fines up to $1,100 per day (previously up to $1,000 per day).

FMLA Relief in Store?

According to extensive Department of Labor (DOL) research into the matter, one of the bigger problems with the Family Medical Leave Act (FMLA) is that many employees are unable to take advantage of the job-protected leave because they cannot afford to take the time without pay. To alleviate this problem, Congress is proposing to make the first six weeks of FMLA paid leave. However, the current bill being considered would only affect government employees.

Congress is also considering additional clarifications. Employers are experiencing FMLA compliance problems due to the Department of Labor's often overly broad regulations and interpretations. After a review of FMLA litigation, some members of Congress believe that DOL interpretations have changed original Congressional intent regarding the definition of "serious health conditions." Some lawmakers note that the DOL regulations authorize FMLA for use in much less serious and temporary conditions.

Employers well know that FMLA abuse has caused some companies to endure higher administrative and personnel costs, loss of productivity, scheduling difficulties, and unnecessary paperwork and recordkeeping. Other problems include the administration of employer' sick leave policies and administrative problems with intermittent leave. Any proposed changes to FMLA that bring employers relief instead of additional burdens would be welcome.

Roth and Traditional IRA Changes Proposed

The Bush Administration is proposing to replace Roth IRAs with Retirement Savings Accounts (RSAs), and to replace Traditional IRAs with Lifetime Savings Accounts (LSAs). Existing IRAs would be grandfathered and rollover rights would continue, but no new contributions would be permitted.

Neither of the replacement savings accounts would permit deductible contributions, but individuals could make annual contributions of $7,500 (indexed for inflation) to both an RSA and an LSA without any age or income eligibility requirements (for a maximum combined contribution of $15,000). Earnings would accumulate and be distributed on a tax-free basis. The RSA would permit tax-free distributions only after age 58; the LSA would permit tax-free distributions at any time. Current IRAs may be converted to RSAs at any time, but there will be tax advantages for conversions prior to 2004.

Also proposed is a long-awaited simplification measure that would automatically consolidate 401(k), thrift, 403(b), governmental 457, SARSEPs, and SIMPLE IRAs into one new type of account to be called an Employer Retirement Savings Account (ERSA), which any size employer could sponsor. Employee deferral limits would be $12,000 in 2003 (increasing to $15,000 in 2006) plus catch-up contributions of $2,000 in 2003 (increasing to $5,000 in 2006) for those over age 50. Such plans would have a simplified nondiscrimination test, and the current safe harbor design would be changed slightly so that the plans would automatically satisfy the nondiscrimination rules if the employer made any one of the following contributions:

- Three percent non-elective contribution,
- Matching contribution of 50 percent of employee deferrals (up to six percent of compensation), or
- Matching contribution that did not increase based on the level of employee deferrals and is equal to the amount that would be made under a 50 percent match (up to six percent of pay).

Additionally, the coverage tests will be simplified so that, if the percentage of non-highly compensated employees covered is at least equal to 70 percent of the highly compensated employees covered, the plan will pass the coverage test. Currently permitted disparity and cross-testing would be prohibited and the top-heavy rules would be repealed. The new law would include uniform and simplified definitions of compensation (W-2 income) and highly compensated employees (those with pay above the Social Security wage base for the prior year).

Patient's Bill of Rights — Redux

As promised, Representative Charles Norwood (R-Ga.) has introduced two new Patient's Bill of Rights legislative proposals. The bills include all of the Patient's Bill of Rights legislation that was passed in the House of Representatives in 2001 including such things as direct access to ob-gyns and pediatricians, prudent layperson's standards for emergency medical care, accessibility, and elimination of gag rules limiting discussions between doctors and patients regarding alternative treatments. Much of this legislation was eased by managed care trends toward open access. Nevertheless, it appears that some in Congress think this is a situation where more would be better.

Representative Norwood also introduced a separate bill called the "ERISA Clarification Act" which would permit individuals to sue employers and health plans in state courts for damages over medically reviewable claims with no limit at all on the amounts of the state court awards. This would essentially do away with ERISA pre-emption because the proposal gives states the ability to enact laws imposing their own standards for medically reviewable claims.

Patient's Bill of Rights legislation is not listed by GOP leaders as a top health priority for Congress. Medicare reform, prescription drug coverage, access to health insurance, rising health care costs, and the medical malpractice liability crisis are much higher on the agenda and are likely to dominate the Congressional legislative landscape for at least the first half of 2003.

Proposal to Broaden Trade Associations Plans

Missouri Senators Jim Talent (R) and Christopher Bond (R) are working on a proposal that would allow small employers to pool their employees and provide self-insured coverage through trade associations in order to spread health care risks among a larger group of potential patients, thereby reducing insurance costs. Because small employers are most burdened by increasing health care costs, the goal of the new proposal would expand health care to some of the 40 million Americans currently without health insurance. Not a new suggestion, this multiple employer welfare arrangement (MEWA) concept is different because enactment of this proposal is expected to contain provisions which would exclude most state laws. Early indications from the White House suggest that President Bush supports the association plan initiative.

Opponents of the proposal fear it will allow employers to evade key state mandates such as cancer screenings or mental health services, and will leave the uninsured worse off than they were before. Some believe that association plans could draw out healthier people, leaving state plans with the sicker, poorer individuals.

Since You Asked — How to Avoid Missed 5500 Filings

Because many Form 5500 filing mistakes involve an incorrect determination that a plan is exempt from filing, the following is an outline of best practices to help avoid embarrassment, penalties, and mistakes related to 5500 filings.

Appoint a Watchdog — Plan sponsors should appoint a person to serve as the first line of defense. This person would have access to medical and non-medical enrollment information and would maintain a current participant count, categorized by plan number. This person would be able to determine exactly how many participants are enrolled in each ERISA plan.

Create a Spreadsheet of Filing Deadlines — A regular review of a plan spreadsheet will allow filers to determine which filings must be prepared on a certain date, and whether the plan in question is insured or self-funded.

Carefully Examine Voluntary Plans — Voluntary plans (as long as they meet certain requirements) are not subject to ERISA, which means that there is no annual filing requirement. However, voluntary plans become employer-sponsored plans when employers portray the benefit option as something being offered, endorsed, or encouraged by the employer. This is where many voluntary plans make the transition to employer-sponsored plans and become subject to a host of reporting and disclosure obligations.

Make an Affirmative Choice — By its actions with respect to various benefits, an employer chooses to make benefits subject to ERISA or to not do so. Unfortunately, many employers do not realize they are making a choice. For example, many employers permit employee contributions for voluntary benefits to be paid on a pre-tax basis under the employer's cafeteria plan. Although the DOL has yet to formally comment on this issue (and many employers assert they are simply engaged in a payroll function), implementing a cafeteria plan arguably converts the voluntary benefit to an employer-sponsored benefit. Pre-tax payment of premiums is one factor that the DOL may consider when testing a plan's ERISA status.

Establish Clear Plan Documentation — All plan materials should clearly state whether the employer intends ERISA or non-ERISA status.

- If the benefits will not be treated as subject to ERISA, enrollment materials should include a statement that the plan is not intended to be subject to federal ERISA requirements, and it is not employer-endorsed or sponsored.
- If the benefits will be treated as subject to ERISA, enrollment materials should include a statement that the plan is endorsed by the employer and is subject to federal ERISA requirements.

FLSA Lawsuits Surge

Fair Labor Standards Act (FLSA) litigation generally involves two areas: whether an employee designated as exempt should be paid on an hourly basis and whether his or her duties fall under one of the act's exemptions. Recent studies show that litigation over the exemption issue is exploding.

Other problem areas of FLSA compliance include:

- Paying workers for pre-shift and post-shift activities;
- Paying for time spent traveling to and from job sites;
- Determining if independent contractors are entitled to overtime;
- Whether docking employees' pay for a disciplinary reason defeats their salaried status; and
- Whether an employer may use compensatory time off in lieu of overtime.

The best FLSA compliance strategy for employers is to deal with overtime and FLSA issues before being sued. Among other things, employers should periodically review the duties of employees to ensure that what they are doing matches their job descriptions. Additionally, employers should be watchful to ensure that non-exempt workers are not working uncompensated overtime hours.

Increasing: Elder Care Costs

Many employers recognize the value of offering elder care benefits to employees. The industry journal, *Business Insurance* recently reported findings of a study which estimates that U.S. businesses experience costs approaching $11.5 billion every year as the result of lost productivity related to employees' elder care. Not only are employees using more sick time and vacation time to take care of their aging parents, but employees are dealing with the stress that comes with caring for elderly parents.

The article cites a 2002 survey of major U.S. employers which shows that 50 percent of companies offer elder care programs — a 30 percent increase from data collected in 1996. Some analysts believe that the current economic downturn has made some employers wary of investing in elder care programs, despite the fact that awareness of such programs has increased dramatically. Other experts note that as baby boomers continue to age and feel the effects of caring for their elderly parents, employers will increase their elder care offerings.

PWBA Name Change

The Department of Labor is divided into many separate agencies, each responsible for a separate area of regulatory control over labor issues.

The name for the Pension and Welfare Benefits Administration (PWBA) has changed. Although its responsibility remains the same, it is now known as the Employee Benefits Security Administration (EBSA) and can be accessed through the following web address: http://www.dol.gov/ebsa/.

Issue Spotlight: Summary Annual Reports

A number of readers have asked for clarification about Summary Annual Reports (SARs). An SAR is an employee-friendly summary of the Form 5500 (the 5500 is also referred to as an annual report), and all ERISA plan sponsors are required to distribute SARs each year to plan participants.

The Department of Labor defines “participants” as any employee or former employee who is (or may become) eligible for coverage under the employer’s benefit plans.

Distributing SARs

A plan sponsor may provide SARs to participants through the following means:

- In-hand delivery to employees
- First class mail
- Inclusion in a union or company publication, but only if the publication’s mailing list is current, and notice that the information is contained in the issue is displayed prominently on the cover, and steps are taken to ensure delivery to participants not on the mailing list.
- Electronic transmission as long as the plan sponsor has obtained any required employee consents and has notified employees of the electronic distribution and has made provision for hard copies of the SAR.

To prove delivery of the SAR, some employers require employees to sign an acknowledgment of receipt. Whether or not such acknowledgment is required, employers should retain some proof of SAR distribution in preparation for DOL audits and also to counteract employee claims that SARs were not distributed.

When to Distribute SARs

The SAR must be furnished to plan participants within nine months after the close of the plan year. However, if the Form 5500 annual report deadline has been extended, the SAR must be furnished within two months after the extended deadline for that filing.

Issue Spotlight: Employer Bound by Weak SPD

What happens when an employer fails to distribute a complete SPD to employees? Even worse, what happens when an employer distributes material to employees that does not meet the requirements for an SPD then later issues a contradictory SPD? These issues were addressed in *Feifer v. Prudential Insurance Company of America*, No. 99-9451 (2d Cir. Oct. 7, 2002).

In 1991 employees received a benefit summary outlining their short- and long-term disability benefits. Because of the description of benefits in the summary, employees believed that their disability benefits would not be reduced if they received Social Security disability benefits.

During 1993, the employer began working on a draft benefit booklet (likely intended to be an SPD). The draft booklet stated that disability benefits would be reduced by the amount of any Social Security disability benefits received by a disabled individual. The draft booklet was not distributed to employees, and was not finalized until 1997.

Between 1993 and 1994, three employees became disabled and received disability benefits, and they were surprised to learn that their disability benefits were reduced because of their other sources of income.

The court determined that, though faulty and not in compliance with ERISA's requirements for a Summary Plan Description, the benefit summary originally distributed to the disabled employees was a summary of their benefits and represented the employer's written "plan." Further, in response to the employer's claim that the written document in employee hands was merely a summary of the underlying disability plans (and that the actual provisions of the plan would govern benefit questions), the court pointed out that no underlying document existed for many years. In the end, the employer was held liable for failing to provide the benefits described in its summary because there was no other written document describing the benefits.

This case offers a stern reminder about the price that an employer will pay if it publishes insufficient plan information and then seeks to argue that its information-lean plan materials do not constitute a "plan." Specific penalty amounts in this case were unavailable. Nevertheless it's safe to assume that litigation costs alone would reflect a significant dollar amount. It is also important to note that legal fees and court costs represent an additional expense often on par with, or which may exceed any actual assessed penalty.

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