

To: Clients and Friends
From: Smith & Downey
Date: January 26, 2012
Re: Recent Developments

Here are some recent employee benefit developments that might be of interest.

1. New Required W2 Reporting; Tracking Required Beginning January 1, 2012. As we have previously reported, this is the month in which employers that filed 250 or more W2s for 2011 must begin tracking the value of the health care coverage enjoyed by their employees so it may be reported properly on 2012 Form W2s. Affected employers who have not reviewed the recent detailed guidance on this rule and coordinated appropriately with their internal or external payroll functions should do so immediately.
2. Nonqualified Plan Corrections – January 31, 2012 Deadlines. Employers who used the IRS correction programs to correct certain nonqualified deferred compensation plan (as very broadly defined in Code Section 409A) document and operational errors during 2011 may be required to report the correction on affected participants' Forms W-2 for 2011 and distribute notices to affected participants by January 31, 2012. In addition, employers who used these IRS correction programs are required to attach a statement to their federal income tax returns for the taxable year in which the employers discovered the failure. (By complying with the requirements set forth in these correction programs, employers can provide their participants with relief from most, or in some cases all, of the onerous penalties that otherwise would be imposed on participants by Section 409A.)
3. 401(k) ADP/ACP and 403(b) ACP Testing Failures. More and more often, we talk with employers that believe they have failed their ADP and/or ACP tests. When we more closely examine the facts, we determine that the employer and its vendor have not employed all the optional tools that may be used to cause a plan that appears to fail these tests to pass them. We encourage our clients who believe they have, or might have, ADP/ACP testing issues to contact us to ensure that they are not failing to employ all of the permissible techniques for passing these tests.
4. Correcting Errors in Plan Administration. Likely because of the increasing complexity of employee benefit plan design, and the steps employers are taking to reduce HR personnel costs, a growing part of our practice involves assisting our clients in finding lawful, and practical, fixes to their plan administration errors. Of course, these errors are more easily fixed if they are discovered by a diligent employer before they are discovered by a regulator or a plaintiff's lawyer. (We have assisted a number of our clients with internal audits to ensure that their plan administration aligns with applicable law and the terms of their plan documents and insurance and re-insurance contracts.)
5. Review of Permissible Mid-year Election Changes, and Review of Participants Not In Fact Eligible. As insurance carriers and re-insurers continue to look for ways to limit their losses, the "eligibility audits" they run on large claims are becoming more and more intense. One area that regularly causes problems for employers involves mid-year election changes by employees that,

in fact, are not permitted by the terms of the applicable insurance or re-insurance contract. All employers should compare the mid-year changes provisions of their plan documents, SPDs and administrative forms to the mid-year changes provisions of their insurance and re-insurance documents to ensure that they align.

Also being challenged by carriers are claims for employees (and those claiming through them) classified as covered by the plan when they do not in fact work the required number of hours for plan participation (or meet any of the other eligibility terms of the plan). A typical example involves employers continuing to permit plan participation by employees on leave when the applicable insurance/reinsurance contract does not contain leave continuation provisions. Again, it is critical that plan documents and insurance/reinsurance documents align with plan administration.

6. Form 8928 Reporting. As we reported in a previous e-Alert, it is critical that employers ensure that they are not committing any health and welfare plan design or administration errors that require annual Form 8928 reporting (because of the various onerous penalties on failures to file these reports and pay the associated taxes, and because of the lack of a de minimis or good faith exception to this reporting requirement). Form 8928 reporting is required for errors involving: a. COBRA; b. required pediatric vaccine coverage; c. HIPAA; d. Mothers and Newborns Health Protection Act; e. Mental and Health Parity Act; f. the HSA comparability rules; g. GINA; and h. Michelle's Law.

Employers should be particularly diligent concerning this issue, because the Form 8928 filing obligation generally falls on the employer (rather than its vendors), and because there is available, in certain circumstances, a 30 day-from-first-knowledge correction opportunity.

7. HFSA Submission Deadlines and Grace Period HFSA's. Virtually all employers with calendar year Health Flexible Spending Accounts permit employees a reasonable period after December 31 to submit reimbursement requests for eligible expenses incurred during the year ending December 31. And some employers utilize the optional 2-1/2 month "grace period rule" for their HFSA's that permits reimbursements of expenses incurred within 2-1/2 after the deferral year.

Because unused HFSA balances revert to the employer, and because many employers don't like the idea of acquiring their employees' unused HFSA balances, now is the time for HFSA sponsors – and perhaps especially grace period HFSA sponsors – to remind their HFSA participants to submit eligible reimbursement requests for 2011 expenses and, in the case of grace period plans, for 2011 and early 2012 expenses.

Some tips often provided by employers are: 1. get prescriptions for over-the-counter drug purchases so those OTC drugs may be reimbursed from the HFSA; 2. refill prescriptions for the longest possible time permitted by the writing physician and the Rx plan; 3. ensure that all eligible co-pays, deductibles and out-of-pocket costs have been submitted for reimbursement; 4. request reimbursement at the IRS rate for the mileage to and from medical, dental and vision providers (19 cents per mile until 6/30/11, 23.5 cents per mile from 6/30/11-12/31/11, and 23 cents per mile from 01/01/12-03/15/12); 5. request reimbursement for the portion of a concierge

physician's fees that cover actual services; 6. review the list of reimbursable items, other than OTC drugs, that may be purchased at the drug store; and 7. catch-up on overdue dental and vision services. (Note the limits on eligible expenses from limited purpose HFSA's maintained in connection with HDHP's/HSAs.)

Please contact us if we can be of any assistance on any of these issues.