

To: Clients and Friends
From: Smith & Downey
Date: December 10, 2010
Re: Year-end Tasks for Employers

Given the amount of legislative and regulatory activity in the benefits area this year, now would be a good time for employers to perform a self-diagnostic to ensure that they have completed the various compliance tasks with year-end deadlines.

Although this e-Alert is not intended to be a comprehensive list of all of the year-end benefit plan tasks facing employers, it should serve as a good starting point.

I. Qualified Retirement Plan Tasks

A. Cycle E IRS Filings Due January 31. Employers whose taxpayer identification numbers end in a 5 or a zero, and all governmental employers that did not file in Cycle C, that sponsor tax-qualified retirement plans (other than 403(b) plans) have a January 31, 2011 deadline for filing determination letter requests with the IRS.

B. Required Plan Amendments. Qualified retirement plan sponsors (including sponsors of 403(b) plans) generally have until the end of their plan years beginning in 2010 (i.e., until December 31 for calendar year plans) to adopt document amendments necessary to comply with HEART and the non-spouse beneficiary rollover provisions of WRERA. Plan sponsors should check to ensure that these amendments have been adopted. (Governmental plans - including governmental 457(b) plans, which are treated like qualified plans for these purposes -- have extended deadlines for some of these rules. Non-governmental 457(b) plans also should be reviewed to determine whether HEART amendments are necessary.)

II. Nonqualified Deferred Compensation Plan Tasks

A. Amnesty Program. The IRS recently issued additional guidance on the steps employers with out-of-compliance deferred compensation plans may take in order to acquire "amnesty" from the very onerous 409A penalties applicable for document or operational violations. In light of this expanded relief from the IRS, employers should check their various arrangements subject to 409A to ensure that their documents and operations are in full compliance with the detailed requirements of that Code section. (For example, arrangements that condition the timing of the payment of deferred compensation or severance on the recipient's signing a release should be checked to determine whether they are subject to 409A and, if so, to determine if the release language meets the IRS's recent interpretation of the applicability of 409A to that language.)

B. Required 457(b) Plan Amendments. (See I., B, above)

III. Health and Welfare Plan Tasks

A. Non-Health Reform Tasks

1. Section 125 Plan Amendments. Calendar year Section 125 plans need to be amended by year-end: (1) to adopt any new design changes for 2011 that affect a participant's salary reduction election; (2) to add any new benefits that become effective in 2011; (3) to provide for the early adoption in 2010 of the age 26 dependent coverage requirement, if applicable; and (4) to provide for a health FSA to reimburse expenses of children up to age 26, regardless of dependent status, for the 2010 (or 2011) plan year, if applicable.

2. HITECH. Health plan (and long term care plan) documents, SPDs, privacy notices and Business Associate Agreements need to be amended by year-end to reflect the HITECH changes.

3. GINA. HIPAA privacy notices need to be amended to comply with GINA.

4. Medicaid/CHIP. By January 1, 2011 (for most plans) employers must distribute the model CHIP notice. Note that, if no participant or dependent lives outside Maryland, DC or nine other states (NOT including Pennsylvania or Virginia), this requirement is not applicable.

B. Health Reform Tasks. Employers must take a number of steps, before their current health plan year-end, to prepare for the first set of changes contained in the health reform act that are effective on the first day of the first health plan year beginning after September 22, 2010 (for example, on January 1, 2011 for calendar year plans). Compliance with this first set of changes requires plan document amendments, SPD amendments, new and revised employee notices, and the like. For example, employers must:

1. Special Enrollment Notices. Provide special enrollment notices regarding the new age 26 dependent coverage requirement and the elimination of any lifetime maximum (where applicable).

2. Required Notice for Grandfathered Plans. Amend grandfathered plans' SPDs and other documents provided to participants to contain the model grandfathering statement.

3. Required Grace Period Plan Amendments and Notices. If applicable and desired, adopt and communicate to participants the "cleansing" amendment(s) necessary to restore grandfathered status to a plan that lost its grandfathered status between March 23 and June 14.

4. Required Non-Grandfathered Plan Amendments and Notices. Adopt and communicate to participants by delivering the various required notices and SPD amendments the required "first

year" amendments to comply with health reform. Specifically, non-grandfathered plans must be amended to:

- a. Eliminate any lifetime coverage maximums on essential benefits and provide for the related special election period (a model notice is available).
- b. Eliminate any annual coverage maximums on essential benefits that do not qualify as "restricted annual limits" under the recent guidance. Specifically, eliminate annual maximums on essential benefits under \$750,000 for the first plan year beginning after September 22, 2010, \$1.25 M for the second, and \$2M for the third. (Plans must eliminate all annual maximums beginning with the first plan year beginning after September 22, 2013.)
- c. Add language about rescission of coverage.
- d. Eliminate pre-ex limitations for children under age 19.
- e. Provide for coverage for children until age 26 and provide for the related special election period (a model notice is available).
- f. Eliminate cost-sharing for preventive care.
- g. Apply new nondiscrimination rules to insured coverages (similar, but not identical, to Code Section 105(h) rules).
- h. Permit selection of any primary care provider.
- i. Permit children to select a pediatrician as a primary care provider.
- j. Eliminate pre-authorization for emergency care.
- k. Eliminate pre-authorization or referral for ob-gyn care.
- l. Provide required internal and external appeals mechanisms.
- m. Provide required notice about rights to designate primary care providers, if the plan permits or requires PCP designations.

5. Required Grandfathered Plan Amendments and Notices. Adopt and communicate to participants by delivering the various required notices and SPD amendments the required "first year" amendments to comply with health reform. Specifically, grandfathered plans must be amended by the first day of the first plan year to which health reform applies to:

- a. Eliminate any lifetime coverage maximums on essential benefits and provide for the related special election period (a model notice is available).
- b. Eliminate any annual coverage maximums on essential benefits that do not qualify as "restricted annual limits" under the recent guidance. Specifically, eliminate annual maximums on essential benefits under \$750,000 for the first plan year beginning after September 22, 2010, \$1.25 M for the second, and \$2M for the third. (Plans must eliminate all annual maximums beginning with the first plan year beginning after September 22, 2013.)

- c. Add language about rescission of coverage.
- d. Eliminate pre-ex limitations for children under age 19.
- e. Provide for coverage for children until age 26, or just to children under age 26 who do not have other "employment-based" health coverage available to them and provide for the related special election period (a model notice is available).

6. **Continual Review of Proposed Grandfathered Plan Changes.** If any grandfathered plans (including "cleansed" plans as described above) are maintained by the employer, design and initiate an on-going procedure to review, in advance of adoption, every proposed change to each grandfathered plan to determine if that change is a change on the regulators' list of changes (that is, the June 14, 2010 list minus certain carrier changes now permitted under the revised guidance). If the proposed change would cause the plan to lose its grandfathered status, weigh the benefits of the proposed change against the projected economic costs of a loss of grandfathered status.

7. **Assemble Records to Prove Grandfathered Status.** In order to preserve grandfathered status, an employer must maintain records of a grandfathered plan's provisions on March 23, 2010 and any changes made since that time. For most employers, these records will include the plan document, SPD, medical schedules of benefits (and/or insurance contracts), and records of total cost and how that cost was split between the employer and participants.

8. **Simple Section 125 Plans.** If the employer has fewer than 100 full time equivalent employees ("FTEs"), consider whether to adopt a "Simple Section 125 Plan" that is exempt from Section 125 non-discrimination testing if it meets specified minimum eligibility and employer contribution requirements.

9. **Amend HFSAs, HRAs and HSAs to Eliminate OTC Coverage.** If the employer maintains a health flexible spending account, a health reimbursement arrangement or a health savings account that reimburses for over-the-counter drugs, effective for expenses incurred after calendar 2010, the employer must amend the program to eliminate that feature (except for OTC drugs provided under a valid prescription).

10. **Amend HFSAs and HRAs to Reflect New Dependent Definition.** If the plan adopted, or is adopting, the new dependent definition approved by the IRS, amend the plan appropriately and notify participants. Under this new definition (which is an optional provision), for expenses incurred after March 29, 2010 (or any later date chosen by the employer), any eligible expenses of a participant's child (through the end of the year in which the child reaches age 26) may be reimbursed from the HFSA or HRA regardless of the child's income, residence, dependent status or marital status.

Please contact us if we can provide assistance with your year-end compliance efforts.