

To: Clients and Friends
From: Smith & Downey
Date: December 28, 2011
Re: Year-End Items

Here are some items that employers should be considering as we head into the year-end.

1. 2012 Health Reform Act Compliance – Although not a particularly big year in the Affordable Care Act compliance timeline, there are tasks for employers in 2012. First, 2012 Form W2s issued by employers (other than church employers with only self-funded health benefits) who issued at least 250 Form W2s in the previous year will need to include information about the value of the health coverage enjoyed by employees through their employers. Fortunately, there is now detailed guidance about this rule, and employers should be coordinating with their payroll services and internal payroll departments to ensure that the requirements of this rule are satisfied, beginning with W2s issued for 2012.

Second, for health plan years beginning after September 30, 2012, employers will need to begin paying to the federal government the \$1 per covered life "Patient-Centered Outcomes Research Trust Fund" fee. We expect detailed guidance on this rule well before September 30, 2012.

Third, the regulators have suggested that the delayed-from-2011 nondiscrimination rules for fully insured health plans may take effect in 2012, so employers with fully insured health plans should monitor this issue carefully.

Fourth, employers with fiscal year health care FSAs will need to apply the new-for-2013 \$2500 calendar year limit on health FSA contributions beginning with their health care FSA year that starts in the middle of 2012.

Fifth, the DOL has issued detailed guidance on the steps employers must take if they receive "medical loss ratio" rebates from their health insurance carriers. Employers that receive these rebates must be sure to follow this guidance.

Sixth, for plan years beginning on or after March 23, 2012, employers will need to file with HHS and distribute to health plan participants a new "quality of care report" required by the health reform act. Employers should monitor expected HHS guidance on this new requirement.

Fortunately for employers, the requirement to issue the new "Summaries of Benefits and Coverage" (also called "Uniform Explanations of Coverage"), which was to become effective March 23, 2012, has been delayed until further notice from the regulators. It appears that the requirement to provide 60 days' advance notice of material health plan changes has been delayed along with the SBC/UEC delay. Naturally, employers should carefully monitor regulatory pronouncements on these two health reform act rules.

2. Lingering Health Reform Compliance Issues – We continue to meet new clients that maintain medical expense reimbursement plans that violate the annual limit rules of the health reform act (and that do not have waivers from the regulators permitting that violation) because those plans

are not: a. HSAs; b. HFSAs; c. HRAs integrated with regular health plans; or d. for plan years beginning before 2014, stand-alone HRAs established before 9/23/10 that comply with certain record retention and annual notice requirements. Naturally, employers who have not determined definitively whether their reimbursement arrangements are exempt from the annual limit rules, by design or because of a regulatory waiver, should consult with ERISA counsel.

Also, likely because of the repeated, but limited, "enforcement grace periods" issued by the regulators, we continue to meet new clients whose health plans are not in full compliance with the extensive new claims/appeals/external review requirements that apply to nongrandfathered health plans. Because all enforcement grace periods having to do with these new rules expire at the end of plan years beginning in 2011 (or earlier in some cases), sponsors of nongrandfathered plans should review their plans' compliance with these new rules now.

Finally, as time passes, more and more previously grandfathered health plans lose their grandfathered status because of plan design changes occurring in the ordinary course. Sponsors of grandfathered plans should continue to review every proposed plan change against the list of "14 deadly sins" that cause a grandfathered plan to lose that status, and should ensure that a plan losing that status is immediately amended to reflect the rules applicable to nongrandfathered plans.

3. IRS Determination Letter Filings for Tax-Qualified Retirement Plans – Cycle A tax-qualified retirement plans – that is, those sponsored by employers with taxpayer ID numbers ending in 1 or 6 -- may need to be filed with the IRS for a determination letter on or before January 31, 2012. Cycle B tax-qualified retirement plans – that is, those sponsored by employers with taxpayer ID numbers ending in 2 or 7 -- may need to begin their IRS filing work that will be due on or before January 31, 2013. If you have a plan falling in either of these Cycles, please contact us to discuss planning for your IRS filing.

4. Mental Health Parity Act Guidance – The regulators recently issued detailed guidance on the Mental Health Parity Act's impact on nonquantitative treatment limitations and copayment variations concerning mental health/substance use disorder benefits. Employers should review the mental health/substance use disorder provisions of their health plans for compliance with this new guidance.

5. Wellness Program Compliance with HIPAA and ADA – We are encountering more and more "home grown" employee wellness programs that do not comply with regulatory guidance under HIPAA and the ADA. Employers with wellness programs, or contemplating establishing wellness programs, should ensure that they are compliant with these statutes (which, especially in the case of the ADA, carry very harsh penalties).

6. Cash Balance Pension Plans and Other "Hybrid" Retirement Plans – The IRS recently issued helpful guidance on required amendments and other issues for Cash Balance and other "hybrid" pension plans. Sponsors of these types of defined benefit plans should determine the impact on their plans of this recent guidance.

7. Form 8955-SSA and Participant Statements – The extended deadline of January 17, 2012 for filing the new 2009 and 2010 Form 8955-SSA (which replaces the Schedule SSA to the Form 5500 used to report separated participants with deferred vested benefits) is fast approaching. The Internal Revenue Code has long required plans filing a Form 8955-SSA (and the prior Schedule SSA) to send each participant listed on the form an individual statement describing the information filed with respect to that person. The IRS has traditionally not enforced this participant statement requirement, but has recently informally indicated that it will be enforcing the requirement and collecting the applicable penalties (up to \$50 per unsent statement), and there is now a question on the Form 8955-SSA which asks whether the required statement was provided to participants. The deadline for sending the participant statements is the due date for the filing of the Form 8955-SSA (i.e. January 17, 2012 for 2009 and 2010). Employers should be working to complete the Form 8955-SSA and comply with the participant statement requirement by the upcoming January deadline.

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