Benefit Beat

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LATE-BREAKING IRS NEWS

On December 16, 2015, the IRS issued ***Notice 2015-87*** which provides significant guidance on a potpourri of topics addressing matters relating to the Affordable Care Act (see ***Year-end Wrap-Up***, *CBIZ Health Reform Bulletin*, 12/29/15), as well as other benefit-related issues. Of particular note:

- ❑ **FSA Carry-forward Amounts**. In 2013, the IRC Section 125 rules were amended to allow a $500 carry forward of unused amounts remaining at the end of the plan year in a flexible medical spending account (FSA) plan. Several questions have lingered since that modification. This Notice provides the following guidance:

- An FSA plan with a carry-forward feature can condition receipt of carry-forward monies on continued participation in the FSA plan. The FSA plan can also limit the number of years that an individual can carry forward the same money.

- With regard to the applicability of COBRA and FSA plan carry-forward amounts:
  - Any carryover amount is included in determining the amount of the benefit that a qualified beneficiary is entitled to receive during the remainder of the plan year in which a qualifying event occurs.
  - The maximum amount that an FSA plan would be permitted to require to be paid for COBRA continuation coverage (102% of the applicable premium) cannot include unused amounts carried over from prior years. The applicable premium would be based solely on the sum of the employee's salary reduction election for the year and any nonelective employer contribution.

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- An FSA plan that allows carryovers of unused amounts for similarly situated non-COBRA beneficiaries must allow carryovers by similarly situated COBRA beneficiaries on the same terms as provided to non-COBRA beneficiaries. However, the plan would not be required to allow a COBRA beneficiary to elect additional salary reduction amounts for the carryover period, or to have access to any employer contributions to the health FSA plan made during the carryover period. In addition, the carryover is limited to the applicable COBRA continuation period.

- **VA medical services will not cause HSA-ineligibility**. Generally, an individual is eligible for a health savings account (HSA) only if he/she is covered by qualifying high deductible health plan coverage and no other coverage. Historically, medical or hospital services provided by the Veterans Administration would disqualify an individual from being HSA-eligible. Last summer, a law was passed that included a provision such that veterans receiving hospital care or medical services for a service-connected disability would not be disqualified from participating in or contributing to an HSA (see ***Veterans Health Coverage and HSAs***, *Benefit Beat*, 8/5/15).

  Due to complexity of making the determination of what constitutes "hospital care or medical services", this guidance simplifies the determination such that any hospital or medical services received from the VA by a veteran with a VA disability rating will satisfy the determination of services.

NEW LAWS IMPACT BENEFIT PLANS

On December 18, 2015, President Obama signed the *Consolidated Appropriations Act, 2016* and the *Protecting Americans from Tax Hikes (PATH) Act of 2015* (**H. R. 2029**; now Public Law No. 114-113). These laws amend several provisions of the Affordable Care Act (see ***Year-end Wrap-Up***, *CBIZ Health Reform Bulletin*, 12/29/15), as well as make notable changes in several benefit-related provisions, as follows:

- **Transportation Program Parity.** These laws provide for a permanent extension of parity for employer-provided mass transit and parking benefits of a qualified transportation program. This means that the allocation of van pooling and transit pass limits will match the parking limit. The new law retroactively reinstates the change to January 1, 2015; thus, for 2015, these amounts are $250 per month ($255 in 2016). It should be noted that mass transit contributions cannot be retroactively increased to accommodate an increase in tax-favored benefits. Some plans may allow employees to contribute up to the statutory pre-tax amount and make up any difference with after-tax dollars. In this instance, these after-tax dollars can be re-characterized as tax-favored dollars.

  Because of the retroactive nature of this change, the IRS issued guidance (***Notice 2016-6***) to assist employers on how to apply and report the increased exclusion for 2015. In a nutshell, the IRS provides a special administrative procedure for employers to use in filing their Form 941, *Employer's Quarterly Federal Tax Return*, for the fourth quarter of 2015 to reflect changes in the excludable amount for transit benefits provided in all quarters of 2015, as well as how to report these amounts on the Form W-2.

- **Church Pension Plans**. The new omnibus budget laws provide some clarifications specific to church retirement plans. As background, a church plan is exempt from ERISA unless it elects to be subject to ERISA. According to ERISA Section 3(33), a church plan is defined as "*a plan established and maintained by a church; or, a plan established by a church and maintained by a tax exempt organization, the purpose of which is the administration and funding of the plan that is controlled by or in association with the church*". This definition leaves open several questions.

  Many of these questions are being litigated by the courts, particularly as it relates to church affiliated organizations, such as hospitals. Notably, the Third Circuit Court of Appeals in *Kaplan v. Saint Peter's Healthcare System* recently opined that a hospital cannot claim church plan status by virtue of an affiliation with a church. Thus, the hospital's plan(s) are subject to ERISA. Other courts have ruled to the contrary. Entities interested in this matter should keep an eye out for future developments.

  Determining Control. Generally, in the for-profit arena, common control is determined by ownership in accordance with IRC Section 414. This ownership doesn't exist in the non-profit world and thus, has made it complicated for control to be determined by church organizations. According to the new law, to be considered a control group, the related entities:

  1. Must receive at least 80% of their financial support from the church; and
  2. Maintain a degree of common management or supervision between the organizations such that the church providing the operating funds is directly involved in the day-to-day operations of the other organization.

  The new law includes details about aggregation and disaggregation that should be reviewed by impacted organizations.

  Automatic Contribution Arrangement. The law allows church plans to adopt an automatic enrollment feature that was previously problematic due to state law prohibitions on automatic withholding. Pursuant to this automatic enrollment feature, participants could elect contributions be made to the plan, or paid directly to them in cash. Such elective contributions would be based on a uniform percentage of compensation provided under the plan until the participant specifically elects opt out, or elects to change his/her percentage rate of contribution.

  Church plans adopting an automatic contribution feature are required to annually notify participants so that they understand their rights and obligations relating to their automatic contributions to the plan. The notice must also include an explanation of available investment options.

  The laws also clarify other matters specific to church pension plans relating to certain plan-to-plan transfers and mergers, such as allowing a transfer of a participant's accrued benefit from a 401(a) church plan to a 403(b) church plan.

The omnibus budget laws also provide a permanent exclusion from income for qualified charitable distributions from IRAs up to $100,000 per year. In addition, rollovers from certain employer-sponsored retirement plans, such as from a 403(b) or 457 plan to a SIMPLE IRA, are permitted as long as certain criteria are met.

Extension of Tax-Favored Treatment of Employer-provided Identity Protection Services

Last fall, the IRS addressed the tax status of employer provided identity protection services (see ***Taxation of Employer-provided Identity Protection Services***, *Benefit Beat*, 9/8/15). Accordingly, if identity protection services are provided to employees by their employer who has experienced a data breach, the amount of such protection services would not be included in the employees' gross income or wages.

On December 30, 2015, the IRS ***extended*** the tax-favored treatment to include identity protection services provided to employees regardless of whether a breach occurred. In addition, this guidance affirms that if cash is provided to employees to purchase their own identity protection services, or if any proceeds are paid from the policy, then such amounts would be taxable.

Guidance on Claiming Health Coverage Tax Credit

A tax credit is available to assist in paying COBRA premium for individuals who lose jobs due to foreign trade-related agreements. This Health Care Tax Credit (HCTC) expired on December 31, 2013. However, a new law enacted last summer not only reinstated the credit through 2019, but also retroactively reinstated it from when it expired (see ***New Trade Law Increases Tax Information Penalties and Reinstates Health Care Tax Credit***, *Benefit Beat*, 7/3/15).

Because of the retroactive reinstatement of the HCTC, the IRS subsequently issued guidance (***Notice 2016-2***) on how individuals can amend their tax returns to claim the HCTC for the 2014 and 2015 tax years. In addition, this guidance also addresses instances where an individual is eligible for both the HCTC and the premium assistance tax credit available for qualified health plan coverage through the marketplace. In a nutshell, eligible individuals can choose to claim either the HCTC or the premium tax credit for 2014 and 2015 tax years. However, beginning in 2016, individual marketplace coverage is not deemed to be qualified health coverage for purposes of claiming the HCTC. Additional information about the HCTC can be found on the IRS' dedicated **webpage**.

Existing Form 5500 Filing Date Retained

Certain welfare benefit plans and retirement plans subject to ERISA are required to file a Form 5500 and related schedules within seven months of the close of each plan year. Plan sponsors could request up to a 2½ month automatic filing extension by completing the Form 5558. Last summer, a law was enacted that extended several tax report dues dates, including the Form 5500 (see ***Modified Due Dates for Certain Tax Returns***, *Benefit Beat*, 9/08/2015) such that beginning after December 31, 2015, the maximum automatic extension for filing the Form 5500 would be the 3½-month period ending on November 15th for calendar year plans. This 3½-month automatic extension provision was subsequently repealed by the *Fixing America's Surface Transportation (FAST) Act* (Public Law 114-94) enacted on December 4, 2015. Thus, the FAST Act repeals the 3½ month extension period and restores the former 2½ month extension.

It should also be noted that the IRS and Department of Labor have released the 2015 edition of the Form 5500 and related schedules. View-only forms, schedules and instructions can be obtained from the **DOL website** or the **IRS website**.