

# The ERISA Industry Committee

Washington Update

October 6, 2014



# Participation Procedure

- Procedure for audience participation
- Audience will be in a “listen-only” mode
- If you wish to ask a question or make a comment, press \*6 on your telephone to “un-mute” your telephone
- After speaking, please press \*6 again to re-enter “listen-only” mode

# Washington Update Agenda

- Welcoming Remarks
- Hill Briefing: Dani Kehoe
- Retirement Update
- Health Update
- Legal Update
- Concluding Remarks/Questions

# ERIC on Social Media

- ERIC is on Twitter and Facebook and has a blog!
- Please follow us (and tell your friends and colleagues).



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<http://erisaindustrycommittee.blogspot.com/>

- More information is available at  
<http://www.eric.org/about/eric-social-media/>.

# Retirement



# Retirement – Legislative Update

## Senate Finance Committee

Hearing on 40<sup>th</sup> Anniversary of ERISA & Updating  
Pension Rules For Greater Retirement Security

September 16, 2014

- Review of testimony/Q&A from Committee members
- Tax Reform connection



# Retirement – Legislative Update

Ways and Means Committee

Subcommittee on Select Revenue Measures

Hearing on Defined Benefit Plans

September 17, 2014

- Review of testimony/Q&A from Committee members
- Connection to pending legislation



# Retirement – Legislative Update

- S 2511 Manager's Amendment to amend ERISA section 4062(e) (Harkin)
- HR 5381 (Tiberi): nondiscrimination testing & frozen DB plans
- S. 2855 (Portman & Cardin) The Retirement Security Preservation Security Act: nondiscrimination testing & frozen DB plans



# Retirement – Regulatory Update

## Treasury Department/IRS

- Hybrid Plan Regulations (finally released! 09/18/14) – effective 1/1/16
- Proposed rules on transition rules (comments due 12/18/14)
- IRS hearing on proposed transition rules – January 9, 2015
- FocusOn call with Treasury & Covington and Burling - October 8<sup>th</sup> 3:30pm – 5pm ET
- In depth discussion at Retirement Policy Committee meeting October 15th



# Retirement – Regulatory Update, cont.

## Department of Labor

- RFI on Brokerage Windows - Comments due November 19<sup>th</sup> (released August 21<sup>st</sup>)
- In depth discussion Retirement Policy Committee meeting October 15th
- FocusOn call to be scheduled
- Possible survey(s) on specific questions included in RFI

# Retirement – Regulatory Update, cont.

## Department of Labor Issues in the ‘queue’

- Lifetime Income & Benefits Statements
- Conflict of Interest
- 40<sup>th</sup> Anniversary of ERISA celebration at EBSA- October 21st

# Retirement – Regulatory Update, cont.

## PBGC

- PBGC information collection activity relating to “actions taken to cash out or annuitize benefits for certain former employees” (appears to relate to premium year or prior year information)
- Revision of 2015 filing procedures & instructions
- Comments by November 24<sup>th</sup>
- ERIC to submit comments



# Health



# ACA Cadillac Tax

- ACA excise tax applicable starting in 2018
- Met with Treasury on 9/24 to discuss pressing issues and urgent need for guidance
  - Major issues:
    - Add safe harbors (such as one based on actuarial value)
    - Tiering
    - Payment of tax
    - Application of COBRA methodology
    - Pre-tax contributions to HSAs
    - Definition of plan, including retiree plans
    - Entities and arrangements subject to the tax
  - Request from Treasury for our priorities

# ERIC poll on Cadillac tax: for which items is guidance most urgently needed?

- Tiering
  - ASAP 43%; next 18 months 45%
- Employer/vendor payment
  - ASAP 20%; next 18 months 50%
- Adaptation of COBRA methodology
  - ASAP 46%; next 18 months 33%
- Pre-tax employee contributions to HSA
  - ASAP 55%; next 18 months 50%
- Definition of “plan”
  - ASAP 53%; next 18 months 40%
- Guidance on retiree plans
  - ASAP 43%; next 18 months 43%

# Troublesome HHS issues

- Met with HHS on 10/2 to discuss mundane, but very significant issues
- TRRP
  - Payment process
  - Counting/not counting Medicare-eligible retirees
- Health Plan Identifiers (HPIDs)
  - Requiring HIPAA certification for self-funded plans
  - Fitting ERISA plans into HPID and controlling health plan definitions
  - Need for urgent action



## HPIDs, cont.

- Recent HHS guidance permits multiple health plans to register for a HPID using one EIN
  - Also resolves some procedural issues

# Excepted benefits

- Final DOL/HHS/Treasury reg
  - Effective 11/30/14; applicable PYBOOA 1/1/15
- Employee Assistance Programs (EAPs)
  - Government even more responsive to ERIC request than in proposed regs
    - Dropped condition that EAP benefits must not be financed by another group health plan
    - Criteria from proposed reg otherwise mostly intact
      - BUT still no limit on number of visits
    - Wellness programs are not EAPs

# Excepted benefits, cont.

- Eases path for limited dental/vision plans to be considered excepted benefits
  - Keeps rule that no requirement for participant to pay additional premium for plan to be excepted benefit
  - Participants must still have right to elect out, BUT can satisfy this rule if claims administered under separate contract
- Guidance on “limited wraparound coverage” still to come

# Other ACA guidance

- 3 new IRS notices
- Notice 2014-49
  - Details on how to count hours when employee transfers and employer makes changes in measurement periods or methods
  - Also new rules on counting hours in M&A situations

# Other ACA guidance, cont.

- Notice 2014-56
  - PCORI fee for PYEEOA 10/1/14 and before 10/1/15 = \$2.08
- Notice 2014-55
  - Cafeteria plans may allow employees to drop coverage prospectively when:
    - Employee goes from >30 hours/week to <30
    - Employee would like to drop employer coverage and sign up for Exchange – fiscal year plan
  - Effective 9/13/14
    - Plan amendments eventually required

# EEOC: Ready, fire, aim!

- EEOC sues company, alleging that wellness program violates ADA
  - Employee refused to complete Health Risk Assessment and do biometric screening
    - After refusal, his insurance was cancelled, and he was forced to pay whole premium
  - EEOC finds that company's wellness program violated ADA
  - Very similar to Orion case from August
- Lack of rule-making stymies employer compliance

# More judicial drama – the ACA

- Fate of individual tax subsidies in federally run Exchanges
  - Two dueling Circuit Court decisions announced 7/22
    - DC Circuit Court opinion in *Halbig v. Burwell*
      - 3-judge panel finds against government, determines that statutory language of ACA is clear that subsidies not permitted in non-state-run Exchanges
    - 4<sup>th</sup> Circuit Court opinion in *King v. Burwell*
      - 3-judge panel comes to opposite conclusion: individuals are eligible for subsidies on federal Exchanges
      - Found that although ACA is ambiguous, IRS was within its power to permit subsidies to be paid to individuals in federal Exchanges
    - DC opinion later vacated; full DC Circuit Court will re-hear
      - So now no formal “split” in opinions that would – normally-prompt SCOTUS intervention

# But on the horizon...

- Oklahoma federal district court weighs in and agrees with original DC opinion, i.e., not legal to pay subsidies to individuals in non-state-run Exchanges
  - Will be appealed to 10<sup>th</sup> Circuit Court
  - Raises specter of a renewed “split” in the Circuit Courts
- Timeline: potentially no final SCOTUS decision before June, 2016
  - And maybe not even then...



# ERIC Task Forces

- Two ongoing Task Forces
  - Preparing for the Cadillac tax
    - Next tack: Congress
  - COBRA in an ACA world
    - Next call: TBD
  - To join: email [gyoung@eric.org](mailto:gyoung@eric.org)

# Legal



# Statute of Limitations and Monitoring Investments

- Participants asked Supreme Court to hear case on:
  - Impact of statute of limitations on monitoring plan investments
  - Fiduciary deference for non-benefit claims
- Solicitor's Office recommended that Court hear the statute of limitations / monitoring issue, but not deference issue
  - Argued fiduciaries have continuing duty to monitor despite statute of limitations
  - Implied that *Tussey v. ABB* may be better case for deference issue
- Supreme Court agreed to hear the statute of limitations / monitoring issue, but not deference issue
  - Could significantly impact requirements for monitoring investments in light of statute of limitations
  - May separately agree to hear deference issue in *Tussey*

*Tibble v. Edison Int'l*, No. 10-56406 (9th Cir. 2013); *Tussey v. ABB, Inc.*, No. 12-2056 (8th Cir. Mar. 19, 2014)

# Upcoming ERIC calls

- FocusOn call on *Hybrid Plan Regulations*
  - Wednesday, October 8, 3:30 p.m. – 5:00 p.m. ET
- Washington Update call
  - Monday, November 10, 11:00 a.m. – noon ET



# Upcoming ERIC meetings

- ERIC Health and Retirement Committee meetings
  - Wednesday, October 15 (afternoon)
- ERIC General Membership meeting
  - Thursday, October 16 (all day)
- \*\*\*BIG ERIC PARTY\*\*\*
  - Wednesday, October 15 (evening)



## ERISA 40<sup>TH</sup> ANNIVERSARY PARTY

# To receive ERIC updates

- If you are an employee of an ERIC member company and would like to receive your own copy of our emails and notifications of future events, please let us know by writing to Adreanne Cooper at ERIC ([acooper@eric.org](mailto:acooper@eric.org).)
- In this email, please include your contact information or signature block, and please indicate whether you wish to receive information on retirement issues, health issues, legal issues, or any combination of the above.

# For further information

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