ERIC

THE ERISA INDUSTRY COMMITTEE

Advocating the Employee Benefit and Compensation Interests of America's Major Employers

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PENSION BENEFITS

Automatic Enrollment Rule Likely to Include Qualified Default

A future proposed rule on automatic enrollment in Section 401(k) plans is likely to include a "qualified" default provision as part of a fiduciary safe harbor, Jeffrey J. Turner, senior pension law specialist at the Department of Labor's Employee Benefits Security Administration, said June 29. BNA reported that Turner made his comments during an ALI-ABA webcast, “Protecting ERISA Fiduciaries, Employers, and Administrators from Benefit Plan Risks and Liabilities.” Turner also outlined concepts that might be expected to appear in the proposed rule, including:

- The plan actually provides for participant direction.
- Advance notice to participants must specify that if they do not take charge

2006 ERIC Meetings & Events

September

11 Washington Representatives Mtg.
19 Executive Board of Directors Mtg.

October

2 Washington Representatives Mtg.

November

6 Washington Representatives Mtg.
15 Health Policy Comm. Mtg.
16 Retirement Security Comm. Mtg.
30 Executive Board of Directors Mtg.

December

4 Washington Representatives Mtg.

of their accounts, the money goes into the default investment.
- Participants must be able to move money out of the default investment.
- The plan must provide a broad range of investments.

Turner cited such investments as life cycle funds, balanced funds, and individually managed accounts as potential default investments. There likely would be restrictions on employer securities as a default investment. The scope or level of relief provided by the default investment would be similar to being compliant with Employee Retirement Income Security Act Section 404(c). The fiduciary would be relieved of any fiduciary responsibility for the initial investment decision and any participant changes to the investments or rebalancing. The fiduciary still would have responsibility for selecting the investment provider and subsequent monitoring of that provider.

Prospects for Pension Reform Legislation Remain Uncertain

With only seven working weeks left until Congress's scheduled adjournment for the 2006 elections, conference committee Republican leaders continue to meet to work through the details of the pension reform legislation, but have still failed to reach agreement on key issues. Recent conference discussions also have included Senate Democrats (Sen. Max Baucus (D-MO) and Sen. Ted Kennedy (D-MA), who are pressing for more generous transition rules for well-funded plans. Members are expected to meet again tomorrow (Wednesday).

As expected, discussions among Republican leaders are being re-examined by the wider group, especially with regard to hybrid plan issues. AARP recently increased the intensity of its lobbying to convince conferees to adopt hybrid plan rules from the Senate bill. In a letter to the conferees, AARP has said the conversion mandates of the Senate bill are necessary to protect older workers.

The method for determining "at-risk" status under the single-employer funding rules also remains a focus of discussion. Negotiations over a tax bill expected to be added to the pension conference agreement appear to be complicating a final settlement on pension reform, so pension discussions continue against a complicated political backdrop.

ERIC's lobbying continues to be intense and members should watch for bulletins and conference calls as negotiations continue. While others appear to be "handicapping" the likelihood of a pension bill passing, ERIC's position remains that passage is likely; we are not letting our guard down.

AARP Letter

IRS Adopts ERIC Guidance on 409A Conflict-of-Interest Exception

Past issues of the *ERIC Executive Report*, are available at www.eric.org.

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The IRS adopted ERIC's recommendation to clarify its rule that it will allow an otherwise impermissible acceleration of nonqualified deferred compensation from a plan governed by Code Sec. 409A if necessary to allow a prospective government employee to comply with federal conflict-of-interest requirements. The IRS had previously conditioned this exception on the employee having to comply with a certificate of divestiture issued by the federal Office of Government Ethics. A certificate of divestiture allows the employee to defer recognition of capital gains when his or her property is sold to comply with conflict-of-interest requirements. In comments filed with the IRS, ERIC noted that because payment under a nonqualified deferred compensation plan is treated as ordinary income, the Office of Government Ethics could not issue a certificate of divestiture in connection with an accelerated payment under such a plan.

New IRS guidance allows early payments of non-qualified deferred compensation if the Office of Government Ethics certifies in writing that: (1) divestiture of the financial interest or termination of the financial arrangement is reasonably necessary to comply with any federal conflict-of-interest statute, regulation, rule or executive order, or is requested by a congressional committee as a condition of confirmation; and (2) specifies the financial interest to be divested or terminated. Amounts paid pursuant to such acceleration generally will be includible in income by the recipient.

ERIC has filed a number of comments with IRS and Treasury concerning proposed guidance on nonqualified deferred compensation.

IRS Notice 2006-64 ERIC's May 2006 409A Comments ERIC's January 2006 409A Comments

DOE Withdraws Defined Benefit Pension Preclusion in Victory for ERIC

Secretary of Energy Sam Bodman, June 20, suspended a policy change that would have denied Department of Energy contractors reimbursement for certain benefit plan designs, including defined benefit pension plans and comprehensive health care coverage for new employees. In letters addressed to Senators who had expressed concern over the change, Secretary Bodman announced that he had directed the Department's Office of Management to suspend for one year the reimbursement policy announced April 27 in DOE Notice 351.1 and to consult with stakeholders, including Congress, during the coming year to solicit their views on the issue.

In a May 15 letter to House Committee on Appropriations Chairman Jerry Lewis (R-CA), ERIC called the new policy "unsound" and "an inappropriate" use of the agency's regulatory authority. The letter said the policy marked an "ominous signal" regarding the Administration's support for voluntary benefit plans and raises questions about the Administration's long-standing opposition to benefit mandates.

In both the May 15 letter and a June 14 letter to the Senate, ERIC argued that the DOE policy set a dangerous precedent that would allow government agencies to advance a patchwork quilt of benefit design preferences through their procurement policies. ERIC expressed concern that such actions would undercut the ability of employers to provide uniform benefits to employees.

ERIC May 15 Letter   ERIC June 14 Letter

Allstate Survey Finds Americans Are Not Saving 'Seriously' for Retirement

Forty percent of Americans surveyed believe they are not saving seriously for retirement, according to a recent Allstate survey. Fully 34 percent of survey respondents said having a company payroll deduction plan has been the biggest incentive to save, followed by 29 percent who said being better educated about investments prompted higher savings. Meanwhile, 52 percent said media coverage of retirement issues prompted them to think about it.

The survey found that 21 percent overall, and only 25 percent of baby boomers born from 1946 to 1964, believed they are "very prepared" financially for retirement. Overall, 38 percent said they expected their retirement to be "financially difficult." Respondents also expressed apprehension about recent trends, such as rising costs of health care, the survey report said.

The report also found other unexpected factors that have hampered America's retirement dreams. Such factors include providing support to adult children which has affected 34 percent of respondents overall, and 43 percent of boomers in their ability to save for retirement. Twenty one percent of Generation Xers born from 1965 to 1978 we also affected by supporting adult children.

Allstate created the annual survey in conjunction with Mathew Greenwald & Associates, which polled 1,603 people born between 1946 and 1978, with household incomes of $35,000 or more. Retirees were accepted with incomes of at least $20,000.

Allstate News Release

COMPENSATION

SEC Commissioner Expresses Concern Over Disclosure Rules

Securities and Exchange Commissioner Paul Atkins said, June 30, that he has "extremely deep reservations" about the SEC's proposal to require disclosure of compensation to employees who are non-executive officers. Atkins said that comments on the proposal have been "virtually universally negative" and that the disclosure is not offset by "the need for sunlight since non-executive compensation decisions are not subject to the same conflicts of interest."

The SEC's proposal is part of a revamp of executive compensation rules released in January 2006. The proposed rule would require disclosure for up to three employees who were not executive officers during the last completed fiscal year and whose total compensation for the last completed fiscal year was greater than that of any of the named executive officers.

Atkins also expressed concern over the proposal's method for determining the named executive officers for which disclosure is required. The current proposal looks at total compensation, which is based on several "assumption-laden calculations" and could result in a "somewhat arbitrary group of named executive officers that changes from year to year." Atkins is concerned that this along with the disclosure of additional information such as stock and option award values both at grant date fair value and upon vesting, exercise, or modification of the award could lead to investor confusion.

Atkins' Speech   SEC's Proposed Rule

HEALTH BENEFITS

Court Hears Oral Arguments in ERISA Preemption Case

The United States District Court for the District of Maryland heard oral arguments late last month in a case that challenges a Maryland law that will require large employers to provide minimum health benefits to employees or pay a tax. The court heard arguments in the suit filed by the Retail Industry Leaders Association on RILA's motion for summary judgment, which courts may grant when no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. The district court has not set a timeline for issuing a ruling on the motion.

RILA filed the case after the Maryland legislature on January 12, 2006, enacted, over Governor Robert Ehrlich's (R) veto, the Fair Share Health Care Fund Act ("Act"). In general, the Act requires private employers with at least 10,000 employees (full or part-time) in Maryland to provide a certain level of health benefits to those employees or contribute to the Maryland Fair Share Health Care Fund ("Fund"). Those employers must spend at least eight percent of wages (six percent in the case of nonprofit organizations) paid to their Maryland employees on health benefits for such employees.

The RILA lawsuit asserts that ERISA preempts the Maryland Act. RILA is also challenging a Suffolk County, NY, law on ERISA preemption grounds. The Suffolk County Act requires large retail grocery stores in Suffolk County to spend at least $3 per hour worked on health care benefits for every non-management employee, including part-time and seasonal workers.

ERIC continues to monitor and oppose state health care mandates such as the on enacted in Maryland.

ERIC State Health Mandate E-Briefing Book

EEOC Staff Comments Indicate ADA Could Bar Wellness

Program Practices

Equal Employment Opportunity Commission (EEOC) staff have made informal comments on whether the Americans with Disabilities Act (ADA) bars certain wellness program practices. The ADA generally prohibits employers from requiring an employee to answer a disability-related inquiry or submit to a medical examination unless it is part of a voluntary program. Health risk assessments (HRAs) often include questions that might be considered disability-related inquiries (e.g., questions on prescription drug use) or entail procedures that could be considered medical examinations (e.g., cholesterol screening). Previous EEOC guidance said that a program is voluntary if an employer neither requires participation nor penalizes non-participation.

The EEOC staff's comments indicate that imposing higher premiums or cost-sharing on an employee who doesn't cooperate with a health plan's disease management professionals amounts makes the program involuntary. Similarly, conditioning plan enrollment on completing an HRA with disability-related inquiries or medical examinations could violate the ADA by making the HRA involuntary. The staff also noted that complying with HIPAA's nondiscrimination requirements for a "bona fide wellness program" isn't necessarily sufficient to satisfy the ADA. The HIPAA rules for these programs limit any financial incentives and require the sponsor to provide a reasonable alternative standard for anyone who is medically unable to meet the standard necessary to get the financial incentive. Whether these practices meet the ADA's standards for a voluntary wellness program requires a separate analysis.

Employers Considering Restrictions on Retiree Health Coverage Despite Part D Subsidy

Despite subsidies from the Medicare drug program, many employers are planning to curtail their health care coverage for current and future retirees, according to a survey released July 29 by the management consulting firm Watson Wyatt Worldwide.

Only 5 percent of those surveyed said they do not expect to place any additional restrictions on their medical benefits for future retirees over the next five years, and 7 percent do not expect to implement further restrictions for current retirees. Despite the expectation of new restrictions, most employers plan to continue to offer some benefit. Only 14 percent of employers plan to eliminate the benefit entirely for future retirees over age 65, while 6 percent plan to eliminate the benefit for current retirees over 65. Nearly two-thirds of employers anticipate increasing financial contributions for future retirees and half of employers expect to change their plan design.

The Medicare Part D drug benefit subsidizes employee and union plans with up to 28 percent of coverage costs exceeding $250—up to $5,000—for retirees who are also Medicare beneficiaries. According to the survey, out of the 77 percent of employers who took the Medicare drug subsidy in 2006, 64 percent plan to take the federal subsidy in the future. Forty percent of employers believe that abandoning retiree medical programs would be the most effective way to reduce costs for their organization. Yet, most still offer plans due to concerns over employee relations, an overall benefits philosophy, or concerns over potential litigation.

ERIC continues to advocate strongly for the continuation of Medicare Part D employer subsidy for those employers who plan to take it.

Average Annual Medical Spending Tops $13,000 for Family of Four

The average total medical spending for the “typical American family of four” reached $13,382 in 2006 according to a report released June 29 by Milliman, Inc. The finding is contained in the second annual Milliman Medical Index (MMI). The MMI measures average yearly healthcare costs when the family of four is covered by an employer-sponsored Preferred Provider Organization (PPO). The new Milliman study determined that the average annual medical cost for a family of four increased by 9.6 percent from 2005 to 2006. The average annual rate of increase for the four-year period 2002–2006 was 9.7 percent.

The MMI examines the key drivers and the components of actual medical spending, including physician charges, prescription drugs and hospital charges. The index breaks out and measures the rate of consumer spending versus the rate of total spending for health care in a given year. Based on a typical PPO plan design, Milliman estimates that the typical American family of four would pay $2,210 out of their own pocket through member cost sharing in 2006.

MMI Study

2006 ERIC Health Policy Conference Addresses Cost Challenges

ERIC’s comprehensive health policy conference on June 27-28th, 2006 lead major employers in facing the rising cost challenges that have continued to make providing health benefits more difficult. ERIC members met with top policy makers and other major employers to discuss the necessary legislative, regulatory, and plan sponsor changes to lowering the costs of providing quality healthcare.

ERIC Chair Jane Greenman (Tyco International) kicked off the conference with a comprehensive overview of the challenges facing employers as they continue to provide employee health benefits. In her remarks, Greenman emphasized the economic reality of major employers working to compete against both domestic and foreign competitors not saddled by the cost of generous employee benefits. That reality has created downward pressure on wages as employers try to cope with the rapid escalation in benefit costs.

ERIC Health Policy Committee Chair Randy Johnson (Motorola, Inc.) followed up by discussing the problems inherent in the current system of health insurance and care provision. He challenged participants to help find solutions to the rising cost of insurance, find ways to reduce medical errors, and encourage healthy lifestyles.

Secretary of Labor Elaine L. Chao provided the conference's keynote address. Her speech focused on many of the same issues as the conference. Secretary Chao discussed the President's initiatives to reform the healthcare market including increased transparency, greater use of HSAs, and the introduction of Association Health Plans—all issues supported by ERIC. The Secretary also discussed the need of medical liability reform and the success of legislation in Texas in controlling the high cost of malpractice insurance premiums.

The **Immediate Savings Strategies** panel featured participants from Mercer, Wachovia, and Tyco International. The panel discussed the strategies their companies have adopted to cut the rate at which their benefit costs have grown. Speakers offered candid advice and success stories, including innovative programs that lowered costs and even paid for themselves.

The **Consumerism: Making Healthcare a Market** panel explored the use of Health Savings Accounts (HSAs), high-deductible health plans, and other tools for connecting health care consumers to the cost of medical care. Representatives from Wells Fargo, Mercer, and IBM discussed the adoption of these models and their impact on growing healthcare costs at their companies. Panelists showed that employers and employees have an increasing interest in taking charge of their healthcare with consumer-directed plans and options.

The **Retiree Health: Options and Strategies to Cover Your Retiree Without Breaking the Bank** panel included a discussion of Medicare Advantage programs in addition to other strategies such as Part D wrap-around plans, service-based plans, and changes to retiree contributions. Benefits professionals from Deseret Mutual, General Mills, and American Airlines discussed the strategies that they have adopted and the success and challenges they have encountered in putting the changes into effect. While panelists agreed that there was no silver bullet, they presented options that allowed them to offer retiree health coverage while increasing savings.

The conference also provided a **Regulatory and Congressional Update** with Bradford Campbell, Deputy Assistant Secretary for Policy at the Department of Labor; Tom Reeder, Acting Benefits Tax Counsel at the Department of the Treasury; Stephen Northrup; Majority Health Policy Director of the Senate HELP Committee; and Kenneth Serafin from the House Ways & Means Committee, Subcommittee on Health briefed ERIC members on pending and coming legislative and regulatory action on health policy issues. Panelists provided a broad array of points that illustrated what ERIC will be up against (and backing) in the current and coming regulatory and legislative environment.

The **Transparency and Value-Based Purchasing** panel discussed efforts to implement greater transparency in the health care system to make consumerism more successful and provide patients with the information needed to choose efficient and effective treatment. Martha Priddy Patterson from Deloitte, Shawn Bishop from the Senate Finance Committee, and Alan Spielman President of URAC debated the effectiveness of these measures.

ERIC's Health Information Technology panel featured Dr. Steven Waldren, Assistant Director of the Center for Health Information Technology at the American Academy of Family Physicians; Dr. Jan Root, Assistant Executive Director of the Utah Health Information Network; and Michael Zamore, from the Office of Congressman Patrick Kennedy. Panelists discussed numerous different angles through which technology can improve healthcare quality and efficiency for plan sponsors and the lives they cover.

Secretary Chao's Speech