

The ERISA Industry Committee

Washington Update

October 7, 2013



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
- Health Update
- Retirement Update
- Litigation Update
- Concluding Remarks/Questions

ERIC on Social Media

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



<https://twitter.com/ERISAIndCmte>



<https://www.facebook.com/ERISAIndCmte>



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

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

Health



Health legislation

- The ACA as trade-off
 - Total repeal
 - One-year delay of ACA
 - One-year delay of individual mandate
 - Eliminate 2.3% excise tax on medical devices
 - Other?
- Threats/reality
 - Government shut-down
 - Impact on regulatory guidance
 - Unwillingness to raise debt ceiling

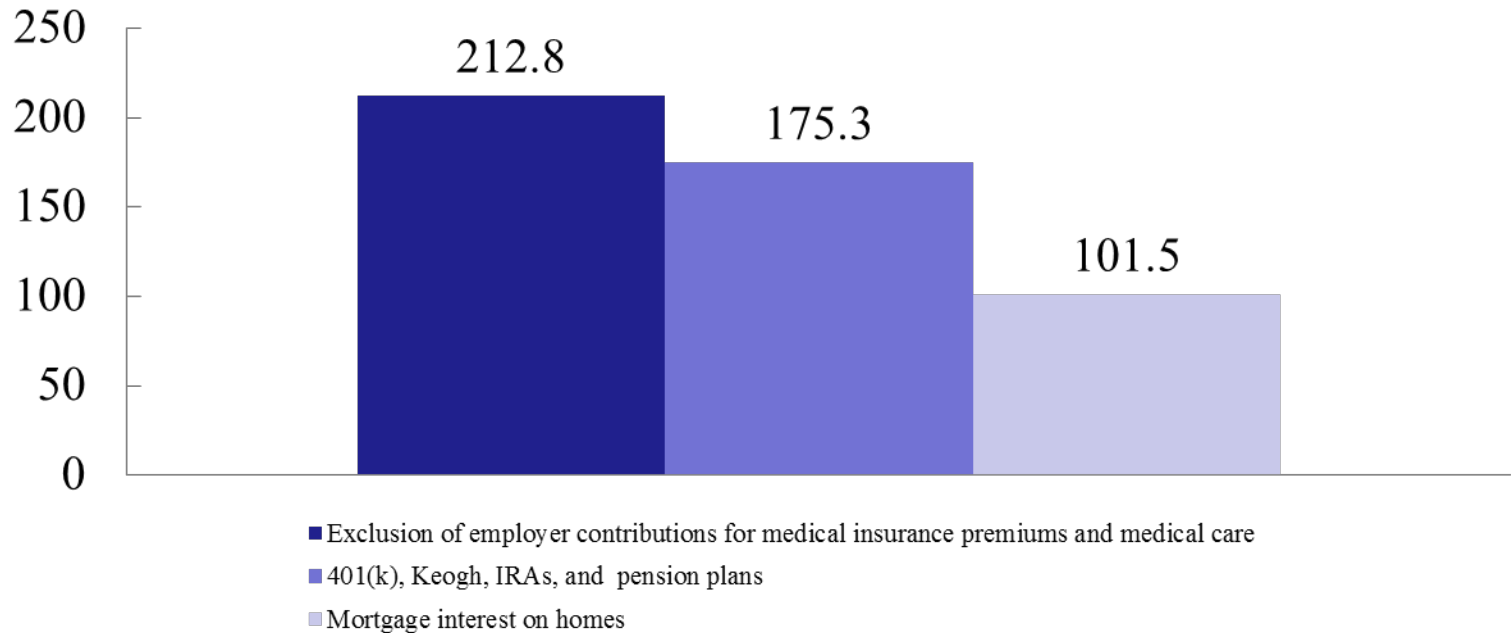
Health legislation, cont.

- Tax reform
 - Big target on employee exclusion for employer-provided health insurance
- Republican Study Committee alternative to the ACA
 - Includes “standard deduction for health insurance”
 - Above-the-line deduction for health insurance applied to both income and payroll taxes
 - \$7500 for individuals; \$20,000 for families
 - Eliminates employee exclusion for employer-provided insurance



Scary Movie #247: Top Income Tax Expenditures FY 2014

Estimated dollars in billions



Source: Office of Management and Budget (OMB), *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2014*.

Exchanges: Day Seven

- Is “up and running” an overstatement?
- How will we know if the Exchange system is working?
- When will we be sure?

Health regulations

- ▶ New Treasury/DOL/HHS guidance on EAPs, HRAs, Health FSAs
 - ▶ Notice 2013-54 and Technical Release 2013-03
- ▶ EAP guidance: no problem through 2014 if EAP does not offer “significant” medical benefits

Health regulations, cont.

- Health reimbursement account (HRA) is a group health plan subject to ACA rules
- HRAs must basically be integrated with a group health plan to comply with ACA
 - ACA consumer protection/market reform rules not applicable to retiree-only HRAs, but HRA still considered MEC
- Retirees with HRAs will not be eligible for subsidized coverage in Exchange
 - Still hoping for “suspended animation” rule

Health regulations, cont.

- New wellness issue: contents of a Health Risk Assessment (HRA)
 - How much can be asked? What topics may be addressed?
 - Fear of further regulation
 - Role of the EEOC

Health regulations, cont.

- DOMA – Notice 2013-61
 - Guidance for employers and employees
 - Addresses claims for refunds or adjustments of overpayments for FICA and income tax withholding for benefits provided to same-sex spouses
 - Notice provides optional special administrative procedures for 2013 and prior open years

Reporting under IRC 6055 and 6056

- ▶ ACA reports delayed, along with shared responsibility penalty
 - First year of coverage: 2015
 - First reports due: early 2016
- ▶ Proposed regulations describe voluminous reporting
 - 6055 reporting used to determine applicability of individual mandate
 - 6056 reporting used to determine applicability of employer penalty and whether individual employee is eligible for subsidized coverage on Exchange
- ▶ Electronic transmission OK if employee consents
- ▶ Need YOUR COMMENTS on these issues

Retirement



Retirement – Legislative Update

Congress/Tax Reform:

- Shut-down
- Expiration of debt ceiling extension –
Fall/year-end strategy & intersection with
tax reform
- Government funding talks may involve
extension of MAP-21 interest stabilization
rate (funding relief)
- ERIC letter of support



Retirement – Regulatory Update,

Department of Labor

- Technical Release 2013-04 on DOMA (September 18, 2013):
 - State of celebration ruling
 - Additional guidance to come
- OIG Report on EBSA oversight on hard-to-value alternative investments

Retirement – Regulatory Update, cont.

- ERIC comment letter on FAB 2013-02 on Fee disclosure enforcement filed September 18 (in conjunction with US Chamber & PSCA)
- Confirm that the FAB's relief applies to all of the regulation's annual disclosures and not just the comparative chart;
- Confirm that plan administrators that delay the annual fee disclosures in accordance with the FAB continue to be entitled to rely on the fiduciary safe harbor included in the regulation;
- Extend the deadline for annual fee disclosures by providing a 45-day window as suggested by the Department; and
- Provide additional relief for special plan events.



Retirement – Regulatory Update, cont.

Regulations in the “queue”

- 408(b)(2) “Guide” project- at OMB on June 25 (Oct. projection date)
- FAQs on 408(b)(2) disclosure regulations
- Information collection request on benefit statements
- Definition of Fiduciary re-proposed regulation- 2013–Late Fall??
- Target Date Fund Disclosure (final regs)



Retirement – Regulatory Update, cont.

Treasury Department/IRS

- IRS announces that single employer defined benefit plans CANNOT receive automatic approval to change the plan year to delay the MAP-21 premium increases

Retirement – Regulatory Update, cont.

Treasury Department/IRS

In the “queue”

- More guidance on DOMA – retroactive effect to come (by year-end?)
- Final Hybrid plan regulations
- PEP plan regulation project
- Lifetime income guidance



Retirement – Regulatory Update, cont.

PBGC

- ERIC files comment letter on PBGC proposed regulations on premium filing (September 23)
 - ERIC supports the PBGC’s proposal to change the premium due date for large plans.
 - ERIC supports the PBGC’s proposal to lower the self-correction penalty cap.
 - ERIC believes that the PBGC should not apply loading factors to premiums for plans that are at-risk.
- Working on PBGC interest rate issue with National Retiree Legislative Network & other business trades



Litigation



Equitable Remedies

- Supreme Court has authorized equitable remedies
 - Clearly for fraud
- Three Second Circuit Cases
 - *Amara v. Cigna* (Supreme Ct. Remand) - Alleged fraud in DB conversion communications
 - *Frommert v. Conkright* (Supreme Ct. Remand) - Administrative interpretation of missing plan provision after amendment
 - *Osberg v. Foot Locker* - Alleged mistaken/ambiguous plan communications after DB plan conversion

CIGNA v. Amara, 131 S.Ct. 1866 (2011); Conkright v. Frommert, 130 S. Ct. 1640 (2010); Osberg v. Foot Locker, 907 F. Supp. 2d 527 (S.D.N.Y. 2012)

Equitable Remedies

- ERIC Amicus Briefs - Decisions Pending
 - *Frommert* (Xerox case) - 2012
 - *Foot Locker* - September 2013
- Key issues addressed in cases
 - Remedies for communication mistakes/ambiguities
 - Burden of proof of harm
 - Scope of deference to plan administrator decisions

Equitable Remedies

- Plaintiffs' Claims
 - Misleading communications actionable regardless of individual harm
 - Surcharge and Reformation available = money damages / ignore plan language or reasonable interpretations
 - Deference to plan administrator narrowly limited

Equitable Remedies

- ERIC Position
 - Must prove actual harm to each participant - no presumption of harm
 - Burden of proof on plaintiffs unless court finds fraud
 - Courts should defer to reasonable plan interpretations
- DOL Amicus Briefs
 - Liability based on SPD mistake/ambiguity
 - No actual harm required - presumption of harm sufficient
 - No deference to plan administrator
 - Liability should be based on participants' expectations

Taxation of Severance Pay

- The IRS believes that all severance payments are subject to employment taxes under a broad definition of “wages”.
- ERIC filed an amicus brief with the 6th Circuit Court of Appeals, which held that the severance pay for involuntary terminations was not subject to FICA taxes.
- Law exempts supplemental unemployment benefits.
- The U.S. Supreme Court agreed to hear the case.
- If the employer wins, companies may no longer be subject to FICA taxes on some severance pay.

United States v. Quality Stores Inc., 693 F.3d 605 (6th Cir. 2012)

Time Limits for Suing

- U.S. Supreme Court will hear oral arguments on October 15th in case examining how long a participant has to sue after a benefit denial
- Disability plan provided 3 years from filing claim
- Plaintiff claims she should have 3 years after final denial by plan
- If Hartford wins, companies may want to limit the length of time participants can file suits in their plan documents

Heimeshoff v. Hartford Life & Accident Insurance Co., U.S., No. 12-729, cert. granted in part 4/15/13

“Excessive” Fee Case

- Participants sued International Paper regarding its 401(k) plans.
- Their claims included that the company paid “excessive” fees for recordkeeping and investment management.
- The case has recently settled, with the employer agreeing to pay \$30 million and make changes to its retirement plans.

Beesley v. International Paper Company, Case No. 06-703 (S.D. Ill.)

Upcoming ERIC calls

- FocusOn call on Large Plan IRS Audits (TBD)
- Washington Update call
 - Monday, November 4, 11:00 a.m. – noon EDT



Upcoming ERIC meetings

- ERIC Washington Representatives Committee for today has been CANCELLED.
- ERIC Membership and Committee meetings
 - Wednesday and Thursday, October 16 - 17

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.)
- 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 all of the above.

For further information

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