

Benefit and Advisory Compliance

Bulletin

April 2010

In February and March, the Department of Labor (DOL) released proposed investment advice regulations and additional guidance on the electronic filing requirements for Form 5500 and filing requirements for 403(b) plan sponsors. New legislation offered funding relief for pension plans, while changes proposed to an existing bill would make it more difficult to pass nondiscrimination testing. The Internal Revenue Service (IRS) now requires employers to self-report excise taxes owed for violations of certain health plan-related laws, and the Third Circuit ruled that a health plan amendment related to a participant's election under a retirement plan violated the anti-cutback rule.

Legislative Developments

Pension funding relief

The Senate recently passed the American Workers, State, and Business Relief Act, which provides temporary funding relief for pension plan sponsors. The bill would allow plan sponsors to choose two years of relief between 2009 and 2011 (with some limited availability for the 2008 plan year). Under this relief:

- Plans could amortize shortfall amortization bases established using a "2+7 rule" (two years of interest followed by a seven-year amortization) or a 15-year amortization rule.
- Required contributions would be increased if the plan sponsor pays excess compensation (i.e., compensation and funded deferred compensation that exceeds \$1 million), declares extraordinary dividends or engages in certain stock redemptions.
- An AFTAP (adjusted funding target attainment percentage) lookback would help plan sponsors avoid the restriction on benefit accruals for plans that are less than 60% funded.

Insight: Requiring certain plan sponsors to increase plan contributions and related actuarial issues may dilute the value of the relief. If relief is elected, it is unlikely that any plan amendments would be required. However, plan sponsors that decide to take advantage of this relief must make an election in accordance with IRS procedures. Various House committees continue to consider pension funding relief provisions, including a possible "active plan" requirement with respect to the 15-year amortization option. It is also possible the House will include defined contribution plan fee disclosure provisions and changes to the nondiscrimination testing rules intended to curb abusive practices (see related article below). Ultimately, it seems likely the Senate bill will have to be reconciled with any action the House

takes. To discuss how this relief, if passed, would affect your pension plan, contact your Towers Watson actuary.

A copy of the Senate bill can be found [here](#).

Nondiscrimination testing

Representative Lloyd Doggett [D-TX] proposed changes to the Retirement Fairness Act of 2009 that would:

- Modify nondiscrimination testing rules to address abusive practices that comply with the current rules but effectively discriminate in favor of highly compensated employees
- Require employers to count part-time non-highly compensated employees (NHCEs) on a fractional basis when performing coverage testing

Insight: These proposed changes replace two provisions in the original draft of the bill, which required only NHCE vested benefits to be counted for 401(a)(4) testing and eliminated cross testing. Counting part-time NHCEs on a fractional basis lowers the NHCE participant count and, therefore, adversely affects coverage test results. The original version of this bill was discussed in the [December 2009 issue](#).

Regulatory Developments

DOL releases proposed investment advice regulations for 401(k) plans

The regulations provide guidance on the statutory prohibited transaction exemption for investment advice added by the Pension Protection Act of 2006 (PPA). The exemption generally allows investment advice to be provided to participants by an unbiased computer model or a fiduciary advisor compensated on a level-fee basis. After reviewing previously published (and withdrawn) regulations and a related class exemption, the DOL revised the rule to limit implementation of the PPA statutory exemption and eliminated the related class exemption. The proposed regulations are nearly identical to the provisions of previously published regulations.

Insight: The prevalence of 401(k) plans as the sole source of employer-provided retirement savings and the plight of 401(k) account balances during the economic recession have heightened the need for plan sponsors to offer investment advice programs to plan participants. Plan sponsors that have an investment advice program in place (particularly those using a computer model) should discuss how (and whether) these regulations affect the vendor's current platform. Towers Watson's dedicated team of vendor management consultants can assist with these discussions.

A copy of the proposed regulations can be found [here](#).

Form 5500 e-filing guidance

All Form 5500s for plan years beginning on or after January 1, 2009 must be filed electronically. The DOL issued six EFAST2 user guides to assist with Form 5500 electronic filing.

Insight: Although filers can prepare and submit Form 5500s using the DOL's free ("no frills") web-based application (called IFILE), the vast majority of filers are expected to use EFAST2-approved third-party software.

The user guides can be found [here](#).

DOL guidance on 403(b) plan Form 5500 compliance

The DOL issued guidance regarding revised Form 5500 filing requirements for 403(b) plans. In accordance with revised Form 5500 requirements for the 2009 plan year, large ERISA-covered 403(b) plans (generally plans with 100 or more participants) will now be required to file audited financial statements with Form 5500. The new guidance responds to questions about transition relief related to certain tax-sheltered annuity contracts and custodial accounts entered into prior to January 1, 2009. The guidance also responds to questions about the scope of the exclusion from ERISA coverage for 403(b) plans not "established and maintained" by the employer. Finally, the DOL created a web page dedicated to 403(b) plan reporting and coverage issues and guidance.

Insight: Sponsors of 403(b) plans with multiple vendors that find it unwieldy to both collect information and manage the required Form 5500 audit may consider moving to a single vendor. Since the current market is very dynamic and competitive, now is a good time to take advantage of available pricing and contract concessions.

The guidance, in Field Assistance Bulletin 2010-01, can be found [here](#).

The new 403(b) web page is available [here](#).

IRS mandates excise tax self-reporting for health plan noncompliance

Effective for plan years beginning on or after January 1, 2010, the IRS requires employer group health plans to report and pay any applicable excise tax for violations of various federal health plan mandates. This includes excise taxes to enforce mandates such as COBRA, mental health parity and HIPAA (preexisting conditions, creditable coverage certificates and special enrollment rules). The IRS created a new form for this purpose.

Insight: Now that self-reporting is mandatory, plan sponsors should review their health plan operations and address any deficiencies. This is especially important, since harsh penalties may result if failure to pay applicable excise taxes is ultimately uncovered during an audit.

The new Form 8928 is available [here](#) and instructions for the form are available [here](#).

Court Decisions

Retiree health plan amendment found in violation of anti-cutback rule

The Third Circuit held that the anti-cutback rule was violated when a health plan was amended to make participants ineligible for retiree health benefits if they elected their pension benefits as a lump sum. While the anti-cutback rule does not apply to health plans, the court found that the amendment constructively amended the pension plan by conditioning receipt of the lump sum benefit on surrendering health care benefits provided by the welfare plan.

Insight: Plan sponsors in the Third Circuit (PA, NJ and DE) need to exercise caution by ensuring that any changes to the company's health and welfare plans do not have an indirect effect on participants' retirement benefits.

The case, *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, is available [here](#).

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