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HR AND BENEFITS UPDATE

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ANTI-ABUSE RULES TO BE CONSIDERED WHEN DETERMINING GRANDFATHERED STATUS

Interim final regulations on how a plan may retain its grandfathered status were issued on June 14, 2010. In addition to the guidelines that addressed what a plan can or cannot do and remain grandfathered, the regulations include two anti-abuse provisions. These provisions presumably were included to prevent plans from improperly claiming grandfathered status.

The first anti-abuse provision applies to mergers and acquisitions as related to plan eligibility. The anti-abuse rules state that if the principal purpose of a merger, acquisition or other business restructuring is done so that new individuals may be covered under an existing grandfathered plan, the plan will cease to be grandfathered.

The second anti-abuse provision states that if a group health plan eliminates a coverage option in an effort to force employees to transfer into a grandfathered plan, this will be seen as being outside the bona fide employment based reasons. In essence, the plan would be forcing employees to transfer from one plan to another, without providing a choice. This is of concern to employers who are in the process of condensing multiple plan options into one plan. It appears that this rule would prohibit employers from eliminating plan options and forcing employees into one remaining plan if they wish to keep their grandfathered status.

The interim final regulations provide two examples to further explain this second anti-abuse provision. In the first example, a group health plan offers two benefit packages on March 23, 2010. Due to the high cost of the first option, the plan sponsor eliminates this option and transfers all employees covered under the first option to the second option. In the example, the conclusion is reached that the plan did not have a bona fide employment-based reason to eliminate the first option. Thus, both options cease to be a grandfathered plan. However, any other benefit package maintained by the plan sponsor is analyzed separately under the rules.

The regulations provide a second example, which illustrates when an employer does have a bona fide employment-based reason to eliminate a plan option. The example states that the employer eliminated a plan option after a manufacturing plant is closed and the employees moved to a separate location. In this example, the closing of the plant was a bona fide employment-based reason to transfer the employees, and the plan may maintain grandfathered status.

SIMPLICITY: A BEST PRACTICE FOR RETIREMENT PLANS

JP Morgan recently published trends in 401(k) plan design in their Insights newsletter.* The findings reveal that "autos" are growing in popularity. The "autos," which are starting to be known as the "auto-suite," include automatic enrollment, escalation and rebalancing.

With automatic enrollment, employees begin participating in the plan usually after a grace period. Contributions are made at a pre-determined rate and invested in a default fund. A participant's active decision, of course, can override any default process. At the end of 2009, 43 percent of the surveyed clients were using automatic enrollment. Additionally, 57 percent of their clients with automatic enrollment are also utilizing automatic escalation, which is a preset increase in the deferral amount each year. Auto-rebalancing allows participants to have their account rebalanced to a targeted weighting.

JP Morgan's research on participant behavior revealed some interesting information about how participants are not necessarily managing their accounts with retirement in mind.

- 68 percent of new participants enrolled due to a plan sponsor decision. This shows the importance of automatic enrollment to just get participants into the plan.
- Only about 10 percent of participants ever made investment transfers, which shows that most participants are not taking an active role in managing their account.
- Contribution levels start low and rise slowly; participants don't actually reach a 10 percent contribution level until they reach age 57.

Taken together, certain best practices can simplify the participant experience. JP Morgan suggests the following:

- Utilize automatic enrollment for current and new employees.
- If an employee opts out of the plan, sweep them back in at regular intervals.
- Use a low default deferral rate to minimize impact on take-home pay.
- Use automatic escalation and require participants to opt out.
- Set the automatic escalation at 2 percent increments and set the cap at 10 percent rather than stopping at the match amount.

Inertia is the natural enemy of most employees, who in many cases just don't know what to do. We would be happy to further discuss the auto-suite items with you. Inertia is the natural enemy of most employees, who in many cases just don't know what to do. We would be happy to further discuss the auto-suite items with you.

* JP Morgan, *Insights*, "Ready. Fire! Aim? 2009 for Defaulted Participants" May 28, 2010

COMPLIANCE FAQ

Question: What is the effect of recent Department of Labor (DOL) administrative guidance on the interpretation of the phrase "son or daughter" in the FMLA?

Answer: The Family Medical Leave Act (FMLA) defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability."[1] The definition is significant because the FMLA permits eligible employees to take up to 12 weeks of unpaid leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition.

The DOL recently issued additional administrative guidance regarding the definition of the term "son or daughter," specifically to clarify the definition of "*in loco parentis*." FMLA regulations provide that persons standing *in loco parentis* include those with day-to-day responsibilities to care for and financially support a child and a biological or legal relationship to the child is unnecessary.[2] The new guidance clarifies that "the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child."[3] Whether an employee stands *in loco parentis* remains an issue dependent on factors such as, the child's age, the degree to which the child is dependent on the person claiming *in loco parentis* status, the amount of support provided and the extent to which the duties of parenthood are exercised.

Examples of situations in which an *in loco parentis* relationship may be found include:

- When an employee provides day-to-day support for his or her unmarried partner's child (with whom there is no legal or biological relationship), but does not financially support the child;
- When an employee will share equally in the raising of a child with the child's biological parent(s);
- When an employee will share equally in the raising of an adopted child with a same sex partner (but who does not have a legal relationship with the child); and
- When a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care, or where an aunt assumes responsibility for raising a child after the death of the child's parents.

Employers should review and update their FMLA policies to take into account this new guidance.

1. 29 U.S.C. § 2611(12)
2. 29 CFR § 825.122(c)(3)
3. Department of Labor's Administrator's Interpretation No. 2010-3 (emphasis added). Available at www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm (last visited Aug. 24, 2010).

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