



January 2009

## LEGISLATIVE UPDATE

### A look back at legislative changes in 2008

We would like to provide you with a comprehensive summary of legislative changes affecting your employee benefit plans and employment policies in 2008. Employers should review their plans and policies to ensure that they are revised and in compliance with the new legislation and regulations.

#### FEDERAL LAW UPDATES

##### THE FAMILY MEDICAL LEAVE ACT (FMLA)

January 25, 2008

The new regulations require employers to provide four types of notice and include optional sample forms that employees can use:

1. **Eligibility Notice.** An employee requesting FMLA leave should be provided an eligibility notice within five business days of the employer acquiring knowledge that a leave may be requested for an FMLA qualifying reason, or within five days after the employer acquires knowledge that a leave may be for an FMLA qualifying reason.
2. **Rights and Responsibilities Notice.** A Rights and Responsibilities notice must be provided to the employee at the same time as the eligibility notice.
3. **Designation Notice.** An employer should send a Designation Notice to the employee within five business days of having satisfactory information to determine whether the leave is FMLA-qualifying.
4. **General Notice.** The general notice must be posted in every work premise, including the employee handbook. The notice must be provided to each employee upon hire if the employer does not have a handbook.

The FMLA amendments also allow unpaid leave for certain family members of military personnel on active duty in a combat zone. Amendments provided for the following two new leave entitlements to take effect immediately:

1. For eligible employees who are the spouse son, daughter, parent or next of kin to a covered service member (a member of the armed services who is on active duty), 12 weeks of leave in support of contingency operations as a result of a qualifying exigency; and
2. For eligible employees who are the spouse, son, daughter or next of kin to a covered service member who is undergoing medical treatment, recuperation or therapy, are in outpatient status, or on temporary disability due to an injury or illness incurred in the line of duty, 26 weeks of leave. The leave period can be taken pursuant to a reduced leave schedule or on an intermittent basis.



The new regulations also include a revised certification form for an employee's serious health condition, family member's serious health condition, military qualifying exigency and military caregiver.

To view a revised FMLA poster, visit [www.woodruff-sawyer.com/webmail/FMLA\\_Poster.pdf](http://www.woodruff-sawyer.com/webmail/FMLA_Poster.pdf)

For additional FMLA sample notices and the regulations, visit: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

If you haven't already done so, make sure to review your plan documents and leave policies to ensure that the FMLA amendments are included.

## THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA) (HR 493)

May 21, 2008

GINA establishes a uniform standard to protect individuals from discrimination in employment practices and health care based on genetic information. The employment related rules go into effect November 8, 2009 and the rules governing health plans go into effect for plan years beginning on or after May 8, 2009. GINA defines genetic information as information about an individual's genetic tests, the genetic tests of family members of such individuals, and the manifestation of a disease or disorder in family members of such individuals. GINA bans group health plans and insurers from using genetic information for setting premiums or contribution requirements. It also prohibits all group health plans from requesting or requiring genetic testing as a condition of enrollment. Insurers and health plans may obtain and use the results of genetic tests to adjudicate claims payments. However, only the minimal amount of data can be requested to adjudicate claims. GINA also amends HIPAA so that use and disclosure of genetic information must meet HIPAA privacy standards including the protection of patients' rights with regard to it. Violations of GINA are subject to \$100 fine per day.

Employers should review their personnel policies and procedures to make sure that the genetic information of employees is kept confidential. It is also a good idea to communicate with health insurers regarding their GINA policies to ensure that service providers are properly monitored.

To view the full text of HR 493 (GINA), visit [www.woodruff-sawyer.com/webmail/GINA.pdf](http://www.woodruff-sawyer.com/webmail/GINA.pdf).

## HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008 (HEART)

June 6, 2008

On June 6, 2008, HEART passed, allowing employers to amend their plans to provide for a variety of additional benefits to individuals on active duty. Permitted benefits include the following:

1. 401(k) make-up contributions effective retroactively to January 1, 2007; and
2. Cafeteria plan distribution of unused account balances to reservists called to 180 days of active duty, provided the amount distributed is treated as taxable income and subject to withholding and income taxes.

Employers can consider providing additional benefits to employees on active duty.



## IRS FINAL REGULATIONS CLARIFYING SPECIAL RULES FOR DIVORCED PARENTS CLAIMING A CHILD AS A TAX DEPENDENT

July 2, 2008

Under the "special rule" included in Code section 152(e), a non-custodial parent may claim a child as his or her tax dependent if:

1. The child is in the custody of one or both parents for more than one-half of the calendar year;
2. The child receives over one-half of the child's support from his or her parents during the calendar year;
3. The parents are divorced or separated under a decree or divorce of separate maintenance, are separated under a written agreement or have lived apart at all times during the last six months; and
4. The custodial parent releases the claim to the exemption to the non-custodial parent in a written declaration that the non-custodial parent attached to his or her tax return.

Employers should be aware of the regulation, and if the health plan defines coverage for dependents more broadly, impute the income on the value of the coverage. Please note that the rules do not apply to dependent care spending accounts.

## NEW MEDICARE SECONDARY PAYER REQUIREMENTS

August 1, 2008

Beginning January 1, 2009, insurers and third party administrators must collect and report information on specified groups of covered individuals. If a health plan is self-funded and self-administered, they must meet the requirements. Any health plans that are not self-funded and self-insured may need to provide additional information to insurers and third party administrators. Data required to be reported will include the participants' type of coverage, data on drug plan availability and group policy numbers. Group health plans that do not currently share information with the Centers for Medicare and Medicaid Services (CMS) pursuant to current agreements must register during the month of April 2009 and transmit initial reports with data regarding coverage as of January 1, 2009 by the third quarter 2009. Group health plans that have agreements in place with CMS must transmit initial reports no later than March 31, 2009. If applicable, get prepared to transmit Medicare Secondary Payer Reports to CMS.

Additional information, forms and reporting requirements can be found at [www.cms.hhs.gov/mandatoryinsrep](http://www.cms.hhs.gov/mandatoryinsrep)

## IRS REVISIONS TO THE EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM (EPCRS) FOR SPONSORS OF RETIREMENT PLANS

August 14, 2008

On August 14, 2008, the IRS released a revision of the EPCRS. The revenue procedures allow retirement plan sponsors to correct operational errors even if the plan is being audited by the IRS. There is also enhanced use of the Voluntary Correction Program (VCP) option to correct errors involving plan loans, excess 401(k) deferrals, and failure to amend plan documents to reflect changes in the law.



Employers that sponsor retirement plans will want to familiarize themselves with the IRS EPCRS to identify and proactively tackle any plan operational errors.

### MICHELLE'S LAW (HR 2851)

September 25, 2008

Effective October 7, 2009 (January 1, 2010 for calendar year plans), health plans covered by Employee Retirement Income and Security Act (ERISA) must continue health coverage for students who take a medically necessary leave of absence from school or change to part-time status. The leave of absence must commence while the child is suffering from a serious injury, be medically necessary and cause the child to lose coverage under the plan. The coverage must continue until the earlier of one year after the leave of absence due to medical necessity or the date on which the coverage would otherwise terminate under the terms of the Plan.

To view the full text of HR 2851, visit, [www.woodruff-sawyer.com/webmail/Michelles\\_Law.pdf](http://www.woodruff-sawyer.com/webmail/Michelles_Law.pdf).

Employers will want to revise plan documents, summary plan descriptions, and other employee communications to ensure the documents and administration are consistent with this new law.

### AMERICANS WITH DISABILITIES ACT (ADA) EXPANSION

September 25, 2008

The ADA Amendment's Act was expanded with broadened coverage to protect anyone who faces discrimination on the basis of disability. The Act considers impairment a disability if it substantially limits at least one major life activity. Additionally, the Act prohibits employers from discriminating against employees based on employer's perception that the employee has a disability.

To view the full text of the ADA Amendments Act of 2008, visit [www.woodruff-sawyer.com/webmail/ADA\\_08.pdf](http://www.woodruff-sawyer.com/webmail/ADA_08.pdf).

Employers should review their discrimination policies to ensure that they are in compliance with the Act.

### EMERGENCY STABILIZATION ACT OF 2008

October 3, 2008

#### Federal Mental Health Parity Law (HR 6983)

As part of the Emergency Stabilization Act of 2008 (ESA), the Mental Health Parity law amended the ERISA, the Public Health Service Act and the Internal Revenue Code (IRC) for plan years beginning on or after October 3, 2009. For calendar year plans, the law applies on January 1, 2010. The law requires health plans with more than 50 employees containing mental health benefits to provide the same mental health benefits as are provided for any other illness. Health plans may no longer apply mental health benefit limits that don't also apply to surgical and medical benefits. The law will apply to all self-funded and fully insured plans subject to ERISA, but not to individual health insurance plans. A group health plan can elect not to be subject to the law provisions if it can prove that the new benefits would result in an increase of 2% or more in the total cost



of the health plan in the first year of the law's application and more than a 1% increase in total plan costs for subsequent plan years.

To view the full text of HR 6983, visit [www.woodruff-sawyer.com/webmail/Mental\\_Health.pdf](http://www.woodruff-sawyer.com/webmail/Mental_Health.pdf).

#### Bicycle Commuter Benefit (HR 1424)

The ESA also provided that employers are now able to provide employees with qualified bicycle commuting reimbursement benefits. Beginning on January 1, 2009, employers can reimburse up to \$20 a month tax free to employees for reasonable expenses incurred for the purchase, repair, improvement and storage of bicycles regularly used to commute to work.

To view the full text of HR 1424, visit [www.woodruff-sawyer.com/webmail/Bicycle\\_Benefit.pdf](http://www.woodruff-sawyer.com/webmail/Bicycle_Benefit.pdf).

Employers should consider reviewing your existing health plans to determine how the new law, once implemented, will affect current plan designs. Employers may want to consider providing bicycle commuting reimbursement benefits.

### AMENDMENT OF THE INTERNAL REVENUE CODE'S DEFINITION OF A QUALIFYING CHILD

October 7, 2008

The Fostering Connections to Success and Increasing Adoptions Act of 2008 amended Section 152(c) of the Internal Revenue Code to clarify that a taxpayer cannot claim a child as a dependent if the dependent is married.

To view a sample dependent care survey, visit [www.woodruff-sawyer.com/webmail/FCSIA.pdf](http://www.woodruff-sawyer.com/webmail/FCSIA.pdf).

Employers will want to consider the benefit of a dependent eligibility audit as a risk management tool to control costs.

### NEWBORNS' AND MOTHERS' HEALTH PROTECTION ACT OF 1996

October 20, 2008

The final regulations of the Newborns' and Mothers' Health Protection Act of 1996 added clarification to the interim 1998 rules that prohibited group health plans and insurers from restricting mothers' and newborns' benefits for hospital stays for childbirth to less than 48 hours following a vaginal delivery or 96 hours following a cesarian section delivery. An exception to this rule permits early discharge if agreed to by the mother and attending medical provider. The regulations clarify that the 48/96 hour period begins at the time of delivery or last delivery of multiple births. If the delivery occurs outside the hospital, the 48/96 hour period begins when the mother or newborn is admitted to the hospital. Additionally, an attending medical provider who can approve a discharge is defined as an individual who is licensed under applicable state law to provide maternal or pediatric care and is directly responsible for providing such care to the mother or newborn. Summary Plan Descriptions must include a description of post-childbirth hospitalization benefits. The regulations will apply to group health plans for plan years beginning after January 1, 2009.

To view a model notice, visit [www.woodruff-sawyer.com/webmail/Newborn\\_Notice.pdf](http://www.woodruff-sawyer.com/webmail/Newborn_Notice.pdf).

To view the final regulations, visit [www.woodruff-sawyer.com/webmail/Newborn\\_Regulations.pdf](http://www.woodruff-sawyer.com/webmail/Newborn_Regulations.pdf).

Employers will want to make sure that Summary Plan Descriptions and Summary of Material Modifications are up to date.



## IRS NOTICE EXTENDING FLEXIBLE SPENDING ACCOUNT (FSA) AND HEALTH REIMBURSEMENT ACCOUNT (HRA) RESTRICTIONS

December 4, 2008

The IRS extended the January 1, 2009 deadline for complying with IRS Notice 2007-2 guidance on debit cards employees use to access their FSA and HRA funds. After June 30, 2009, health FSA and HRA debit cards may not be used at drug stores and pharmacies unless they comply with inventory information approval systems meetings IRS requirements or 90% of the store's gross receipts during the prior taxable year consisted of items that qualify as medical expenses under IRC Section 213(d). Drugstores and pharmacies enrolled with the inventory information approval system will have a merchant category code to identify themselves in a debit card transaction.

Employers will want to note the extension for purposes of informing employees that certain drug stores and pharmacies may effect them using debit cards to access FSA and HRA funds.

## IRS PROPOSED RULES ON CAFETERIA PLANS

January 1, 2009

The proposed cafeteria plan regulations published in the federal register on August 6, 2007 are generally effective January 1, 2009 but the effective date is likely to be delayed. These rules include general rules on qualified and nonqualified benefits and changes in the tax law since the prior regulations were proposed. The rules also clarify and expand the existing rules prohibiting cafeteria plans from discriminating in favor of highly paid employees. These rules confirm that the cafeteria plan must be in writing and administered in accordance with plan terms or the plan will be disqualified. The Cafeteria Plan document must contain the operating rules, benefit description, eligibility rules, manner of employer contributions, maximum employer and employee contributions, plan year, timing of participant elections, and irrevocability of participant elections.

To view the proposed IRS Cafeteria Plan regulations, visit [www.woodruff-sawyer.com/webmail/cafeteria.pdf](http://www.woodruff-sawyer.com/webmail/cafeteria.pdf).

If you haven't already done so, employers should gather discrimination testing information (including eligibility dates, contribution amounts, plan entry date, hire date, compensation, birth date, social security number and classification) for cafeteria plans and develop annual nondiscrimination testing procedures. Additionally, employers will want to make sure their cafeteria plans are in writing and contain all of the information required in the regulations.

On January 1, the IRS minimum deductible and out of pocket limits for high deductible health plans and retirement plans issued or renewed in 2009 will be increased. The following table compares the amounts from 2008 and 2009.



## HIGH DEDUCTIBLE HEALTH PLANS (HDHP)

IRC Limit	2008	2009
<b>HDHP MINIMUM DEDUCTIBLE AMOUNT</b>		
Individual	\$1,100	\$1,150
Family	\$2,200	\$2,300
<b>HDHP MAXIMUM OUT OF POCKET AMOUNT</b>		
Individual	\$5,600	\$5,800
Family	\$11,200	\$11,600
<b>HSA STATUTORY CONTRIBUTION AMOUNT</b>		
Individual	\$2,900	\$3,000
Family	\$5,800	\$5,950
<b>CATCH-UP CONTRIBUTIONS (55 AND OLDER)</b>		
	\$900	\$1,000

## 401(K), 403(B) AND 457 PLAN ELECTIVE DEFERRAL LIMIT

IRC Limit	2008	2009
<b>401(K), 403(B) AND 457 PLAN ELECTIVE DEFERRAL LIMIT</b>		
	\$15,500	\$16,500
<b>401(K), 403(B) AND 457 CATCH-UP CONTRIBUTION LIMIT</b>		
	\$5,000	\$5,500

Employers that sponsor high deductible health plans and retirement plans will want to revise plan correspondence materials and correspondence in accordance with the new minimum deductible and out of pocket limits.

## STATE LAW UPDATES

### BAN ON BALANCE BILLING

October 15, 2008

The California Department of Managed Care implemented regulations that ban health care providers from "balance billing" consumers. "Balance billing" is a practice that occurs most often after emergency room visits, when a patient is billed due to the fact that the doctor or hospital that provided services is not contracted with the patient's health plan. The hospital and medical groups can only pay the reasonable and customary value of services by law. The reasonable and customary amount charged by the hospitals is often less than what the insurance company pays. As a result, the patient is billed for the value of services in excess of what the health insurance pays. Currently, the Department of Managed Health Care can take enforcement actions against a hospital that is in the practice of balance billing customers.

Employers should be aware of the regulations.



## MASSACHUSETTS ISSUES MINIMUM CREDIBLE COVERAGE STANDARDS

OCTOBER 17, 2008

The October 17, 2008 final regulations established health plan “core services” and a “broad range of medical benefits” required for Massachusetts residents age 18 or older. The regulations apply to individuals, not employers. However, employees that have health plans that do not provide the required benefits may be fined tax penalties that could exceed \$900 a person. The regulations impose core service and a broad range of medical benefit requirements beginning January 1, 2009. On January 1, 2010, the broad range of medical benefit requirement will be expanded.

For additional information and the regulations, visit [www.mahealthconnector.org](http://www.mahealthconnector.org)

Employers whose health plans provide coverage to employees in Massachusetts should review carrier agreements to compare the benefits of existing employer groups’ benefits against those mandated by the state of Massachusetts.

## SAN FRANCISCO HEALTH SECURITY ORDINANCE

April 30, 2008

On April 30, 2008, many employers in San Francisco were required to make additional expenditures for employee health care expenses, particularly for part-time employees who may not otherwise be entitled to health benefits under employer policies. Employers that are for profit with 20 or more employees must make quarterly expenditures toward the health care expenses of any employees (including part time employees and telecommuters) who worked at least 10 hours a week in 2008 and 8 hours a week in 2009. Certain exclusions apply, including the requirement for employees who are managers, supervisors, or confidential employees and who earn at or above \$80,397 or \$38.65 an hour for 2009. Employers must contribute within 30 days after the end of each quarter, and make annual reports to San Francisco’s Office of Labor Standards Enforcement.

To view the SFHSO regulations, visit [www.woodruff-sawyer.com/webmail/SFHSO.pdf](http://www.woodruff-sawyer.com/webmail/SFHSO.pdf).

Employers will want to make sure they are in compliance with the ordinance.

## SAN FRANCISCO COMMUTER ORDINANCE

January 19, 2009

Scheduled for full implementation January 19, 2009, the San Francisco Commuter Ordinance (Ordinance) requires employers, other than governmental entities with employees of 20 or more counting employees that work in and out of San Francisco, to provide employees with commuter benefit options. Employers must provide at least one of the following options to employees:

1. Operate a vanpool, bus or multi-passenger shuttle service;
2. Allow employees the election of deducting commuting costs from pre-tax wages to purchase transit passes or vanpool rides; and/or
3. Payment of at least \$45 a month for transit passes or reimbursement for carpool or vanpool expenses.



Employer's will want to review ordinance options and determine if they are covered by the Ordinance, which employees are covered, which options will be provided, and how they will be implemented.

If you have any questions or need additional information, please contact your WS&Co. benefits representative.

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*The information provided in this Employee Benefits Briefing should not be construed as tax advice, legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an accountant or attorney concerning your own situation and any specific legal questions you may have.*

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