



August 2009

## LEGISLATIVE UPDATE

*By Jennifer Lunski, Esq.*

At Woodruff-Sawyer, we offer a monthly update on legislative changes that impact employee benefit plans. Employers should review the update to ensure their plans and policies are revised and in compliance with the new legislation and regulations. This month includes articles on the following topics:

1. Medicare Secondary Payer Coordination of Benefits
2. Form 5500 Filing Deadline for Calendar Year Plans
3. Changing Employee Contributions or Plan Design Features in the Middle of the Plan Year
4. NY Extends COBRA Coverage to 36 Months
5. NY Extends Dependent Coverage Through Age 29
6. Oregon Bill Calling for Tax Increases on Members Passed
7. Retirement Plan Update

This briefing ends with legislation on the horizon that is currently pending approval in the House and the Senate. This month's Legislation on the Horizon section includes the following topics:

1. The Healthy Families Act
2. Health Care Reform Update

Woodruff-Sawyer will guide you through the necessary steps to ensure that your employee benefit plans are in compliance. If you require additional consulting on any of these issues, please contact a Woodruff-Sawyer benefits representative.

### MEDICARE SECONDARY PAYER COORDINATION OF BENEFITS

Section 1862(b) of the Social Security Act authorizes the Medicare Secondary Payer program. In order to reduce expenditures under the Medicare program, the law identifies specific conditions under which another party pays first and Medicare is only responsible for qualified secondary payments. Medicare is the secondary payer to the following insurance plans and programs: 1. A group health plan based on a person's own or a spouse's current employment; 2. Auto and liability insurance; 3. No-fault liability insurance; and 4. Workers' compensation issues.

The Medicare, Medicaid and SCHIP Extension Act of 2007 requires insurers, third party administrators providing claim administration for self-insured plans, and self-insured and self-administered group health plans to provide the Secretary of Health and Human Services (HHS) with information that identifies situations where the plan is or has been primary to Medicare. This requirement was effective January 1, 2009. Moreover, effective June 2009, liability insurance including self-insurance, no-fault insurance and workers' compensation laws and plans must also submit information to the Secretary.

Please note that there is a new guide issued by the Center for Medicare and Medicaid Services (CMS) on Medicare Secondary Payer reporting in addition to their publication, the Alert: Compliance Guidance Regarding Obtaining Individual HICNs and/or SSNs for Group Health Plan (GHP). For a copy of the guide go to: <http://www.cms.hhs.gov/MandatoryInsRep/Downloads/GHPUserGuideV2.3.pdf>.

For a copy of the Alert and the Model Language, go to: [http://www.cms.hhs.gov/MandatoryInsRep/04\\_Whats\\_New.asp#TopOfPage](http://www.cms.hhs.gov/MandatoryInsRep/04_Whats_New.asp#TopOfPage).

**Action Item:** Work with Woodruff-Sawyer to make certain that your insurer is currently entering into voluntary data sharing agreements with the CMS.



## FORM 5500 FILING DEADLINE FOR CALENDAR-YEAR PLANS

Form 5500 is a federal tax form that is getting increasing scrutiny from the Department of Labor (DOL). If you are the sponsor of an employee benefits plan with 100 or more covered participants at the beginning of the plan year, you are required to file the Form 5500 for that year.

The filing deadline for Form 5500 is the last day of the seventh month after the end of the plan year unless an extension (Form 5558) is filed. For a 2008 calendar year plan, the deadline was July 31, 2009. An extension to file extends the deadline by two-and-a-half months (October 15, 2009 for a 2008 calendar year plan.)

Filing instructions for Form 5500 can be found in the IRS Instructions for Form 5500, which can be accessed at: <http://www.irs.gov/pub/irs-pdf/i5500.pdf>.

You may view a sample Form 5500 at: <http://www.irs.gov/pub/irs-pdf/f5500.pdf>.

The following are answers to some Frequently Asked Questions about Form 5500 plans:

### How can I obtain an extension for filing?

Generally, you may request an extension by filing IRS Form 5558 by the unextended due date of your Form 5500 (i.e., July 31, 2009 for calendar year benefit plans). An extension of up to two-and-one-half months is automatically granted as long as the extension is filed by the initial filing deadline. Moreover, if an employer applies for an extension of time to file its federal corporate income tax return, this may also trigger an automatic extension to file the Form 5500. You can request a copy of Form 5558 directly from the IRS. The phone number for ordering forms from the IRS is 1.800.TAX.FORM (1.800.829.3676). However, your Woodruff-Sawyer representative can ensure that the form is created on your behalf.

### Where do you file your Form 5500 plan?

Form 5500 must be filed with the Employee Benefits Security Administration (EBSA), not the IRS. Refer to the IRS Instructions for Form 5500 to determine the filing address for your form. You may want to mail your 5500 filing by certified

or overnight delivery for proof of mailing. Refer to the IRS list of approved private delivery services in the instructions.

### Can we file our Form 5500 electronically? Should we?

You can file electronically, but it is not currently required. The DOL is requiring that all Form 5500s be electronically filed for plan years beginning on or after January 1, 2009. Therefore, since Form 5500 is generally due seven months after the end of the plan year, most filers will not need to file their Form 5500 electronically until at least July 2010. For instructions on filing electronically, please refer to the IRS Instructions for Form 5500.

Please note that very few plans are currently filing electronically. Moreover, the DOL is currently developing a new electronic filing system called EFAST2, so it makes sense to wait until that system is available.

### What civil penalties may be assessed by the DOL against plan administrators who fail to file the Form 5500?

Plan administrators filing a late Form 5500 (i.e., after the date the form was required to be filed, including extensions) may be assessed a penalty of up to \$1,100 per day by the DOL with no maximum, although generally the penalty is \$50 per day for the period they failed to file. For non-filers, the DOL may assess a penalty of up to \$300 per day with a maximum of \$30,000 per year. Further, the IRS may assess additional penalties of \$25 per day up to a maximum of \$15,000 per year, which are separate from DOL-assessed penalties.

**Action Item:** Work with Woodruff-Sawyer to ensure that your Form 5500s have been prepared and sent to the DOL in a timely matter.

## CHANGING EMPLOYEE CONTRIBUTIONS OR PLAN DESIGN FEATURES IN THE MIDDLE OF THE PLAN YEAR

In this economy, many employers are asking Woodruff-Sawyer representatives about how to cut costs on their employee benefit plans without waiting for the next renewal/open enrollment cycle. More importantly, clients are asking for helpful ways to communicate these plan design and contribution changes in a way that educates employees



about the tremendous costs associated with health care and retirement plans, while maintaining employee morale. Some employers are considering increasing employee contribution levels, while others in dire financial straits and engaging in activities such as business shutdowns are terminating their plans altogether. We have outlined some key items to take into consideration when making mid-year plan employee contribution level or design changes.

**Steps to take when altering employee benefit plan rates or making plan design changes by modifying benefits:**

1. Check carrier contracts for provisions regarding mid-plan year desired changes and verify the insurer will not impose additional costs.
  2. Check all Plan Documents and Summary Plan Descriptions to ensure that the employer has the right to modify the plan. An employer will want to document the decision-making process in order to have records that prove that they provided employees notice of the change as soon as they were aware of it in order to stabilize employee morale and defend themselves against potential frivolous employee lawsuits.
  3. Under ERISA, provide required Summary of Material Reductions (SMR) to employees no more than 60 days after the changes are made. Alternatively, employers that routinely communicate benefit changes every 90 days or sooner can include SMR information in a regularly scheduled communication. ERISA imposes a general duty on plan fiduciaries to act in the best interests of the participants and beneficiaries. Although ERISA does not require advanced notice to participants, consideration should be given to notify employees with an SMR when the employer makes the decision to make the change to ensure participants can get other coverage.
  4. Plan documents will have to be revised to incorporate design changes.
  5. Have the official or the board that is designated to modify or terminate the plan pass a corporate resolution.
1. Provide HIPAA notice of credible coverage certificates to enrolled employees.
  2. Check carrier contracts for provisions regarding cancellation notice requirements and/or penalties.
  3. Have the official or board that is designated to modify or terminate the plan pass a corporate resolution.
  4. Employer is required to provide a SMR to employees 60 days after the changes are made. Alternatively, employers that routinely communicate benefit changes every 90 days or sooner can include SMR information in a regularly scheduled communication.
  5. File a final Form 5500 by the end of the seventh month after the plan year ends.
  6. An employer will want to document the decision-making process to have records proving that they provided employees notice of the change in order to stabilize employee morale and defend themselves against potential employee lawsuits.
  7. For self-insured plans, put procedures in place for run-out claims that are incurred before the plan termination. Participants should be notified that there is a deadline to submit run-out claims.
  8. If the plan is terminating, COBRA is not required. However, if the plan is continuing or if there is a plan sponsored by an affiliated employer, COBRA notices will need to be sent to participants. Although a COBRA notice is not required in the event that the plan is terminated, it is advisable to send a notice to employees that educates them about the fact that coverage is terminating and that provides alternative coverage options.

**Steps to take when terminating an employee benefit plan:**

**Action Items:** Work with Woodruff-Sawyer for assistance in: 1. Coordinating carrier contracts, or any administrative needs related to plan design changes or termination; 2. Planning mid-year open enrollment events to assist employees in making appropriate choices based on plan changes, including bringing in alternative cheaper coverage for the employees to buy on their own that is not sponsored by the employer; 3. Drafting communications that assist participants in understanding the high costs of health care in a way that will not negatively affect employee morale.



## NY EXTENDS COBRA COVERAGE TO 36 MONTHS

On July 29, 2009, New York enacted a law that extends COBRA coverage to 36 months. The law is effective retroactive to July 1, 2009. It only applies to New York Situs contracts and policies of insurance that are issued, renewed, modified, altered or amended on or after such date.

Under COBRA, workers who lose their jobs can continue to purchase group health insurance provided by their former employers' group health plans for limited periods of time under certain circumstances for themselves and their families. Federal COBRA generally applies to employers with 20 or more employees, while the State's "mini-COBRA" law requires that smaller employers — those who have fewer than 20 employees — offer the same continuation coverage.

Under this new law, employees or members eligible for federal COBRA or state continuation coverage may receive a total of 36 months of coverage. This extension would allow employees or members — regardless of the size of the employer — to receive a total of 36 months of COBRA coverage by transferring to state continuation coverage after their federal COBRA coverage has been exhausted (if their federal COBRA does not last 36 months). For example, if an employee is entitled to 18 months of federal COBRA benefits, the employee would then be eligible for an additional 18 months of state continuation ("mini-COBRA") coverage once the federal COBRA coverage has been exhausted. Furthermore, employees who are only eligible for state continuation coverage (i.e., those with employers with less than 20 employees) are now entitled to 36 months of state continuation coverage.

For more information on this law, including the text of the bill, please visit:

[http://www.ins.state.ny.us/cobra/cobra\\_prem.htm](http://www.ins.state.ny.us/cobra/cobra_prem.htm)

Please note: The law does not have an impact on the ARRA subsidy since the ARRA subsidy is only for 9 months, and this law generally extends COBRA coverage from 18 to 36 months (i.e., the subsidy should be over before the extension takes place).

**Action Item:** Work with your Woodruff-Sawyer representative to ensure that if you outsource COBRA administration, that your COBRA administrator is aware of the extension and revising the length of COBRA coverage accordingly.

If you administer COBRA in-house, ensure that employees who went on COBRA after July 2009 receive 36 months of coverage.

## NY EXTENDS DEPENDENT COVERAGE THROUGH AGE 29

On July 29, 2009, New York enacted a law that requires insurers to offer coverage to unmarried dependents of subscribers through age 29 who live in New York and are not eligible for group coverage or Medicare. This law is effective on September 1, 2009. It only applies to New York Situs contracts and policies of insurance that are issued, renewed, modified, altered or amended on or after such date.

Under the law, each group plan is to allow dependents who have lost coverage due to the previous age restrictions an election period of 60 days from the qualifying event as well as 12 months from the effective date of this statute to elect coverage under their parents' policy. Insurance carriers are also required to establish a "distinct premium" for this group of individuals and employers are not required to pay anything towards the cost. The law also requires insurers to offer employers an option to purchase coverage that includes young adults as dependents in family policies through age 29.

For more information on this law, including the text of the bill, please visit:

[http://www.ins.state.ny.us/health/S6030\\_Age29.htm](http://www.ins.state.ny.us/health/S6030_Age29.htm)

**Action Item:** Your Woodruff-Sawyer representative can help you with following up with the carriers to ensure that New York Situs contracts are in compliance.

## OREGON BILL CALLING FOR TAX INCREASES ON MEMBERS PASSED

On August 4, 2009, Oregon Governor Ted Kulongoski signed HB 2116 bill into law. This bill extends health coverage to uninsured children in Oregon. HB 2116 creates, among other things, a tax on medical insurance premiums as partial funding for increased access to health care.

Effective October 1, 2009, the bill calls for health carriers to remit one percent of the 'gross premium amount' paid by their insured members to the State of Oregon. The tax is in effect through 2013. Funds generated by the premium



tax will help expand health care access for the uninsured, including the expansion of the Oregon Health Plan to 35,000 uninsured, low-income adult Oregonians, as well as 80,000 uninsured Oregon children through a new program called "Health Care for All Oregon Children."

The premium tax will apply to products as of October 1, 2009 through September 30, 2013 (as we understand the law, self-funded employers are not affected by this change).

**Action item:** Your Woodruff-Sawyer representative can help you with tracking when insurers will be applying the premium tax and assisting you in planning. We understand that many insurers, including Regence BCBS and Providence, will pass this 1% tax through, effective October 1, 2009. We will be following up with your carrier and will communicate to you the details as we hear them.

## RETIREMENT PLAN UPDATE\*

### IRS announces the top 10 most common mistakes 401(k) plan administrators make

Adopting and administering a qualified retirement plan requires a certain level of ongoing oversight and maintenance. Unfortunately, due to the complexity of administering retirement plans, mistakes can and often do happen. Thankfully, the IRS has developed a procedure to correct many plan administrative failures through their Employee Plans Compliance Resolution System (EPCRS) program.

The EPCRS program provides examples on how to self-correct a variety of plan failures. The latest version of the EPCRS program may be found in Revenue Procedure 2008-50 at [http://www.irs.gov/irb/2008-35\\_IRB/ar10.html](http://www.irs.gov/irb/2008-35_IRB/ar10.html). Below, you will find the "Top 10" 401(k) plan failures as defined by the IRS.

#### "Top 10" 401(k) plan failures

1. Failure to amend plan for current tax law changes
2. Failure to follow the plan's definition of compensation

3. Failure to include eligible employees
4. Failure to follow plan loan provisions
5. Allowing impermissible in-service withdrawals
6. Failure to satisfy minimum distribution rules
7. Employer eligibility failure—adopting an impermissible type of retirement plan
8. Failure to pass ADP and ACP compliance tests under 401(k)
9. Top-heavy compliance test failures
10. Failure to satisfy contribution limits

### Target-Date Fund public hearing

On June 18th, a public hearing was conducted in which the DOL and the Securities and Exchange Commission (SEC) heard testimony on the management and handling of retirement-plan investments called target-date funds. These funds, holding a blend of stocks, bonds and other investments, automatically reset the asset mix in its portfolio according to a time frame appropriate for the investor. In many cases, this relates to an investor's retirement date.

The scrutiny comes after target-date funds designed for people who are now in, or near, retirement hit investors with big losses last year. The SEC and DOL heard testimony from more than 30 professionals. Included were representatives from investment management firms, insurance companies, asset allocation specialists, academia, financial planning/advisory firms and industry trade groups. Of particular interest to the panel was the investment performance of the target date 2010 fund (2010 is depicted as the year the investor reaches age 65). These 2010 portfolios experienced on average, a 25% loss of value in 2008. Due to the growing presence of these types of funds in 401(k) plans, and the risky nature of the investment strategies, more participant disclosure may be warranted.

One important aspect of these hearings was the discussion regarding the use of proprietary funds within a target date strategy managed by a mutual fund complex. Target-date funds are built and managed mainly by two types of firms: The first type are the large investment management firms whose core business is active money management (Fidelity, Putnam, TR Price, Vanguard, etc.) The second type are asset

---

\* Retirement Plan Update contributed by Mike Sladky, Account Executive, Benefits at WS&Co.



allocation firms that don't manage investments per se (they are not responsible for security selection in the portfolios) but build target-date funds through the use of index funds and non-affiliated commingled funds like mutual funds, collective trusts and separate accounts.

Certain participants raised concerns about the conflicts of interest that a mutual fund complex faces when building a target-date fund with its own proprietary mutual funds. The criticism levied on these mutual fund firms included: skewing of the allocations to higher equity exposure for economic reasons; poor performance; and the presumed self-serving process of selecting the underlying funds.

As automatic enrollment programs become more popular with 401(k) plans and the use of target-date funds as the qualified default investment grows, expect more news on this topic.

## LEGISLATION ON THE HORIZON

While the following legislation is currently being considered by the House and Senate, it is not yet clear as to whether it will be passed. Woodruff-Sawyer representatives are tracking the status of this legislation for you, and can provide consulting related to the legislation in the event that it is signed by President Obama. Woodruff-Sawyer's Compliance team is actively involved in visiting Washington D.C. and members of the House and Senate to closely monitor upcoming legislation in order to be well informed on your behalf in the event that new legislation is passed.

## THE HEALTHY FAMILIES ACT

In May, 2009, the Healthy Families Act (HFA) was introduced to the House and Senate. If the bill is passed, it will create mandated paid leave on a federal level. On June 10, 2009, the House of Representatives Committee on Education and Labor held hearings regarding the passage of the legislation.

The HFA requires employers with 15 or more employees in 20 or more calendar weeks to accrue one hour of paid sick leave per 30 hours worked. The bill declares that an employer shall not be required to permit an employee to earn more than 56 hours of paid sick time in a calendar year, unless the employer chooses to set a higher limit.

The bill allows employees to use such time to: 1. Meet their own medical needs; 2. Care for the medical needs of certain family members; or 3. Seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking. The bill would give employees the right to begin using accrued paid sick time beginning on the 60th calendar day following commencement of the employee's employment. As currently drafted, the bill would allow employees to carry over earned but unused paid sick time from one calendar year to the next, except under certain limited circumstances. Finally, the HFA would require employers to reinstate accrued but unused leave for any employee that is rehired within 12 months after separating from employment, and continue to recognize additional paid sick time accruals if there is a recommencement of employment with the employer.

To view the text or status of H.R. 2460 and S. 1152, visit the library of Congress website at <http://thomas.loc.gov> and enter Healthy Families Act under the Search Bill Summary and Status.

One consideration for employers is to adopt a paid time-off policy where the leave is equal to or more generous than that which may be required under the HFA. Paid time-off policies that are more generous than the HFA could be exempt from the law's requirements. However, since the law is not final, there is no way of definitively knowing what the requirements will be.

## HEALTH CARE REFORM UPDATE

The national debate about how to reform the U.S. health care system is one of the nation's top political issues. Health care overhaul plans are now being debated in the U.S. Congress, and President Barack Obama has said he wants to sign health care reform legislation into law this year. In his June 2, 2009 letter to the Honorable Edward Kennedy and the Honorable Max Baucus, the President states: "I am committed to working with the Congress to fully offset the cost of health care reform by revising Medicare and Medicaid spending by another \$200 to \$300 billion over the next 10 years, and by enacting appropriate proposals to generate additional revenue." This update summarizes the current state of the debate.



In mid-July, Woodruff-Sawyer representatives visited members of the House of Representatives and Speaker Nancy Pelosi's office to get an idea of the progress on health reform on Capital Hill. On Tuesday, July 14 the three House committees with jurisdiction on health reform—Energy & Commerce, Ways & Means and Education & Labor—released a revised version of their tri-committee bill for health care reform.

As it stands now, the House version of the bill introduces a public plan option that would be managed by the state or federal government. The bill requires health insurers to offer coverage to all applicants, regardless of their health status. All individuals would be required to have health coverage. Additionally, employers would be required to either offer health coverage or pay into a pool.

Many House of Representatives members feel the legislation is necessary due to the rising cost of health care. In general, most consumers think insurers' profit margins are in excess of 20%. However, statistics from Price Waterhouse Cooper reveal that for every health dollar spent, 87% is actually for medical services, 10% goes to compliance, claims and other necessary administration, and 3% goes to the insurer's profit. The Congressional Budget Office is reporting that the cost of the legislation drafted by the House committees would be \$1 trillion over the first 10 years, increase taxes or fines on employers by \$208 billion over 10 years, and reduce the number of uninsured by 37 million.

In response to the official House version of the bill, the House of Representatives Blue Dog coalition has stated that

---

*The information provided in this Legislative Update should not be construed as 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 attorney concerning your own situation and any specific legal questions you may have.*

---



---

*Woodruff-Sawyer is one of the largest independent insurance brokerage firms in the nation, and is an active partner of International Benefits Network and Assurex Global. For over 90 years, Woodruff-Sawyer has been partnering with clients to implement and manage cost-effective and innovative insurance, employee benefits and risk management solutions, both nationally and abroad. Headquartered in San Francisco, Woodruff-Sawyer has offices throughout California and in Portland, Oregon.*

*For more information, call 415.391.2141 or visit [www.wsandco.com](http://www.wsandco.com).*

any public option would have to be financially stable and not rely on the Federal treasury for its operations. Moreover, the Blue Dogs have expressed that the public option has to be actuarially sound and have adequate reserves to cover medical claims. Additionally, several state governors have expressed concern over the costs involved. Due to the fact that the state and the federal government share the cost of Medicaid coverage for those with low incomes, any increase in eligibility levels, benefits, or payments to doctors would impose new costs on the states. Governor Schwarzenegger is among those who expressed concern with the State having to pay more towards health insurance given the current budget issues in California which have been exacerbated by the recession.

Though President Obama had hoped the bill would be passed before the August recess, Senator Harry Reid announced on July 23rd that there would be no legislation signed prior to the recess. The delay is primarily the result of Republican opposition and cost concerns by fiscally conservative Democrats. Eventually, when the bill is passed, it will be sent to the Senate Health, Education, Labor and Pensions (HELP) and Finance Committees for review. Some officials on Capital Hill stated that they do not foresee a public plan passing through the Senate. Others expressed that this is the time for reform and the time for a public plan for uninsured Americans is now.

Due to the fact that this legislation is in continual flux and is not going to be implemented until 2013, Woodruff-Sawyer is advising clients not to take any action related to health plan design changes based on any draft legislative items. Woodruff-Sawyer representatives are watching the health care reform legislative items closely, and will be there to consult with you if and when health care reform legislation is passed.

---

#### **About Jennifer**

*Jennifer is an Account Executive-Compliance Services at Woodruff-Sawyer & Co. She consults directly with our Employee Benefits clients on all matters of compliance and leads both internal and external trainings. She has also conducted numerous trainings and is a published expert on ERISA, COBRA and HIPAA rules and regulations, Jennifer has investigated a broad spectrum of company employee benefit plans and has extensive experience negotiating with industry fiduciaries and service providers. Jennifer can be reached at 415.402.6577 or [jlunski@wsandco.com](mailto:jlunski@wsandco.com).*