



October 2009

LEGISLATIVE UPDATE

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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. The Government Releases Clarifications on GINA;
2. November 15, 2009 Medicare Part D Notices Due; and
3. Tips for Protecting Your Employee Benefit Plan and Yourself if You Are an ERISA Fiduciary

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 your Woodruff-Sawyer benefits representative.

GOVERNMENT RELEASES CLARIFICATIONS ON GINA

The Genetic Information Nondiscrimination Act of 2008 (GINA) governs the use of genetic information for insurers and group health plans. Genetic information is defined under GINA broadly to include any family history information. GINA was enacted by Congress over growing concern that employers, insurers and benefit plans would misuse genetic information that was collected.

Title I of GINA provisions for group health plans are effective for plan years beginning on or after May 21, 2009. Thus, the effective date for calendar year plans is January 1, 2010.

On October 7, 2009, the Department of Labor (DOL) and the Department of Health and Human Services (HHS) jointly released interim final regulations under GINA.

We have outlined the interim final regulations that will have the most significant impact on your employee benefits plans.

1. **Health Risk Assessments:** The most significant impact that the new regulations will have on employee benefit plans relates to the use of health risk assessments (HRA). Under GINA, the rules prohibit group health plans and insurers from collecting genetic information prior to or in connection with enrollment. The rules provide an example which illustrates that a health risk assessment that includes questions about family medical history and is completed prior to enrollment violates GINA, even if no incentive is provided for completing the assessment. In the event that the HRA includes questions about family medical history or genetic information, the new regulations prohibit group health plans and insurers from soliciting participation in the HRA in conjunction with plan enrollment, or at any other time before the employee's effective date of coverage in the plan. No incentives can be linked to the participation in the HRA, rewards cannot be given for participation in the HRA, and it is impermissible for the HRA to be used as a screening mechanism for determining participation in disease management programs or the receipt of other medical benefits. Employers should work with their health and wellness vendors to ensure that health risk assessments are modified appropriately.
2. **Group Health Plan Premiums:** The new legislation prevents group health plans and group health insurance issuers from adjusting group premium or contribution amounts on the basis of genetic information.
3. **Underwriting:** Group health plans and group health insurance issuers may not request genetic information for underwriting purposes. Moreover, group health plans



may not collect genetic information about an individual before the individual is enrolled or covered under the plan.

4. **HIPAA Privacy:** The Department of Health and Human Services has been directed to revise the HIPAA privacy regulations so that current regulations on privacy of health information also includes genetic information.
5. **Employer Requirement:** GINA prohibits employer discrimination against employees in the form of compensation and privileges based on and resulting from knowledge of the employee's genetic information. If an employer possesses genetic information about an employee, the information must be maintained in a separate file and must be treated as a confidential medical record within the meaning of the Americans with Disabilities Act (ADA).

Employer Action Item: Work with your vendors to revise health risk assessments, open enrollment materials and handbook policies to exclude any questions related to family medical history or genetic information.

DON'T FORGET! MEDICARE PART D NOTICES ARE DUE NOVEMBER 15!

Regulations require health plan sponsors to distribute an Annual Notice to plan participants regarding prescription drug coverage. The purpose of the notice is to assist Medicare beneficiaries in electing prescription drug coverage by informing them if their employer's plan is creditable or non-creditable (regardless of whether the employer's plan coverage is primary or secondary). Notices are required to be sent to plan participants or their family members who are eligible for Medicare Part D. As most employers don't know who is eligible for Medicare, we recommend that these notices be sent to all plan participants. Sample notices and updated guidance from CMS can be found at http://www.cms.hhs.gov/CreditableCoverage/08_CCafterJanuary1.asp#TopOfPage. Before selecting which notice is applicable to you, determine if the coverage that you offer is creditable or non-creditable.

Employer Action Item: Work with your Woodruff-Sawyer representative to do the following: 1. Determine if your plan contains prescription drug coverage that is creditable or non-creditable; 2. Determine if your workforce can be notified electronically or through mail; 3. Notify appropriate

participants by the November 15 deadline. You may consider including this notice in your annual open enrollment communications if they are to be released within 12 months of November 15th.

TIPS FOR PROTECTING YOUR EMPLOYEE BENEFIT PLAN AND YOURSELF IF YOU ARE AN ERISA FIDUCIARY

As I have made the transition from acting as a Senior Investigator for the Department of Labor for almost a decade to a benefits consultant at Woodruff-Sawyer, many people have asked me what the most common issues are with respect to fiduciary liability related to retirement plans. Below I have summarized the answers to the most frequently asked questions that clients have asked in their attempt to navigate the meaning of fiduciary obligations under the Employee Retirement and Income Security Act (ERISA).

Q: What is the top common compliance mistake plan trustees and administrators make with respect to retirement plans?

A: An easy mistake to make when administering a retirement plan is failure by sponsors to forward employee contributions withheld from payroll to the 401(k) plan in a timely manner. Under ERISA, the regulations state that employers have a fiduciary obligation to forward employee contributions withheld from payroll as soon as is administratively feasible, but in no event later than 15 days after the payroll period. In many instances, employers and vendors misinterpret the regulations to mean that they have 15 days after each payroll period to forward employee contributions deducted from payroll to the plan. In fact, a Department of Labor (DOL) audit would require the fiduciaries to forward funds as soon as is administratively feasible which typically can be done through a bank wire in one day depending on how large the payroll department is.

Tip: It is always a good idea to methodically review the responsibilities of the person whose duties are to forward employee contributions to the plan, and ensure that they are forwarding contributions as soon as is administratively feasible. Additionally, procedures should be in writing in the event that the person designated to perform this duty is on leave.

Q: May plan assets pay for plan expenses?



A: If a plan document allows for administrative fees to come out of plan assets, then fees associated with third party administrators, photocopying expenses, plan administrative expenses and the like can be paid for out of the plan assets. However, when a plan sponsor makes a settlor decision, the decision is not governed by fiduciary rules. A settlor decision is a business decision in relation to plan design, plan amendment, or plan termination. Plan assets may NOT be used to pay for settlor activities. However, once a settlor activity is made, the implementation of the settlor decision may be a fiduciary act which can be paid for from plan assets. For example, if a fiduciary makes the decision to change a plan design, any plan document revisions related to the design that are necessary to implement the design are fiduciary acts and thus could be paid from the plan.

Tip: Hire a consultant to audit your plan to ensure that expenses paid for the plan are allowable and that no settlor fees have been charged to the plan. Only administrative fees can be charged to the plan, settlor fees cannot. It is very difficult to decipher the difference between administrative fees and settlor fees. However, the failure to properly code these expenses could result in improper 5500 reporting, and DOL audit penalties.

Q: If my Company is going out of business or has determined that it can no longer sponsor a 401(k) plan, what steps do I need to take to appropriately terminate the plan?

A: When a company ceases operation, files for bankruptcy or is bought out by another corporation, many issues with respect to the pension plans are ignored, arising in ERISA fiduciary breaches. If you are in the process of taking steps to terminate your pension plan, make sure that there is a corporate resolution passed so that the plan is properly terminated. However, the responsibility does not stop at the passage of a corporate resolution. The termination of a pension plan involves communicating to participants the tax ramifications of the imminent distribution of their account balance and the form of the distributions available. Moreover, many participants in a pension plan with active account balances may have left the company years ago without a current address on file. In this instance, a fiduciary must take steps to attempt to locate those employees. Failure to do so could hold up the final termination date since the plan is not officially terminated until all remaining funds have been removed from the plan.

Tip: Follow Field Assistance Bulletin (FAB) 2004-02 and document that you have taken the proper steps outlined in the FAB to contact missing participants. It is advisable to have consultants who can guide you through this process and take care of it for you in the event that you are not able to properly devote your time to it.

Q: What does ERISA require with respect to the amount that the fidelity bond should cover?

A: ERISA Section 412 requires that every person who handles or controls plan funds shall be bonded to provide protection to the plan against loss by reason of acts of fraud or dishonesty. Though most banks are exempt from the bonding requirement, individuals who handle or direct plan contribution deposits are not. Every fiduciary of a plan and anyone else (plan official) who handles or has the authority to handle plan assets must be bonded. The bond must provide a direct right of access in favor of the plan in the event the insured plan official takes plan assets. The bond coverage amount must be at least 10% of plan assets up to a maximum bond amount of \$500,000. It is unlawful for anyone who is required to be bonded to handle plan assets without a bond. Likewise, it is unlawful for any fiduciary to allow another plan official to handle plan assets without being properly bonded.

Tip: Sometimes brokers and insurers fail to place the fidelity bond in the name of the plan and ensure that the bond is in the correct account. Make sure that you have a consultant review these items. In the event that you have an instance of fraud or dishonesty by an employee who steals from the plan, the bond provides protection for the Company and the plan assets.

Q: How do fidelity bonds differ from fiduciary insurance?

A: The ERISA fidelity bonds are required under ERISA Section 412 and cover the plan against losses due to a criminal act. Fidelity bonds are sometimes offered as an endorsement to your Employee Theft/Crime policy but can also be written as a stand alone policy. Fiduciary insurance protects the Company in the event the plan fiduciaries breach their duties under ERISA.

Tip: Fiduciary breach lawsuits under ERISA are on the rise due to recent stock market investment declines and the Supreme Court ruling in the LaRue case which increased



litigation risk for plan sponsors. Make sure that you know who the fiduciaries are and that your insurance policies provide for adequate cover and policy limits including defense costs. It may be a good idea to ask the board to provide an additional corporate indemnification to cover you as you carry out your duties under ERISA.

Q: I have service providers that I delegate responsibilities to with respect to the pension plan. If they do not properly perform their duties, aren't I protected as a fiduciary since I hired them to do the job correctly?

A: Under ERISA, when assigning responsibility (whether to an internal committee, human resources department or external service provider) the fiduciary cannot simply delegate a task. The fiduciary must continually check in with their service providers to make sure they have the knowledge, experience and resources necessary to carry out their responsibilities and assignments correctly. Moreover, fiduciaries have a duty to monitor and track whether or not their service providers are providing them the most up to date service compared with other industry professionals to ensure that the plan is getting the most value out of any fees paid. It is often surprising for fiduciaries to learn that if their service providers perform any negligent acts which result in ERISA fiduciary breaches, it is still the Company or plan fiduciaries that are responsible for any government penalties or participant lawsuits.

Tip: Service providers need to be trusted advisors, and they should make sure that they are monitoring themselves. If they do not ask you how their performance is, and consult experts in their field as to if they are performing to industry standards, there could be a problem. Bottom line is, you need to monitor your service provider and document that you are monitoring them. A good service provider will understand this and make the monitoring and documentation process something that is embedded in their standard meetings or yearly performance reviews with you so that you do not have to do extra work. Service providers that understand ERISA will give you a commitment for regular updates on services, and perform them with you regularly, without you having to remind them.

Q: What should a fiduciary look for in selecting service providers and experts?

A: The selection of a service provider is a fiduciary act under ERISA. After considering the services that you need,

obtain multiple requests for a proposal that outlines service providers services, experience, and costs. Make certain that you are asking each service provider the same questions in the requests for proposal so that you can adequately compare them and select the one that best fits your needs. If you are hiring an attorney or accountant where a license is required, check with state or federal licensing authorities to confirm the provider has an up-to-date license. If the provider you are selecting is handling plan assets for you, confirm that the provider is bonded. Also, it is important that once you select the service provider that you thoroughly review their contract and understand all of the terms in it. Finally, make sure that you keep the information you gathered during the process of selecting the service provider and document the process you followed in reviewing and selecting service providers.

Tip: It is often helpful to have an independent consultant guide you through the process of selecting and monitoring service providers. It is a time-consuming job, and often it makes sense to outsource this duty to an expert in the field who can properly assess your needs, review the service providers contracts and services, and document the decision making process for you. Although hiring an independent consultant is something that employers shy away from due to costs, in the long run, having someone who makes sure that you have adequate service providers can prevent mistakes from happening which often equate to litigation and government penalties.

Q: What triggers an audit by the government?

A: It varies by agency, but typically the Internal Revenue Services (IRS), Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) and the DOL audit employers that sponsor employee benefit plans based on participant complaints, Form 5500 and other reporting required filings and targeted projects.

Tip: Make sure that your Form 5500 preparer knows how to correctly mark appropriate items so that mistakes are not made and your plan is not targeted incorrectly. Also, create a culture where employees feel comfortable bringing issues to you directly so that potential lawsuits can be avoided by resolving matters through an internal administrative process ahead of time.

Q: What are the most important things to remember to be a good fiduciary in compliance with ERISA and the IRC?



A. That can be a complex question, but generally if you follow the below steps you should be in good shape:

1. First, have a thorough understanding of all components of your plan and policy procedures (i.e. investment policy). Although it is time consuming to read your plan, it is important that you are aware of what benefits you're providing, and who needs to administer the benefits. Under ERISA, ignorance is not bliss, it is a violation! A good understanding of the plan can avoid problems and prepare you to answer participant questions. Also, understanding your plan will ensure that you are following the plan document.
2. Make sure that you methodically follow a prudent process when selecting your service providers. You have to hire people who will do a good job and understand the law. If your service providers breach ERISA, you are still responsible as the fiduciary. Also, monitor your service providers after you hire them and make sure they are abreast of new developments in the law as well as tools available in the marketplace to get you the best services. In the event that your plan pays for service provider fees, make sure that the service providers you select are charging appropriate fees in alignment with the marketplace.
3. Understand the law. For example, if you have participants who contribute to the plan, make sure that you attend a class once a year as a refresher on ERISA regulations with respect to plan assets.

4. Make sure that the reports you file with the government are accurate and that you are providing all of the ERISA required disclosures to participants.
5. Act in a prudent manner and always make decisions that are solely in the interests of the participants and their beneficiaries.

Tip: If you are a plan sponsor, on a board of directors that appoints the fiduciary committee or a fiduciary committee member, make sure that you get regular training on the duty of a fiduciary to an ERISA plan. The duties and regulations are constantly evolving and it is important to have consultants who follow and train you on the changing landscape of the law.

Q: Under ERISA how is a fiduciary defined?

A: In general a fiduciary is in a position of trust, acting for the benefit of others with a high duty of care and loyalty. A fiduciary is any person who exercises discretionary authority or control over plan assets or administration, or gives investment advice.

Tip: If you are not sure whether you are a fiduciary, it makes sense to contact an expert to ensure that you know your role and are properly trained.

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.

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About Jennifer

Jennifer is Compliance Officer in the Benefits practice 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 on ERISA, COBRA and HIPAA to Department of Labor employees, the Department of Justice and to employers that sponsor ERISA-covered plans. 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.

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