

Benefits Report

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DOL Issues Proposed Regulations Requiring Disclosure of Service Provider Fees and Conflicts of Interest

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On December 13, 2007, the Department of Labor (“DOL”) issued proposed regulations under Section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (“ERISA”) that would require plan service providers to provide more comprehensive written disclosure to the plan fiduciary who has authority on behalf of the plan to enter into an arrangement with the service providers. This includes disclosure of information regarding the compensation the service provider would receive, either directly or indirectly, and any conflicts of interest that may arise in connection with the provision of services to the plan. *See* 72 Fed. Reg. 70988, 12/13/07. In conjunction with the proposed regulation, the DOL also issued a proposed class exemption that would provide relief to a plan fiduciary for engaging in a prohibited transaction if, unknown to the plan fiduciary, the service provider should fail to comply with the disclosure requirements under the proposed regulation. *See* 72 Fed. Reg. 70893, 12/13/07.

These regulations would be effective 90 days after the publication of the final regulations. The DOL requested comments on the proposed regulations. Based on the volume of comments (over 90),

the proposed regulations’ complexity, and their potential for significantly effecting the provision of services to plans, the DOL announced that it has scheduled public hearings in March to assist it in understanding the issues involved.

Background

In recent years fee disclosure issues have been at the forefront of the debate on the effect of fees on retirement benefits. Several class action lawsuits have been filed involving claims of breach of fiduciary duty under ERISA for charging excessive fees and failing to fully disclose fees charged. At least three bills are pending in Congress which are intended to address a perceived gap in information and conflict of interest issues. The DOL’s proposed regulations are another attempt to address these plan fee issues.

Although current law does not specifically require that service providers disclose information regarding fees to plan fiduciaries, in fulfilling its duties under ERISA section 404, a plan fiduciary must have sufficient information to determine if it is acting prudently and solely in the interest of the plan participants and for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration. In addition, Section 406(a)(1)(C) of ERISA prohibits the furnishing of goods, services, or facilities between a plan and a party in interest to the plan (defined under ERISA section 3(14) to include service providers). ERISA section 408(b)(2), however, provides a statutory prohibited transaction exemption for contractual arrangements between plans and service providers as long as the contract

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or arrangement is reasonable, the services are necessary for the plan's establishment or operations, and no more than reasonable compensation is paid for the services. The DOL's proposed regulations define a reasonable contract or arrangement primarily in terms of the disclosure requirements it must contain.

The Proposed Disclosure Requirements

In order for a contract or arrangement to be reasonable under the proposed regulations, any contract or arrangement (or its renewal or extension) between a plan and certain service providers must require the service provider to disclose the compensation it will receive, directly or indirectly, and any conflict of interest that may arise in connection with its services to the plan.

The proposed regulations impose disclosure requirements on three specific types of service providers:

- those who provide services as fiduciaries under ERISA or the Investment Adviser's Act of 1940 ("Adviser's Act");
- those who perform banking, consulting, custodial, insurance, investment advisory, investment management, recordkeeping, securities or other investment brokerage, or third party administration services; and
- those who receive indirect compensation in connection with accounting, actuarial, appraisal, auditing, legal or valuation services.

While the scope of the proposed regulation is limited to these three types of service providers, the DOL cautions in the preamble to the regulation that general fiduciary obligations under ERISA, as well as the existing requirements under ERISA section 408(b)(2), continue to apply to the selection and monitoring of *all* service providers. Further, the proposed requirements would apply only to contracts or arrangements for services to plans themselves, and not to contracts or arrangements with entities that merely provide plan benefits to participants and beneficiaries.

For a contract or arrangement for services to a plan to be considered reasonable:

- the terms of the contract must be in writing, to the best of the service providers knowledge;
- the terms must disclose specific information required by the proposed regulations;

- the terms must require that the service provider disclose to plan fiduciaries any "material" changes to the specific information required within 30 days of acquiring knowledge of the change; the preamble defines "material" as being information that "would be viewed by a reasonable plan fiduciary as significantly altering the "total mix" of information made available to the fiduciary, or as significantly affecting a reasonable plan fiduciary's decision to hire or retain the service provider;"
- the terms must require that the service provider disclose all information related to the contract or arrangement, and any compensation or fees received, that is requested by the responsible plan fiduciary in order to comply with filing requirements under Title I of ERISA;
- the service provider must actually comply with its disclosure obligations; and
- the plan must be allowed to terminate the arrangement without penalty to the plan on reasonably short notice, to prevent the plan from being locked into an arrangement that has become disadvantageous.

The disclosure requirements can be satisfied by use of electronic format or by disclosure in multiple documents from multiple sources. There is no designated time period for the disclosure, but the preamble states that this information should be provided sufficiently in advance of entering into the contract or arrangement for the responsible plan fiduciary to have a reasonable amount of time to prudently consider the information. The contract should also include a representation that, before the contract was entered into, all required information was provided to the responsible plan fiduciary.

Compensation and Fee-Related Disclosures

In advance of entering into a contract or arrangement, the service providers in any of the covered categories described above would be required to provide to plan fiduciaries written disclosure of the following information related to compensation and fees:

- all services provided to the plan under the contract or arrangement;

- the compensation or fees to be received by the service provider for each service; and
- the manner in which the compensation or fees would be received.

The proposed regulations broadly define compensation or fees to include money or any other thing of monetary value, such as gifts, awards, finder's fees, commissions, 12b-1 fees, soft dollar and "float" income received or to be received by the service provider or its affiliate directly from the plan or plan sponsor, as well as any indirect compensation received from a party other than the plan, plan sponsor or service provider. An affiliate of a service provider includes any person directly or indirectly controlling, controlled by, or under common control with the service provider, as well as any officer, director, agent, employee, or partner of the service provider.

The proposed regulations also provide that the compensation or fee can be expressed in terms of a formula, asset charge, or per capita charge, as long as the description permits the responsible plan fiduciary to evaluate the reasonableness of the compensation or fee.

The proposed regulations would require that providers of bundled services disclose all of the services and, with two exceptions, the *aggregate* compensation or fees received in connection with the bundle of services. The submission of separate compensation information would be required:

- where a party receives fees that are a separate charge directly against the plan's investment reflected in the net value of the investment, such as management fees paid by mutual funds to their investment advisers, float revenue and 12b-1 distribution fees; and
- where fees are set on a transaction basis, such as finder's fees, brokerage commissions, and soft dollars, even if they are paid from mutual fund management fees or similar fees.

The required description of the manner of receipt of compensation would involve stating whether the service provider will bill the plan, deduct fees directly from the plan's account, or reflect a charge against the plan investment. The service provider would also have to explain how any prepaid fees would be calculated and refunded upon contract termination.

Conflict of Interest Disclosures

The proposed regulations also require the disclosure of certain information regarding potential service provider conflicts of interest. In the preamble to the proposed regulation, the DOL notes the importance of knowing service provider relationships and indirect sources of compensation because of the impact these relationships may have on the manner in which the service provider provides services for the plan. The required information to be provided to the plan fiduciary by the service provider or affiliate includes:

- whether the service provider will provide any services to the plan as a fiduciary under ERISA or the Adviser's Act;
- whether the service provider expects to participate in or acquire a financial or other interest in any transaction to be entered into by the plan in connection with the contract and, if so, a description of the transaction and the service provider's participation or interest;
- whether the service provider has any material financial, referral or other relationship with a money manager, broker, other client of the service provider, other service provider of the plan, or any other entity that could create a conflict of interest for the service provider in providing services under the contract and, if so, a description of relationship;
- whether the service provider will be able to affect its own compensation or fees without the prior approval of an independent plan fiduciary in connection with the provision of services under the contract and, if so, a description of the nature of such compensation; and
- whether the service provider has any policies or procedures designed to prevent either the compensation or fees, or the relationships or conflicts, of the types described above from adversely affecting the provision of services under the contract to the plan and, if so, an explanation of these policies and procedures.

Should the contract or arrangement fail to require disclosure of the information or should the service provider fail to disclose the required information, then the contract or arrangement would not be "reasonable", and therefore, the contract would not provide ERISA section 408(b)(2) relief to the plan

fiduciary from the ERISA section 406(a)(1)(C) prohibited transaction rules. Furthermore, the service provider, as a “disqualified person”, would be subject to excise taxes under Internal Revenue Code section 4975. As noted above, the DOL has also proposed a prohibited transaction class exemption which would provide relief from ERISA section 406(a)(1)(C) to a plan fiduciary that reasonably believes the service provider has complied with the disclosure requirements and has no reason to know that the service provider has failed to comply with such disclosure requirements. Under the proposed class exemption, if a plan fiduciary discovers that a service provider failed to disclose required information, the fiduciary must request that information in writing. If the information is not provided within 90 days of that request, the plan fiduciary then has 30 days to notify the DOL. The fiduciary must then determine whether to terminate or continue the contract with the service provider.

Comments and DOL Response

As expected, the proposed regulations have generated a significant number of comments. DOL officials have recently noted that the biggest issue facing the Department as it evaluates comments on the proposed regulations is resolving the question of whether mutual fund investments are covered under the proposed regulations because mutual funds are not considered to hold plan assets and are, therefore, not governed under ERISA. Commentators

have suggested that it would be appropriate to consider mutual funds to be indirect service providers that should be covered under the proposed regulations. Service providers have also expressed concerns about the feasibility of complying with the complex regulation’s proposed 90-day effective date once the DOL publishes its final regulations and the fact that a primary service provider must provide fee information to the plan fiduciary but cannot guarantee the information from other service providers. Commentators have also expressed concerns about the specific written disclosure requirements, about disclosure requirements for bundled service providers, and about transition issues for existing contracts. Other questions have arisen with regard to who is a service provider, how far that service provider status extends, and what the liabilities between the parties are if the disclosure requirements are not properly met. On February 14, 2008, Rep. George Miller and Sen. Edward M. Kennedy told the DOL that its proposed fee disclosure regulations needed to go much further in terms of required disclosures of fees, and stated that they would continue to pursue more comprehensive legislation regarding fee disclosures in Congress.

Given the tension between Congress’ desire to require greater transparency with regard to 401(k) fees and concerns by service providers as to the feasibility of properly complying with the regulations when they are finalized, there is no doubt that fee disclosure issues will continue to dominate the regulatory landscape in the coming months.



New Leave Entitlements for Military Reasons Added to Family and Medical Leave Act

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On January 28, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008 (the “Act”) (Pub. L. 110-181). The Act amends the Family and Medical Leave Act of 1993 (“FMLA”) to provide for two new types of leave for eligible employees who are family members of service-members. The Act provides an eligible employee up to 26 workweeks of unpaid leave in a single 12-

month period to care for a family member who suffers a serious illness or injury while on active military duty. The Act also provides an eligible employee with up to 12 workweeks of unpaid leave in a single 12-month period for a “qualifying exigency” when a family member is on active duty or is called to active duty in the Armed Forces. The Act is generally effective January 28, 2008. Closely following passage of the Act, on February 11, 2008, the Department of Labor (“DOL”) issued proposed regulations on the FLMA (“proposed regulations”) which, in part, address the changes made by the Act.

Background

A “covered employer” for the purposes of the FMLA includes private-sector employers with 50 or more employees for each working day during each of 20

or more calendar workweeks in the current or prior calendar year. FMLA also applies (regardless of the number of employees) to all public agencies and local educational agencies (*e.g.*, both public and private elementary and secondary schools). FMLA provides eligible employees with up to 12 workweeks of unpaid leave in a single 12-month period. Prior to passage of the Act, eligible employees were entitled to unpaid leave:

- for the birth of and care for a newborn child;
- for the placement of a child for adoption or foster care;
- for an employee's own serious health condition; or
- to care for an immediate family member (*i.e.*, spouse, child or parent) with a serious health condition.

To be eligible for FMLA leave, an employee must have worked for his or her employer for at least 12 months and worked a minimum of 1,250 hours of service in the prior 12 months. The Act adds two new FMLA leave entitlements which are discussed in further detail below.

Leave to Care for an Injured Servicemember

Under the Act, an eligible employee who is the spouse, child, parent, or next of kin (*i.e.*, nearest blood relative) of a "covered servicemember" is entitled to a total of 26 workweeks of unpaid leave during a single 12-month period to care for the covered servicemember. The Act defines a "covered servicemember" as a member of the Armed Forces (including the National Guard or Reserves) who is:

- undergoing medical treatment, recuperation, or therapy;
- is otherwise in outpatient status; or
- is on the temporary disability retired list for a "serious injury or illness."

The Act defines "serious injury or illness" as an injury or illness that the servicemember incurred in the line of duty while on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the servicemember's office, grade, rank or rating.

The 26 workweeks of servicemember family leave may be taken at once, intermittently or on a

reduced leave schedule. These 26 workweeks are the maximum amount of leave an eligible employee may take in a single 12-month period, and this includes any FMLA leave an eligible employee might take during the same 12-month period for reasons unrelated to caring for the covered servicemember. For example, an employee would not be entitled to 26 workweeks of leave to care for a covered servicemember and an additional 12 workweeks for the birth or adoption of a child.

In the preamble to the proposed regulations, the DOL notes that there are several open questions surrounding this new leave entitlement. For example, it is unclear whether the 26-workweek leave entitlement should be interpreted to apply per covered servicemember. Could an eligible employee take 26 workweeks of leave to care for his or her spouse who is a covered servicemember in a 12-month period, and then take another 26 workweeks of leave to care for his or her child who is a covered servicemember in a separate 12-month period? The DOL seeks the public's comments on these issues so that it may consider these comments when finalizing the proposed regulations.

Leave When Family Member is Called to Active Duty

The Act also allows an eligible employee to take up to a total of 12 workweeks of unpaid leave during a single 12-month period for a "qualifying exigency" arising because the eligible employee's spouse, child, or parent is on active duty, or has been notified of a call or order to active duty in the Armed Forces. The DOL has not yet defined the term "qualifying exigency." However, the DOL's initial view is that leave for a "qualifying exigency" should be limited to non-medical related matters (*e.g.*, making arrangements for child care; making financial and legal arrangements to address the servicemember's absence; attending to farewell or arrival arrangements for a servicemember, etc.). This provision of the Act is not effective until the DOL issues final regulations defining the term "qualifying exigency." Although this provision of the Act is not yet effective, the DOL encourages employers to provide this type of leave to eligible employees in the interim.

Required Notification by Employee

If an eligible employee seeks to take FMLA leave to care for a covered servicemember, the employee must provide their employer with 30 days advance

notice if the need for leave is foreseeable. If 30 days advance notice is not practicable (*i.e.*, because of unforeseeable circumstances), the employee must give notice as soon as is reasonable and practicable. Further, if an eligible employee seeks to take FMLA leave due to a “qualifying exigency,” the employee must give notice to the employer as soon as is reasonable and practicable.

Continuation of Health Plan Coverage

As is the case with other types of FMLA leave, employers must give eligible employees who take leave under the new FMLA leave entitlements described above the option to continue coverage under their health plan at the same level and under the same conditions as provided prior to the leave. Further, when the employee returns to work, he or she must be reinstated in group health coverage on the same terms and conditions as existed prior to the leave (*i.e.*, the employee cannot be subject to a waiting period or an exclusion for pre-existing conditions upon reenrollment).

As noted above, these new FMLA leave entitlements are generally effective January 28, 2008. In response to these amendments to the FMLA, employers should revise their policies and procedures to ensure that eligible employees are granted appropriate leave to care for their family members who are covered servicemembers. Further, employers should communicate to their employees the right to take these additional FMLA leave entitlements. Finally, employers should amend their health plan documents and summary plan descriptions to ensure that these documents are in compliance with the provisions of the Act.

Comprehensive Update of FMLA Regulations

The proposed regulations are the first comprehensive update of the FMLA regulations since they were first issued in 1995. The DOL plans to issue the final FMLA regulations by the end of this year. The following briefly summarizes the key proposed changes to the regulations that may impact your employee benefit plans. The proposed regulations also contain numerous provisions that impact employment law that are not addressed in this article. You may want to consult with your employment counsel regarding any employment law aspects of the proposed FMLA regulations.

New Definition of Eligible Employee

As stated above, to be eligible for FMLA leave, an employee must have worked for his or her employer (who is a covered employer), for at least 12 months and worked a minimum of 1250 hours of service in the prior 12 months. The proposed regulations clarify that this 12-month period does not have to be consecutive. However, under the proposed regulations, (and subject to certain exceptions) employers now have the option of disregarding periods of employment that precede a continuous break in service of five years or more. For example, if in 2008 an employee worked five months for an employer and worked for the same employer for two full years in 1997 through 1998, the employer would not be required to take into consideration the two years of prior employment when determining whether the employee is currently eligible for FMLA leave.

Employer Liable for Harm to Employee whose Health Insurance is not Reinstated

The current regulations provide that if an employee fails to pay his or her share of premiums during FMLA leave and the employer allows the employee's health insurance to lapse due to this failure, the employer has a duty to reinstate the employee's health insurance when the employee returns to work. The proposed regulations make clear that if the employer does not reinstate the employee's health insurance upon his or her return to work, the employer is liable for harm suffered by the employee. This may include:

- benefits lost by reason of the violation;
- other actual monetary losses sustained as a direct result of the violation; and
- appropriate equitable relief tailored to the harm suffered.

New Employer Notice Requirements

Under the proposed regulations, employers are required to distribute three types of notices to eligible employees. These notices include the “general notice,” “eligibility notice” and “designation notice.” Under the “general notice” requirement, employers are required to post a notice explaining the FMLA's provisions and provide procedures for filing complaints of violations of FMLA. Employers also are required to provide information concerning an employee's rights and obligations under FMLA in

any employee handbooks. To streamline this “general notice” requirement, the proposed regulations state that the same “general notice” may be both posted and distributed. The penalty for not posting the “general notice” has been increased to \$110 per offense.

When an employee requests FMLA leave, the employer also is responsible for notifying the employee of his or her eligibility to take FMLA leave (*i.e.*, whether the employee has been employed for at least 12 months and has worked for a minimum of 1,250 hours of service in the prior 12 months). The proposed regulations require that this “eligibility notice” be sent to the employee within 5 business days (a change from the current requirement of 2 business days) after the employee either requests leave or the employer acquires knowledge that the employee’s leave may be for an FMLA qualifying reason. If the employee is not eligible for FMLA leave or does not have any FMLA leave available, the notice must state the reasons why the employee is not eligible for FMLA. For example, the employer might need to indicate that an employee has not met the 12-month eligibility requirement.

Under the proposed regulations, once an employer has sufficient information to determine whether a requested leave qualifies as FMLA leave, the employer must notify the employee within five business days (increased from the current requirement of two business days) that the leave is designated as FMLA leave. The proposed regulations add that this “designation notice” must inform the employee of the number of hours, days or weeks, if possible, that will be designated as FMLA leave. The proposed regulations allow employers to provide an employee with both the eligibility notice and designation notice at the same time when the employer has adequate information to designate the leave as FMLA leave at the time the employee requests the leave. The DOL has issued optional model notices for each of the three types of notice.

Further, under the current FMLA regulations, if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken by the employee does not count against the amount of leave for which the employee is eligible under FMLA. In order to be consistent with the holding of the Supreme Court case *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81 (2002), the DOL has proposed deleting the last sentence of this section of the current regulations to clarify that if an employer fails to properly designate a leave as FMLA leave, the employer will not be

required to provide any additional FMLA leave if the employee has already received his or her 12 (or 26 as applicable) workweeks of FMLA leave.

New Employee Notice Requirements

The proposed regulations address the amount of notice an employee must give to his or her employer before taking an FMLA leave. If the leave is foreseeable, the employee is required to give the employer 30 days advance notice. The proposed regulations clarify that if 30 days advance notice is not practicable, the employee must at a minimum provide the employer with verbal notification within one or two business days of learning of the need for leave. When requesting leave, an employee is not required to specifically ask for FMLA leave. However, the proposed regulations add the requirement that when an eligible employee requests leave, he or she must provide “sufficient information” to his or her employer to make the employer aware that an FMLA right may be at issue. Accordingly, when requesting leave, the eligible employee must inform the employer:

- that the employee is unable to perform the functions of his job (or that a family member is unable to participate in regular daily activities);
- of the anticipated length of the absence; and
- whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.

If an employee must take a leave that is unforeseeable, the employee or the employee’s spokesperson (*e.g.*, spouse, adult family member or other responsible party) must provide notice to the employer “as soon as practicable.” In the preamble to the proposed regulations, the DOL states that it expects that (except in extraordinary circumstances), an employee should be able to provide notice of the need for leave to their employer at least prior to the start of his or her work shift.

Changes to Medical Certification Requirements

An employer may request, within five business days of an employee’s request for leave, that the employee provide medical certification from his or her health care provider (employers currently have two business days to request this certification). The proposed regulations add the requirement that if a certification provided by an employee is incomplete or

insufficient (*i.e.*, one or more entries are blank, etc.) then the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. The DOL further clarifies that it is the employee's responsibility to either provide complete and sufficient certification, or to furnish the health care provider providing the certification with any necessary authorization required by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") so that the health care provider may release the necessary medical certification to the employer.

Under the proposed regulations, an employer may contact the employee's health care provider for purposes of clarification and authentication of the employee's medical certification. Notably, an employer may contact the health care provider directly (without the employee's permission) if the employer simply seeks to determine the certification's authenticity (*i.e.*, verifying that the form was completed and/or authorized by the health care provider who signed the document). The proposed regulations eliminate the requirement that the employer's health care provider (as opposed to the employer itself) contact an employee's health care provider for purposes of authenticating or clarifying the employee's medical certification.

The proposed regulations also provide guidance regarding the recertification rules. An employer may

not request recertification more often than every 30 days, and when a certification indicates that the medical condition will last for an extended period of time, the employer may obtain recertification every 6 months. The proposed regulations also provide guidance on the rules regarding fitness-for-duty certification. Instead of providing the employer with a "simple statement" that he or she is able to return to work, the employee must obtain a certification from his or her health care provider that the employee is able to resume work.

Conclusion

As noted above, these revisions to the FMLA regulations are only proposed regulations. They are subject to a 60-day public comment period that ends on April 11, 2008. We look forward to the issuance of the final FMLA regulations after the end of this public comment period.

FIRM NEWS

Elizabeth Loh was recently appointed co-chair of the Employment Committee of the Asian American Bar Association.

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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