



PENSION & BENEFITS



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REPORTER**OCTOBER 27, 2009****HIGHLIGHTS****DOL Releases Schedule C Guidance, Addressing Health and Other Plans**

The Department of Labor releases another series of frequently asked questions (FAQs) regarding the new 2009 Form 5500 Annual Return/Report of Employee Benefit Plan Schedule C, providing direction to group health plans and other welfare benefit plans, in addition to pension plans. **Page 2413**

Citigroup's Application of 'Fractional Test' Held to Comply With ERISA

Citigroup Inc. did not violate the Employee Retirement Income Security Act's minimum benefit accrual rules by using a "fractional test" in its cash balance pension plan that allowed Citigroup to compute minimum accruals when participants severed their employment with the company, instead of on a year-by-year basis, a federal appeals court holds. **Page 2440**

Agency Officials Provide Details on GINA Rules, Mental Health Parity Act

The Department of Labor, along with the departments of Health and Human Services and Treasury, plans to release rules by the end of the year that would implement the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, a DOL official says during an American Bar Association conference on health and welfare benefit plans. **Page 2430**. . . Meanwhile, a benefits attorney says employers can take several steps to handle the thorny issue of how to use health risk assessments before the regulations under the Genetic Information Nondiscrimination Act of 2008 become effective for most plans on Jan. 1, 2010. **Page 2430**

Employee Plans Investigating Schemes Disguised as Retirement Plans

The Internal Revenue Service's Office of Employee Plans, when appropriate, will be taking the lead in conducting promoter investigations of qualified retirement plans that are accommodating parties to abusive transactions, an IRS manager says. **Page 2413**

Attempt to Recoup Benefits Paid to Pilots With 'Sham' Divorces Rejected

Continental Airlines Inc. has no ability under the Employee Retirement Income Security Act to recoup pension benefits it paid to a group of senior pilots who allegedly obtained "sham divorces" to get a payout of their benefits, the U.S. District Court for the Southern District of Texas rules. **Page 2441**

IRS Apprises Liaison Group on Forthcoming Employee Plans Guidance

Employee plans guidance delayed by a change of administration in early 2009 has reached the clearance stage and is close to release, according to Internal Revenue Service managers speaking at a meeting of the Mid-Atlantic Area Pension Liaison Group. **Page 2414**

IRS INTEREST RATES

APPLICABLE RATES for November are issued. **Page 2455**

ALSO IN THE NEWS

HEALTH CARE REFORM: Senate negotiators are seriously considering including a provision in health care reform legislation establishing a national government-run public health insurance plan to compete with private insurers that states would be able to opt out of, lawmakers say. **Page 2432**

CASH BALANCE PLANS: An employee is not required to exhaust his administrative remedies before pursuing his claim that BP's cash balance pension plan violates ERISA, a federal court holds. **Page 2442**

WITHDRAWAL LIABILITY: Splitting away from decisions by other federal courts, a federal appeals court holds that an employer's multiemployer pension fund liability can arise out of either a contractual obligation to contribute to the fund or under labor-management relations law. **Page 2444**

FUNDING: Final rules for pension funding and benefit restrictions are complex in ways that generally cannot be avoided, several actuaries who advise companies on pensions and benefits tell BNA. **Page 2415**

“Capitalism has been hijacked by CEOs,” Minow said. She said she believes CEO pay is too high across the board. She also pointed to the “subprime mess” as an example of the wrongheaded way in which financial institutions paid people based on the “quantity of their transactions rather than the quality.” Nevertheless, Minow said the real reform of executive pay “has got to come from the market,” not from the government.

Seven Things Boards Should Avoid. The “seven deadly sins” of executive pay, according to Minow are:

- making up cuts in pay in one area by increasing pay in another,
- imputing years of service to justify retirement benefits,
- using phoney metrics that set the bar too low,
- paying dividends on nonvested stock,
- paying outrageous departure packages,
- engaging in peer group manipulation, and
- handing out perks and gross ups.

Good Pay Programs. A good pay program, in Minow’s view, is one that :

- indexes all stock options to a peer group or ties them to real goals,
- has real clawbacks,
- has majority voting in director elections, and
- discloses beyond what is called for in the executive pay disclosure rules.

Regarding disclosure, Minow said that under the Securities and Exchange Commission rules “we learn about what the CFO makes,” but not what the trading desk guy makes,” and that is wrong. The rules should be expanded to include reporting on everyone getting a high level of bonus compensation, she said.

By MARY HUGHES

Pension Reform

Obama Administration Makes Commitment To Improve Employer Retirement System

The Obama administration is committed to making the employer-based retirement system work better for employers and employees, Secretary of Labor Hilda Solis said Oct. 21 at the opening of a conference sponsored by Retirement USA.

“Individual savings are important, but I’m unconvinced that in the long run they will be more successful than the employment-based system for ordinary and hardworking Americans,” Solis said.

Describing Assistant Labor Secretary Phyllis Borzi as “an experienced consensus builder,” Solis said that the Employee Benefits Security Administration under Borzi also will investigate and prosecute employers and service providers that fail to properly invest contributions to retirement savings and health plans. “This year, for the first time, we will focus on investigating and prosecuting criminal violations in contributory plans, such as 401(k)s and health plans,” Borzi repeated what she said at other meetings (176 PBD, 9/15/09; 36 BPR 2169, 9/22/09).

Solis and other speakers called for an expansion of worker protections under the Employee Retirement Income Security Act of 1974 and for major new retire-

ment legislation when the Pension Protection Act of 2006 is scheduled to sunset at the end of 2014.

ERISA Flaws. “ERISA added critically important protections for workers and their families, but the system has also let down too many workers over the past few years,” Solis said, adding that “some of the protections have been eroded by the courts, by Congress, and by regulation that has too often been focused on making things easier for employers at the expense of protecting workers.”

Anna Burger, international secretary/treasurer of the Service Employees International Union and chair of the Change to Win Coalition, said that if PPA is not changed, more single-employer and multiemployer defined benefit plans will fail. “We know we have a key piece of retirement legislation coming our way when the Pension Protection Act of 2006 is sunset at the end of 2014, and that gives us an opportunity to rewrite the law and make the changes that we all need,” Burger said.

The Retirement USA Conference solicited and presented proposals for a future retirement system to replace what conference sponsors described as a patchwork approach to retirement security. If U.S. policymakers can envision a universal, secure, and adequate retirement system, they will find a way to pay for it, said Karen Ferguson director of the Washington, D.C., based Pension Rights Center. “To get to a new place, we need to be open to new ideas,” she said.

Coalition. The center is a founding member of the Retirement USA coalition that launched an initiative in early 2009 to reform the employer-based retirement system (45 PBD, 3/11/09; 36 BPR 618, 3/17/09). Ferguson said the Retirement USA coalition, which has 19 member organizations, is committed to preserving traditional defined benefit pensions, improving tax code Section 401(k) retirement savings plans, expanding retirement coverage, and strengthening Social Security.

Ferguson said people should put aside questions of political feasibility and be open to new ideas for a future retirement system. “We will find a way to pay for it, just as other countries have done,” she said.

Barbara Kennelly, president and chief executive officer of the National Committee to Preserve Social Security and Medicare, said Social Security “will be under the gun as soon as health care reform is done” by groups that favor reducing entitlement benefits. Benefits under the Social Security program replace only 40 percent of preretirement income, so that other sources of retirement security will always be necessary, Kennelly said.

Difficult Combination. Richard Trumka, president of the AFL-CIO, said a combination of PPA funding rules and new accounting standards have pushed even healthy companies to freeze their pensions and close them to new hires. Remarking on a lack of explicit standards for employers to be responsible for their employees’ retirement security, Trumka said that “policymakers demand little if anything from employers.”

Retirement must not be a dream realized only by bosses, Trumka said. Retirement must become a reality for workers, too, he said.

A majority (78 percent) of Americans are concerned about having enough money for retirement, according to results of a poll conducted in July by the National

Academy of Social Insurance and the Rockefeller Foundation, said Margot Brandenburg, associate director of the Rockefeller Foundation, which is one of two major financial supporters of Retirement USA. The other is the Atlantic Philanthropies.

BY FLORENCE OLSEN

Information on Retirement USA and the conference is at <http://www.retirement-usa.org/>.

Tax Policy

IRS Business Plan to Emphasize International Tax Compliance, Withholding, DiFronzo Says

The international section of the Internal Revenue Service's 2009-2010 priority guidance plan is likely to be "a little less ambitious" than in previous years, but is expected to focus significant attention on offshore compliance, tax evasion, and withholding, a senior agency official said Oct. 21.

While not saying specifically what would be on the plan, Michael DiFronzo, IRS deputy associate chief counsel (international-technical) said that IRS's ongoing emphasis will be on changes to qualified intermediary agreements and on modifying cross-border withholding and reporting requirements.

DiFronzo said the business plan is expected within "a matter of weeks," acknowledging the agency is behind schedule. With regard to areas that could be addressed in the coming business plan, "there were a number of good projects on last year's plan that didn't get done," he said.

PFIC Issues May Be Addressed. DiFronzo said IRS recognizes that there are many issues under the passive foreign investment company (PFIC) regime and pointed to the lookthrough rule under tax code Section 1297(c) as a potential area for guidance. "I think we need to make that area clear," DiFronzo said.

The IRS official also noted projects to address taxpayer burden reduction and to improve compliance, as well as projects to address regulations that are sunseting, such as those on overall domestic losses and rules under tax code Section 905(c).

"Don't be surprised if those are on the plan," the official said.

DiFronzo said in more "tried and true" areas, the business plan is likely to look at transfer pricing, the foreign tax credit, and mergers and acquisitions, with a focus on repatriation transactions.

He noted that the number of international projects on the business plan is likely to be closer to the number on the 2008-2009 plan than to the more ambitious numbers of previous years.

Leaner Approach to International Projects. Last year, DiFronzo said, IRS started with 30 international projects, added five during the year, and ended up finishing 22 of those 35 projects—just under 63 percent, which he said was a good percentage given the new administration and resource constraints.

"This year we're looking to make up some ground," he told practitioners, adding that out of "X" cross-border projects likely to be on the business plan, IRS already has finished five.

Those projects addressed fails charges, corporate versions under tax code Section 7874, rules under code Sections 882 and 877A, respectively, and the port of Foreign Bank and Financial Accounts (FBFI) he said.

IRS is likely to remain conservative in the number of projects it chooses in the international area, DiFronzo said, noting that "we're still in transition." Although key international positions are now filled, staffing has been an issue for a lengthy period, he said. Previous to the likelihood of international legislation affecting resources, and currently, "we have a fair amount of controversy taking up resources," he added.

Business Plan Process Questions Raised. In addition to specifics, the discussion also addressed more general questions of how the business plan is formulated and what it means for an item to be added.

In answer to questions from panel moderator Robert Femia, Miller & Chevalier, Washington, D.C., DiFronzo said that "if an item makes the business plan, there is an intention that it will get done. There's a realistic probability that it will get done."

He acknowledged that, in reality, IRS never completes the full business plan in the year the project is listed, but he added that "if it's on the plan, you've made a commitment that it will get resources."

DiFronzo said that, for a project to be included on the business plan, it requires agreement between the Chief Counsel's office, the Treasury Department's Office of Tax Policy, and the commissioner of internal revenue's office.

High-Level Agreement Needed. Those three entities also have to agree in order to add projects during the business plan year, DiFronzo said. "It takes an unusual fact pattern to add to it later, but it does happen," he said.

Panelist Robert Culbertson of Paul, Hastings, Janney & Walker LLP, Washington, D.C., a former IRS associate chief counsel (international), queried whether the business plan, by coordinating IRS and Treasury guidance priorities, helps to avoid a "Treasury bottleneck."

Bottlenecks can develop, DiFronzo said, because more people are available to write guidance at IRS than are available at Treasury to review the guidance.

DiFronzo said the process of developing the business plan is intended to make the guidance process work more smoothly but that resource issues are likely to continue. He noted that the IRS Chief Counsel's Office has about 2,500 attorneys while Treasury's Office of Tax Policy has about 100 overall, with about 100 IRS attorneys devoted to international issues and about 11 international attorneys on the tax staff at Treasury.

Selection Process Rigorous. The IRS official noted that the process of developing the business plan is a rigorous one, involving sifting through comments from dozens of stakeholders as well as IRS divisions, branches and offices, who together recommend as many as 100 projects.

The agency tries to select projects of the highest importance and the most impact, DiFronzo said, adding that "sometimes industry-specific projects are a little harder to move because they don't affect as many taxpayers."