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Benefits e-News: A Value Added Service from Robinson & Cole LLP

Benefits e-News is a monthly electronic newsletter reporting on recent changes in the law affecting employee benefits and other developments affecting plan sponsors and their employees. Benefits e-News provides web links to the Internal Revenue Service, the United States Department of Labor, the United States Department of Health and Human Services HIP HIPAA web site, and the Pension Benefit Guaranty Corporation. Benefits e-News is easy to navigate. To access a web link, position your cursor on the link and click your mouse. To return to Benefits e-News, click the back button on your browser.

We hope that you find Benefits e-News to be informational and helpful. If you know of others who would like to receive this online newsletter (or if you would like to discontinue receiving Benefits e-News), please click here and send us an email message. If there are certain topics that you would like covered in future issues, please let us know.

DOL Issues Advisory Opinion Letter on Indemnity and Hold-Harmless Clauses in Service Provider Contracts

Some actuarial firms and other service providers have opted to include indemnification and hold-harmless clauses in their new contracts with plan sponsors. These clauses typically limit the service provider's liability to the greater of one year's fees for ordinary services or a fixed dollar amount. There has been some concern on the part of plan sponsors that the adoption of contracts containing such clauses, particularly in their broadest form, could constitute a violation of the plan sponsor's fiduciary duties under ERISA.

The Department of Labor has recently released an Advisory Opinion addressing this issue. The letter was requested by a pension fund whose actuarial firm had presented a renewal contract that contained indemnification and hold-harmless provisions. The clause limited the actuarial firm's liability to the fund, and any third party arising from the actuarial firm's services to the fund, to the greater of $250,000 or one year's actuarial fees, "regardless of the cause of action." Although the fund opted to use another provider for actuarial services, the fund nonetheless requested an opinion given the increasing popularity of such provisions. The Advisory Opinion concluded that the DOL did not believe that "in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are either per se imprudent . . . or per se unreasonable." However, the DOL noted that "provisions that purport to apply to fraud or willful misconduct by the service provider are void as against public policy" and concluded that it would not be prudent or reasonable to agree to such provisions. The opinion noted that such clauses could be reasonable with respect to claims of negligence or malpractice, but that in any case, the fiduciary must evaluate: the reasonableness of the provision; the availability of comparable services from a provider not utilizing such an indemnification provision; and the potential risk and costs to the plan if such a clause limited the actuarial firm's liability.

This Advisory Opinion provides significant guidance with respect to a plan fiduciary's duties in determining whether to agree to a service provider contract containing indemnification or hold-harmless provisions. Perhaps most significantly, it appears that agreeing to a blanket protection for the service provider against all claims, regardless of the nature of the claim, is per se imprudent. The DOL was clear that acts of fraud or willful misconduct should not be indemnified. Accordingly, any contract a plan sponsor signs should specify that there is no indemnification for willful acts or fraud. The opinion also makes it clear that just because a clause excludes willful acts or fraud from indemnification, the plan sponsor must still analyze the potential cost to the plan and the availability of other options that present less risk. If the plan sponsor is able to obtain comparable services elsewhere, the plan sponsor must analyze the risks of accepting a contract with an indemnification clause and find some reason that accepting those risks is in the better interest of plan participants than utilizing a service provider who does not require indemnification. As some actuarial firms are not incorporating such indemnification clauses into their contracts, the safest course of action at this time may to simply utilize such firms. If the plan sponsor intends to enter into a relationship or continue an existing relationship under a contract containing an indemnification clause, the plan sponsor should carefully document how the risks were weighed and why the decision was made to accept those risks rather than use another provider.

IRS Amends Distribution Rules for Fixed Payments

The IRS has issued a Ruling permitting the adjustment of substantially equal fixed payments from a pension plan or IRA on a yearly basis using the value of the participant's account on the plan's valuation date. Under the prior rules, individuals who were receiving substantially equal fixed payments could not adjust the amount of such payments without subjecting the entire account to a 10% excise tax. The new rule is intended to prevent participants from exhausting their accounts too quickly when a downturn in the economy reduces their account value.

Arbitration Costs can't be Shared with Participants in an ERISA Plan

In Bond v. Twin Cities Carpenters Pension Fund, pension plan participants challenged a mandatory arbitration provision contained in the plan that required participants to split the costs of arbitration. The Eighth Circuit Court of Appeals found that this arbitration provision could discourage the pursuit of legitimate claims by participants given the costs associated with such claim. The court ruled in favor of the participants and held that such an unduly burdensome claims system is prohibited by ERISA.

Employees' General Release of Claims Included ERISA Claims

Former employees of NationsCredit Corp. signed a broad release waiving any and all claims against NationsCredit. Later, in Chaplin v. NationsCredit Corp., the employees brought an ERISA claim for severance benefits and argued that they had not waived their right to bring an ERISA claim since the release the employees signed was general and did not specifically state that it included ERISA claims. The Fifth Circuit Court of Appeals rejected the former employees' claims and found that they had waived their ERISA claims by signing the release. The court ruled that a release does not have to specifically mention ERISA in order to incorporate a waiver of ERISA claims. This is the only circuit to have reached such a conclusion at this time.

Mental Health Parity Act Sunset Date Extended

The Mental Health Parity Act requires group health plans that provide both medical benefits and mental health benefits to provide parity in applying dollar limits for mental health and other medical benefits. In September, the DOL extended the original sunset date of the Mental Health Parity Act under ERISA from September 30, 2001 to December 31, 2002. However, the Internal Revenue Code's requirements for the Mental Health Parity Act do not expire until the end of 2003. Thus, although insurers, who are subject to Act's requirements under ERISA, but not the Internal Revenue Code, will not be subject to the Act after 2002, insured and self funded group health plans that are subject to the IRS requirements of the Mental Health Parity Act remain subject to the Act until the end of 2003. Sponsors of insured plans should verify that their group insurance policy contains parity in mental health benefits to avoid the penalties of being subject to an excise tax, or having to pay for the mental health benefits not provided by the insurer.

IRS, PWBA Launch Joint Project to Find Form 5500 Nonfilers

The IRS and Pension, Welfare and Benefits Administration have announced a joint project intended to ensure that all plans required to file Form 5500s have made such filings. The program, which begins immediately, will identify nonfilers by scanning the records of the IRS and PWBA. Beginning in December 2002, the agencies will begin sending letters of inquiry to the potential nonfilers identified by the project.

Deadline for Filing a Compliance Extension for the Transaction and Code Set Standards is Fast Approaching

October 15, 2002 is the deadline for covered entities to file an extension for compliance under the Transaction and Code Set Standards of HIPAA. By filing an extension, covered entities (which are health plans, health care clearinghouses, and health care providers who perform certain electronic transactions) will have an additional year (October 16, 2003) to comply with the Transaction and Code Set Standards.

The Transaction and Code Set Standards require covered entities (not employers) who engage in the following electronic transactions to use a specific coding format when conducting the transaction. These covered transactions include:

• health claims or similar information,
• health care payment and remittance advice,
• coordination of benefits,
• health claim status,
• enrollment and disenrollment,
• eligibility,
• health plan premium payments, and
• referral certification and authorization

Two other transactions, first report of injury and health claims attachment, do not currently have standards, but standards for those transactions will be released in the future.

Self-insured health plans will have to file a compliance extension plan or ensure that their plan administrators file on their behalf. This week, the government has issued information stating that a fully-insured group health plan may wish to file an extension plan, but it has not taken a position on whether such plans must file. If in doubt, a fully-insured plan may want to check with its insurer or HMO. More information and a model compliance plan can be found at thisHHS link.

For more information, please contact us

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