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HR AND BENEFITS UPDATE

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FINAL FMLA REGULATIONS ISSUED

On November 17, the Department of Labor (DOL) issued final regulations regarding the Family and Medical Leave Act (FMLA). As a reminder, FMLA applies to private employers with 50 or more employees within a 75 mile radius. FMLA also applies to governmental and local school employers regardless of size.

WHAT AN EMPLOYER NEEDS TO DO TO COMPLY

Prior to the law's effective date of January 16, 2009, employers should update their employee handbooks to:

» Define a serious health condition as an absence of three consecutive days and two visits to a healthcare provider. The two visits must occur within 30 days of the period of incapacity with the first visit occurring within seven days of the incapacity;

» Include a requirement that an employee must notify the employer of the need for leave 30 days prior to the leave or the same day (or day after) the employee knows of the need for leave, whichever is earlier;

» Include language from the new "Notice to Employees of Rights under FMLA";

» Provide leave up to 12 weeks for eligible employees who have an immediate family member on active duty leave. The employee must experience a qualifying exigency, which is defined as short notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any additional activities upon which the employee and employer agree; and

» Provide leave up to 26 weeks for eligible employees who have a family member who has a serious illness or injury due to active military duty.

The revised handbook or a handbook addendum should be distributed to employees prior to January 16, 2009. If the employer does not have a handbook, the employer must distribute the Notice to Employees of Rights under FMLA prior to that date, which is available at http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf.

An employer should also update their notices and forms to reflect the new provisions. The regulations include revised Certification Forms, Designation Notice, and a combined Notice of Eligibility and Rights and Responsibilities. Model Notices are available at http://www.dol.gov/esa/whd/fmla/finalrule.htm.

Finally, employers should revise their procedures to reflect the following changes:

» An employer's HR professional, leave administrator, or management official may contact an employee's health care provider to clarify or authenticate the provider's certification. An employee's direct supervisor may not contact the provider.

» An employer must notify the employee of his/her eligibility and rights under FMLA within five days of the employee's request.

FIDUCIARY RESPONSIBILITY IN TODAY'S FINANCIAL CLIMATE

The current environment of financial market turmoil is causing many retirement plan sponsors to re-examine their fiduciary responsibilities to the defined contribution plans they oversee and the participants in those plans. In most cases, the first person a plan sponsor turns to with these questions is their plan advisor. A great place to begin such a conversation is by covering two main topics: proactive employee communications, and adherence to a prudent process of managing investment decisions (including a review of investments currently offered).

As a plan fiduciary, you have a responsibility to the plan and its participants, regardless of market ups and downs. Most importantly, you should attempt to combat the panic that some in the media are feeding and remind your participants to stay the course by avoiding such bad behavior as market timing. Missing out on just a handful of the best-performing days in the market may leave investors at a significant performance disadvantage compared to investors who remain fully invested for the long term. Although unnerving at times, some of the sharpest market declines have been followed by steep rebounds. Today's financial climate presents an excellent opportunity to remind participants of the importance of diversification (putting all their money in cash is not the solution to this market crisis), regular rebalancing, dollar cost averaging and the long-term nature of retirement savings. Meeting with a financial professional is a great step that participants can take towards creating a healthy financial picture.

With regard to managing investment decisions, a fiduciary demonstrates prudence by the documented process they follow to make decisions on the selection, removal and replacement of investment options. Documentation of both the process and outcomes is paramount. When the process is followed properly it can significantly reduce and shield plan fiduciaries from potential liability regarding participant investment decisions. Accordingly, this is a great opportunity to review the protections of complying with ERISA Sections 404(a) (fiduciary duties) and 404(c) (protections from liability for participant investment decisions). Your advisor can also help you work through the Fiduciary Checklist, a thorough examination of fiduciary best practices that was developed by industry-leading ERISA attorneys. Fiduciaries are also well-served to confirm the extent that investments presently offered to participants include exposure to distressed obligations and/or failing institutions and insurers. Most retirement plan vendors have already produced marketing materials which address the issue, and these pieces can be distributed to participants. Obtaining related documentation from your vendor will support your due diligence efforts and can be used as part of a prudent employee communication plan.

Establishing and maintaining clear lines of communication with participants and following a prudent process of determining plan investment options can provide meaningful advantages to plan fiduciaries and participants alike.

BENEFITS COMPLIANCE FAQ

Question: We are cleaning out our files to start fresh for the New Year. How long should we keep employee benefits related forms, claims, bills, and booklets?

Answer: The Employee Retirement Income Security Act (ERISA) provides guidelines for certain record retention requirements for plan sponsors and employers. ERISA §§107 and 209 impose the time frames that employee benefit plan records must be maintained. In the event an employer or sponsor is unable to furnish such records during that time frame, there are applicable fines and penalties that may be levied. ERISA has conveniently provided that an electronic copy of a form is as good as a paper one as long as certain requirements are met. The electronic recordkeeping system must maintain the integrity of the original document, be properly backed up, and be able to print legible copies.

Generally, ERISA requires that plan records must be kept "for a period of not less than six years after the filing date of the [related reporting] document". Since the Form 5500 is not due until seven months following the end of the plan year and many plans file a 2 1/2 month extension, it is generally recommended that such records be kept for eight years. Records that fall in this category include: plan documents, summary plan descriptions, certificates of coverage, Form 5500's, COBRA notices, claim approvals, denials and appeals, election materials, forms and changes, participant contributions, and administrative expenses.

Records regarding selection, monitoring correspondence and contracts of service providers and most HIPAA-related documents must be maintained for a period of at least six years.

Finally, the Internal Revenue Code § 6039D presents yet different record retention time frames, as it mostly affects records relating to eligibility rules, discrimination testing and election records for cafeteria plan components such as dependent care flexible spending accounts (FSA) and health savings accounts (HSA). These records must be maintained for at least five years. Cafeteria plan components that are subject to ERISA such as health plans or health FSAs would continue to follow the eight year retention rule.