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ERISA, EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION NEWSLETTER

This Newsletter reports the 2009 index limits for Social Security benefits, the Internal Revenue Service ("IRS") limits for tax-qualified retirement plans, the Pension Benefit Guaranty Corporation ("PBGC") guarantee limit and Medicare rates. These past several months have been busy indeed with respect to tax and ERISA law changes, as well as updates to Massachusetts health care law.

We proudly announce that Marcia Wagner has been inducted as a Fellow of the American College of Employee Benefits Counsel. According to the College:

> "Ms. Wagner's election to the College reflects a careful judgment by prominent employee benefits practitioners that Ms. Wagner meets demanding criteria, emphasizing both excellence in the quality of practice and serious contributions to the public's understanding and appreciation of employee benefits law. Ms. Wagner's record of notable achievement and dedication reflects the type of activities that the College was created to honor.
>
> Ms. Wagner's induction as a Fellow of this organization is viewed as a national distinction. Each nominee is required to have focused on employee benefits law for at least 20 years and to have demonstrated a sustained commitment to public awareness and understanding of benefits law through such activities as writing, speaking, public policy analysis, public education or public service. Nominees are also required to have provided exceptionally high-quality professional services to clients, the bar, and the public. As a result, selection as a Fellow is a high honor reflecting substantive contributions to the field of employee benefits over the Fellow's entire career."

Marcia Wagner and John Keegan have been selected, by their peers, as "Super Lawyers" in the ERISA/employee benefits field for both Massachusetts and New England, while Ms. Wagner was selected for the additional honor of being among the top 50 women attorneys and top 100 attorneys in all fields of law for Massachusetts and New England.

Ms. Wagner has received the honor of being in the 2009 edition of The Best Lawyers in America in the specialty of Employee Benefits Law.

Al Lurie is the general editor of the new and very well-received Bender's Federal Income Taxation of Retirement Plans, a prominent treatise in the ERISA field. Al Lurie, Marcia Wagner, Barry Newman and Jon Schultze are contributing authors of three chapters to this treatise.

Al Lurie has published an article entitled, "Triple Play: Stevens to Roberts to Thomas or a View of LaRue" published in the September/October 2008 issue of Business Entities.

A report to Congress by the American Law Division of the Congressional Research Service cites an article by Marcia Wagner and Barry Newman that examines the possibility of ERISA preemption of the Massachusetts Health Care Reform Act. The article was originally published in the Tax Management Compensation Planning Journal and the NYU Employee Benefits and Executive Compensation Review.

The Wagner Law Group is pleased to announce that in January 2009, Russell A. Gaudreau, Jr. will join the firm as a partner. Mr. Gaudreau has had a long and distinguished career at Ropes & Gray, where he headed its employee benefits consulting and actuarial practice, has received many prestigious accolades, including Best Lawyers in America (1987-2009), Chambers USA: America's Leading Lawyers for Business (2006-2008), and Massachusetts Super Lawyers (2004-2009), is a Director and Founder of the prominent New England Employee Benefits Council, and is a long time member of the faculties of Georgetown and Boston Universities where he teaches employee benefits law. Clients of The Wagner Law Group will benefit from Mr. Gaudreau's years of experience and expertise as a master ERISA/employee benefits practitioner.

To learn more about our team and practice, please visit our website at www.erisa-lawyers.com. In the event you desire legal advice or consultation, please feel free to contact any member of The Wagner Law Group.

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I. COST OF LIVING ADJUSTMENTS

	2008	2009
Maximum annual payout from a defined benefit plan at or after age 62 (plan year ending in stated calendar year)	$185,000*	$195,000*
Maximum annual contribution to an individual's defined contribution account (plan year ending in stated calendar year)	$46,000**	$49,000**
Maximum Section 401(k), 403(b) and 457(b) elective deferrals	$15,500***	$16,500***
Section 414(v)(2)(B)(i) catch-up limit for individuals aged 50 and older	$5,000***	$5,500***
Maximum amount of annual compensation that can be taken into account for determining benefits or contributions under a qualified plan (plan year beginning in stated calendar year)	$230,000	$245,000
Test to identify highly compensated employees, based on compensation in preceding year (plan year beginning in stated year determines “highly compensated” status for next plan year)	$105,000	$110,000
Wage Base For Social Security Tax	$102,000	$106,800
Wage Base For Medicare	No Limit	No Limit
Amount of compensation to be a “key” employee	$150,000	$160,000
Maximum Social Security Benefit at Social Security Normal Retirement Age	$2,185/month	$2,323/month
Earnings Test – Early Retirement (Age 62) (Amounts that Can Be Earned before Benefits Are Cut)	$13,560/year	$14,160/year
PBGC maximum monthly guaranteed life annuity at age 65	$4,312.50/month	$4,500/month

* There are late-retirement adjustments for benefits starting after age 65.
** Plus "catch-up" contributions.
*** These are calendar year limitations.

II. RETIREMENT PLANS

A. IRS Determination Letter Program for Tax-Qualified Retirement Plans

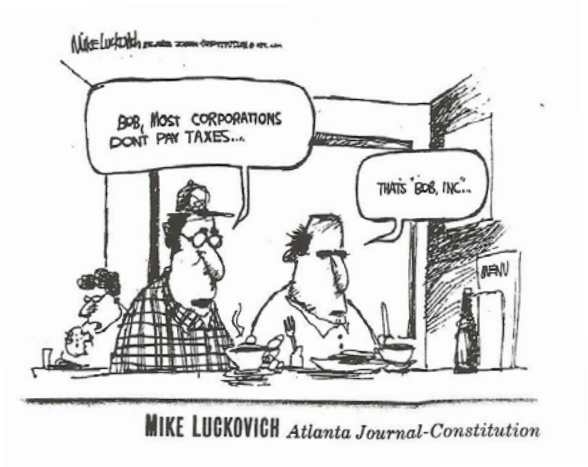
As discussed in several of our previous Newsletters, the IRS processes applications for determination letters using a staggered five-year system. A determination letter is the method by which a plan sponsor seeks the Internal Revenue Service's approval that the form of a plan complies with all legal requirements. Under this system, each individually designed retirement plan is assigned to one of five "cycles" (12-month periods starting on February 1 and ending the following January 31) based upon the last digit of the sponsor's federal employer identification number ("EIN"). These cycles are as follows:

EIN ends in:	*Cycle:*	*First day of cycle:*	*Last day of cycle:*
1 or 6	A	February 1, 2006	January 31, 2007
2 or 7	B	February 1, 2007	January 31, 2008
3 or 8	C	February 1, 2008	January 31, 2009
4 or 9	D	February 1, 2009	January 31, 2010
5 or 0	E	February 1, 2010	January 31, 2011

The cycles will begin again on February 1, 2011, when the second Cycle A opens.

The initial Cycle A and Cycle B have both closed, and Cycle C is about to close. If your EIN ends in a 1, 2, 3, 6, 7, or 8, and you sponsor an individually-designed qualified retirement plan that was not submitted for a determination letter during the applicable period, please contact our office as soon as possible to discuss your options.

Because this firm, and more importantly the IRS, believes that having a current determination letter represents a best practice for all plan sponsors, we strongly recommend that we apply on behalf of our clients for updated determination letters during the appropriate cycle. The determination letter system anticipates that plans will file for a new determination letter only once every five years, but plans must still be amended from time to time as the law and regulations governing tax-qualified plans change.



B. IRS Considering Modifying Determination Letter Process for Governmental Plans

As discussed above, the IRS revised its determination letter process to implement a staggered "cycle system" under which the deadline for filing an IRS determination letter application generally varies based on the last digit of an employer's EIN. One exception to this EIN-based system was that governmental tax-qualified plans were all assigned to Cycle C, which was scheduled to end January 31, 2009.

In recent months, significant concerns were raised about governmental plans' ability to comply with the January 31, 2009 Cycle C determination letter deadline. Issues that have been raised include the following: (i) unlike private sector plans, many governmental plans are based in statutes and rules that do not form a single document; the IRS has indicated that a composite document composed of statutes and other documents will be acceptable; and (ii) many governmental plans have not been submitted for a determination letter for a long time, if ever. This lack of a prior determination letter has given a number of a governmental entities pause about filing because of concerns that they will not be able to find evidence of timely adoption of historical amendments. The IRS has provided some relief with respect to this issue by providing that verification of timeliness is only necessary for "GUST"[1] and later amendments (i.e., mid-1990s to present).

As a compromise to the governmental plan community, the IRS is providing governmental plans a one-time option to file either under Cycle C or under Cycle E, which ends January 31, 2011. After 2011, all governmental plans would return to Cycle C. The IRS is providing incentives for governmental plans to remain in Cycle C, such as expedited processing of determination letter applications and reduced correction fees. Governmental plans that have already filed under Cycle C would be given the opportunity to "back out" of Cycle C and move to Cycle E.

C. 403(b) Plans Must be Amended for New Regulations by January 1, 2009

1. Background

As we have discussed in previous Newsletters, on July 26, 2007, the Internal Revenue Service published its long-awaited final regulations under Section 403(b) of the Internal Revenue Code (the "Code"). The final regulations, which were issued in proposed form in November 2004, replaced regulations issued in 1964 that had not been comprehensively revised in more than 40 years.

[1] GUST is an acronym that stands for the statutory changes made by the Uruguay Round Agreements Act (commonly referred to as GATT because the Act approved the trade agreements negotiated under the General Agreement on Tariffs and Trade), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), and the Taxpayer relief Act (TRA) of 1997, plus the Internal Revenue Service Restructuring and Reform Act of 1998, and the Community Renewal Tax Relief Act of 2000 (CRA).

The final regulations consolidate legislative and regulatory developments over the last four decades that have significantly eroded the differences between 403(b) plans and other salary reduction arrangements such as 401(k) and 457(b) plans. While the new regulations generally codify existing rules, they also impose new documentary requirements; eliminate good faith compliance with the statutory nondiscrimination requirements for nonelective deferrals by requiring that each employee have an effective opportunity to make deferrals and by limiting some of the categories of employees that may be excluded in applying the universal availability requirement.

The IRS's final regulations are generally effective January 1, 2009.

2. Plan Document Requirement

A major change in the final regulations, and consistent with the trend toward making 403(b) plans and qualified plans uniform, is the requirement that a 403(b) plan be maintained pursuant to a written plan document which, in both form and operation, satisfies the Section 403(b) regulations. The plan must contain all the material terms and conditions for eligibility, benefits, applicable limitations, and the time and form under which distributions will be made. The plan may incorporate by reference other documents, such as the insurance policy or custodial agreement, which, as a result of the reference, become part of the plan. In the event of any conflict between the plan and documents incorporated by reference, the plan governs. The plan document may allocate responsibility for performing administrative functions and must identify who is responsible for complying with those Code requirements, such as loans and hardship withdrawals, that apply on an aggregated basis to all contracts issued to a participant.

Note: It is essential that all sponsors of 403(b) plans have a compliant 403(b) plan in place prior to January 1, 2009. If you need assistance in this regard, please contact us as soon as possible.

Note: As of the date of this Newsletter, the plan document deadline is December 31, 2008. However, we understand the IRS is considering extending this deadline. Nonetheless, and given that we cannot rely on what the IRS might do, we urge our clients and friends to do their utmost in order to comply with the December 31, 2008 deadline.

D. Massachusetts Will Tax Unincorporated Owners and Partners on 401(k) Contributions

On July 2, 2008 the Massachusetts Department of Revenue ("DOR") issued a ruling, Directive 08-3, in which it held that elective contributions made by, and matching contributions made for, partners and self-employed individuals under a 401(k) plan are not deductible for Massachusetts state income tax purposes. Although such contributions are deductible for federal income tax purposes, they are includible in state taxable income and deducted when distributions are made from the 401(k) plan. According to the DOR, this is because Massachusetts specifically does not allow the federal deduction for these contributions.

While this ruling is probably correct as a matter of legal interpretation, it certainly came as a surprise since this interpretation has never been enforced by the DOR. Reflecting this, the ruling states that it will not be applied to the deduction of elective contributions to 401(k) plans for open tax years prior to 2008; the deduction of matching contributions for prior open tax years is not allowed, however.

Since members of limited liability companies are taxed in the same way as partners and self-employed individuals, this ruling clearly will also have an impact on LLC members.

E. Provisions of the Heroes Earnings Assistance and Relief Tax Act of 2008

On June 17, 2008 President Bush signed the Heroes Earnings Assistance and Relief Tax Act into law (P.L. 110-245). This law, known as the HEART Act, has a number of provisions that will affect each corporation's administration of its employee benefit plans and require certain amendments for its qualified plans and possibly also its cafeteria plans.

1. Tax-Qualified Plans

There are three changes in the law that must be reflected in tax-qualified plans, as well as one change that is voluntary, relating to plan participants who die while on military service.

a. *Death Benefits*. A qualified plan must provide that, if a participant dies while performing qualified military service, as defined in the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), his or her survivors will be entitled to any additional benefits provided under the plan had the participant resumed and then terminated employment as a result of death (other than benefit accruals relating to the period of qualified military service). Thus, if a plan provides for accelerated vesting for a participant who dies while employed, accelerated vesting would also have to apply to participants who die while in qualified military service. This new requirement is effective for individuals dying during qualified military service after 2006, and will therefore apply to individuals who have already died while in military service. A plan amendment to reflect this change in the tax qualification requirements must be adopted before the end of the 2010 plan year, which, in the case of calendar year plans, is December 31, 2010.

b. *Elective Deferrals*. Starting in 2009, a participant on military leave for at least 31 days may be entitled to receive a distribution of elective deferrals as if he or she had severed from employment. However, any participant who receives such a distribution of elective deferrals must be prohibited from making elective deferrals and employee contributions for a period of six months following the distribution. Any plan amendment permitting such a distribution must be adopted by the end of the 2010 plan year.

Under the HEART Act, any such distribution made to a qualified reservist called to active duty for a period of at least 180 days (or indefinitely) is not subject to the 10% early distribution penalty tax. This exemption had been scheduled to expire at the end of 2007, but is

now permanent. Any such distribution may be recontributed to the plan during the two-year period following the end of active military service.

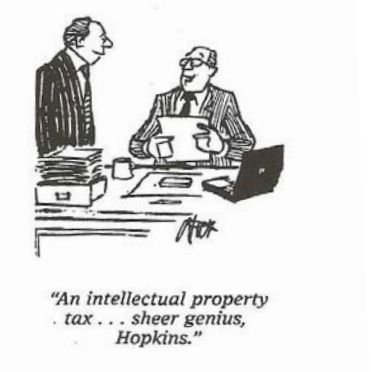
c. *Wage Continuation*. If an employer elects to continue some or all of an employee's wages, i.e., differential pay to make up the difference between the employee's regular compensation from the employer and his or her military compensation, while he or she is on military leave for a period of 31 or more days, this compensation must be treated in the same manner as other compensation from the employer for tax withholding and retirement plan purposes. This provision applies to wages paid after 2008, and must be reflected in a plan amendment adopted by the end of the 2010 plan year. Note that state withholding provisions may differ from the new federal rule.

d. *Additional Accruals Because of Death Benefits or Disability*. The HEART Act permits (but does not require) retirement plans to treat a participant who dies or becomes disabled during qualified military service as if he or she had returned to work on the day before the date of death or disability, and then terminated employment the next day. This would permit the plan to include (on a nondiscriminatory basis) the additional benefit accruals or employer contributions that would have been earned during military leave when calculating the participant's benefit. For purposes of employer matching contributions, the contribution amount is to be determined by assuming the employee continued contributions at the average rate that he or she had contributed during the 12 months preceding military service. This provision, while voluntary, is retroactive to January 1, 2007.

2. Cafeteria Plans

The HEART Act amends the rules for cafeteria plans so that they may permit distributions from a health flexible spending account ("FSA") to a reservist who is called to active duty for a period of at least 180 days. This distribution must be made between the date that the reservist is called to active duty and the last day that reimbursement can be made for that plan year under the plan's provisions. This provision is effective as of June 17, 2008. While this provision would protect a reservist from the cafeteria plan use-it-or-lose-it rule, any distributions that are not made for medical purposes would be taxable as wages and therefore subject to income and employment taxes.

Comment: Although the changes to the employee benefit requirements in the HEART Act are relatively minor in nature, they will add some measure of administrative complexity to the operation of qualified plans and cafeteria plans, since the HEART Act creates new administrative rules applicable only to those on military leave. In addition, the HEART Act will require some amendments to all qualified retirement plans. Finally, if employers wish to take advantage of the new health FSA distribution rule, this will also require amendments to employers' health FSA plans.



"An intellectual property tax . . . sheer genius, Hopkins."

F. Mandatory Plan Amendments – Internal Revenue Code Section 415

Every tax-qualified plan, regardless of whether the plan is a prototype, volume submitter, or individually-designed, must be amended to comply with the final Code Section 415 regulations. Code Section 415 restricts: (i) the amount of contributions that may be allocated to a participant's account in a defined contribution plan, and (ii) the amount of annual benefit that a participant may accrue under a defined benefit plan. The regulations generally apply to limitation years (usually the plan year) commencing on and after July 1, 2007.

The deadline to adopt an amendment to implement the new regulations is the later of the last day of the plan year commencing on or after July 1, 2007 or the due date for filing the employer's income tax return (including extensions) for the taxable year that ends within that tax year. For example, if the plan year is the calendar year and the employer's fiscal year is the calendar year, the amendment will be effective January 1, 2008, and it must be adopted by March 15, 2009 or the extended due date for the corporate income tax return. If a plan is not amended on or before the deadline, it will be subject to disqualification.

Despite this general rule, the deadline may be earlier in 2008 depending on how the plan is written. This means that, if your company maintains a tax-qualified retirement plan, it should be amended in the near future to avoid qualification problems.

G. IRS Revises Voluntary Correction Program for Retirement Plans

On September 2, 2008, the IRS issued Revenue Procedure 2008-50 which updates and expands its comprehensive system of correction programs, the Employee Plans Compliance Resolution System ("EPCRS"), for retirement plans. The new EPCRS retains the basic structure of Revenue Procure 2006-27, the predecessor to Revenue Procedure 2008-50, but makes a number of enhancements and expansions.

1. Background

EPCRS is designed to assist sponsors of retirement plans when they voluntarily correct certain errors that, if uncovered by the IRS on audit, could lead to plan disqualification. Notably, the IRS generally takes the position that any plan error, no matter the size, is sufficient basis for plan disqualification. In this regard, the consequences of the disqualification of a retirement plan are, in general, as follows: (1) for open tax years, the employer loses its tax deduction for nonvested contributions made to the plan for such years; (2) for open tax years, participants recognize income with respect to their vested accrued benefits; (3) for open tax years, the plan's underlying trust recognizes income on its earnings; (4) distributions from the disqualified plan are not eligible for rollover into another tax-qualified vehicle (i.e., all participant monies are subject to immediate taxation) and (5) the plan sponsor and/or the plan fiduciaries responsible for failing to maintain the plan's tax-qualified status face the risk of lawsuits.

The three components of EPCRS are: (1) the Self-Correction Program ("SCP"), which allows plan sponsors to correct certain "insignificant" operational failures without notifying the

IRS or paying the IRS any compliance fee; (2) the Voluntary Correction Program ("VCP"), which allows plan sponsors to request IRS approval of a proposed correction and to pay a fixed compliance fee that is, in general, based upon the number of plan participants and type of disqualifying defects; and (3) the audit-based Closing Agreement Program ("Audit CAP"), which allows plan sponsors to correct failures during an IRS audit by means of a negotiation with the IRS of a correction methodology and sanction.

2. Updates and Expansions to EPCRS

The following items are the most significant manners in which the IRS updated and expanded EPCRS:

a. *Failure to Include an Eligible Employee*. The correction method for a failure to include an eligible employee in a Section 401(k) plan has been expanded to include a situation in which deferral contribution elections are not implemented by the plan sponsor or are implemented in a manner that is inconsistent with the plan's terms. Specifically, a plan sponsor may correct such failure by making a corrective contribution for the employee's missed opportunity to make elective deferrals and any missing employer matching contributions, including earnings. With respect to missed employee elective deferrals due to the plan sponsor's failure to implement a participant election on a timely basis, the employer must make a contribution, adjusted for earnings, equal to 50 percent of the employee's "missed deferral." The missed deferral is calculated by multiplying the employee's elective deferral percentage by the employee's compensation for that year. With respect to any missing employer matching contributions, the employer makes a contribution, adjusted for earnings, equal to the matching contribution the employee would have received had the employee made a deferral equal to 100 percent of the missed deferral amount.

Prior to this expansion, because EPCRS applied this correction methodology only to situations involving a "failure to include" an otherwise eligible employee in the plan, many plan sponsors were uncomfortable applying it to situations in which elective deferral contribution elections were implemented in a manner that was inconsistent with the plan's terms. Therefore, the typical correction for such an error was for the plan sponsor to make a contribution based upon the employee's actual election that was erroneously processed. The revised EPCRS methodology eliminates the windfall such correction provided to such employee.

b. *Earnings*. Earnings adjustments for corrective contributions or distributions derived from the Department of Labor's Voluntary Fiduciary Correction Program's online calculator (which is located at http://askebsa.dol.gov/VFCPCalculator/WebCalculator.aspx) may now be applied to corrective contributions, distributions, allocations and/or reallocations if it is not otherwise feasible to make a reasonable estimate of what the actual investment results have been. Previously, plan sponsors that were unable to calculate actual investment results were generally required to apply earnings based on the plan's "best performing fund."

Comment: The Wagner Law Group has lobbied long and hard for this modification.

c. *Streamlined Application Procedures*. The current VCP rules provide a streamlined application procedure to correct a failure to adopt interim amendments and certain other legally-required plan changes. The revised EPCRS provides new and expanded streamlined application procedures for: (a) loans in excess of maximum amounts permitted by the Code; (b) a failure to distribute elective deferrals in excess of maximum annual limitations; (c) a failure to pay required minimum distributions; (d) certain corrections permitted to be made by plan amendment; (e) plan sponsor eligibility failures; and (f) certain failures relating to simplified employee plans and individual retirement accounts.

d. *Excise Taxes*. Amounts improperly distributed to participants, which a participant has then rolled over to an IRA, are currently subject to a six percent excise tax under Section 4973 of the Code and may be subject to a ten percent excise tax on early distributions (if the participant was less than age 59½ at the time of the distribution). However, the revised EPCRS states that, in appropriate cases, the IRS will not pursue such excise taxes relating to excess contributions made to IRAs if the recipient removes the overpayment and earnings from the IRA and returns them to the applicable plan.

e. *De minimis Corrections*. Under the revised EPCRS, if the total corrective distribution due a participant is $75 or less (increased from $50 or less under the prior version of EPCRS), the plan sponsor is not required to make the corrective distribution if the costs of pursuing and delivering the distribution to the participant would exceed the amount of the distribution.

f. *Expansion of the Availability of SCP for Substantially Complete Corrections*. In order to qualify for correction under SCP, correction of a significant operational failure must be at least "substantially complete" prior to the IRS placing such plan under examination. The revised EPCRS indicates that correction is substantially complete if it is at least 65 percent complete, decreased from 85 percent in the prior EPCRS.

g. *Plan Loans*. In addition to the extension of the use of a standardized VCP for some plan loan failures, the new EPCRS make two other significant changes to facilitate plan loan corrections. First, the definition of plan loan failures that can be corrected through EPCRS is expanded to include violations of the Code Section 72(p)(2), even where the plan's terms do not provide for loans. Second, the compliance fee for a plan is reduced by 50 percent, where (i) the only failure is the failure of plan loans to meet the requirements of Code Section 72(p), and (ii) the plan loan failure affected no more than 25 percent of the plan participants.

h. *Sample Application Form*. A sample application form is provided in Appendix D to EPCRS.

i. *Contribution Failures*. The definition of excess amounts within EPCRS has been updated and specified corrections have been provided for failures relating to excess amounts, including those that exceed the limitations in Code Section 415 and/or 401(a)(17) or that exceed plan-imposed contribution limitations.

3. Effective Date

The updated EPCRS is generally effective January 1, 2009, but plan sponsors may apply its provisions earlier.

Comment: The updates to and expansion of EPCRS are welcome changes available to plan sponsors in maintaining their plans' tax-qualified status. Because of the severe penalties associated with the disqualification of a tax-qualified plan, if a plan sponsor discovers any instance of noncompliance, legal counsel should be consulted to ensure that such noncompliance is appropriately rectified through EPCRS. Should such a discovery be made, The Wagner Law Group would be pleased to assist you.

Comment: Ms. Wagner is a member of the IRS' Advisory Committee on Tax Exempt and Government Entities ("ACT"). On June 11, 2008, the ACT issued its report concerning recommendations for updating and modifying EPCRS, for the purpose of improving this valuable program. The Wagner Law Group was pleased to assist the IRS in this regard.

Comment: Marcia Wagner and Diane Goulder Cohen are revising the BNA Tax Management Portfolio on EPCRS, the premier treatise in this area, for publication in 2009.

H. DOL Proposes Disclosure Rules for Participant-Directed Investments

1. Background

The Department of Labor ("DOL") has issued proposed regulations which will require all individual account plans, including Section 401(k) plans, that give participants the authority to direct the investment of their accounts, to provide to plan participants certain specified information about the plan and the investment opportunities and costs.

"This is a story about a man and a desk and a flow chart."

"I don't sign anything till my lawyers have had a chance to look at it."

In issuing the regulations, DOL said that currently, "there is concern as to whether [plan participants and beneficiaries] have access to basic plan and investment information in a format useful to making informed decisions about management of their own retirement accounts." DOL goes on to point out that, unlike the voluntary provisions of the ERISA Section 404(c) disclosure requirements (which protect plan fiduciaries against liability from poor results on investments made by participants), the latest disclosure requirements will be mandatory.

According to DOL, the proposed regulations will require that "uniform, basic disclosures be provided to all participants and beneficiaries who direct the investment of plan assets in their individual accounts and that all investment-related information be presented in a format that makes comparisons easy."

Specifically, the proposal would require the disclosure of two types of information: plan-related information and investment-related information. Most investment-related information must be disclosed in a chart or similar format that will enable participants to compare the plan's investment options.

2. Plan-Related Information

Plan-related information includes general information about the plan, administrative expense information and individual expense information. This information includes:

- An explanation of the circumstances under which participants and beneficiaries may give investment instructions, including any limitations on such instructions, or restrictions on transfers to or from an investment alternative.
- A description of plan provisions relating to voting and tender rights.
- Identification of the specific plan-designated investment alternatives offered under the plan.
- Identification of specific plan-designated investment managers to whom participants and beneficiaries may give investment directions.
- An explanation of any fees and expenses for plan administrative services for day-to-day operational expenses (e.g., legal, accounting, record-keeping, etc.) that may be charged against individual accounts. The information must also include the basis on which such charges will be made (e.g., pro rata or per capita).
- A description of such services and the amount actually charged in the preceding calendar quarter for these services to a participant's account for such day-to-day administrative services and a general description of the types of services for which the participant has been charged.
- An explanation of individual expenses, including dollar amounts actually charged against each participant's account, for services provided on an individual rather than a plan-wide basis (including fees for investment advice, loans and qualified domestic relations orders).

In general, disclosure of plan-related information to a participant must be made for most items on or before the date of plan eligibility and annually thereafter. If there are any material

changes to the required information, these changes must be provided to participants and beneficiaries not later than 30 days after the date of adoption of such changes.

Participants must receive the information on individual expenses and other amounts actually charged against the participant's account once each calendar quarter. With the exception of information required quarterly, the plan-related information may be provided in the plan's summary plan description or pension benefit statement, if that material is furnished at a frequency that comports with the timing requirements of the disclosure rules. Quarterly information may also be provided in the pension benefit statement if the timing requirements are met.

3. Investment-Related Information to be Provided to Each Participant or Beneficiary

The second type of information which must be disclosed is basic information with respect to each "designated investment alternative" offered under the plan. A designated investment alternative means any investment alternative designated by the plan to which participants may direct the investment of assets held in their individual accounts.

DOL has recognized that "most participants and beneficiaries will probably not review large amounts of detailed investment information. Information that is too detailed may overwhelm participants [which would] significantly outweigh any possible benefits." For this reason, the proposed regulations state that, in order to encourage and facilitate review by participants, the investment-related information must be presented in a comparative format. This must be done through a chart or similar format that will permit straightforward comparison of the plan's designated investment alternatives.

The investment-related information must include:

- Identifying information including the name of each investment alternative; its category (e.g., stable value, mutual fund, etc.); whether the investment is actively or passively managed; a website for supplemental information (DOL is currently considering a requirement that the plan provide this information if it cannot be accessed electronically); the type of investments (e.g., money market, balanced fund, large cap); and the type of management utilized by the investment (e.g., active or passive management).
- Performance data for the investment alternative for 1-year, 5-year and 10-year periods (if available), and benchmarks for comparison to an "appropriate broad based securities market index" (generally, the same index as required in the prospectus by the Securities and Exchange Commission) over comparable time periods.
- Disclosure of fee and expense information, including the fees for purchase, holding and sale of each of the plan's investment alternatives. The information must include: the amount and description of each shareholder-type fee charged directly against a participant's account (e.g., load charges, sales charges, redemption and surrender fees); annual operating expenses; and a statement indicating the total annual operating expenses of the investment, expressed as a percentage.

- The information must also include a statement that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions.
- Each participant who has invested in a specific investment alternative must be provided with any materials provided to the plan relating to the exercise of voting, tender or similar rights.
- Subsequent to investment, and upon the request of a participant, the plan must provide: copies of prospectuses, financial statements, a statement of the value of a share or unit of the investment alternative; and a list of assets comprising the portfolio of the investment alternative.

Investment-related information applicable to all participants (which would not include the last two bullet points) must be provided in a chart or similar format that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan. DOL has provided a model format that, if used, will be deemed to have satisfied this requirement if used by the plan administrator.

As with plan-related information, participants must be automatically provided investment-related information on or before the date that they become eligible to participate in the plan and at least annually thereafter. For new participants, plan fiduciaries may provide the most recent annual disclosure furnished to other participants.

The proposed regulations include model disclosure forms that can be used to satisfy the requirements of the regulations relating to performance data and investment fees.

4. Timing of Disclosures

Each of the various disclosures required by the proposed regulations must be given within certain specific time frames. The disclosures regarding administrative fees and investment-related information must be provided to participants on or before the date of plan eligibility and at least annually thereafter. The disclosures concerning specific expenses charged to participants' accounts must be provided at least quarterly.

5. Revenue-Sharing Disclosure Not Required

Notably, the regulations do not appear to require a disclosure informing participants that investment expenses may pay for certain plan services.

6. Unbundling of Fees for Services Not Required

The preamble to the regulations states that DOL does not believe it is necessary or useful for participants to have administrative charges broken out and listed on a service-by-service basis.

7. Brokerage Windows Excluded from Coverage

Importantly, the proposed disclosure rules do not apply to "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

8. Relief for Reliance on Information Provided by Service Providers

A footnote in the preamble states that plan fiduciaries will not be liable for reasonable and good faith reliance on information furnished by their service providers with respect to the information required to be disclosed.

9. Enforcement

Each instance of failing to provide the required disclosures to participants would constitute a breach of fiduciary duty under ERISA. The DOL and plan participants could bring enforcement actions in federal court against plan fiduciaries for failure to provide the required disclosures, and such fiduciaries could be personally liable for any losses incurred by participants as a consequence of not receiving the required disclosures.

I. Funding Business Startups with Plan Assets

With recent events in the financial markets putting a squeeze on business credit, many aspiring entrepreneurs are searching for novel ways to acquire business capital. One that has gained the IRS' attention, and coverage in the press, is to withdraw money from existing retirement accounts and then channel it into a new retirement plan. On October 1, 2008, the IRS released guidelines on the parameters of these arrangements. Though not stating that these arrangements are noncompliant per se, the guidelines sound a warning bell that the IRS will scrutinize these transactions very carefully.

Referred to in the IRS guidelines as Rollovers as Business Startups ("ROBS"), these arrangements provide a business owner with the ability to convert retirement accounts into business capital by using the rollover process. By creating a corporation that sponsors a retirement plan, the individual can rollover proceeds from a prior employer's retirement account into the new plan. Then, through an exchange of corporate stock for the rollover money, the owner receives instant business capital. The plan owns all the stock, for the benefit of the individual, and the business receives needed cash. The distribution restrictions normally associated with taking money out of a retirement plan are circumvented, and the capital is not taxed at this time.

ROBS plans are questionable in that they may solely benefit one individual's exchange of tax-deferred assets for currently available funds. This stock exchange occurs inside what should otherwise be a retirement plan for the benefit of employees. Yet, usually few, if any, employees other than the individual who initiates the transaction actually benefit from the exchange. Furthermore, these arrangements are predicated on stock valuations that are frequently superficial and are administered more as a corporate funding vehicle than a bona fide employee benefit program.

Comment: The IRS believes that ROBS arrangements may endanger the qualified status of otherwise tax-qualified employee plans and may be prohibited transactions, requiring complete undoing of the transaction, and imposition of excise taxes. For these reasons, The Wagner Law Group has been advising clients to proceed cautiously or, better, to avoid entirely, these arrangements.

III. SECTION 409A DEADLINE FOR NON-QUALIFIED PLANS IS APPROACHING

As we have discussed in previous Newsletters, the December 31, 2008 deadline for compliance with Code Section 409A rules is fast approaching.

Code Section 409A imposes restrictions on the design, operation and administration of nonqualified deferred compensation arrangements. Any deferred compensation that is included in an employee's income as a result of a failure to comply with Section 409A is subject to an additional 20% penalty tax, payable by the employee, as well as interest charges. Any employer who has not already done so should:

A. Create a List of All Plans, Arrangements, and Contracts that Could Potentially be Subject to Code Section 409A.

Any arrangement that gives an employee the right to compensation that will or may be paid in a later year could be subject to Code Section 409A, including, but not limited to, certain split-dollar arrangements, certain stock options, stock appreciation rights, supplemental executive retirement plans ("SERPs"), cash bonus plans, employment agreements, severance agreements, and change in control agreements.

B. Review and Amend Affected Plans

All affected plans must be reviewed and amended to comply with the requirements of Code Section 409A by December 31, 2008. Unwritten plans that are subject to Code Section 409A must be reduced to writing by December 31, 2008.

C. Review Plans, Procedures and Protocols for Operational Compliance

Plans should be reviewed to ensure that they operate in accordance with the terms of the plan document and Code Section 409A. Employers should also implement internal procedures to ensure compliance with Code Section 409A with respect to both the operation and maintenance of any affected plans, proper reporting and withholding of compensation, and review any new plans or arrangements for Code Section 409A compliance prior to execution and implementation.

D. Other Compliance Deadlines

A nonqualified deferred compensation plan may provide, or be amended to provide, for a new payment election for both time and form of payment by December 31, 2008, without violating the rules against acceleration of payment or changes in time and form of payment. However, an election made in 2008 may not accelerate into 2008 an amount that would be payable in a later year, nor may the election defer until a subsequent year any amount that would otherwise be payable in 2008. A deferral from one post-2008 year to another would be permissible, as would an acceleration to one post-2008 year to another.

IV. WELFARE BENEFIT PLANS

A. Two New Group Health Care Plan Laws Enacted

1. Mental Health Parity Act

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (the "Act") was enacted into law as part of the Emergency Economic Stabilization Act (P.L. 110-343; a.k.a. the $700 billion bail-out bill) on October 3, 2008. If mental illnesses and/or substance abuse are covered by a health plan or contract, the law requires that the "financial requirements" applicable to such coverage are to be no more restrictive than the most common financial requirements that apply to substantially all medical and surgical benefits covered by the plan. Financial requirements include deductibles, co-payments, coinsurance, out-of-pocket

expenses and yearly and lifetime maximums. Similarly, the law would require parity as to treatment limitations such as the permitted frequency of visits, the total number of visits permitted, and the total days of coverage.

Current law only requires parity in maximum yearly and lifetime coverage amounts.

Small employers (between two and fifty employees) would automatically be exempted from the provisions of the Act. However, larger employers can only opt out of these requirements if they can demonstrate, through actuarial certification, that the new mental health parity provisions will increase health care costs by more than 2% in the first year and 1% in subsequent years.

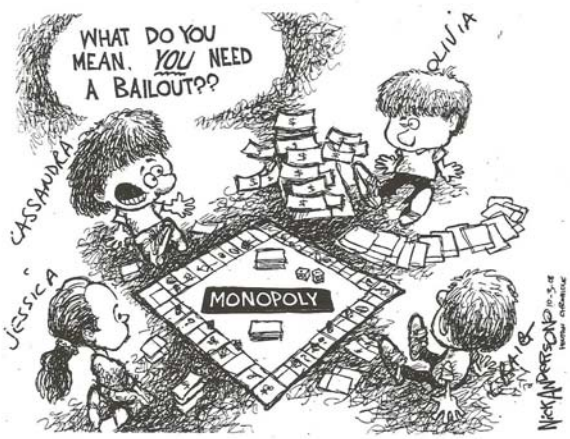
Finally, the Act clarifies that mental health parity requirements are merely a floor for mental health coverage and that states can enact more extensive requirements for insurance contracts and for self funded plans that are not covered by ERISA, as long as these state laws do not conflict with Federal law.

The law is effective for plan years beginning one year after the date of enactment. For calendar year plans, this would mean January 1, 2010. The Act requires the Department of Labor, the Internal Revenue Service and Health and Human Services to issue regulations within one year or to provide guidance on the application of the Act's provisions.

2. Coverage Extended for Seriously Ill College Students

President Bush has signed into law P.L. 110-381, known as Michelle's Law. This new law requires group health plans to continue coverage for seriously ill college students who would otherwise lose their status as dependents under their parents' plan if a medical condition forces them to drop out of college.

Most group health plans, either through plan design or under state health insurance laws, permit the coverage of participants' children until a certain specified age. However, this coverage may be extended for several additional years for dependent children who are full time college students or are receiving other post-secondary education.



This law amends ERISA, the Internal Revenue Code and the Public Health Service Act, to require group health plans to allow these students to take up to a 12-month "medically necessary leave of absence" without losing their status as covered dependents under their parents' group health insurance plan or insurance contract. Coverage can be terminated if the child's covered dependent status would have been lost even if he or she had remained in school (e.g., if the student would have aged out of the extension for college students).

A "medically necessary leave of absence" is defined as a medically necessary change in enrollment that commences while the dependent is suffering from a serious illness or injury which causes the dependent to lose student status for purposes of coverage under the terms of the health care plan. The plan or insurer must receive a written certification by the student's treating physician that the leave is medically necessary.

The group health plan, or insurer, must include a description of the terms of this new continuation coverage with any notice regarding a requirement for certification of student status for coverage purposes.

The law is named for a student who died after losing health care coverage. It is effective for plan years beginning after October 8, 2009.

B. Massachusetts Health Care Reform Act Fair Share Contribution Test and Definition of Creditable Coverage Have Been Changed

Two of the agencies that are responsible for the administration of the Massachusetts Health Care Reform Act (the "Act") have issued new regulations. The first regulation will have a significant impact on the Fair Share Contribution Test which employers must pass to avoid the payment of a Fair Share Contribution penalty. The second regulation changes the requirements for the minimum level of health care coverage Massachusetts residents must obtain to avoid income tax penalties, which could indirectly affect the design of employers' group health care plans.

1. Fair Share Contribution Test

a. *Revised Testing*. The Massachusetts Division of Health Care Finance and Policy has issued final regulations which will make it far more difficult for certain employers to pass the Act's Fair Share Contribution Test. Under the new set of rules, employers with more than the equivalent of 50 full time employees will either have to pass two separate tests to avoid penalties or cover a larger percentage of their full time employees than under current rules. Currently, only one of the two original tests had to be passed.

"And that's just here. I have plenty more buried offshore."

Under the Act, Massachusetts employers with the equivalent of 11 or more full time employees that fail to make a "fair and reasonable" contribution toward the cost of health coverage must pay an annual "Fair Share Contribution" of $295 per employee. To be exempt from the annual payment, an employer currently has to pass one of the following two tests:

- *25% Test*. The employer's health insurance plan must cover at least 25% of its full time employees who are employed at Massachusetts locations (whether or not they are Massachusetts residents). For purposes of this test, a "full time employee" is generally defined as an employee who works at least 35 hours per week. This test is not affected by other coverage an employee may have. For example, if an employee is covered by a spouse's plan, this will not count towards meeting the 25% test.

- *33% Test*. An employer has to pay at least 33% of the premium cost for all of its full time Massachusetts employees who are covered by employer-provided insurance.

Each employer must file information with regards to its Fair Share Contribution Test for the period of October 1 through September 31, with the Division of Unemployment Assistance ("DUA") by the following November 15.

Under the current rules, few employers have had trouble avoiding the $295 penalty. However, under the new rules, employers with more than the equivalent of 50 full time employees will either have to pass both the 25% test and the 33% test (which is now called the premium contribution standard) or cover at least 75% of its full time employees who are employed at Massachusetts locations.

Employers with the equivalent of 50 or fewer full-time employees will remain subject to the original test so they will still have to pass either the 25% test or the newly-named premium contribution standard (i.e., the 33% test).

Because the combined test will be more difficult to pass, the new rules are expected to raise $45 million in penalties which can be used to help fund the subsidized Commonwealth Care health insurance coverage for low income Massachusetts residents. The new testing rules will be effective January 1, 2009.

b. *Quarterly Reporting*. In addition to the new testing requirements, the regulations conform with recently enacted legislation that requires the Fair Share Contribution to be determined on a quarterly basis. Currently, this determination is made annually through the information filed with DUA. However, starting with the testing period that begins October 1, 2008 and ends December 31, 2008, the Fair Share Contribution Test, and the determination of any required Fair Share Contribution penalties, will be made on a quarterly basis. It is unclear at this time if the DUA will require quarterly reports from all employers or whether it will continue to only require a single annual report but determine the Fair Share Contribution penalties based on quarterly information. Nevertheless, employers should be prepared to compile information about hours of employment and health care coverage on a

quarterly basis, regardless of whether DUA requires quarterly returns or requests information for all quarters in a single, annual submission.

2. Creditable Coverage

The Commonwealth Health Insurance Connector Authority (the "Connector") has issued new regulations defining the term "creditable coverage" that, in general, will become effective January 1, 2009.

Under the Act, almost all Massachusetts residents must have health care coverage that meets the definition of "creditable coverage," either acquired through their employer or purchased on their own. Those who do not have this coverage are subject to state income tax penalties.

Although the creditable coverage regulations are directed at individuals and not employers, if an employer's group health care plan fails to comply with the creditable coverage regulations, its employees would be obligated to purchase their own insurance in order to meet the Act's health insurance coverage requirements. Therefore, employers are under pressure to comply with these regulations.

Until the end of 2008, creditable coverage includes any health insurance policy issued by an insurer licensed in Massachusetts and any self funded health plan that meets the definition of a welfare benefit plan under ERISA. However, beginning January 1, 2009, in order to meet the creditable coverage requirements, most individuals must have health insurance covering "a broad range of medical benefits." This includes "core services" (physician services, in-patient acute care services, day surgery and diagnostic procedures and tests) plus preventive care, emergency services, hospitalization, ambulatory patient services, mental health and substance abuse services, and prescription drug coverage. Beginning January 1, 2010, coverage must also include medical/surgical care, diagnostic imaging and screening, maternity and newborn care and radiation therapy and chemotherapy.

A plan may impose different levels of coverage for in-network and out-of-network providers if it discloses the deductibles, copays and coinsurance amounts. However, for individuals, the maximum deductible for in-network covered services cannot exceed $2,000 and the annual limit on out-of-pocket spending cannot exceed $5,000. These numbers are doubled for family coverage.

In addition, prescription drug coverage may have a separate deductible with a maximum of $250 for individuals and $500 for families.

The plan cannot have an overall maximum annual benefit limit that applies to all covered services collectively. It also cannot have an annual maximum for "core services." However, the plan may have maximum benefit limitations for non-core services such as inpatient rehabilitative care or physical therapy. In addition, a plan may not limit its contractual commitment for core services to an indemnity schedule of benefits.

The plan must provide at least three preventive care visits for an individual and six preventive care visits for a family before imposing an in-network deductible. (Preventive care services are defined to include routine physical exams, well baby care, medically necessary immunizations, and routine GYN exams.) Alternatively, the plan may cover preventive care in accordance with "nationally recognized preventive care guidelines."

For 2009 only, creditable coverage will also include any employer-sponsored plan that meets the requirements of a high deductible health plan ("HDHP") as defined under the federal law for health savings accounts ("HSAs") if the employer facilitates access to an HSA administrator to enable the employees to establish an HSA. In 2010, the HDHP must meet certain additional criteria including the requirement for "a broad range of medical benefits," the prohibition on an annual maximum payment for core benefits, and the rules for preventive care services.

As a safe harbor, the regulations provide that if a plan "does not meet every element" of the creditable coverage requirement, it may still be considered to provide creditable coverage if the Connector determines that it has a broad range of coverage (including core services), and has an actuarial value at least equal to the Bronze level plan offered by the Connector through its Commonwealth Choice program.

The regulations will, in general, apply to collectively bargained plans one year after the expiration of the collective bargaining agreement in effect on January 1, 2009.

The Connector has reserved the right to periodically issue administrative bulletins interpreting the regulations and to provide "other information to assist compliance." Also, it has said it will "continue to track implementation...and make mid-course corrections when necessary."

These requirements, with the possible exception of the preventive care visits and the prescription drug requirement, are, according to the Connector, intended to cause little disruption for most employers that are already providing their employees with health care coverage. However, while in-state insurers and HMOs will design their products to meet these requirements (and should disclose whether a policy satisfies the creditable coverage requirement), employers with self funded plans should reassess their plans to determine that the regulatory criteria are met. In addition, the January 1, 2009 effective date may create difficulties for many employers and their employees.