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Setting precedent.

Employee Benefits and Executive Compensation

2008 Legislative Roundup

New Rules for Nonqualified Deferred Compensation

- Code Section 409A
 - Notice 2008–113: Correction program for operational failures.
 - Correction Categories:
 - Failures corrected in the taxable year in which the failure occurs.
 - Failures corrected in the following taxable year.
 - Failures that do not exceed a threshold amount (limited relief).
 - Failures regardless of the amount (limited relief).
 - Limited relief for insiders.
 - 2009 transition rule.

New Rules for Nonqualified Deferred Compensation

- Code Section 409A (cont'd)
 - No correction program for document failures, yet.
 - Notice 2008-115: Relief from Code Y reporting until further notice.

New Rules for Nonqualified Deferred Compensation

- Code Section 409A (cont'd)
 - Proposed Income Inclusion Regulations (1.409A-4)
 - In the event of a violation, all deferred amounts are includible in income unless included in a prior year or subject to a substantial risk of forfeiture.
 - Provide rules for determining the present value of payment, including detailed calculation rules based on type of plan.
 - General rules:
 - Violation is not permanent (year by year analysis).
 - Amount includible determined as of end of year.
 - Deduction for previously includible amounts.
 - Proposed regulations can be relied on until the regulations become final (Notice 2008-115).

New Rules for Nonqualified Deferred Compensation

- Code Section 457A
 - Added by the Emergency Economic Stabilization Act of 2008.
 - Taxpayers generally must include in income compensation deferred under a “nonqualified deferred compensation plan” of a “nonqualified entity” when no longer subject to a “substantial risk of forfeiture.”
 - Targeted at offshore hedge funds, but can apply to foreign corporations and partnerships that have a number of tax-exempt or off-shore partners.
 - Generally applies to amounts attributable to services performed after December 31, 2008. Special rule for existing deferrals.



New Rules for Nonqualified Deferred Compensation

- Code Section 457A (Cont'd)
 - Notice 2009-8: Q&A Guidance and Transition Rules
 - Includes complex rules for determining whether foreign corporations and partnerships are “nonqualified entities”.
 - Concepts are just similar enough to 409A to be confusing:
 - “Nonqualified deferred compensation plan”
 - “Substantial risk of forfeiture”
 - “Short-term deferral”
 - Unlike Section 409A, applies to accrual-basis taxpayers.
 - Transition rules, including an opportunity to opt-out before July 1, 2009 for pre-2009 deferrals by waiving post-2008 vesting requirements.

New Rules for Executive Compensation

- Troubled Assets Relief Program (“TARP”)
 - Go to www.treasury.gov/initiatives/eesa/
 - TARP Reform and Accountability Act (HR 384) would prohibit bonuses for the 25 highest-paid employees at any bank that receives TARP money.
 - *President and Treasury announced new rules today.*



New Rules for Pension Plans

- Worker, Retiree, and Employer Recovery Act of 2008
 - Required Minimum Distribution Relief
 - Applies to distributions otherwise due in 2009 or on or before April 1, 2010 with respect to individuals who attain the age of 70 ½ in 2009.
 - Does not apply to 2008 RMDs, including those that must be made by April 1, 2009.
 - A beneficiary receiving distributions over a 5–year period can waive distribution for 2009, effectively extending the distribution period to 6 years.
 - Consider whether plans must be amended.

New Rules for Pension Plans

- Worker, Retiree, and Employer Recovery Act of 2008 (cont'd)
 - Funding Relief
 - Plan that fails to meet the target percentage for a year must amortize only the difference between its funding level and the target percentage.
 - Can still use the transition target percentage in the next year.
 - Multi-employer plan relief.



New Rules for Pension Plans

- Worker, Retiree, and Employer Recovery Act of 2008 (cont'd)
 - Asset Valuation
 - Clarifies rules governing asset valuation, permitting “smoothing” over a 24-month period.
 - Short-term impact limited by valuation corridor.
 - IRS “is considering possible automatic approval of certain changes in funding methods for the 2009 plan year” (Winter 2009 Employee Plans News).
 - Section 436 Accrual Limitations
 - Look-back rule for plan years beginning during 12-month period ending September 30, 2009.

New Rules for Pension Plans

- Worker, Retiree, and Employer Recovery Act of 2008 (cont'd)
 - Technical corrections, including:
 - Definition of normal cost includes plan-related expenses and excludes mandatory employee contributions.
 - Plans subject to restrictions on lump-sum distributions can provide mandatory cash-outs of small lump-sum amounts.
 - For plan years starting after 12/31/09, plans required to permit nonspouse rollovers.

New Rules for Pension Plans

- Heroes Earnings Assistance and Tax Relief Act of 2008
 - Survivor Benefits.
 - Optional Additional Benefit Accruals.
 - Extension of Exemption from Early Withdrawal Penalty.
 - Differential Wage Payments.
 - Plan amendments by end of 2010 plan year.
- Investment advice regulations on hold.

New Rules for Welfare Plans

- Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008
 - Generally requires full parity between mental health/substance abuse benefits and medical/surgical benefits offered under a group health plan.
 - Does not *require* plans to provide mental health or substance abuse benefits.
 - Generally effective for large group health plans on the first plan year on or after October 2, 2009.

New Rules for Welfare Plans

- Genetic Information Nondiscrimination Act of 2008 (“GINA”)
 - Prohibits group health plans and their insurance carriers from using genetic information to determine eligibility, contributions, premiums and pre-existing condition exclusions.
 - Effective for plan years beginning after May 21, 2009.
- Michele’s Law
 - Dependent full-time college students who take a medically necessary leave of absence for up to one year will not lose their health insurance coverage.
 - Applies only if plan continues coverage for full-time students.
 - Effective for the first plan year beginning on or after October 9, 2009.

New Rules for Welfare Plans

- HEART Act
 - Employers may amend FSAs to allow reservists called to active duty to withdraw all or a portion of their account.
 - Distribution is taxable to the employee.
- ADA Amendments Act of 2008
 - Definition of disability should be construed in favor of broad coverage of individuals under ADA.
 - Expands definition of “major life activities.”

New Rules for Welfare Plans

- Defining “Dependant”
 - Fostering Connections to Success and Increasing Adoptions Act of 2008
 - Requires that a “qualifying child” be unmarried and younger than the individual claiming the child as a dependent.
 - If neither parent claims the child as a dependent, another taxpayer may, provided he or she has a higher adjusted gross income than either parent.
 - Revenue Procedure 2008-48
 - Explains when IRS will treat a child of divorced/separated parents as the dependent of both parents.

New Rules for Welfare Plans

- Emergency Economic Stabilization Act of 2009
 - Bicycle Fringe Benefit:
 - Employer can reimburse up to \$20 per month for reasonable expense for the purchase of a bicycle and for repair and storage, if the employee regularly bikes to work.
 - Funded solely through employer contributions; excludable from income.
 - Employee cannot receive in conjunction with any other qualified transportation fringe.
 - Effective January 1, 2009.



Family and Medical Leave

- 2008 National Defense Authorization Act (FMLA)
 - Eligible employees may take up to 26 weeks of leave during a 12 month period to care for a service member recovering from an illness or injury sustained in active duty.
 - Eligible employees whose spouses, children or parents have been called to active duty are entitled to a maximum of 12 weeks of leave for “any qualifying exigency.”



State Laws

- State Laws
 - Massachusetts: Continued tweaking of healthcare reform act.
 - Starting in 2009, large employers will be subject to a more stringent fair share contribution test. Simplified fair share contribution reporting requirements.
 - San Francisco: San Francisco Health Care Security Ordinance
 - Washington, D.C.: Accrued Sick and Safe Leave Act of 2008
 - Effective November 13, 2008, employers with at least 100 employees must provide employees in Washington, D.C. one hour of paid leave for every 37 hours worked, not to exceed 7 days per year.