VENABLE LLP

employee benefits &
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Please contact any of the attorneys in our Employee Benefits & Executive Compensation Group if you have any questions regarding this Alert.

Harry Atlas
hiatlas@venable.com
410.528.2848

Jennifer Berman
jsberman@venable.com
410.244.7756

Kenneth Hoffman
krhoffman@venable.com
202.344.4810

Meredith Horton
mphorton@venable.com
202.344.8290

Thora Johnson
tajohnson@venable.com
410.244.7747

Kendra Kosko
klkosko@venable.com
202.344.4466

Jason Levine
jelevine@venable.com
202.344.4629

Andrea O'Brien
aiobrien@venable.com
301.217.5655

Barbara Schlaff
beschlaff@venable.com
410.244.7494

Serena Simons
sgsimons@venable.com
202.344.4599

Lisa Tavares
latavares@venable.com
202.344.4075

Martha Jo Wagner
mjwagner@venable.com
202.344.4002

John Wilhelm
jawilhelm@venable.com
703.760.1917

Roundup of Important Developments Affecting Health Plans

With the 2009 open enrollment season for calendar year plans just around the corner, it is important to consider the effects of several recent developments on your group health plans and to prepare accordingly.

Economic Bailout Legislation Expands and Makes Permanent Mental Health Parity Requirements

The Tax Extenders and AMT Relief Act ("Extenders Act") makes permanent provisions of the Mental Health Parity Act of 1996 ("MHPA"), which provides that group health plans offering mental health benefits cannot impose aggregate lifetime or annual dollar limits on mental health benefits that are not imposed on substantially all medical and surgical benefits. For plan years beginning after October 3, 2009, the Extenders Act also requires that group health plans impose no more restrictive "financial requirements" or "treatment limitations" on mental health benefits than they do on substantially all medical and surgical benefits. For these purposes, "financial requirements" include deductibles, copayments, coinsurance, and out-of-pocket expenses, and "treatment limitations" include limits on the frequency of treatment, number of visits, and days of coverage. The Extenders Act also limits the exemptions originally provided for under the MHPA. Regulatory guidance is expected. Any delays in issuing regulations, however, will not change the effective date of the new requirements. In light of these significant changes to the mental health parity rules, you should begin reviewing your plan's benefits structure to ensure it will be compliant with the new provisions when they go into effect.

HEART Act Permits Distributions of Unused Health FSA Account Balances to Qualified Reservists

Under IRS rules, distributions from an employee's health Flexible Spending Account ("health FSA") may only be made to reimburse the employee for qualified health expenses. In addition, the IRS "use it or lose it" rule generally requires an employee to forfeit any unused balance in his or her health FSA account at the end of the year. Pursuant to the Heroes Earnings Assistance and Relief Tax ("HEART") Act, however, cafeteria plans may now be amended to permit an employee who is called to active duty for at least 180 days (or an indefinite period) to request the unused balance remaining in his or her health FSA without any corresponding qualified health expenses. These "qualified reservist distributions" are included in the employee's gross income and wages, are subject to employment taxes, and must be reported as wages on the employee's Form W-2.

Revised Medicare Part D Model Disclosure Notices Issued

The federal government issued updated model Medicare Part D disclosure notices for use after June 15, 2008. The revised notices replace the 2007 versions. While no significant changes have been made to the substance of the notices, the changes were designed to make the notices more accessible and understandable. If you have been using the 2007 model notices, you will want to replace them with the updated versions. Similarly, if you have been using customized notices, you will want to review your notices in light of the changes made to the model notices. The updated model notices can be found at: http://www.cms.hhs.gov/creditableCoverage/09_CCafterJune15.asp.

Much New Guidance on HSAs Issued

The IRS has issued significant new guidance regarding Health Savings Accounts ("HSAs"). Some highlights include: (i) clarifying the rules concerning a permissible one-time rollover from an eligible individual's IRA or Roth IRA to an HSA; (ii) providing guidance for determining an eligible individual's maximum HSA contribution limit; (iii) permitting an employer to recoup its contributions to an employee's account if it is later determined that the employee was never eligible to establish an HSA; (iv) permitting an employer to recoup amounts it contributes to an employee's HSA in excess of the maximum annual contribution limit (however, mistaken contributions that do not exceed the maximum annual contribution limit may not be recovered by the employer); and (v) clarifying that an employer cannot recoup contributions to an HSA account made after an employee ceases to be eligible. Furthermore, if an employer does not recoup the contributions described in items (iii) or (iv) above by the end of the year, such contributions must be included as gross income and wages on the employee's Form W-2.

GINA Prohibits Discrimination Based on Genetic Information

Enacted earlier this year, the Genetic Information Nondiscrimination Act ("GINA") prohibits group health plans, health insurers, and employers from discriminating on the basis of an individual's genetic information. While the Health Insurance Portability and Accountability Act ("HIPAA") already prohibits health plans and insurers from determining eligibility or charging individuals higher premiums on the basis of "health factors," including genetic information, GINA goes further to prohibit health plans and insurers from (i) adjusting group premiums on the basis of genetic information; (ii) requiring (or even requesting) that an employee or a member of his or her family submit to a genetic test; and (iii) requesting, requiring, or purchasing genetic information for underwriting purposes. Although these new provisions are not effective until January 1, 2010 for calendar year plans, you should begin to review your health plans and the guidelines of your plans' underwriters to ensure compliance.

MetLife v. Glenn, U.S. Supreme Court Clarifies and Expands *Firestone*

In *Glenn*, the U.S. Supreme Court addressed two issues: (i) whether a plan administrator's dual roles as decider and payor of employee benefit claims create a conflict of interest; and (ii) how such a conflict of interest should be factored into a court's

review of the plan's benefit claim determination. The Court expanded on its nearly 20-year-old decision in *Firestone Tire & Rubber Co. v. Bruch* and ruled that a third-party administrator, as well as an employer (as *Firestone* had ruled), has a conflict of interest if it both decides and pays claims. Furthermore, the Court held that this conflict of interest will be "weighed as a 'factor' in determining whether there was an abuse of discretion" by the plan administrator in evaluating the benefit claim. In reaching its conclusions, the Court noted that a conflict of interest may be more of a factor in a court's review of a plan administrator's benefit determination when "circumstances suggest a higher likelihood that it affected the benefits decision," but less so "where the administrator has taken active steps to reduce potential bias and promote accuracy." Accordingly, in light of the Court's decision, you should consider reviewing the structure of your health plan's benefit determination procedures (including those of your service providers) in order to assess what may need to be changed in order to "reduce potential bias and promote accuracy."

California Supreme Court Issues Landmark Ruling on Same-Sex Marriages

Earlier this year, the California Supreme Court ruled that excluding same-sex couples from marriage was unconstitutional. California now joins Massachusetts in recognizing same-sex marriages. (That said, a proposed state constitutional amendment overriding the court's decision has been incorporated into the 2008 California general election ballot.) Despite this ruling, however, for federal tax purposes, marriage continues to remain defined as a union between a man and a woman. Therefore, a same-sex spouse does not qualify as a "spouse," under federal tax rules. While an employer can certainly provide health coverage to same-sex spouses, the coverage is taxable unless the same-sex spouse otherwise qualifies as the employee's dependent. This ruling serves as a good reminder to review the eligibility provisions of your health plan, including the definition of "spouse," to ensure you are providing coverage to those employees and dependents you intend to cover and excluding all others.

More State and Local Health Care Initiatives on the Horizon

In recent years, a number of state and local health care initiatives have been enacted. Among those garnering the most attention is the Massachusetts Health Care Reform Act, which among other provisions, requires employers not providing sufficient health care benefits to their employees to make "fair share" contributions to the Commonwealth. New proposed regulations, which would make these contribution requirements more onerous, are currently under consideration. Additionally, in *Golden Gate Restaurant Association v. City & County of San Francisco*, the Ninth Circuit Court of Appeals recently upheld a San Francisco ordinance requiring employers to make certain minimum health care expenditures on the part of their covered employees. Employers with employees in Massachusetts, San Francisco, and other jurisdictions with health care initiatives will need to monitor their health plans to guarantee continued compliance with these changing rules.

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