The Benefits Insider is a bimonthly member exclusive publication prepared for WorldatWork members by the American Benefits Council (“the Council”), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WorldatWork or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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Chart of Democratic Candidates’ Retirement Proposals Updated, Reflects Sanders’ New Executive Compensation Bill

With 15 nominating contests taking place on “Super Tuesday, March 3 (representing more than a third of all delegates for the Democratic National Convention), the Council has updated the detailed chart comparing the retirement and tax policy proposals of eight of the leading Democratic presidential hopefuls.

The updated chart, provided courtesy of Davis & Harman, LLP, reflects the two significant changes:

- In response to the February 27 Government Accountability Office (GAO) report, IRS and DOL Should Strengthen Oversight of Executive Retirement Plans, Senator (and Democratic front-runner) Bernie Sanders (I-VT) has introduced (with Sen. Chris Van Hollen (D-MD)) the CEO and Worker Pension Fairness Act. This measure would accelerate the taxation of nonqualified deferred compensation and, for highly compensated employees, equity-based compensation, by taxing those benefits when there is no longer a substantial risk of forfeiture (i.e., when vested). The bill would use the increased tax revenues to help fund PBGC’s multiemployer pension fund. (An official summary of the bill, prepared by its sponsors, is also available.)

- Former New York City Mayor Mike Bloomberg has released additional details on his retirement and tax proposals since the previous update. Bloomberg’s retirement savings plans include a proposal to establish a public option retirement savings plan, a call to restore the Department of Labor’s 2016 Fiduciary Rule and support for a 0.1% tax on financial transactions (including trades within retirement plans).

RECENT REGULATORY ACTIVITY

Agencies Provide Revised SBC Template and Related Documents for 2021

The U.S. Departments of Labor (DOL), Treasury and Health and Human Services (HHS) (collectively, “the departments”) have released summary of benefits and coverage (SBC) documents to be used for plan years beginning on or after January 1, 2021. The 2021 SBC documents were originally released in November 2019, generally to reflect that the individual mandate penalty was reduced to $0 beginning in 2019, and the 2021 SBC documents were then revised earlier this month to correct minor errors.

Group health plans and health insurance issuers offering group or individual market coverage are required to provide SBCs. The SBC requirement, added by the Affordable Care Act, was first effective in 2012 but the SBC template and related documents have been revised by the departments over the years, with the currently applicable documents having been in effect since 2017. On February 3, 2020, the departments released an FAQ summarizing the changes made in November 2019 to the 2021 SBC documents, as compared to the 2017 documents. The 2021 documents can be found on the DOL SBC website and the CMS SBC website.

The changes include:
Revisions to the template and instructions to remove the statement that individuals without minimum essential coverage may owe an individual mandate penalty, because, starting January 1, 2019, the individual mandate penalty was reduced to $0. The template continues to include a minimum essential coverage indicator but the associated language is updated to read: “Minimum Essential Coverage generally includes plans, health insurance available through the Marketplace or other individual market policies, certain Medicare and Medicaid coverage, CHIP, TRICARE, and certain other coverage. If you are eligible for certain types of Minimum Essential Coverage, you may not be eligible for the premium tax credit.”

Updates to the uniform glossary to reflect that the individual mandate penalty was reduced to $0 beginning in 2019 (i.e., the definition of individual responsibility requirement is removed and the definition of minimum essential coverage is updated).

Changes to the template and instructions to reflect that minimum value is not relevant for individual market coverage. However for group coverage, the minimum value indicator continues to apply.

Addition of specific dollar amounts for the “total example costs” for each of the three coverage examples in the template (which include cost estimates for having a baby, managing type 2 Diabetes and a simple fracture).

Updates to the coverage examples calculator, guide, and narratives, including using 2016 data rather than 2013 data. For a complete list of the updates to the calculator, guide, and narratives see https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Crosswalk-of-Changes-11-2019.pdf.

The FAQ states that plans and issuers will be required to use the revised template, instructions, guide and narratives and, if they so choose, the calculator, “beginning on the first day of the first open enrollment period for any plan years (or, in the individual market, policy years) that begin on or after January 1, 2021, with respect to coverage for plan or policy years beginning on or after that date.” The departments also reiterate that use of the calculator is not required and that plans and issuers may create their own calculator using the guide and narratives.

The departments originally issued the 2021 SBC documents on November 7, 2019. HHS subsequently added a note on its SBC webpage that the departments “had identified minor errors in several of the 2021 SBC materials and supporting documents posted in November 2019, including the 2021 SBC Template. We corrected the errors and released remediated documents on February 3, 2020.” HHS has provided a list of the clean-up revisions.

Council Comments on New Compensation Rules under Section 162(m)

In written comments to the Internal Revenue Service (IRS) on February 18, the American Benefits Council recommended modifications and clarifications to a recent notice of proposed rulemaking (NPRM) under Section 162(m) of the Internal Revenue Code.

Section 162(m) limits the deduction for certain employee remuneration in excess of $1,000,000 for federal income tax purposes. The recently proposed rules incorporate changes enacted as part of the Tax Cuts and Jobs Act of 2017 (TCJA).
Previously, non-salaried, performance-based compensation like payments of stock or commissions was exempted from the $1 million limit under Section 162(m). Under the TCJA, however, publicly traded corporations are forbidden from deducting more than $1 million in compensation per covered executive, regardless of whether that pay is made up of salary, commissions or incentives such as stock options. The law also expanded the definition of executives who are covered by the limit.

The Council’s letter addresses the following topics:

- **Grandfathered contracts and negative discretion**: While the proposal provides important clarifications supported by the Council, we remain concerned that there are circumstances under which it is very unclear that negative discretion in a plan or contract could actually be exercised “under applicable law.” We therefore urge the IRS to confirm that if a corporation concludes that its negative discretion could only be clearly exercised in the case of misconduct by the executive or other event outside of the control of the company, even if that is not specifically provided for in the terms of the plan or contract, the plan or contract is still considered binding for purposes of the grandfather rule.

- **Grandfathered contracts and earnings**: The IRS interprets the grandfather rule as not applying to “earnings” on otherwise grandfathered amounts unless earnings are required to be paid under “applicable law.” The IRS also interprets the written, binding contract standard as applying only to 12 months of earnings where the corporation maintains the right to prospectively terminate the plan. The Council urges the IRS to reconsider this view, suggesting that final regulations clarify that if the corporation is obligated to provide earnings on grandfathered amounts as long as the grandfathered amounts remained deferred, then such earnings are themselves grandfathered. Final regulations should also clarify that earnings based on a deemed investment or reasonable rate of interest will continue to be grandfathered while such amounts are deferred.

- **Director compensation**: The proposed regulations take the surprising position that compensation paid to a non-employee for services as something other than an employee (for example, serving as a director) is covered by the $1 million deduction limit in Section 162(m). The Council argues that a director’s compensation should not count toward the $1 million limit.

- **Retroactive effective dates and good faith relief**: The proposed regulations include a number of provisions that are proposed to apply retroactively. The Council asserts that, until regulations are finalized, it is not appropriate to apply a rule that is still the subject of notice and comment. Instead, the Council recommends that taxpayers be able to rely on a good faith interpretation of the law.

- **Determination of covered employees**: The Council urges the IRS to modify the rules in the proposed regulations to make clear that if a publicly-held corporation is subject to the proxy disclosure rules for a taxable period, the covered employee include only the PEO, PFO and the individuals who appear as one of the top three most highly compensated officers on that proxy statement (in addition to any individuals who were previously identified in prior taxable periods). The Council also urges the IRS to amend the rules to allow companies to rely on their proxy disclosure for determining the top three most highly compensated employees.

- **Affiliated groups and partnership allocations**: The proposed regulations impose new rules applying the deduction limitation to partnerships in which one of the partners is a
publicly-held corporation. If, under the proposed regulations, a partnership continues to be an entity that is itself not deemed to be a publicly-held corporation, the partners should continue to be entitled to their distributive share of the partnership’s compensation deductions when those deductions arise in the course of employees performing services for the partnership.

- **Coordinating Section 162(m) and Section 409A: The Council welcomes the relief provided** under Section 409A for payments of deferred compensation that would be delayed until such amounts are deductible under Section 162(m). The Council requests, however, that IRS clarify the scope of this relief and, in particular, clarify that the relief applies equally to deferrals that are grandfathered under Section 162(m) as well as non-grandfathered amounts.

**Council Urges Exemption of Employment-Related Information from California Privacy Law**

In early February, the California Attorney General issued modifications to its earlier proposed regulations implementing the California Consumer Privacy Act of 2018 (“CCPA”). The earlier proposed regulations were released in October 2019. In February 25 written comments to the California Attorney General on those modified regulations, the American Benefits Council urged that the current one-year exemption for employment-related information under the CCPA be made permanent, or at least extended, while California can further study the issue.

*Background*

The CCPA, enacted in 2018, creates new consumer rights relating to the access to, deletion of, and sharing of personal information that is collected by businesses. The CCPA was effective January 1, 2020, but the law requires the California Attorney General to provide final regulations by July 1, 2020, and provides that the Attorney General cannot bring an enforcement action under the CCPA until then.

The CCPA is the first state law comprehensive privacy statute enacted in the United States. It generally applies to personal information of California residents that is collected by a for-profit entity doing business in California. The CCPA has carve-outs for information subject to HIPAA, but otherwise could apply to an employer with respect to employment information or benefits information outside of these carve-outs. The version of the CCPA passed in 2018 contained no general exemption for personal information collected in the context of employment.

The Council worked with the California Chamber of Commerce and other stakeholders on an amendment, adopted in September 2019, which provides that the CCPA does not apply to personal information collected by a business about a person in the course of that person acting as a job applicant or employee, to the extent the personal information is collected and used solely in that context. The amendment also provides that the CCPA does not apply to personal information of another person necessary for a business to administer benefits relating to an employee if used solely within that context. The exception applies to all of the CCPA’s requirements, except the general notice required by the CCPA at the time of collection of personal information. While the Council and other stakeholders pushed for this exception to be permanent, the final adopted version has a sunset provision so the exemption only applies until January 1, 2021.
Proposed Regulations & Modification

The proposed regulations issued in October 2019 did not address these exceptions. The February 2020 modification also does not address these exceptions but does adopt a specific definition for employment-related information that includes information related to employee benefits. The definition says that collection of employment-related information is considered a business purpose, suggesting that the Attorney General would consider employment-related information in its own category. The modification goes on to exempt employment-related information from some content requirements of the general notice (but not the entire notice).

The Council views this as a positive change since we have been urging the legislature to recognize that employment-related information should be treated differently than consumer information collected by a for-profit business. The Council’s comment on the revised draft regulations:

- Reiterates the importance of making the exemption for employment-related information permanent or at least extending it, while California can further study the issue. The Council will also be pursuing this issue with the California legislature.
- Expresses support for the addition of the terms employment benefits and employment-related information, as acknowledgement that that information is different from marketplace information.

Other states are considering privacy legislation and California’s law is likely to serve as a model. As such, this recent comment letter is part of the Council’s continued effort to work toward a permanent exemption for employment-related information under these multiple state privacy laws.

RECENT LEGISLATIVE ACTIVITY

Health Price Transparency Bill Introduced in House; Council Issues Letter of Support

Representatives Tom Malinowski (D-NJ) and Larry Bucshon (R-IN) have introduced the Know the Price Act (H.R. 6005) in the U.S. House of Representatives, a stand-alone bill designed to improve the transparency of cost and quality measures for health care providers.

The bill is a stand-alone measure using language included in Section 301 of the the Lower Health Care Costs Act (S. 1895), bipartisan legislation approved by the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee.. On an ongoing basis the Council has offered detailed policy recommendations to the Senate HELP Committee to help employers continue providing affordable, quality coverage to over half the country and drive innovation that improves the health care system as a whole.

Specifically, in a March 1, 2019, letter to the committee, the Council recommended increasing employers’ access to health data, especially their own. In keeping with this recommendation, Section 301 of the Senate HELP bill and the Malinowski-Buschon bill ban gag clauses that prevent enrollees, plan sponsors or referring providers from seeing cost and quality data on providers and clauses that prevent plan sponsors from accessing de-identified claims data that could be shared under HIPAA with third parties for plan administration and quality improvement purposes.
According to a news release issued by Malinowski’s office, the Know the Price Act would prohibit “gag clauses that are currently common in contracts between healthcare providers and insurers that are used to restrict a patient’s access to price and quality information. It would also permit employers to access anonymous health care consumption data, consistent with HIPAA privacy requirements, that would enable them to purchase insurance plans better structured to service the needs of their workforce.”

In a letter to the bill’s sponsors on February 27, the Council expressed support for the measure, calling it “another important step in combating rising health care costs through improving price and quality transparency across the health care delivery system and facilitating the use of value-based insurance designs.”

The Malinowski-Buschon measure is unlikely to move as a stand-alone bill, its introduction could increase momentum for inclusion of the provision in a broader health care legislation.

For more information on this or other health policy matters, please contact Ilyse Schuman, senior vice president, health policy, at (202) 289-6700.

RECENT JUDICIAL ACTIVITY

High Court Upholds Ruling Against Plan Sponsor in Plan Disclosure Statute of Limitations Decision

In a unanimous decision rendered on February 26, the U.S. Supreme Court affirmed a lower court ruling in favor of a retirement plan participant claiming a breach of fiduciary duty under ERISA. The Council had filed two amicus (“friend of the court”) briefs in support of the plan sponsor.

The final ruling affirmed the Ninth Circuit U.S. Court of Appeals interpretation of ERISA’s three-year statute of limitations provision, holding that a participant does not necessarily have “actual knowledge” of information in plan disclosures that he received but did not read or does not recall having read.

In Sulyma v. Intel Corporation Investment Policy Committee, the plaintiff argued the defendants violated fiduciary duties under ERISA by investing a portion of the plans’ assets in alternative investments, such as hedge funds and private equity investments through custom-built target date funds.

The U.S. District Court for the Northern District of California granted summary judgement to Intel in March 2017, holding that the plaintiff’s claims were time-barred under ERISA’s three-year statute of limitations (under which a claimant has three years to file if the claimant has actual knowledge of the alleged imprudent action and a six-year statute of limitations when the claimant had no knowledge.)

The plaintiff testified he did not “recall” the plan documents and was not “aware” of the allocation until consulting with an attorney shortly before filing the lawsuit. The disclosures were provided by electronic posting and emails and the record established the plaintiff routinely opened emails sent to him and regularly visited the websites hosting the disclosures and performance.
information – in fact clicking on more than 1,000 pages on the plan’s website during the 26 months he worked for Intel.

In November 2018, the Ninth Circuit reversed and remanded the district court’s summary judgment, stating, “If Sulyma in fact never looked at the documents Intel provided, he cannot have had ‘actual knowledge of the breach’ because he cannot have been aware that imprudent investments were made.”

In separate amicus briefs urging the U.S. Supreme Court to review the Ninth Circuit decision and then supporting Intel on the merits of the case, the Council argued that ERISA plan disclosures, as required by law, provide participants with the “actual knowledge” of the disclosed information, which would trigger the start of the three-year limitation. The circuit court’s decision “breaks with the near-uniform, common-sense rule in numerous federal courts that disclosing information to plan participants gives those participants actual knowledge of the information disclosed.”

Ultimately, the Supreme Court affirmed the Ninth Circuit decision, suggesting that Intel did not sufficiently prove that the plan participant had the requisite “actual knowledge.”

It is important to note that while the Supreme Court’s holding is negative, the court emphasized that actual knowledge may be established at a later stage of the litigation by inference from circumstantial evidence (which could include the fact of disclosure), or by showing “willful blindness.”

Participant groups have been referencing this case, even prior to the Supreme Court decision, in arguing against expansion of electronic disclosure for retirement plans. Plan sponsors may want to discuss potential changes with the plan’s service providers in response to this case such as adding an acknowledgement that they have read and understood information on a page before they can continue to the next page.