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## Monthly Newsletter – Volume 2, No. 11 – November 9, 2006

### *Highlights of the Month*

- 1. Department of Labor Launches Interactive Health Benefits Advisor Website**
- 2. Internal Revenue Service and Social Security Administration Issue Limits for 2007**
- 3. Internal Revenue Service Extends Compliance Deadline for Code Section 409A Regulations**
- 4. Department of Labor Issues Field Assistance Bulletin Regarding Health Savings Accounts and ERISA**
- 5. District Court Rules That NYSE Did Not Discriminate When It Terminated Benefits for Disabled Former Employees**
- 6. Department of Labor Issues Advisory Opinion Regarding Asset Allocation Strategies for Defined Benefit Pension Plans**

### **Department of Labor Launches Interactive Health Benefits Advisor Website**

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) today announced the launch of a new interactive Web site to serve as a resource for employers in complying with the various federal health benefit laws. The ***Health Benefits Advisor*** is designed to help employers and other plan officials understand their responsibilities in operating group health plans. The Health Benefits Advisor, at [www.dol.gov/elaws/ebsa/health](http://www.dol.gov/elaws/ebsa/health), provides information on the Consolidated Omnibus Budget Reconciliation Act (COBRA), Health Insurance Portability and Accountability Act (HIPAA), Newborns' and Mothers' Health Protection Act, Mental Health Parity Act, and the Women's Health and Cancer Rights Act. The website includes detailed information about each law and links to other relevant information that EBSA has published.

The website includes a section to help employers determine whether they are subject to any or all of these requirements. This section asks questions about the type of employer (*i.e.*, private sector, government, or church), number of employees, and benefits offered.



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## **Internal Revenue Service and Social Security Administration Issue Limits for 2007**

On October 18, 2006 the Internal Revenue Service (IRS) issued the cost of living adjustments applicable to pension plans. The limits are as follows:

	<b>2007</b>	<b>2006</b>	<b>2005</b>
401(k), 403(b) and 457(b) plan maximum salary reduction	\$ 15,500	\$ 15,000	\$ 14,000
Age 50 catch-up salary reduction contributions	5,000	5,000	4,000
SIMPLE maximum salary reduction (§408(p)(2)(E))	10,500	10,000	10,000
Age 50 catch-up salary reduction for SIMPLE accounts	2,500	2,500	2,000
Defined Benefit Maximum Annual Pension (§415(b)(1)(A))	180,000	175,000	170,000
Defined Contribution Maximum Annual Addition (§415(c)(1)(A))	45,000	44,000	42,000
Maximum Compensation Limit (§ 401(a)(17), 404(l), 408(k))	225,000	220,000	210,000
Definition of Highly Compensated Employee Earnings Limit (§414(q)(1)(B))	100,000	100,000	95,000
Definition of Key Employee Earnings Limit for Top-Heavy Plans (§416(i)(1)(A)(i))	145,000	140,000	135,000
SEP Minimum Compensation (§408(k)(2)(C))	500	450	450



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In addition, the Social Security Administration has announced the limits that are applicable for 2007:

	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>Taxable Wage Base</b>			
Social Security	\$ 97,500	\$94,200	\$ 90,000
Medicare	Unlimited	Unlimited	Unlimited
<b>Employer/Employee Payroll Tax Rates</b>			
Social Security	6.20%	6.20%	6.20%
Medicare	1.45%	1.45%	1.45%
<b>Maximum monthly social security benefit</b>			
	\$ 2,116	\$ 2,053	\$ 1,939
<b>Maximum income without reducing Social Security retirement benefits</b>			
Over age 65	Unlimited	Unlimited	Unlimited
Year attaining age 65	\$ 34,440	\$ 33,240	\$ 31,080
Under age 65	\$ 12,960	\$ 12,480	\$ 12,000
<b>Medicare Part A</b>			
Medicare tax rate	1.45%	1.45%	1.45%
60-day deductible	\$ 992	\$ 952	\$ 912
<b>Medicare Part B</b>			
Monthly premium (minimum shown is based on max. \$80,000 income if single; \$160,000 if married)	\$ 93.50 to \$161.40	\$ 88.50	\$ 78.20
Deductible	\$ 131	\$ 124	\$ 110

Limits for contributions, deductibles, and out-of-pocket expenses for High Deductible Health Plans (HDHPs) for 2007 are as follows:

	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>Maximum Contribution:</b>			
Individuals	\$ 2,850	\$ 2,700	\$ 2,650
Families	5,650	5,450	5,250
<b>Catch-up Contributions, age 55 and over</b>	800	700	600
<b>Maximum Out-of-Pocket for HDHPs:</b>			
Individuals	5,500	5,250	5,100
Families	11,000	10,500	10,200
<b>Minimum Deductible for HSA HDHPs</b>			
Individuals	1,100	1,050	1,000
Families	2,200	2,100	2,000



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## **Internal Revenue Service Extends Compliance Deadline for Code Section 409A Regulations**

The IRS has announced, in Notice 2006-79, that it will not be able to issue final regulations under Internal Revenue Code §409A in time for taxpayers to comply by December 31, 2006, and has extended the compliance deadline to December 31, 2007.

Code § 409A was enacted in 2004 and generally provides that, unless certain requirements are met, amounts deferred under a nonqualified deferred compensation plan for all taxable years are currently includible in gross income to the extent not subject to a substantial risk of forfeiture and not previously included in gross income. Code § 409A also includes rules applicable to certain trusts or similar arrangements associated with nonqualified deferred compensation, where such arrangements are located outside of the United States or are restricted to the provision of benefits in connection with a decline in the financial health of the sponsor. The IRS issued proposed regulations in October 2005, with a proposed effective date of January 1, 2007.

Notice 2006-79 includes the following:

- Final regulations are expected to be issued by the end of 2006, and will be effective January 1, 2008. Until the regulations become final, deferred compensation plans must continue to be operated in good faith compliance with § 409A.
- Deferred compensation plans must be formally amended to comply with § 409A and the final regulations by December 31, 2007 (regardless of fiscal year).
- Plan participants may be allowed to make new payment elections until December 31, 2007, subject to the same limits that applied to the previous extension. The IRS also clarified that a plan that has previously allowed participants to make a new payment election can also allow them to change the election during the extended period.
- A plan that wraps a qualified pension plan can continue to link its benefit payments to the time and form of payment elected under the qualified plan until December 31, 2007.
- Discounted stock options and stock appreciation rights can be retroactively amended to increase the exercise price to the market value on the date of original exercise until December 31, 2007, except for public companies that are required to restate their earnings because of backdated options granted to Section 16 insiders.



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## **Department of Labor Issues Field Assistance Bulletin Regarding Health Savings Accounts and ERISA**

Field Assistance Bulletin (FAB) 2006-02 is designed to answer questions from the Department of Labor's (DOL) first round of guidance in [FAB 2004-1](#), and other issues that have since arisen. On April 7, 2004, the Employee Benefits Security Administration issued Field Assistance Bulletin (FAB) 2004-01, addressing the status of Health Savings Accounts (HSAs) under ERISA. That guidance explained that HSAs generally would not constitute "employee welfare benefit plans" covered by Title I of ERISA in situations where employer involvement with the HSA is "limited". Employer involvement was deemed to be limited if the employer did not: limit the ability of eligible individuals to move their funds to another HSA or impose conditions on utilization of HSA funds beyond those permitted under the Code; make or influence the investment decisions with respect to funds contributed to an HSA; represent that the HSA is an employee welfare benefit plan established or maintained by the employer; or receive any payment or compensation in connection with an HSA. Some of the key questions addressed and answered in FAB 2006-02 are:

1. **Q:** May an employer open an HSA for an employee and deposit employer funds into the HSA without violating the condition in the FAB that requires that the establishment of an HSA by an employee be "completely voluntary"?  
**A:** The fact that an employer unilaterally opens an HSA for an employee and deposits employer funds into the HSA does not divest the HSA account holder of control and responsibility and, therefore, would not give rise to an ERISA-covered plan so long as the conditions described in FAB 2004-01 are met.
2. **Q:** If an employer maintains a high deductible health plan (HDHP) for its employees, can the employer limit the HSA providers that it allows to market their HSA products in the workplace, or select a single HSA provider to which it will forward contributions without making the HSA part of the employer's ERISA-covered group health plan?  
**A:** If the employer relies on the group-type insurance safe harbor in 29 C.F.R. § 2510.3-1(j), it cannot "endorse" the HSA provider. In the DOL's view, an employer would not be considered to "endorse" an HSA within the meaning of the regulation merely by limiting the HSA providers that it allows to market their HSA products in the workplace or selecting a single HSA provider to which it will forward contributions. Employers may also provide employees general information on the advisability of using an HSA in conjunction with the HDHP without "endorsing" the program.



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3. **Q:** Are HSAs subject to the prohibited transaction provisions of § 4975 of the Internal Revenue Code?  
**A:** Although the DOL believes that HSAs meeting the conditions of FAB 2004-01 generally will not be ERISA-covered plans, the Medicare Modernization Act specifically provided that HSAs will be subject to the prohibited transaction provisions in § 4975 of the Code. As a result, employers who fail to promptly transmit participants' HSA contributions may violate the prohibited transaction provisions of § 4975 of the Code (§ 4975(c)(1)(D)).
4. **Q:** Can an employer pay the fees associated with the HSA that the employee would normally be expected or required to pay without causing the HSA to become an ERISA-covered plan?  
**A:** The fact that an employer contributes to an HSA does not result in the HSA being an ERISA-covered plan. Therefore, the DOL does not believe that an employer paying fees associated with an HSA that the employee would otherwise be required to pay would make that HSA an ERISA-covered plan.

### **District Court Rules That NYSE Did Not Discriminate When It Terminated Benefits for Disabled Former Employees**

The U.S. District Court for the Southern District of New York (*Tirone v. New York Stock Exchange Inc. S.D.N.Y.*, No. 05 Civ. 8703 (WHP)) has ruled the New York Stock Exchange (NYSE) did not discriminate against 15 disabled former employees when it adopted a leave of absence policy that terminated their health and life insurance benefits.

The NYSE sponsors a welfare plan which provides disability, retirement, health and life benefits for professional and managerial employees. Tirone worked at the NYSE for a number of years before beginning a medical leave of absence in 1990. The NYSE classified Tirone as totally disabled after he could not return to work and he began receiving disability payments under the Plan's disability coverage. During this time, and up until March 2005, Tirone also participated in medical coverage and life insurance coverage under the Plan. Effective January 1, 2005, the NYSE adopted a leave of absence policy which provided that persons who cannot return to work after two years of commencing a leave of absence will have their employment status discontinued. Tirone was notified by the NYSE of the new policy and informed that his medical and life insurance coverage would be terminated if he did not return to work by March 31, 2005. He did not return to work by that date and his coverage under the Plan was terminated on that date. In October 2005, Tirone filed a class action lawsuit, against the NYSE, on his



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behalf and that of 14 other disabled former employees of the NYSE alleging a denial of benefits in violation of the Plan. In December 2005, Tirone filed a suit against the NYSE Employee Benefits Plans Committee and John Martino, the administrator of the Plan. In January 2006, the Court consolidated the complaints and Tirone filed an Amended Consolidated Complaint seeking damages pursuant to ERISA §§ 502 and 510: (1) compensation for the coverage Plaintiffs have been denied as a result of the Leave of Absence Policy; (2) reinstatement as active NYSE employees on medical leave or, alternatively, payment of future health and life insurance coverage; and (3) costs and attorneys fees. Section 510 of ERISA, as codified at 29 U.S.C. § 1140, provides: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled to under [an employee benefit plan]."

The Court stated that other courts in their District have held that § 510 only proscribes interference with the employment relationship and that "the plaintiffs in this case must allege that defendant took some type of adverse employment action to interfere with the attainment of their benefit rights under the plan." The plaintiffs did not work for the NYSE when their benefits were discontinued; although they kept their employee status until the Leave of Absence policy was implemented, they did so only to receive benefits, and their termination only affected them by depriving them of those benefits. The courts in the District have previously held that a reduction of benefits, in and of itself, is not adverse employment action for purposes of § 510. The plaintiffs contended that the defendants violated § 510 by singling out for termination of benefits those plan participants on long term disability. The Court found that this is not the type of discrimination that gives rise to a § 510 liability; "If every change to a welfare plan that disparately impacted participants were considered discriminatory, employers who reduce or terminate coverage for certain categories of illness . . . would face near-automatic section 510 liability."

### **Department of Labor Issues Advisory Opinion Regarding Asset Allocation Strategies for Defined Benefit Pension Plans**

On October 3, 2006, the Department of Labor issued an advisory opinion on behalf of JPMorgan Chase Bank, N.A. (JPMorgan) regarding the application of the fiduciary responsibility provisions of Title I of ERISA. Specifically, JPMorgan inquired as to whether a fiduciary of a defined benefit pension plan could consider the liability obligations of the plan and the risks associated with those obligations in determining the investment strategy for the plan. JPMorgan proposed to "risk manage" their defined benefit pension plan assets by better matching the risks of the plan's investment portfolio with the risks of the plan's benefit liabilities, with a goal of reducing the likelihood that



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the benefit liabilities will increase at a time when the plan's assets decline in value. In their request to the DOL, JPMorgan stated that their focus would be on reducing the risk of underfunding to the plan and its participants and beneficiaries by reducing the volatility of funding levels. JPMorgan also noted that there could be incidental benefits to the plan sponsor by adopting this strategy, e.g., reduced volatility in the plan sponsor's financial statements and reduced minimum contribution obligations. However, the main benefit of reducing the volatility of funding levels would be to the participants and beneficiaries through a reduced need to rely on plan sponsor funding, thereby protecting the participants and beneficiaries in the event of plan sponsor insolvency.

JPMorgan requested the DOL provide their views on whether a plan sponsor could engage in this type of investment strategy without violating the ERISA fiduciary directive to act "solely in the interest" of the plan's participants and beneficiaries. (ERISA § 404(a)(1)). Previously issued regulations (29 CFR 2550.404a-1) interpret the prudence requirements of ERISA as they apply to fiduciaries of benefit plans and provide that such requirements are satisfied if (1) the fiduciary making an investment has given appropriate consideration to those facts and circumstances that, given the scope of the fiduciary's duties, the fiduciary knows or should know are relevant, and (2) the fiduciary acts accordingly. In the advisory opinion, the DOL stated that it believes "plan fiduciaries have broad discretion in defining investment strategies appropriate to their plans" and "does not believe that there is anything in the statute or regulations that would limit a plan fiduciary's ability to take into account the risks associated with benefit liabilities or how those risks relate to the portfolio management in designing an investment strategy." Thus, the DOL concluded that the fiduciary would not violate their duties under Code §§ 403 and 404 solely because the fiduciary implements the type of strategy proposed by JPMorgan.