

Spring 2009

# Benefits Alert

**In This Issue:**Waiver of Required  
Minimum Distributions  
for 2009

2

Final 403(b)  
Regulations Require  
Action by Year End

2

Investment Losses  
Introduce Fiduciary  
Risk

3

Cafeteria Plans  
Amendments Required  
to Reflect New SCHIP  
Enrollment Rights

3

## New COBRA Subsidy for Laid Off Workers Requires Immediate Action by Employers

The recently enacted American Economic Recovery and Reinvestment Act (better known as the “Stimulus Bill”) includes a COBRA subsidy provision that makes critical changes to the COBRA health continuation coverage rules and requires immediate attention by all COBRA-covered health plan sponsors.

Under the new COBRA subsidy, the federal government will pay 65 percent of the required COBRA premium charged to COBRA qualified beneficiaries receiving coverage due to a covered employee’s involuntary termination of employment occurring between September 1, 2008 and December 31, 2009. Eligible recipients are treated as having paid the full COBRA premium to the extent that they pay 35 percent of the required premium, and the employer or insurer is then “reimbursed” by the government in the form of a reduction to the employer’s payroll tax deposits in

the amount of the remaining 65 percent. This subsidized coverage commences on February 17, 2009 (the date of enactment of the provision) and extends for up to nine months, although the subsidy may end earlier if the individual becomes eligible for certain other group health care or Medicare.

Employer sponsors and administrators of COBRA-covered health plans must take immediate action to comply with these new subsidy rules. Coordination with the payroll department will be necessary in order to accommodate reduced payroll tax deposits in the amount of the eligible subsidy. In addition, COBRA election notices must be revised to include information concerning the COBRA subsidy, and special notices must be sent no later than April 18, 2009 to individuals who are eligible to elect or are already receiving COBRA continuation coverage. In some cases, individuals who passed on COBRA coverage when it was first offered to them will have a second option to elect COBRA under the new government subsidy program.

This is a quickly developing area of law. New guidance is being published by the Department of Labor and IRS virtually every day. The K&C Employee Benefits team has prepared a detailed information package, including instructional memo and sample notice and election forms, which is available to our clients at a nominal cost. Please contact Priscilla Balderama if you would like these materials and contact Shad Fagerland or Rick Mapp if you have questions or would like to discuss these new requirements.

## Waiver of Required Minimum Distributions for 2009

In response to declining retirement account balances, Congress recently enacted a new law – the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”) – waiving Required Minimum Distributions (“RMDs”) for the 2009 taxable year. Plan sponsors should be aware of this change and prepared to adjust administrative practices as necessary to ensure that the new rules are properly implemented.

RMD’s are distributions to retired participants who have reached the age of 70½. In order to ensure that plan assets are at least partially consumed (and taxed) prior to death, the RMD rules require participants to take at least a minimum distribution from a qualified plan or IRA each year after attaining age 70½. The minimum distribution amount is calculated by dividing the prior December 31 market value by a life expectancy factor contained in published IRS tables. Under normal times, the RMD rules serve to require partial distributions while still leaving enough of the original account balance intact to last throughout the individual’s remaining projected years in retirement.

The recent decline in the equity markets has increased the risk that RMDs will deplete retirees’ accounts too quickly. Recognizing this concern, Congress included a temporary patch in WRERA allowing retirees to postpone taking any RMDs that would otherwise have been required to be taken during the 2009 taxable year. This waiver applies to 401(k) plans, 401(a) plans, 403(b) plans, certain 457(b) plans, and Individual Retirement Arrangements (IRA). The waiver also applies to individuals who turn 70 ½ in 2009 and who would normally wait until April 1, 2010 to take their distribution.

Individuals who have already taken distributions in 2009 may be eligible to transfer these distributions to another plan or IRA through a tax-free rollover. WRERA relieves the employer of responsibility to provide rollover notices in connection with these payments, but plan sponsors should be aware that retirees who inadvertently took RMD’s earlier in the year may want to return these amounts to the plan in order to enjoy an additional year of tax deferral.

Like any new retirement law, plan sponsors will need to amend their plans in order to comply with the 2009 RMD waivers. Amendments need to be completed by the last day of the 2011 plan year. Please contact any member of the K&C Employee Benefits team if you have questions about how WRERA applies to your plan.

## Final 403(b) Regulations Require Action by Year End

Treasury Regulations finalized in 2007 impose a number of new requirements on sponsors of 403(b) arrangements such as non-profit organizations, hospitals, colleges and universities, etc., including the requirement that the terms of the 403(b) plan must be outlined in a written plan document. The compliance deadline, originally scheduled for January 1, 2009, has been postponed an additional year, giving employers another few months to develop compliance strategies.

The burdens of the new regulations have led many 403(b) sponsors to question whether there is any substantial advantage to maintaining a 403(b) program as opposed to a qualified retirement plan such as a 401(k). Previously, 403(b) plans had represented a means for eligible employers to offer retirement benefits without having to shoulder the responsibility (and expense) of actively administering the plan. Under the typical 403(b) arrangement, employees contract directly with individual insurance companies or financial firms, while the employer’s role was typically limited to taking payroll deductions and forwarding contributions to the respective vendor in accordance with the participant’s directions. The new regulations make 403(b) plans less appealing by imposing heightened burdens on the employer, including new responsibilities to maintain a centralized plan document, to obtain signed information sharing agreements with all participating vendors, and to approve vendors eligible to receive funds under the plan.

Substantial questions remain unanswered under the final 403(b) regulations, most notably whether the involvement of the employer in monitoring and approving vendors opens the door to potential fiduciary liability. But because the compliance deadline is looming, sponsors of 403(b) arrangements must now make a quick choice:

1. Decide to exit the retirement plan business by terminating or freezing their existing 403(b) arrangement by the end of the 2009 plan year;
2. Continue to maintain the 403(b) as an active plan, adopt a compliant plan document no later than December 31, 2009, maintain a list of approved vendors who have signed the necessary information sharing agreement, and refuse to forward plan contributions to vendors who have not been approved; or

continued from page 2

3. Terminate or freeze the 403(b) arrangement and adopt in its place another form of retirement benefit such as a 401(k) plan.

Employers should begin planning now in order to implement the chosen strategy by the year-end deadline. Please contact any member of the employee benefits team to discuss your company's options in greater detail.

## Investment Losses Introduce New Fiduciary Risk

Here's a frightening thought: what if 401(k) participants had the right to sue the employer to recover investment losses incurred in their 401(k) accounts – including losses caused by the employees' own investment elections?

This may be a more realistic threat than it seems. Plaintiffs' attorneys have launched a new wave of lawsuits seeking to exploit technical violations of section 404(c), the ERISA provision designed to protect employers and other plan fiduciaries from investment losses incurred in individually directed accounts. Section 404(c) provides that if a participant in an individual account plan (such as a 401(k) plan) is provided with an effective opportunity to direct the investments in his or her own account, no other plan fiduciary can be held liable for any associated investment losses. This protection may have created a false sense of complacency among plan sponsors, who often assume that they are fully shielded from investment-related liability due solely to the fact that they allow participants to choose their own investments.

In reality, 404(c) protection is available only if the plan satisfies a number of specific technical requirements outlined in the regulations, including requirements to publish risk and return information concerning each available investment fund and to provide certain other enumerated disclosures to plan participants.

Many plans may inadvertently fail one or more of the prerequisites for 404(c) protection. For instance, a plan fails to qualify for 404(c) protection unless specific language is included in the summary plan description or other communications to participants prominently stating that the plan is intended to qualify as a 404(c) plan. Additionally, a plan may lose 404(c) protection in certain individual cases, such as if the plan administrator has imposed restrictions on participants' ability to make investment changes (such as a rule restricting the maximum number of changes that can be made per month).

If any one of the enumerated 404(c) requirements is not satisfied, plan fiduciaries face potential personal liability for investment losses incurred in participant accounts. In light of the current market downturn, now is a good time to review your plan's 404(c) compliance strategy. Contact any member of the K&C Employee Benefits team for further details or to schedule a professional 404(c) compliance audit of your company's 401(k) plan documents and investment

## Cafeteria Plan Amendments Required to Reflect New SCHIP Enrollment Rights

The Children's Health Insurance Program Reauthorization Act, signed into law on February 4, 2009, creates a new special enrollment period that will require amendments to employer-sponsored cafeteria plans and health plans by April 1, 2009.

The special enrollment period applies to employees and dependents who lose eligibility for a State Children's Health Insurance Program ("SCHIP") or Medicaid or who first become eligible to participate in a premium assistance program under SCHIP or Medicaid. Such employees must be allowed to enroll in the employer's health plan within 60 days of the loss of coverage or eligibility determination, even if this enrollment date falls outside the plan's open enrollment period.

The effective date of this new enrollment right provision is April 1, 2009. Cafeteria plans should be amended to permit this enrollment right no later than April 1, 2009. In addition, employers must also prepare a new notice of special enrollment rights which should be distributed to current participants and included in the health plan's summary plan description.

If you would like to discuss these new enrollment rights or if you would like assistance preparing necessary amendments and notices, please contact a member of the K&C Employee Benefits team.

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Inside This Issue

- Waiver of Required Minimum Distributions for 2009
- Final 403(b) Regulations Require Action by Year End
- Investment Losses Introduce Fiduciary Risk
- Cafeteria Plans Amendments Required to Reflect New SCHIP Enrollment Rights

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## Employee Benefits & Executive Compensation Group

The attorneys who practice in the firm's Employee Benefits Practice Group have established a full-time commitment to this specialty. They offer clients the highest level of experience and sophistication in the area of employee benefits.

The benefits arena has become exceedingly complex with each new layer of state and federal regulation. Due to the continuing stream of complex and technical employee benefits litigation since ERISA, the federal government plays an active role in how you plan and administer your employee benefits programs. Every employee benefit program demands frequent evaluation in light of fast changing federal laws and regulations.

The Employee Benefits Practice Group works with the legal, financial, and human resource professionals of our clients to implement and maintain the most effective and cost efficient benefits programs.

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