

HR & Benefits News

DOL Relaxes Rules on DC Plan Expense Allocations

With Field Advice Bulletin (FAB) 2003-3 (05/19/03) the DOL clarified its position on allocation of proper and reasonable plan expenses. ERISA is not specific about how general plan expenses should be allocated.

Pro Rata v. Per Capita

The FAB clarifies pro rata (based on assets in individual accounts) & per capita (expenses equally to each account regardless of assets). 2003-3 seems to imply the following:

- a. investment management fees should be allocated on a pro rata basis
- b. fixed administrative costs may be allocated either on a pro rata basis or a per capita basis, depending on the facts and circumstances
- c. expenses from investment advice offered to plan participants may be allocated either on a pro rata basis or a per capita basis, but may instead be charged back on an individual basis

Please read the entire FAB at www.dol.gov/ebsa/regs/fab_2003-3.html

Saver's Credit

Rob Portman (R-Ohio) & Ben Cardin (D-Md.) have introduced H.R. 1776 as their 2nd generation of retirement plan law changes. Under H.R. 1776, the saver's tax credit adopted in 2001 would expand to cover couples with an adjusted gross income (AGI) of up to \$60,000 (up from \$55,000) and singles with AGIs of \$30,000 (up from \$25,000). The maximum credit would increase to \$1,100 from \$1,000 and become permanent. While this tax credit -- available for employee contributions to 401(k) plans and IRAs -- has received relatively little attention, it offers an important savings advantage for both the employee and the employer (and may receive an employer match to boot). By encouraging lower paid employees to use the credit and participate in the plan, employers may also reduce nondiscrimination limits that could limit highly compensated employees' contributions.

Bipartisan bill would remove limits on offering MSAs

H.R. 2351, introduced 06/06/03 by House Ways and Means Committee Chairman Bill Thomas, R-Calif., and Rep. William Lipinski, D-Ill., would remove provisions in a 1996 law that limits MSAs to employers with 50 or fewer employees and put a 750,000 limit on the number of MSAs that can be established allowing all employers to offer MSAs & make MSAs permanent. H.R. 2351 would also allow both employers and employees to fund an MSA and allow MSAs to be offered **through flexible benefit plans**. Another provision in the legislation—not directly related to MSAs—would allow employees to roll over to the following year up to \$500 of unspent flexible spending account balances, an idea first offered by the Bush administration.

IRS issues Revenue Procedure 2003-44

2003-44 enhanced the EPCRS, the IRS' comprehensive system of correction programs for sponsors of retirement plans that have failed to meet one or more requirements of the Internal Revenue Code. This new revenue procedure significantly streamlines the EPCRS process. www.irs.gov/pub/irs-tege/rp0344_pres.pdf

DOL Fact Sheet on Proposed new Regulations on COBRA Notices

www.dol.gov/ebsa/newsroom/fs052803.html New COBRA Rules Expand Notice Obligations - Group health plans will have to provide more specifics on COBRA rights under proposed COBRA notice rules issued May 28 by the U.S. Department of Labor (DOL). The new information includes requirements to provide special notices when COBRA coverage ends early and someone is ineligible for coverage.

The long-awaited rules, published in today's Federal Register (68 F.R. 31831) (plus two new notices)

<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-13057.htm>

Smile: dental benefits still sparkle

Premiums for dental coverage remain stable according to the National Association of Dental Plans (NADP). In 2002 premiums rose between 3.9% and 6.6% & rate changes for 03 are expected to be around: 5% to 7%.

We expect many more employers will incorporate dental benefits into Section 125 cafeteria plans as a low-cost way to expand benefits offerings. Sec. 125 Dental premiums can be made on a pre-tax basis and employees are willing to assume more costs in order to have dental coverage, especially if they had none before. Indemnity plans still seem popular but employers need to scrutinize expenditures more carefully and we expect more to move to self-funded direct-reimbursement dental (ideally under a full-flex plan), even if the employer fully-insures the medical.

Tax credit-DCSA tradeoff Myths or Dependent Care Spending Accounts: Do They Make Sense in 2003?

The perception that the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) changes lessened the benefits of dependent care spending accounts (DCSAs) for employees, particularly the lower paid, is a **myth**. In fact, because EGTRRA allows salary reductions to dependent care spending accounts to increase employees earned income tax credits, *more employees will now benefit from DCSAs*.

Also see: *C:\Jim\AASC\Prospects\Sales Ideas\125 Executive Summary ERs Guide to PDHB.doc*

CAUTION: Confidential Information Remains On Old Hard Drives

A report recently released by the Massachusetts Institute of Technology (MIT) found that used hard drives sold at secondhand computer stores and on the internet contained significant personal and corporate information, including credit card numbers, medical reports, and detailed personal and corporate financial information. The report, "Remembrance of Data Passed: A Study of Disk Sanitation," also revealed that although the majority the drives had been reformatted before being sold, most attempts to erase information from the drives before selling them were ineffectual.

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How Much Do YOU Pay? - Opaque Costs add up

Fund trading costs are opaque to advisors and investors in virtually all mutual funds and variable annuities. (These costs are deducted from Net Asset Value, so performance is reported net of them.) The DOL continues to evaluate the cost disclosure in participant-directed retirement plans, including 401(k)'s. The DOL is concerned that participants are not receiving enough information to evaluate the costs of investment options, including brokerage commissions and trading costs in mutual funds.

Be aware, these choices may generate even higher costs:

Fund-of-funds that pool several mutual funds, each independently managed.

Blended funds that combine multiple managers into one fund. For example, they may allocate part of assets to a growth manager and another part to a value manager.

"Lifestyle funds" that combine several funds or managers and systematically adjust the risk level as the client advances toward retirement.

The additional costs in these vehicles can include: 1) two separate layers of management fees; 2) extra trading costs involved in allocating cash flows among managers or adjusting risk levels; and 3) rebalancing assets among managers or styles. Some fund groups have concluded that each internal rebalancing event within a fund can add 50-100 basis points to trading costs. In it's possible that costs including operating expense ratio, trading and rebalancing-could total 4-6% of assets annually plus any broker-dealer charges. What can you do; call us for advice!

DOL Clarifies Allocation of Retirement Plan Expenses

The Department of Labor (DOL) has issued guidance that clarifies how to treat expenses within a plan, and whether certain expenses should be allocated on a per capita or pro rata basis or charged to individual participants.

In *Field Assistance Bulletin (FAB) 2003-03* www.dol.gov/ebsa/regs/fab_2003-3.html, the DOL points out that ERISA does not specifically address plan expense allocation, but under ERISA Section 404(a) fiduciaries must carry out their duties prudently and "solely in the interest of the participants and beneficiaries." When reviewing whether a plan should allocate expenses among all participants on a pro rata or per capita basis, fiduciaries should first review the plan document. If there is no guidance from this source, then "prudence"—weighing the "competing interests of various classes of the plan's participants and the effects of various allocation methods on those interests"—should be followed. Regarding individual versus general expenses, the DOL has *clarified its position* from prior guidance on Advisory Opinion 94-32A, which stated that charging an individual participant with costs related to a qualified domestic relations order (QDRO) would violate ERISA. The DOL now states in the FAB that "the same principles applicable to determining the method of allocating expenses among all participants ... apply to determining the permissibility of allocating specific expenses to the account of an individual participant, rather than the plan as a whole." The FAB also provides examples of specific plan expenses that may be charged to individual participants, including: hardship withdrawals, benefit distributions, separated participants' vested accounts, calculations of benefits payable under different plan distribution options, QDROs and qualified medical child support orders.

Employer contributions to health plans may triple, reaching 16.5% by 2010

The Employment Policy Foundation (www.epf.org/research/newsletters/2003/hb20030501.pdf) claims employer contributions to health plans, which constituted 7.3% of total compensation last year, would reach 16.5% by 2010 at the current pace, that is a tripling!

IRS Clarifies if Certain Medical Expenses Are Deductible

On May 15, the IRS issued two revenue rulings clarifying whether certain medical expenses are deductible under Code Section 213 -- and thus potentially reimbursable under a health flexible spending account. The rulings cover breast reconstruction and vision correction surgery; teeth whitening procedures; and nonprescription drugs, equipment, supplies or diagnostic devices. The basic distinction is between amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, which generally are deductible, versus cosmetic surgery or other similar procedures—which generally are not deductible.

According to Rev. Rul. 2003-57 <http://www.irs.gov/pub/irs-drop/rr-03-57.pdf>, breast reconstruction surgery following a mastectomy ameliorates a deformity related to a disease; therefore, the cost is an expense for medical care and is deductible. The cost of laser eye surgery is also an expense for medical care because it meaningfully promotes the body's proper function. The ruling states that because the laser eye surgery is to correct defective vision and promote the proper function of the body, the cost of such surgery, including laser procedures such as LASIK and radial keratotomy, is an expense for medical care. By comparison, the teeth-whitening procedure does not treat a physical or mental disease or promote proper body function, but is directed at improving a person's appearance; therefore, expenses for that procedure are not deductible.

In Rev. Rul. 2003-58 <http://www.irs.gov/pub/irs-drop/rr-03-58.pdf>, the IRS explained that because aspirin is a drug and does not require a physician's prescription for individual use, its cost is not a deductible medical expense, even if recommended by a physician. However, nonprescription items that are not medicines or drugs—including equipment such as crutches, supplies such as bandages and diagnostic devices such as blood sugar test kits—may be deductible medical expenses if they are for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any body structure or function. The news release: <http://www.irs.gov/newsroom/article/0,,id=109652,00.html>

IRS rules that expenses related to obtaining an egg donor are Deductible medical expenses

[Priv. Ltr. Rul. 200318017 (Jan. 9, 2003)]: <http://www.irs.gov/pub/irs-wd/0318017.pdf> In this Private Letter Ruling, the IRS considered whether certain fees and expenses related to the provision of a donated egg to a taxpayer were deductible medical expenses under Code Section 213. Because the expenses that the taxpayer had asked about were preparatory to her own medical procedure, they were deductible under Code Section 213. A Private Letter Ruling may not be cited as precedent and is directed only to the taxpayer who requested it. By contrast, earlier IRS guidance suggested that medical and legal expenses incurred by a taxpayer for a surrogate mother and her unborn child would not be deductible.

Bill Would Allow LTC Insurance to Be Offered Under Cafeteria Plans, FSAs

Rep. Nancy Johnson (R-Conn.) on May 14 introduced the Long Term Care and Retirement Security Act of 2003 (H.R. 2096), a bill that would allow long term care (LTC) insurance to be offered under cafeteria plans and flexible spending accounts (FSAs). **H.R. 2096** would amend Code Section 125(f) to allow LTC insurance plans as defined under Section 7702B to be offered through cafeteria plans to the extent the amount of the payment does not exceed the eligible LTC premiums as defined by Section 213(d)(10). The bill also would amend Section 106 to allow LTC insurance to be offered under an FSA. H.R. 2096 is before the House Ways and Means Committee.

The DOL has *Proposed* FLSA White-Collar Exemption Changes

The *Proposed* Regulations are: *29 C.F.R. Part 541, March 31, 2003, (68 Fed. Reg. 15585 et. seq.) 33* and these *proposed* DOL white-collar employee exemption rules may mean big changes to the way you'll have to comply with FLSA employee classification guidelines. This *proposal* could affect as many as 6.5 million U.S. workplaces with 109.5 million employees and annual payrolls of \$2.8 trillion. Chances are your organization may be affected, and when these rules become final, you'll have little choice but to re-examine the FLSA-exempt status of all your employees—or risk back-pay lawsuits by employees and vigorous DOL investigations. If & when the new rules become final, possibly later this year, you will need to adjust.

Belt-tightening: Employers trim costs to counter rising pension expenses, economy & soaring health care

The Henry J. Kaiser Family Foundation and the Health Research and Education Trust (HRET) reports 17% of employees worked for a company that reduced health care benefits in 2002, compared with 7% in 2000. Employees' health premiums skyrocketed to an average of \$454 a year for single coverage, a 27% jump from last year. Many reduced matching contributions. According to the Profit Sharing/401(k) Council of America the average employer's match dropped to 2.5% in 2001, after peaking at 3.3% of pay in 98 & 99.

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Are YOU Protected?

As a fiduciary, you may be held *personally liable* for breach of fiduciary responsibility. ERISA provides guidelines of prudence to follow regarding management of retirement plan assets including:

- You must establish a written Investment Policy. ERISA Sections 402(a)(1), 402(b)(1)-(2), 404(A)(1)(D)
- Investment decisions must be made with the skill and care of a prudent expert. ERISA Section 404(a)(1)(B)
- Investment performance must be monitored. ERISA Section 405(a)
- Investment performance must be controlled. ERISA Section 404(a)
- Prohibited transactions must be avoided. ERISA Sections 406(a)-(b)

Per ERISA Plan Fiduciaries are obligated to retain qualified investment professionals if the Fiduciaries do not have the necessary investment expertise to make investment decisions.

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also See: C:\1Jim\AASC\AASC Newsletters\COBRA new DOL requirements 2New Notices.doc

Comp and Benefits Provisions Dropped From Tax Bill

Congressional negotiators eliminated all compensation- and benefits-related provisions from the recently approved tax bill. The reconciliation bill, the "Jobs and Growth Tax Relief Reconciliation Act" (H.R. 2), was approved by both houses of Congress May 23.

The \$350 billion tax bill reduces the current top tax rates for dividends (38.6 percent) and capital gains (20 percent) to 15 percent through 2008. Lower earners would pay 5 percent through 2007, and nothing in 2008. Among many other provisions, the bill will reduce the four top income tax brackets, increase the child tax credit from \$600 to \$1,000 for this year and next (and then set it at \$700 starting in 2005), and increase deductions for married couples in the 15-percent tax bracket. Parents will receive up to \$400 per child this summer. President Bush is expected to sign the bill into law quickly.

IRS website has new information on health coverage tax credit created By trade act of 2002

Under the Trade Act of 2002, a new tax credit has been available since December 2002 for eligible individuals for up to 65% of the premiums that they pay for qualified health insurance coverage (including COBRA coverage) for themselves and their families. The group of individuals eligible for this credit is very limited and includes only (1) trade-displaced workers receiving trade adjustment assistance under the Trade Act of 1974; and (2) individuals who are at least 55 years old and receiving a pension benefit from the Pension Benefit Guaranty Corporation. The IRS has posted information at its website regarding the new tax credit, which it has dubbed the health coverage tax credit (HCTC). Much of this information is not new and deals generally with the eligibility requirements applicable to individuals wishing to claim the HCTC and with the types of coverage for which premiums are credit-eligible (called qualified health insurance). The website also includes information as to types of coverage (called other specified coverage) that will disqualify an individual for the HCTC altogether. For a copy: <http://www.irs.gov/individuals/article/0,,id=107825,00.html>

IRS Spells Out COBRA Tax Credit Procedures The IRS has added to its Web site provides details about the tax credit program for health coverage—including COBRA coverage—created by the Trade Adjustment Act of 2002 (TAA). Although the information is for individuals, not employers, it may prove helpful to employers curious about the administration of the TAA program.

Generally, the TAA provides that individuals (and their family members) who lose their jobs for trade-related reasons can receive a 65-percent tax credit for certain “qualified” health insurance, such as COBRA coverage, if they meet certain criteria. Other eligible individuals include Pension Benefit Guaranty Corporation (PBGC) pension beneficiaries.

The Web site [<http://www.irs.gov/individuals/article/0,,id=107825,00.html>] explains how what the IRS is calling the Health Coverage Tax Credit (HCTC) works:

- (1) State workforce agencies and the PBGC will notify individuals who may be eligible for the tax credit.
- (2) Eligible individuals must call the HCTC Customer Care Center. A customer service representative will verify an individual’s eligibility and confirm health coverage.
- (3) Each month, the individual sends 35 percent of the premium (along with a payment coupon) to a payment center (to be designated). This payment center then adds the remaining 65 percent and sends the full payment to the designated health plan.

The Web site explains how individuals can claim the HCTC in advance beginning in August 2003 by contacting the HCTC Customer Contact Center at 866/628-4282. It further explains how the HCTC can be claimed at the end of the year by completing IRS Form 8885, the Health Insurance Credit for Eligible Recipients.

Change Retirement Investing Methods??

Maybe participants Investors Should Favor Bonds Over Stocks in 401(k) Plans because of the new tax law? Consider stocks and bonds in tax-advantaged retirement accounts vs. taxable accounts. Investors may buy and hold stocks in regular accounts but favor bonds in retirement plans because there may be a top tax rate of just 15% on stock dividends & long-term capital gains; less than ½ the maximum tax rate of 35% on ordinary income, (including interest payments from bonds). This may help make the case for the bigger tax cuts by putting bonds in tax-advantaged accounts. Time will tell.

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HR & Benefits News

"Non-Qualified" Plan Assets Held to Higher Standards for ERISA Compliance

In the current DOL ERISA regulations, even small company plans with less than 100 participants must purchase a fidelity bond for their plan assets and report the bond on Form 5500 or order an annual independent audit of the plan. The type of assets in the plan determines what size of bond or what type of audit is acceptable to the DOL. "Non-qualified" pension plan assets may include limited partnerships, artwork, collectibles, mortgages, real estate and securities of "closely-held" companies that are typically held outside of regulated institutions such as a bank; an insurance company; a registered broker-dealer or other organization authorized to act as trustee for individual retirement accounts under Internal Revenue Code §408. If a plan has 5% or more in "unqualified" assets, plan sponsors have two choices 1). a fidelity bond equal to 100% of the value of the "non-qualified asset" or 2). an annual "full-scope" CPA audit where the CPA physically confirms the existence of the assets at the start and end of the plan year. A limited-scope audit, where the accountant bases the audit opinion on another party's review of the operation, is not sufficient to satisfy the DOL regulations for non-qualifying assets. Whether a plan sponsor chooses a fidelity bond or an audit for their non-qualified plan assets, it is essential to be in compliance with the Department of Labor regulations. Call us if you need help with a bond.

Warning: Courts force company to offer equal benefits to ALL retirees

Downsizing & retiree coverage warnings - All HR Personnel should use extreme caution when questioned by employees about benefits; even post-retirement benefits. A company recently lost it's case in the sixth circuit because even though the CEO wrote a clear letter & memo and they had proper SPDs that clearly stated the rights of the employer to make plan changes to reduce benefits when desired, an HR Assistant inadvertently offered contrary verbal advice to two employees but the sixth circuit court extended the ruling against the employer, to ALL Retirees! Moral ff the story: HR representatives should always assume they are acting in a fiduciary capacity & exercise extreme caution, especially during downsizings.

Employer wins coverage case

Regarding ERISA Preemption: Hardy v. Midland Enterprises Inc., 6th Cir., No. 01-4121. Midland won it's case for retiree health premium increases. Courts reject plaintiff Glenn Hardy's argument that Midland misinformed him in a letter explaining the health plan premiums. Midland's official health care plan document provided that Midland reserved the right to modify the plan for any reason at any time, the court noted (and was not contradicted in any communications). The higher court said Hardy was seeking a state law remedy for the losses he incurred because of the increased premiums for the health plan in alleged contravention of the 1995 letter explaining the plan's terms. These claims "relate to" the ERISA-governed health plan, in that they affect the relationship among the principal ERISA entities, the court said, and therefore, the claims are preempted by ERISA (so ERISA essentially saved the employer) and that all but one of Hardy's state law claims were preempted by ERISA.

A Saving Credit for Workers

The Savers Credit is great for building savings among low-income workers. This credit is new for 2002, and not widely known. The "saver's credit" provides a tax credit (i.e., a government match) for low-income workers who contribute to a retirement account. The maximum credit is 50 percent of contributions up to \$2,000. That means certain savers could get a federal income tax credit of \$1,000 by contributing to a 401(k) or an IRA. The saver's credit is contained in section 25B of the Internal Revenue Code, which was added by section 618 of the Economic Growth and Tax Relief Reconciliation Act of 2001.

The Savers Credit is scheduled to expire after 2006. It is not "refundable" (i.e., it can be paid to taxpayers in cash only if it exceeds their tax bill). So it has value only if a saver has to pay income tax. Many low-income workers don't because of the earned income tax credit.

This Savers Credit has not received wide attention but J. Mark Iwry, former Treasury Department benefits tax counsel now at Brookings, said it appears from Internal Revenue Service data that 3 1/2 million to 4 million taxpayers took the credit this past filing season. Also, 71 percent of employers in one survey said they found the credit increased participation by workers -- and 18 percent of those employers said the increase was significant. <http://www.washingtonpost.com/wp-dyn/articles/A37864-2003May10.html>

Salary reduction contributions to a 401(k) plan, whether or not those contributions give rise to the saver's credit, are taken into account in the nondiscrimination test for salary reduction contributions (the ADP test) for plans subject to that test. Also, voluntary after-tax employee contributions to a qualified plan, whether or not those contributions give rise to the saver's credit, are taken into account in the nondiscrimination test for employee after-tax contributions (the ACP test) for plans subject to that test.

The credit is available if you: are 18 or older, are not a full-time student, are not claimed as a dependent on someone else's return, and have adjusted gross income (shown on your tax return for the year of the credit) that does not exceed:
 \$50,000 if you are married filing jointly,
 \$37,500 if you are a head of household with a qualifying person, or
 \$25,000 if you are single or married filing separately.

The saver's credit rate is based on the taxpayer's adjusted gross income for the taxable year for which the credit is claimed, as follows:

Married Filing Jointly	Head of Household	All Other Filers	Credit
\$0 - \$30,000	\$0 - \$22,500	\$0 - \$15,000	50% of contribution Max is :\$1,000
\$30,001 - \$32,500	\$22,501 - \$24,375	\$15,001 - \$16,250	20% of contribution Max is : \$ 400
\$32,501 - \$50,000	\$24,376 - \$37,500	\$16,251-\$25,000	10% of contribution Max is : \$ 200
Over \$50,000	Over \$37,500	Over \$25,000	Credit not available - 0

For example, a taxpayer whose filing status is single with adjusted gross income of \$15,000 may be entitled to a credit equal to 50% of his or her contributions (up to \$2,000 of contributions).

Congressional Budget Office says number of uninsured overstated

The commonly cited figure of roughly 40 million Americans lacking health insurance overstates the case according to a new government CBO study; it may be 50% less! About 21 to 31 million are uninsured for an entire year, the CBO reported in "How Many People Lack Health Insurance and for How Long?" but they did not, make any formal policy recommendations. Full report: www.cbo.gov

IRS issues debit card health care reimbursement rules

The IRS has provided formal guidance for the use of electronic payment cards to pay qualified medical expenses from flexible spending accounts (FSAs) and the new consumer-driven health plans' health reimbursement arrangements (HRAs), effective by the end of this year. The ruling "is a positive development since HRA claims can now more easily be paid," interprets **John Hickman**, a partner at Alston & Bird. *However*, he notes that the ruling will generally require linkage between the HRA and major medical plan coverage. Certain conditions must also be met: Plan participants have to certify the card will be used only for eligible medical expenses, that expenses will not be reimbursed from any other source and that there is documentation for these expenses. FSA and HRA claims can be certified, substantiated and adjudicated electronically, so long as the card is **only** used with medical providers.

"Non-Qualified" Plan Assets Held to Higher Standards for ERISA Compliance

In the current DOL ERISA regulations, even small company plans with less than 100 participants must **A Bad Year for Benefit Costs** David M. Katz, of CFO magazine says Government data shows benefit costs jumped markedly last year; **medical**, DB plans get the blame & "From the point of view of private-sector employers, it's been a disastrous year for benefit costs". For the year ended March 2003, benefit expenses leaped 6.1 percent, greater than the 4.8 percent jump for the year ending March 2002, according to figures just released by the U.S. Bureau of Labor Statistics.

Much of the rise in benefit costs stemmed from surging health-insurance premiums. All told, employer costs for those benefits now account for nearly 30 percent of compensation costs, according to the bureau's statistics. (Include sick-time, Vacation, FICA, FUTA, etc., etc. & you bump into the nearly 50% mark as indicated by the US Chamber of commerce.).

FSAs –About FSAs long & tested history

These tax-advantaged health spending vehicles were first approved by Congress in 1978. FSAs allow an employee to authorize a pre-tax salary reduction amount, generally in the first month of a given calendar year, that will be transferred into an account to be used to pay directly for health care expenses, as defined quite broadly by section 213(d) of the Internal Revenue Code. FSA contributions are exempt from both income and payroll taxes. Although good for most any size employer, major U.S. firms are the most likely to offer FSAs however participation rates by employees remain relatively low, generally due to poor communications.

Employers try to contain or reduce welfare plan costs

In addition to retirement plans, employers should also examine employee welfare benefit plans and fringe benefit plans including plans that provide health benefits such as major medical, dental and vision benefits (whether they are insured or self-insured), medical expense reimbursement plans and health flexible spending arrangements (FSAs). They also include benefits such as life insurance, disability insurance, dependent care assistance, educational assistance, and qualified transportation fringe benefits. Employers have multiple options to contain these costs. For the first time in nearly 20 years, small *businesses say soaring health costs, not taxes are their biggest headache*; average health care costs rose 15% this year. Taxes had been No. 1 since 1986!

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30% of all health-care spending is wasted

When the Midwest Business Group on Health released a study last June that found that as much as 30% of all health-care spending is wasted on unnecessary or even dangerous services, employers around the country pricked up their ears. The MBGH study, "Reducing the Costs of Poor Quality Health Care through Responsible Purchasing Leadership," found that misuse and overuse may add between \$1,700 and \$2,000 per patient to medical costs overall.

FDA takes action

The FDA is moving to make the prescription antihistamines Allegra and Zyrtec, manufactured by Aventis Pharmaceuticals and Pfizer, respectively, available without a prescription, *against the wishes of the drug makers.*

FSA's: HIPAA PORTABILITY & PRIVACY

Health FSAs should comply with HIPAA's privacy rules. Health FSAs are subject to HIPAA privacy because they are "health plans." Although many health FSAs are "excepted benefits" for purposes of HIPAA's portability rules (i.e., HIPAA's rules regarding preexisting condition exclusions (PCEs), special enrollment, and nondiscrimination), they are not excepted benefits for purposes of HIPAA's administrative simplification provisions, including the privacy rules, unless it is a self-funded, self-administered group health plan with fewer than 50 participants & not administered by a TPA.

The DHHS Health Information Privacy Frequently Asked Questions (FAQs) was updated April 24, 2003. As "an employee welfare benefit plan under ERISA" that "pays for medical care," a health FSA is probably a group health plan under this guidance. Although the medical benefits provided under a cafeteria plan may constitute one or more ERISA employee welfare benefit plans, a cafeteria plan itself is not an ERISA employee welfare benefit plan—it is merely a funding vehicle for the underlying benefits. (See DOL Ad. Op. 96-12A (July 12, 1996).) HIPAA privacy rules became effective for most employers on **April 14, 2003** (small health plans have until April 14, 2004). "[FSAs] and cafeteria plans are not excluded from the definition of 'health plan' as excepted benefits, unless it has fewer than 50 participants and is self-administered."

Landmark lawsuit: Failure to obtain bond leads to termination of 401(k) plan

In a landmark case brought by the PWBA (Civil Action No. 1:00CV 889), a federal judge ordered the termination of a company 401(k) plan because the company and its majority owner had violated ERISA by failing to **bond** the pension plan offered to company employees.

Retirement plans should obtain *sufficient* bonding of the plan assets & they must fully comply. A precedent has been set and now the DOL's PWBA & the IRS will target more small companies, so your choice is either a fidelity bond or an audit. About Snyder: www.dol.gov/ebsa/newsroom/pr032901.html
More on compliance with ERISA www.dol.gov/ebsa/compliance_assistance.html

Frequent SPD's are STILL critical & key to legal protection

Current Legal action: Plan Administrator was Liable for Damages for Inadequate Delivery of SPD
[Leyda v. AlliedSignal, Inc., 2003 U.S. App. LEXIS 3728 (2d Cir. 2003)]

For safety: distribute detailed current SPDs to all employees - often

It is imperative to review your SPDs to ensure they contain all of the information now required under DOL Regulation 2520.102-3 and they must be written in plain language that is calculated to be understood by the average plan participant (ERISA 102(a)).

Reducing benefits? Exceeding SOMM deadlines are vital surety to avoid employer liability!

Use caution to avoid violations of ERISA's accelerated 60-day SOMM disclosure rule for group health plans

Miscellaneous proposed bills affecting health care financing, including sec. 125 plans

H.R. 176 by Royce (R-CA) - Would amend IRC § 125 to allow employees to carryover up to \$2,000 of unused health flexible spending account money to a subsequent year, but on a taxable basis.

H.R. 1776 Rob Portman (R-Ohio) & Benjamin Cardin (D-Md.) introduced The Pension Preservation and Savings Expansion Act of 2003 (H.R. 1776) on April 11, 2003. It would amend IRC § 125 to allow employees to roll up to \$500 of unused flexible spending account money into their 401(k), 403(b), 457 or IRA at the end of the year, subject to existing limits on plan and IRA contributions *and* would permit retirees to use pre-tax retirement plan distributions to pay for retiree medical premiums.

It would also allow employers with defined contribution plans such as 401(k)s to fund a modest portion of retiree medical expenses on a pre-tax basis. If enacted it would affect: EGTRRA Permanence and Acceleration - Pension Portability - Plan Administration (DB & DC & Gvt. plans) & Limitations on Executive Compensation.

The American Benefits Council published an executive briefing that summarizes H.R. 1776, visit:
www.americanbenefitscouncil.org/documents/hr1776_abccchart_042203.pdf

Also see: www.house.gov/cardin/Press_Releases_2003/0411a2003_pr.htm for a *summary*.

Or the entire text: <http://thomas.loc.gov/> Then enter Pension Preservation in the search word/phrase box

H.R. 1177 by DeMint (R-SC) Would amend IRC §125 to allow up to \$500 of unused funds in a health Flexible Spending Account (FSA) to be carried over to the following year or cashed-out and included in gross income. Unused funds could also be contributed to a 401(k) plan, 403(b) plan, governmental 457(b) plan, or medical savings account (MSA). It already has more than 40 co-sponsors including Rep. Albert Wynn (D-Md); other influential supporters include the National Association of Manufacturers & the ECFC. H.R. 1177 is identical to the previous Bush proposal to make 125 plan rules more liberal.

Coming soon: an EEOC proposed rule on reducing retiree benefits

The Equal Employment Opportunity Commission expects to publish by mid-June a proposed rule that will make clear that altering, reducing or eliminating employer-sponsored health benefits when a retiree becomes eligible for Medicare does not violate federal age discrimination law. This will allay employer fears that common retiree health care plan designs could trigger litigation by the EEOC.

More Companies Cut Contributions

A growing number of companies, searching for ways to cut costs, are suspending their matching contributions to workers' 401(k) retirement accounts.

Charles Schwab & Co. won wide attention in March because it cut matches while Schwab has been outspoken in its support of the investment vehicle; Schwab is not alone, as many companies are now cutting back.

Employers try to contain or reduce welfare plan costs

In addition to retirement plans, employers should also examine employee welfare benefit plans and fringe benefit plans including plans that provide health benefits such as major medical, dental and vision benefits (whether they are insured or self-insured), medical expense reimbursement plans and health flexible spending arrangements (FSAs). They also include benefits such as life insurance, disability insurance, dependent care assistance, educational assistance, and qualified transportation fringe benefits. Employers have multiple options to contain these costs. For the first time in nearly 20 years, small *businesses say soaring health costs, not taxes are their biggest headache*; average health care costs rose 15% this year. Taxes had been No. 1 since 1986!

Gephardt Proposes Near-Universal Healthcare scheme: Giving Health Care to All Americans

With an initial cost of about \$210 billion a year, and Gephardt said he would scrap **all** of President Bush's tax cuts to help pay for it. "This is the right way to stimulate the economy, not knee-jerk tax cuts that do nothing but pay off George Bush's wealthy campaign contributors while killing economic growth," Gephardt said in a speech to the Service Employees International Union, Local 1199. He added that his plan would produce "an economic stimulus more powerful than any this country has ever seen." Gephardt's proposal would *require all employers* to provide private health insurance to their workers and would offer refundable tax credits to corporations, including those who now offer insurance, to offset 60 percent of their insurance costs. In substituting his plan for Bush's tax cuts, Gephardt guarantees that, if he were to win the election, the deficits would continue unabated. He made clear that eliminating the deficit during his presidency would be neither likely nor a priority. - Ken Thorpe, of Emory University worked on the failed Clinton plan & did an analysis that projects Gephardt's plan costs at \$213 billion in the first year and \$247 billion by the third year, for a three-year cost of \$690 billion. - Gephardt's plan contains no provision to contain health care costs, so his scheme will be significantly more expensive than projected. – Some politicians called Gephardt's plan "a pie-in-the-sky, radical revamping of our health care system". We must ask three simple but important questions:

1. Does the proposal add to the cost and complexity of the health care system?
2. Will working families maintain access to the choices and health care innovations now available in the private market, or will they be forced into a one-size-fits-all government-administered program (i.e. Canadian style)?
3. Does the proposal address the underlying drivers of rising costs like lawsuits, mandates and waste, fraud and abuse, things that do not contribute to the quality of care but do squeeze consumers out the system and good doctors out of business?

Prior Bush proposals

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Retirement Savings Accounts (RSAs) *And*
Employer Retirement Savings Accounts (ERSAs) which consolidates 401(k), SIMPLE 401(k), 403(b),
governmental 457, SARSEPs, and SIMPLE IRAs into ERSAs
Plus liberalized Section 125 Medical FSA rules

Proposed Effective Date: in 2003.

These Bush proposals are still Viable & good plans but look for more proposals like the newer Portman/Cardin ideas.

NOTE: the Wall Street Journal (05/05/03) reports the Senate Finance Committee's tax package may not include the dividend-tax relief that President Bush wants unless they can muster more support for it & said Finance Chairman Charles Grassley (R., Iowa) is inclined to leave it aside (more to come).

Uniformed Services Employment and Reemployment Rights Act (USERRA)

AFL-CIO Reserves Web Site For Military Service ~ *This is a very thorough, informational site.*

www.aflcio.org/reserverights

The AFL-CIO has launched an online information resource for reservists and their families about their job rights. The Web site serves as a refresher course on the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), which provides guidelines employers, regardless of size, must follow when military reservists and the members of the National Guard return to work following their service. It contains information on benefits for reservists, a 19-page US Department of Labor fact sheet on USERRA & a link to the Employer Support of the Guard and Reserve Web site that includes frequently asked questions about the rights of employees on active duty - **http://www.dol.gov/ebsa/faqs/faq_911_2.html**
On a very generalized basis, it is similar to COBRA (but for public corps there are compensation considerations).

HHS Announces Compliant Procedures For HIPAA Privacy Violations

The department of Health and Human Services (HHS) announced the addresses of regional offices where *employees can file complaints* against their employers for HIPAA medical privacy violations. This should serve as a warning to all employers to be fully compliant with the privacy rule that went into effect on April 14th. The announcement was made in late March in the Federal Register. It also includes information on how to file a complaint. Employers should make sure they are following the new rules - to avoid employee complaints & hefty fines. Investigations will be based on employee complaints and as employees become more aware of their rights, they will complain if they feel those rights are violated.

Are your day-to-day operations protecting privacy rights sufficiently?

Consumers can now go online at the Office of Civil Right's web site and download the Complaint Form & learn how to file a health information privacy complaint with The Office For Civil Rights:

www.hhs.gov/ocr/howtofileprivacy.htm

The Form: **www.hhs.gov/ocr/howtofileprivacy.pdf** or **www.hhs.gov/ocr/howtofileprivacy.doc**

e-mail: **OCRComplaint@hhs.gov** Or call OCR (toll-free) at: 1-866-627-7748

To Learn more about the Civil Money Penalties: **www.hhs.gov/ocr/moneypenalties.html**

Civil money penalties (CMPs) of \$100 per violation (up to a maximum of \$25,000 per calendar year for identical violations) may be imposed on a covered entity for violations of HIPAA administration errors.

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Covered entities then *have only 60 days to respond* stating exactly why they dispute the HHS accusations and how they would make arguments to an appeal judge otherwise, they will lose their appeal rights www.hhs.gov/ocr/index.html.

Council on Flexible Compensation (ECFC) Technical Advisory Committee

Russ Weinheimer of the IRS's Associate Chief Counsel's Office--commented on a variety of issues in an informal, non-binding basis during the March 2003 Annual ECFC Conference in Arlington, Virginia.

Regarding Cobra And Pre-Tax Salary Reductions: Mr. Weinheimer said that it was his view that the loss of the ability to fund one's health insurance coverage on a pre-tax basis is not a loss of coverage for COBRA purposes if the employee retains the right to pay for that coverage on an after-tax basis.

John Hickman, a leading benefits attorney and partner with Alston & Bird and chair of Council on Flexible Compensation (ECFC) Technical Advisory Committee commented:

The growth of health reimbursement arrangements (HRAs) could be slowed or complicated depending on how several U.S. government agencies rule on various issues, HRAs Must Contend With Federal Agency Rulings (2003 ECFC annual conference).

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U.S. Department of Health and Human Services (HHS) -- on how electronic data interchange affects payments from health plans to providers;

HHS, the Internal Revenue Service (IRS), and the U.S. Department of Labor -- on whether the Health Insurance Portability and Accountability Act's nondiscrimination rules apply to HRAs;

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IRS Finalizes Rules On Notice Of Future Benefit Reductions, rules are effective April 9, 2003

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Overall, the final regulations retain the structure of the proposed regulations, and include some expanded examples of notices. Proposed regulations under Section 411(d)(6) are expected from Treasury and the IRS, which will include general guidance on early retirement benefits and retirement-type subsidies.

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HR & Benefits News

It's here: HIPAA Privacy Rule requirements

Effect April 14, 2003 for most large health plans but delayed until April 14, 2004 for small health plans having annual receipts of \$5 million or less.

The Pension Preservation and Savings Expansion Act of 2003 (H.R. 1776)

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Sec. 125 FSA proposals

Rep. Jim DeMint (R-S.C.) re-introduced legislation to allow participants in health flexible spending accounts (FSAs) to roll over up to \$500 in unspent contributions to the following year's account.

H.R. 1177 was introduced March 11 and already has more than 40 co-sponsors including Rep. Albert Wynn (D-Md); other influential supporters include the National Association of Manufacturers & the ECFC. It would repeal Code Section 125's "use-it-or-lose-it" requirement allowing participants with health flexible spending accounts (FSAs) to keep up to \$500 in unspent funds for use the following year. *Alternatively*, unused FSA account balances (up to \$500) could be taken as taxable cash (includible in gross income) or transferred to a defined contribution retirement plan or to an MSA thus encouraging savings for unexpected medical expenses.

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Frequent SPD's are STILL critical & key to legal protection

Current Legal action: Plan Administrator was Liable for Damages for Inadequate Delivery of SPD
[Leyda v. AlliedSignal, Inc., 2003 U.S. App. LEXIS 3728 (2d Cir. 2003)]

For safety: distribute detailed current SPDs to all employees - often

It is imperative to review your SPDs to ensure they contain all of the information now required under DOL Regulation 2520.102-3 and they must be written in plain language that is calculated to be understood by the average plan participant (ERISA 102(a)).

Reducing benefits? Exceeding SOMM deadlines are vital surety to avoid employer liability!

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