KAUFMAN & CANOLES
attorneys at law

employee benefits alert

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OBAMA HEALTH CARE REFORM ENACTED

As we go to press with this K&C Benefits Alert, historic healthcare reform legislation has been approved by Congress. On Sunday, March 21, 2010, the House of Representatives voted to approve the "Affordable Health Care for America Act" (the "Act") a version of which had been previously passed by the Senate. Though political maneuvering continues, the President is expected to sign the Act in law as early as Tuesday, March 23, 2010.

From the House Ways and Means Committee summary, key provisions of the Act include:

Health Care Reform Summary

Provision	Effective Date
Tax Credits: • Small business tax credit – 35% of premium costs of health insurance (50% in 2014) for companies with fewer than 50 employees	2010
Insurance Reforms: • Children may stay on parents' health plan until age 26	2010
• No denials based on pre-existing conditions – children (all persons in 2014)	2010
• No cancellation of coverage based on claims history	2010
• No lifetime limits or annual caps on coverage	2010
• Preventative care – check-ups, physicals, must be provided with no co-pays or deductibles	2010
• Plans must spend 80 to 85% of total premiums on medical services (as opposed to administrative costs)	2011
Taxes: • Medicare payroll taxes increase from 1.45% to 2.35% for singles earning more than $200,000 and families earning more than $250,000; plus 3.8% tax on investment income at these income levels	2013
Mandates: • Individual mandate – individuals will be required to get insurance or pay a fine	2014
• Employer mandate – businesses with 50 or more employees must offer insurance or pay penalty of $2,000 per worker per year	2014
Other: • Health Care Exchanges – state-based marketplaces will open to provide individuals and small businesses a forum to shop for affordable insurance	2014
• Subsidies – Federal government will offer subsidies to families making up to $88,000 per year, to cover the cost of health insurance	2014

The Act is a complex and lengthy (over 2,000 pages) piece of legislation affecting virtually every American citizen and business. Expect voluminous regulations to be issued implementing this landmark new law. Look for additional information from us in the near future as details emerge.

APRIL 30 EGTRRA DEADLINE FOR EMPLOYERS USING PROTOTYPE PLANS

Employers using preapproved prototype plan documents for their 401(k), profit sharing, or other defined contribution plans should be aware that amendments reflecting changes made by the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") must be adopted ***no later than April 30, 2010.***

The sponsor of the prototype document should already have issued draft amendments or restated adoption agreements for your approval. These amendments must be signed and dated no later than April 30, 2010 in order to remain in compliance with IRS qualification requirements. A signed and dated copy of the revised adoption agreement should be kept on file with the employer, and a second copy returned to the office of the prototype sponsor.

For adopters of the Kaufman & Canoles prototype plan, please return your signed and dated EGTRRA adoption agreement to the attention of Richard C. Mapp, III at our Norfolk office, P.O. Box 3037, Norfolk VA, 23510.

EXTENSION OF FEDERAL COBRA SUBSIDY

The Temporary Extension Act of 2010 (the "Act"), enacted March 2, extends the existing COBRA subsidy program to cover health plan participants who are involuntarily terminated through the end of March, 2010. The Act also makes important changes to some of the subsidy programs eligibility and notice requirements.

Among the changes made by the Act, the 65% COBRA subsidy must now be made available to employees who first became eligible for COBRA due to a reduction in hours, and then subsequently experienced an involuntary termination of employment. Additionally, these individuals must be given an opportunity to "re-elect" COBRA coverage for an additional 15-month period after the date of their subsequent termination.

Another important change made by the Act is that individuals who believe they should be eligible for the COBRA subsidy now have the right to sue employers in Federal court to enforce their right to receive the subsidy. Employers may face an additional $10/day penalty for any failures to offer the subsidy to eligible individuals.

Employers who have experienced workforce reductions since March 1 should delay sending out COBRA notice materials until new model notices are published by the Department of Labor. Please contact a member of our Employee Benefits team if you have any additional questions about the impact of these revisions to the COBRA subsidy program.

IRS ANNOUNCES CORRECTION PROGRAM FOR NONQUALIFIED DEFERRED COMPENSATION PLAN FAILURES

Section 409A of the Internal Revenue Code, which generally became effective on January 1, 2005, imposed numerous new requirements applicable to nonqualified deferred compensation plans. One of the requirements of 409A is that a nonqualified deferred compensation plan in existence anytime after January 1, 2005 is deemed to violate 409A unless a plan document containing all required terms was adopted by the employer no later than December 31, 2008.

Until recently, the IRS had not provided a formal mechanism for employers to correct failures to meet this plan document deadline or to otherwise correct deficiencies in plan documents that were adopted within the deadline. Thus, if an employer failed to adopt a 409A-compliant plan by December 31, 2008, any executives covered under the plan would face the ongoing possibility of substantial tax penalties in the event that the employer's error was subsequently discovered on audit.

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The IRS has now approved a 409A document correction program that allows employers to voluntarily adopt 409A-compliant plan documents without subjecting covered executives to adverse tax consequences. Under the terms of the program, outlined in IRS Notice 2010-6, plan documents that are consistent with the requirements of 409A may be adopted during a special window period ending December 31, 2010, or December 31, 2011 for certain enumerated document failures.

This guidance gives employers who failed to satisfy the initial deadline a valuable "get out of jail free" card, provided that the employer adopts or amends all covered plan documents prior to December 31, 2010. Contact a member of our Employee Benefits team if you have any nonqualified plans that may have slipped through the cracks with respect to the initial 409A compliance deadline.

FIDUCIARY BEST PRACTICE: 401(K) FEE BENCHMARKING

A wave of recent litigation has highlighted the risks associated with 401(k) investment fees. Several lawsuits have been filed against major employers and 401(k) service providers alleging either that the fees charged by the 401(k) investment funds are excessive, or that the service provider who recommended the funds has a conflict of interest due to receipt of compensation paid by the funds. Plan fiduciaries face potential personal liability for any excessive or improper fees charged through the 401(k) investment funds to plan participants.

To protect against this risk, we recommend that 401(k) sponsors conduct a periodic review of the fees charged by their current 401(k) investment funds to ensure they are reasonable in comparison with fees charged by comparable funds in the marketplace. It is important to review not only the total amount of fees charged to plan participants, but also the amount of fees that are paid to the broker or investment advisor pursuant to so-called "revenue sharing" or 12(b)(1) arrangements. While it may prove difficult for an individual employer to gather this information on its own, a number of consultants specializing in 401(k) fee benchmarking have emerged in recent years. A competent consultant should work for a low fixed rate and should also be willing to serve as co-fiduciary of the 401(k) plan with respect to the selection of investment funds.

Contact a member of our Employee Benefit Practice Group to discuss the costs and benefits associated with 401(k) fee benchmarking analysis.

USING ROTH IRA ASSETS TO PURCHASE A BUSINESS

Starting in 2010, high-income taxpayers are now permitted for the first time to convert a traditional IRA to a Roth IRA. Unlike a traditional IRA, distributions from a Roth IRA are tax-free and also possess certain other advantages, such as exemption from the required minimum distribution rules that require holders of a traditional IRA to start taking taxable distributions beginning at age 70-1/2.

One potential use of Roth IRA assets that may have some appeal for high-income individuals is the use of tax-free assets to start or acquire a small business. In a previous client alert, we outlined a strategy that can be used to allow an individual to use assets held in a Roth IRA to purchase a business startup: the Roth Business Ownership Plan, or Roth-BOP.

This strategy, while initially controversial, has recently been approved in informal comments by the IRS, provided that care is taken to ensure that all IRS requirements (including rules governing the valuation of any assets acquired by the Roth IRA and rules requiring other employees of the acquired business to be given an opportunity to invest in the business).

Despite this seal of approval, numerous traps await the unwary. Knowledgeable legal counsel should be retained before attempting to structure a Roth-BOP transaction. Our Employee Benefits team has experience designing these Roth-BOP transactions from the ground up and is available to consult in order to help determine whether such a transaction might make sense to you or to a targeted group of your executives.

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IN THIS ISSUE

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EMPLOYEE BENEFITS, ESOPs & EXECUTIVE COMPENSATION

who we are

Employee benefits have grown recently to encompass more than one-third of the compensation budget of most employers.

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 legislation since ERISA, the federal government plays an active role in how you plan and administer your employee benefits programs. Every employee benefits program demands frequent reexamination in light of fast-changing federal law and regulation.

The Employee Benefits Group at Kaufman & Canoles works with the legal, financial, and human resource professionals of our clients to implement and maintain the most effective and cost-efficient benefits programs. We serve government contractors, manufacturers, sales and distribution companies, technology ventures, and non-profit organizations. We also serve banking and finance, healthcare providers and systems, and professional services firms. Our clients include international companies, publicly traded corporations and state and local governments.

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