HOLLAND&HART
BENEFITS LAW GROUP

News Alert

October 28, 2008

EESA: A Potpourri Of Employee Benefits Provisions

Holland & Hart is the largest law firm in the Rocky Mountains, providing a complete range of legal services to a diverse group of commercial and individual clients.

The firm offers an extensive network of legal talent and resources equipped to assist businesses in every stage of development, and in all facets of the law.

For more information, visit the Holland & Hart web site at www.hollandhart.com.

It seems almost every major piece of legislation Congress passes has some impact on employers and their benefit plans, and the Emergency Economic Stabilization Act of 2008 (EESA) is no exception. EESA was signed into law earlier this month, and includes a potpourri of employee benefits issues including mental health parity, coverage of college student dependents on leave of absence from school, as well as new standards related to executive compensation and corporate governance.

Mental Health Parity. The Mental Health Parity Act (MHPA)is a federal law that amended the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code and the Public Health Security Act to prohibit group health plans from applying lower annual or aggregate lifetime dollar limits to mental health and substance use benefits than were applied to medical and surgical benefits. While the MHPA rules do not require group health plans to provide mental health and substance use benefits, if mental health benefits are offered, they have to be offered on a level that is on par with medical/surgical benefits. If group health plans fail to meet the mental health parity requirements, an excise tax will be imposed on the plan sponsor.

In addition to making these existing parity rules permanent, EESA will require a group health plan (defined as a plan of an employer with 51 or more employees in the prior calendar year) to ensure that the "financial requirements" and "treatment limitations" that apply to mental health or substance abuse benefits are not more restrictive than the predominant requirements and limitations that apply to medical/surgical benefits under the plan. "Financial requirements" include requirements such as deductibles, copays and out-of-pocket expenses – which means that a plan cannot have a cost-sharing mechanism that applies only to mental health or substance abuse benefits. "Treatment limitations" are limitations such as the duration of coverage, number of visits or frequency of treatment. Moreover, EESA provides that if out-of-network coverage is provided, except in the area of mental health or substance abuse, out-of-network coverage must be provided to mental health and substance abuse treatment as well.

The new requirements are effective in plan years beginning after October 3, 2009. Thus, for calendar year plans, these provisions are effective January 1, 2010. If your health plan provides more restrictive coverage for mental health care or substance use than those for medical and surgical benefits covered by the plan, adjustments must be made in the benefit coverages in order to comply with the new law. In addition, if your plan has separate cost-sharing requirements or treatment limitations applicable to only mental health or substance use disorder benefits, these will need to be eliminated or applied to all benefits equally. Finally, out-of-network mental health services must be comparable to out-of-network medical and surgical benefits.

Coverage of College Students on Leave. A provision of EESA known as "Michelle's Law" imposes new restrictions on the ability of group medical plans to terminate coverage of college-age dependents. Beginning in 2010 (for calendar year plans), a college student covered under his or her parent's health plan as a dependent cannot be dropped from the plan if the student is on a "medically necessary leave of absence" from school. The plan is generally required to maintain coverage for one year, and is entitled to require written certification from the student's treating physician documenting the medical necessity.

Before January 2010, you will want to review your plan's provisions regarding termination of coverage for dependents, and make any necessary revisions to sustain coverage for college-age dependents in these circumstances.

Bicycling as Qualified Transportation Fringe. EESA expanded the types of commuting costs that employers may reimburse under a Section 132(f) qualified transportation fringe benefit program. Beginning in 2009, employers may reimburse employees for expenses incurred for the purchase of a bicycle and bicycle improvements, repair, and storage if the bicycle is regularly used for travel between the employee's residence and place of employment. The maximum reimbursement is $20 per month, and cannot be used if the employee claims any other type of qualified transportation fringe reimbursement during that month.

If you wish to reimburse employees for bicycle commuting costs in 2009, you will need to amend (or adopt) your transportation plan before December 31, 2008, and also will want to make sure your payroll and administrative practices are in place before January.

Executive Compensation. EESA added a new Section 457A to the Internal Revenue Code that is intended to stem practices commonly used by hedge fund managers to defer fee income from foreign hedge funds. Individuals who receive deferred compensation from a no-tax jurisdiction (such as an offshore corporation) can no longer defer paying tax on the compensation until the compensation is paid. Instead, individuals will be taxed on a current basis, and if the requirements of Section 457A are not satisfied, a 20% penalty and interest charge may be imposed. The requirements of Section 457A apply in addition to, and not in lieu of, the requirements of Section 409A, and the new rules generally apply to amounts attributable to services performed on or after January 1, 2009.

Significant changes also were made to the executive compensation rules for financial institutions that are taking advantage of the Troubled Assets Relief Program (TARP), one aspect of the U.S. government's response to the financial crisis. Financial institutions that make a direct sale of troubled assets to the U.S. Treasury in conjunction with TARP are subject to new standards for executive compensation and corporate governance, such as:

- a reduction of the Section 162(m) cap on annual deductions for certain executive compensation from $1 million to $500,000;
- a ban on golden parachute payments to certain executives;
- limits on incentive compensation that encourage executives to take unnecessary and excessive risks; and
- a clawback of compensation that was paid to executives on the basis of financial criteria that are later proven to be materially inaccurate.

For other benefits-related information on the financial crisis, click here. You may also contact a member of the Benefits Law Group with any questions pertaining to executive compensation and employee benefits.

Jane Francis
jfrancis@hollandhart.com
(303) 295-8599
Denver

Rebecca Hudson
rhudson@hollandhart.com
(303) 295-8005
Denver

Elizabeth Nedrow
enedrow@hollandhart.com
(406) 252-2166
Billings

HOLLAND&HART LLP
BENEFITS LAW GROUP

News Alert

Leslie Thomson
lthomson@hollandhart.com
(406) 252-2166
Billings

Brenda Berg
brberg@hollandhart.com
(303) 295-8029
Denver

This Holland & Hart Alert is an advertisement used to provide our clients and friends with timely information regarding recent developments in the law. This news alert has been sent to you for informational purposes only and should not be interpreted as legal advice.

We at Holland & Hart believe we are sending this news alert with your permission. If you feel you have received this news alert in error or don't wish to receive future news alerts from us, please contact us 303-295-8365, and accept our apologies for the intrusion.

For questions regarding this Alert, please contact
Beth Nedrow, Holland & Hart LLP, 401 North 31st Street, Suite 1500, Billings MT 59101
Phone: 406-252-2166 | enedrow@hollandhart.com