

## Service

Employee Benefits &  
Executive  
Compensation

# Recent Developments in the Benefits World

The following highlights some recent developments that we found particularly noteworthy for our clients and friends. We intend this newsletter to serve as a "checklist" for future reference as opposed to a comprehensive summary. If you would like to discuss any of these matters in more detail, please contact one of the members of our group.

**Section 409A Compliance Deadline:** Although the Section 409A rules have been in effect since January 1, 2005, the deadline for amending non-qualified deferred compensation arrangements is December 31, 2008. This deadline is not expected to be extended again. Current IRS guidance allows participants and employers to change the time and form of payments under the non-qualified deferred compensation arrangement through the end of this year without violating Section 409A.

**Section 162(m) Changes Affecting Employment Agreements:** Earlier this year the IRS changed its longstanding ruling policy with respect to what qualifies as "performance-based compensation" that is exempt from the \$1,000,000 limitation on a public company's deduction for certain executives' compensation. Under the new guidance, if compensation is payable whether or not the applicable performance goal is attained upon termination for cause, for good reason, or upon voluntary retirement, the compensation is not "qualified performance-based compensation." This new IRS position applies to performance periods beginning after January 1, 2009, if the agreement was entered into or renewed after February 21, 2008. All new and existing employment agreements with covered persons should be reviewed and if

necessary amended before the effective date of the IRS new policy to ensure deductibility under Section 162(m). To see IRS Revenue Ruling 2008-13, [click here](#).

**Section 403(b) Regulations take effect January 1, 2009:** With final regulations under IRC 403(b) set to be effective January 1, 2009, plans must be adopted or amended no later than December 31, 2008, and any required information-sharing agreements with vendors must also be adopted this year. IRS officials have stated that the IRS is developing a program for pre-approved plans, but it is not likely to be in place in time to comply with the January 1, 2009 deadline.

**U.S. Supreme Court on a Conflicted Administrator:** The Supreme Court decided June 19, 2008 that an insurance company which both determines eligibility for benefits and pays benefits out of its own funds has a conflict of interest, and this conflict should be a factor in determining whether the administrator has abused its discretion in denying benefits. The Court did not prescribe how such a conflict should matter in a claim dispute, but did suggest steps that can be taken to minimize the role of a conflict. These steps include (1) walling off claims administrators from those responsible for firm finances; and (2) imposing management checks that penalize inaccurate decision making without regard to whom the inaccuracy benefits. Similar principles may apply if the employer is the plan administrator for a self-insured plan. For the text of the decision in *Metropolitan Life Ins. Co. v. Glenn*, [click here](#).

**Qualified Default Investment Alternatives:** The Employee Benefits Security Administration recently issued guidance to update the regulations regarding qualified default investment alternatives (QDIAs). The guidance addressed the scope of the QDIA regulation, notice requirements, limits on fees and investment restrictions for the 90 day period following the first investment in a QDIA on behalf of a participant, grandfather-type relief for stable value funds, and more. To see Field Assistance Bulletin 2008-3, [click here](#).

**Heroes Act Enhancing Benefits for Military Personnel:** On June 17, 2008, the President signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008, which had passed Congress unanimously. The Heroes Act requires qualified plans to provide enhanced benefits to survivors of a plan participant who dies while performing qualified military service, and permits certain enhancements under qualified plans and health FSAs for participants who have qualified military service. The Act is effective as of June 17, 2008 but plan amendments are not required to be

adopted before the end of the 2010 plan year. The Heroes Act also extends the Mental Health Parity Act sunset to December 31, 2008. To see the full Act, [click here](#).

**Genetic Information Nondiscrimination Act of 2008:** GINA was signed into law on May 21, 2008, and prohibits employers sponsoring health plans from restricting enrollment or adjusting premiums on the basis of genetic information, or using or disclosing protected health information that is genetic information for underwriting purposes. GINA adds civil penalties to ERISA and the Public Health Service Act for violations. GINA requires final regulations to be adopted within one year after enactment, and is effective with respect to group health plans for plan years beginning after the first anniversary after enactment, i.e., plan years beginning after May 21, 2009. To see a summary of the new law, [click here](#).

Questions? Contact the attorneys in our Employee Benefits & Executive Compensation group.

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