BenefitBeat

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FMLA-Expanded? Clarified? When Can Leave Be Taken to Care for Adult Son or Daughter

The Family and Medical Leave Act applicable to employers employing 50 or more employees, provides eligible employees with time off to attend to ones' own serious health condition, as well as time off to care for family members. Generally, the law has defined family member to include: a spouse, a parent, or a child under the age of 18, except to the extent the child is disabled.

The Department of Labor has recently issued ***guidance*** clarifying when time off can be taken to care for an adult child. Of particular note, although the adult child must be disabled, the disability need not have existed when the child was a minor.

The definition of disability is the same as that used by the Americans with Disabilities Act ("ADA") and should be construed broadly. The ADA defines disability as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.

Finally, to be entitled to take leave, the adult child must need assistance with three or more activities of daily living (ADL).

Plan Communication is Key and Make it Accurate

In 2011, the Supreme Court opined on the conflict among plan communication, such as the plan document and the summary plan description (SPD) in *CIGNA Corp v. Amara* (see ***Plan…Summary Plan Description …Which One Governs?***, *Benefit Beat,* 6/7/2011). The case was remanded to the trial court to determine whether equitable relief would be available due to the conflicting information provided to plan participants.

In December, 2012, the U. S. District Court of Connecticut determined that, in fact, equitable relief is owed plan participants due to misleading information contained in the SPD (*Amara v. CIGNA Corp*., No 3:01-cv-2361, D. Conn. Dec. 20, 2012).

While this case may wind its way back up through the courts, it is nevertheless, a reminder of how important it is to ensure that all plan communications are accurate and consistent.

Delinquent Filer Voluntary Compliance (DFVC) Program

Several years ago, a Delinquent Filer Voluntary Compliance (DFVC) Program was instituted to encourage ERISA plans to bring their annual filing into compliance (see ***Delinquent Filer Voluntary Compliance (DFVC) Program Update***, *Benefit Beat*, 4/1/2002). The incentive, of course, is significantly reduced penalties.

For plans with fewer than 100 participants at the beginning of the plan year, the applicable penalty amount is $10 per day for each day the annual report is filed after the date on which the annual report was due, not to exceed the greater of:

- $750 per annual report or,
- in the case of a DFVC Program submission relating to more than one delinquent annual report for the plan, $1,500 per plan.

For plans with 100 or more participants at the beginning of the plan year, the applicable penalty amount is $10 per day for each day the annual report is filed after the date on which the annual report was due, not to exceed the greater of:

- $2,000 per annual report; or
- in the case of a DFVC Program submission relating to more than one delinquent annual report for the plan, $4,000 per plan.

In January, 2013, the Department of Labor issued a ***Technical Update***, a ***Fact Sheet*** and ***FAQs*** restating and updating the program.

Of particular note, all filings must be made electronically and generally, filings are made on the current year Form 5500, though there is a ***chart*** to determine what forms and schedules to include. This is particularly important since there have been significant revisions to the Form 5500 and schedules in recent years. Also included in the recently issued guidance is a ***tool*** to assist in calculating the penalties.

Employee Plans Compliance Resolution System (EPCRS)

Again in an effort to give plans an opportunity to correct mistakes, the government established an Employee Plans Compliance Resolution System (EPCRS). This program has been recently modified.

Any plan anticipating need to avail itself of the program, should review this guidance (***Revenue Procedure 2013-12***) carefully. While it will take effect April 1, 2013, plans can begin using the new forms (see IRS' ***Correcting Plan Errors – Fill-in VCP Submission Documents***) and procedures immediately. Some of the corrections that are highlighted in the new program include:

- Self-Correction Program ("SCP")
- Voluntary Correction Program ("VCP"), and
- Audit Closing Agreement Program ("Audit CAP").

The guidance includes a ***chart*** of changes to the EPCRS program.

Updated IRS Publications

The IRS has recently updated several publications that may be of interest to employers:

- ***Publication 15-B. Employer's Tax Guide to Fringe Benefits***
- ***Publication 502. Medical and Dental Expenses***. For certain purposes, this publication can be used to determine expenses that are reimbursable from plans such as flexible medical spending accounts and health savings accounts; though, it is important to note that there are differences between deductible expenses and those reimbursable from such plans.
- ***Publication 503. Child and Dependent Care Expenses***. Note: exercise caution when relying upon this publication, because the dependent care credit is different from the dependent care assistance credit.
- ***Publication 969. Health Savings Accounts and Other Tax-Favored Health Plans***

Qualified Transportation Expenses

As mentioned in the January *Benefit Beat* (see ***Benefit and Compensation Changes Included in Fiscal Cliff Law***), the American Taxpayer Relief Act has retroactively extended the maximum qualified transportation benefit applicable to mass transit and van pooling. In effect for 2012 and 2013, the mass transit benefit mirrors the qualified parking benefit which was $240 for 2012 and $245 for 2013.

If a plan can avail itself of the $240 maximum for 2012, guidance has been provided on how to correct the taxes (see ***IRS Notice 2013-08***).

About the Author: Karen R. McLeese is Vice President of Employee Benefit Regulatory Affairs for CBIZ Benefits & Insurance Services, Inc., a division of CBIZ, Inc. She serves as in-house counsel, with particular emphasis on monitoring and interpreting state and federal employee benefits law. Ms. McLeese is based in the CBIZ Leawood, Kansas office.