



Employee Benefits Law Information Memo

December 2010

Electronic Dispatch

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TAX BREAK EXTENSION LEGISLATION INCLUDES EMPLOYEE BENEFITS PROVISIONS AND IRS DELAYS COMPLIANCE WITH NONDISCRIMINATION RULES FOR INSURED GROUP HEALTH PLANS

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("Tax Relief Act"), which generally extended the Bush-era tax reductions through December 31, 2012. The Tax Relief Act also included several employee benefits-related extensions of interest to employers.

Educational Assistance Programs

Section 127 of the Internal Revenue Code ("Code") permits an employer to maintain a program to provide tax-free educational assistance to its employees, provided that certain eligibility and nondiscrimination requirements are satisfied. A qualified educational assistance program may provide up to \$5,250 in tax-free educational assistance for the payment of tuition and related expenses for undergraduate and graduate level coursework. Code Section 127 was scheduled to expire on December 31, 2010. The Tax Relief Act extends the application of Code Section 127 through December 31, 2012, allowing employers to continue to provide tax-free educational assistance to their qualifying employees for an additional two years.

Adoption Assistance Programs

Code Section 137 permits an employer to provide tax-free adoption assistance benefits (up to \$13,360 per eligible child for 2011) to its employees, subject to the satisfaction of certain eligibility and nondiscrimination rules. Code Section 137 was scheduled to expire on December 31, 2011. However, the Tax Relief Act extends the application of Code Section 137 through December 31, 2012.

Mass Transit and Vanpool Benefits

Under current law, an employee may exclude from income up to \$230 per month in qualified employer-provided mass transit and vanpool benefits (along with employer-provided parking benefits), provided that the program satisfies the requirements of Code Section 132(f). However, the permitted exclusion amount for mass transit and vanpool benefits was scheduled to be reduced to \$120 per month after December 31, 2010. The Tax Relief Act extends the \$230 monthly exclusion amount for employer-provided mass transit and vanpool benefits through December 31, 2011. The exclusion for employer-provided parking benefits is not subject to this sunset provision.

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IRS Delays Compliance with Nondiscrimination Rules for Insured Group Health Plans

Section 2716 of the Patient Protection and Affordable Care Act (“Affordable Care Act”) requires insured group health plans to satisfy the requirements of Code Section 105(h)(2). Code Section 105(h)(2) prohibits discrimination in favor of highly compensated individuals as to eligibility to participate, and the benefits provided. A highly compensated individual is defined as one of the five highest paid officers of the employer, a 10 percent or greater shareholder, or (with some exclusions) an individual among the highest paid 25% of all employees when ranked by compensation. Section 2716 also provides that “rules similar to” the nondiscriminatory eligibility classification test, nondiscriminatory benefits test and the controlled group rules of Code Section 105(h)(3), (4) and (8), respectively, shall apply. Failure to satisfy these requirements could result in a hefty excise tax being imposed on the employer: \$100 per day per individual discriminated against.

In September, IRS Notice 2010-63 requested comments about the guidance needed in order to satisfy the nondiscrimination requirements. In addition to guidance concerning the meaning of “rules similar to” Code Section 105(h), commentators noted that compliance prior to 2014, when the state insurance exchanges and individual and employer responsibility and penalty provisions take place, would be difficult without substantial guidance. The Notice acknowledges that guidance is required with respect to such questions as whether the rate of employer contribution is a “benefit” that must be provided on a nondiscriminatory basis, whether the nondiscrimination standards can be applied separately to distinct geographic locations, how the rules apply to expatriates and inpatriates, how the rules apply to employees who voluntarily waive coverage, and whether paying for the coverage of highly compensated individuals on an after-tax basis affects the nondiscrimination requirements, among other things.

The IRS (and the Departments of Labor and Health and Human Services) have delayed compliance with the nondiscrimination requirements of the Affordable Care Act until after regulations or other administrative guidance are issued (IRS Notice 2011-1). The nondiscrimination rules would otherwise apply to insured, non-grandfathered group health plans for plan years beginning after September 23, 2010. Grandfathered insured plans were required to comply beginning with the 2014 plan year, or the first plan year grandfathered status is lost, if earlier.

If you have any questions about this memorandum, please contact Aaron Pierce in our Syracuse office (315-218-8635, apierce@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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