Hill Ward Henderson

Attorneys at Law

ERISA Group Benefits Alert

November 2011

2012 COLA LIMITS

The IRS has released the plan limits for 2012. Many of the plan limitations have changed, so be certain to review the below list and update your systems accordingly.

RETIREMENT PLAN LIMITS	2011	2012
Compensation Limit	$245,000	$250,000
401(k)/403(b)/457 Elective Deferrals	$16,500	$17,000
401(k)/403(b)/457 Catch-Up Contributions	$5,500	$5,500
SIMPLE Plan Employee Deferrals	$11,500	$11,500
SIMPLE Plan Catch-Up Contributions	$2,500	$2,500
Annual Defined Contribution Limit	$49,000	$50,000
Annual Defined Benefit Limit	$195,000	$200,000
Highly Compensated Employee Threshold	$110,000	$115,000
Key Employee/Officer Threshold	$160,000	$165,000
Social Security Taxable Wage Base	$106,800	$110,100
SEP Minimum Compensation	$550	$550
SEP Maximum Compensation	$245,000	$250,000

2012 IRS Form W-2 Reporting of Health Care Costs

As part of the Health Care Reform, the cost of employer-sponsored health coverage must be reported on Form W-2 for the 2012 calendar year (reported in January 2013). This requirement was originally effective for the 2011 calendar year, but was delayed by one year. There are exemptions for certain employers and the costs for certain types of employer-sponsored health coverage.

The Internal Revenue Service has provided transition relief with respect to this reporting requirement for certain small employers who are required to file fewer than 250 Forms W-2 in the prior year. However, unless additional guidance is issued by the Internal Revenue Service, these employers will be required to satisfy this reporting requirement for the 2013 calendar year (reported in January 2014).

The following coverage costs are exempt from this new reporting requirement:

1. Dental and vision coverage that is not integrated into a group health plan. An employer must include the cost of coverage under a dental plan or a vision plan if such plan is integrated into a group health plan providing such additional health care coverage.
2. Employee deferral contributions to a health flexible spending account.
3. Contributions to a health savings account (HSA). (Please note that employer contributions, including an employee's contributions through a cafeteria plan, to an HSA will continue to be required to be separately reported on the Form W-2 in box 12 with code W.)
4. The value of coverage under a health reimbursement arrangement (HRA).

It is important to take steps now to ensure that systems are in place to report this information on the Form W-2.

401(k) Safe Harbor Notice

A 401(k) Safe Harbor Notice must be provided to each employee who is eligible to participate in a 401(k) safe harbor plan within a "reasonable time" (generally, at least 30 days and no more than 90 days) before the first day of the plan year. Accordingly, for calendar year plans, a notice should be provided to each employee who is currently eligible to participate in the plan no later than December 1, 2011. Please note that posting the 401(k) Safe Harbor Notice in a common area does not meet the IRS notice requirement.

In addition to providing the notice to all currently eligible employees, each employee who becomes eligible to participate in the plan during the plan year (e.g., on the monthly, quarterly, or other entry dates) must be provided a copy of the notice no more than 90 days before the employee becomes eligible to participate in the plan, and no later than the date the employee becomes eligible to participate in the plan. We recommend that you provide the notice at least 30 days before the employee becomes eligible to participate in the plan, even though you could technically wait until the employee's actual entry date.

IRS and Treasury Officials Spoke Unofficially on 401(k) Issues

At a recent ABA Tax Section Employee Benefits Committee meeting, the IRS and Treasury officials provided answers to questions submitted by ABA members. The questions and answers addressed several interesting and sensitive 401(k) issues.

For instance, with respect to a 401(k) safe harbor plan, how does the plan satisfy the safe harbor requirement that the rate of match for Highly Compensated Employees (HCEs) may not exceed the rate of match for non-HCEs? Does the rate of match refer to the cumulative rate or marginal rate? Another issue they touched upon related to determination of catch-up contributions. If an eligible participant makes a separate election to defer catch-up contributions, is the election/designation itself sufficient to treat the contributions as catch-up contributions? Are there other factors involved in determining what contributions constitute catch-up contributions?

The IRS and Treasury representatives provided answers to all of the above-listed inquiries, and more. While the responses are unofficial, they certainly shed light and provided guidance on the issues that were being addressed.

Cumulative Rate of Safe Harbor Matching Contributions

One of the requirements for a 401(k) safe harbor plan is that the ratio of matching contributions made on account of an HCE's elective deferrals may not be greater than the ratio of matching contributions made on account of a non-HCE's elective deferrals. Does it refer to the cumulative rate of match or marginal rate of match?

Suppose a plan sponsor maintains a safe harbor 401(k) plan which provides different level of matching contributions to non-HCEs and HCEs. The non-HCEs receive safe harbor matching contributions equal to 100% of their elective deferrals up to 4% of their compensation. The HCEs receive safe harbor matching contributions equal to 50% of their elective deferrals up to 5% of their compensation. Under this arrangement, the non-HCEs can receive a 4% match if they defer 4% of their compensation. Whereas, the HCEs have to defer 5% of their compensation in order to receive a 2.5% match. Furthermore, only the non-HCEs will receive a match on deferrals exceeding 4% of compensation. Thus, this formula always guarantees that the non-HCEs receive a higher cumulative matching contribution. The IRS representative agreed that this formula meets the safe harbor requirement that the rate of matching on deferrals by HCEs will never exceed the rate of matching on deferrals made by non-HCEs because the rate of match refers to the cumulative rate of match, rather than the marginal rate.

Catch-Up Contributions, or Not?

If a portion of an eligible participant's elective deferrals is designated by the participant as catch-up contributions, are they treated as catch-up contributions because they are labeled as such? Maybe not. It might depend on whether the participant's annual combined elective deferrals and catch-up contributions exceed the applicable statutory limit.

Suppose a 401(k) plan permits eligible participants to defer catch-up contributions by making a separate election. A participant has elected to make catch-up contributions in addition to regular deferrals. Further suppose that the plan sponsor matches participants' regular deferrals on a per payroll period basis, but does not match catch-up deferrals. At the end of the plan year, if the sum of the participant's regular deferrals and catch-up deferrals does not exceed the statutory elective deferral limit, shall the plan sponsor match the portion of deferrals labeled by the participant as "catch-up contributions?" The answer is yes. The IRS representative clarified that only that portion of elective deferrals that exceed the annual applicable dollar limit will be treated as catch-up contributions, regardless of how they are labeled or designated. Therefore, under these circumstances, both the regular deferrals and the designated catch-up contributions are regular elective deferrals, and the plan sponsor should match all the deferrals made by the participant for the year.

News From Around the Firm

- This year Hill Ward Henderson celebrated its 25th Anniversary.
- Among Tampa law firms, Hill Ward Henderson recently received the most number of First Tier Rankings for Practice Areas by *U.S. News & World Report's National Law Firms Survey*, with 25 practices being cited, including our Executive Compensation & Employee Benefits Group.
- Our firm's 90 attorneys have been recognized with a variety of distinctions including:
  - 30 HWH Attorneys have been named to *Best Lawyers in America*, including all four shareholders in the Executive Compensation & Employee Benefits Group.
  - 23 HWH Attorneys have been named to *Florida Trend's Legal Elite*.
  - 24 HWH Attorneys have been named *Florida Super Lawyers*.
- This year, four attorneys at our firm were named "Tampa Lawyer of the Year" by *Best Lawyers in America* within their respective practice areas.
- Two of our founding shareholders, Thomas N. Henderson, III and Benjamin H. Hill, III received two unique honors - they were named as two of the Top Ten Attorneys in Florida by *Super Lawyers* and as members of *Florida Trend's Legal Elite Hall of Fame*.

- Recently, Bay Area Legal Services honored Hill Ward Henderson with its Justice Advocacy Service Award for philanthropic and advocacy efforts for the disadvantaged in our community.

Please note that this *Benefits Alert* only highlights the most significant changes in the law. The details of these changes are complex and beyond the scope of this Alert. We look forward to discussing these changes and how they may impact your plans with you. Please do not hesitate to contact any of the following members of our Employee Benefits and Executive Compensation Practice if you have any questions or if you would like additional information.


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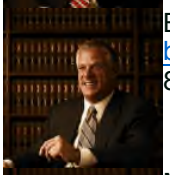
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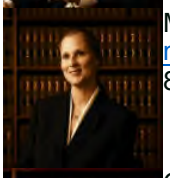
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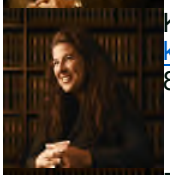
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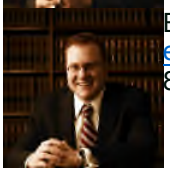
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