

Current Legislative and Regulatory Initiatives for Health and Retirement Plans in the United States and Canada

Executive Report

Kelli Kolsrud, CEBS | Senior Information/Research Specialist
Patricia A. Krajnak, CEBS | Director, Reference/Research Services
Julie M. Stich, CEBS | Senior Information/Research Specialist



United States – Health Care Plans

Much of the regulatory and legislative activity related to health care benefits in 2011 was focused on the implementation of the Affordable Care Act of 2010. Few, if any, health care bills are expected to pass in 2012 due to the gridlock in Congress and the upcoming presidential election.

Health Care Reform

- **Affordable Care Act (ACA) Implementation in 2011**
 - Most health plans implemented the first group of changes required by ACA at the beginning of 2011. Required changes included the expansion of dependent coverage to adult children, the prohibition of preexisting condition exclusions, and the limitation and/or elimination of rescissions, annual limits and lifetime maximums.
 - Regulations on unreasonable insurance rate increases were proposed and finalized.
 - Due to the exhaustion of funding, the Early Retirement Reinsurance Program ceased accepting applications in May 2011 and will cease making reimbursements for claims incurred after December 31, 2011.
 - The interim final rules for internal claims appeals were amended in response to feedback from stakeholders. The amended rules should assist plans and issuers in coming into full compliance with the law.
 - Interim guidance was released on reporting the value of health benefits on Form W-2. Beginning with the Form W-2s provided to employees in January 2013, group health plans must report the value of employer-provided health coverage provided in 2012.
 - Regulations were proposed for accountable care organizations.
 - In anticipation of the 2014 effective date for employers to offer affordable health benefits or pay a penalty, the Internal Revenue Service (IRS) asked for public comments on the definition of full-time employee, the 90-day limit on waiting periods and a proposed safe harbor for affordable coverage.
 - Regulations were issued about the health care exchanges, slated to be available in 2014.
 - The Institute of Medicine issued a report outlining a set of criteria and methods to develop a package of essential health benefits. The Department of Health and Human Services (HHS) must define “essential health benefits” for purposes of the Affordable Care Act.
 - HHS halted the long-term care insurance program described in the CLASS Act due to insufficient funding.
 - Guidance was released concerning the Summary of Benefits and Coverage reporting requirement. Due to a number of concerns raised in public comments, the effective date for this requirement will be delayed until further guidance is released.
 - Interim final rules were released requiring new health plans to cover women’s preventive health services at no additional cost. The guidelines were based on recommendations from the Institute of Medicine.
 - The Employee Benefit Security Administration (EBSA) announced two proposed rules under the ACA to protect businesses and workers whose health benefits are provided through a multiple employer welfare arrangement (MEWA).
 - A proposed amendment to the existing claims procedures rules are scheduled to be released in December 2011. This amendment is intended to strengthen, improve and update the current rules governing the internal claims and appeals process.

- Before March 23, 2012, HHS is required to develop quality of care reporting requirements for all nongrandfathered health plans and health care provider reimbursement structures that affect the quality of care.
- For policy and plan years ending after September 30, 2012 and before October 1, 2013, health insurers and self-insured health plans will have to pay a “comparative effectiveness research fee.” This is an annual fee equivalent to \$1 (\$2 after September 30, 2013 and indexed thereafter for inflation) multiplied by the average number of covered lives under the plan. The IRS issued guidance and requested comments concerning the mechanics of making this payment and determining the average number of covered lives.
- Additional issues listed on the IRS Priority Guidance Plan for 2011-2012 include:
 - Guidance on the reports required by employers with at least 50 full-time employees to the IRS and each covered full-time employee about certain information regarding their health plans.
 - Guidance on the \$2,500 annual contribution limit to health flexible spending arrangements.
- **Repeal of ACA**
 - Several bills have been introduced in Congress to repeal or defund all or part of ACA.
 - The expanded Form 1099 reporting feature was repealed in April 2011.
 - The provision requiring plan sponsors to offer free-choice vouchers to certain employees who purchase coverage on their own through the state health insurance exchanges was also repealed in April 2011.
- **Court Decisions**
 - Several court cases related to health care reform provisions were decided in 2011 with differing results. Most of the cases focus on the constitutionality of the ACA mandate that requires every individual to get health insurance coverage or pay a penalty. The Supreme Court has agreed to hear arguments on specific issues from the cases. Arguments are scheduled for March 2012 and a decision is expected before the end of the Supreme Court’s session in late June 2012.

Other Health Care Initiatives

- Regulations were proposed to modify the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule’s standard for accounting of disclosures of protected health information (PHI). The proposed rule, in part, implements statutory requirements under the Health Information Technology for Economic and Clinical Health Act (HITECH Act) to require covered entities and business associates to account for electronic disclosures of PHI to carry out treatment, payment and health care operations.
- The Office of Civil Rights (OCR) announced implementation of a pilot audit program to ensure covered entities and business associates are complying with the HIPAA Privacy and Security Rules and Breach Notification standards.
- The Equal Employment Opportunity Commission (EEOC) proposed rules for Genetic Information Nondiscrimination Act (GINA) recordkeeping requirements.
- The COBRA subsidies provided by the American Recovery and Reinvestment Act of 2009 (ARRA) ended in August 2011.
- EBSA is scheduled to release proposed rules to amend regulations concerning the standards applicable to the exemption under ERISA Section 408(b)(2) for contracting or making

reasonable arrangements with a party in interest for office space or services. This amendment will ensure that plan fiduciaries of welfare plans are provided with information necessary to a determination of whether an arrangement for services is “reasonable.”

- IRS is scheduled to release a notice in December 2011 in advance of proposed regulations on how to calculate COBRA premiums. The rules would limit the amount that group health plans can require individuals to pay for COBRA continuation coverage.
- IRS is scheduled to propose regulations in December 2011 to provide additional guidance on permitted election changes in a Section 125 cafeteria plan.
- IRS is scheduled to finalize regulations on cafeteria plans in December 2011.

United States – Retirement Plans

With Congress facing partisan gridlock, it seems unlikely that any substantial retirement legislation will pass before the November elections.

Retirement Security

Activity in this area has focused on identifying the problems leading to inadequate retirement income, and educating participants about the importance of saving.

- **Congressional Hearings**
 - *Simplifying Security: Encouraging Better Retirement Decisions*, Senate Committee on Health, Education, Labor and Pensions, 2/3/2011: Witnesses included Lori Lucas, Defined Contribution Institutional Investment Association.
 - *Retirement Security: Challenges Confronting Pension Plan Sponsors, Workers, and Retirees*; House Education and the Workforce Committee, Subcommittee on Health, Education, Labor and Pensions; 6/14/2011: Witnesses included James Klein, President, American Benefits Council.
 - *The Power of Pensions: Building a Strong Middle Class and Strong Economy*, Senate Committee on Health, Education, Labor and Pensions, 7/12/2011: Witnesses included Diane Oakley, Executive Director, National Institute on Retirement Security.
 - *Tax Reform Options: Promoting Retirement Security*, Senate Committee on Finance, 9/15/11: Witness included Dr. Jack VanDerhei, Director of Research, EBRI, and Dr. William G. Gale, Senior Fellow, Brookings Institution.
- **Reports**
 - *Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits*, Government Accountability Office (GAO), 3/30/11: Report concludes that net new retirement plan formation in recent years has been very small, that 92% of new plans were defined contribution (DC) plans, that new plans were generally small (fewer than 100 participants), and that the low net growth of private retirement plans is a concern in part because workers without employer-sponsored plans do not benefit as fully from tax incentives as workers that have employer-sponsored plans.
 - *Disparities for Women and Minorities in Retirement Savings*, ERISA Advisory Council of the Employee Benefits Security Administration (EBSA), April 2011: Report concludes that women and minorities are less well-positioned for retirement than men and whites, and called for regulatory plan design changes and increased education.

- *Retirement Income: Ensuring Income throughout Retirement Requires Difficult Choices*, report to the Chairman of the Senate Special Committee on Aging, GAO, 6/7/2011: Report discusses proposed options for increased lifetime income and financial literacy.
- **Participant/Consumer Education**
 - *Savings Matters*, video, EBSA, September 2011: Video (in English and Spanish) for young workers presents the importance of saving early for retirement.
- IRS has said in its 2011-2012 Priority Guidance Plan (dated 10/31/2011) that it plans to release in 2012 guidance on certain issues relating to lifetime income from retirement plans.
- Several bills have been introduced into the House and Senate that encourage automatic savings and lifetime income distribution options, and discourage preretirement withdrawals from retirement accounts.

Defined Benefit (DB) Pension Plan Funding

Developments in this area have tended to be technical in nature, expanding on legislative changes made by the Pension Protection Act of 2006 (PPA 2006) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010).

- *Technical Revisions to Actuarial Information on Form 5500 Annual Return/Report for Pension Plans Electing Funding Alternatives Under Pension Relief Act of 2010*, technical document, EBSA, 4/5/2011: Document announces certain technical revisions to Form 5500 Schedules MB (Multiemployer DB Plan and Certain Money Purchase Plan Actuarial Information) and SB (Single-Employer DB Plan Actuarial Information) that have been adopted in IRS Notices 2010-83 and 2011-3 to reflect funding relief alternatives retroactively available to DB pension plans under PRA 2010.
- *IRS Notice 2011-96 (Sample Plan Amendment for Section 436)*, 11/29/2011: Notice provides a sample plan amendment that plan sponsors may adopt to satisfy Internal Revenue Code (IRC) Section 436 regarding limitations on the accrual and payment of benefits under certain underfunded single employer DB plans.
- EBSA has said in its spring 2011 guidance priority list (fall 2011 list not yet available) that it will release in early 2012 a final rule on the Annual Funding Notice, a requirement of sections 501 and 503(c) of PPA 2006; the rule will provide guidance on annual funding notices and DB plan summary annual reports.
- IRS has said in its 2011-2012 priority guidance plan (dated 10/31/11) that it intends to release:
 - A final rule providing guidance on the determination of minimum required contributions for purposes of the funding requirements that apply to single employer DB plans.
 - A proposed rule providing additional guidance regarding the determination of plan assets and benefit liabilities for purposes of single employer DB funding requirements, the use of certain funding balances maintained for those plans and the benefit restrictions for certain underfunded DB plans.
- Two bills have been introduced into the House addressing DB plan funding.

Multiemployer Defined Benefit Pension Plans

- After much deliberation, the Financial Accounting Standards Board (FASB) issued an Accounting Standards Update on disclosures about an employer's participation in and financial obligations to a multiemployer pension plan.

Update No. 2011-09—Compensation—Retirement Benefits—Multiemployer Plans (Subtopic 715-80): Disclosures about an Employer’s Participation in a Multiemployer Plan, FASB, 9/21/2011

- FAQs on Multiemployer Plan Leasing Arrangements, EBSA, 10/13/2011: Frequently-asked questions (FAQs) offer guidance for multiemployer benefit plan trustees on avoiding prohibited transactions in common leasing arrangements.
- IRS has said in its 2011-2012 priority guidance plan (dated 10/31/11) that it intends to release a proposed rule under IRC section 432 providing guidance relating to multiemployer plans that are in either endangered or critical status.

Public Employee Retirement Plans

As state and local governments across the country faced budget shortfalls, attention turned to the cost of public employee retirement systems and their funding deficiencies. Governments took action to change employee contributions, benefit eligibility and accrual calculations, automatic cost-of-living adjustments and collective bargaining laws.

- *The Underfunding of State and Local Pension Plans*, brief, Congressional Budget Office (CBO), May 2011: Brief discusses alternative approaches to assessing the size of public employee pension shortfalls and their implications for funding decisions.
- Governmental Accounting Standards Board (GASB)
 - *Postemployment Benefit Accounting and Financial Reporting*, 7/8/11: GASB is proposing amendments to existing pension standards to improve how costs and obligations associated with governmental pensions are calculated and reported.
 - *Accounting and Financial Reporting for Pensions, and amendment of GASB Statement No. 27*, exposure draft: Document relates to reporting by governments that provide pensions to their employees.
 - *Financial Reporting for Pension Plans, an amendment of GASB Statement No. 25*, exposure draft: Document addresses reporting by pension plans that administer benefits.
 - *Economic Condition Reporting: Financial Projections*, preliminary views, 12/6/2011: Proposal that state and local governments should present five-year projections of cash inflows, outflows and financial obligations as required supplementary information to financial statements, giving a clearer picture of their financial health; pension and other postemployment benefits would be included in the projections. Public comments are being accepted until 3/16/2012.
- *Determination of Governmental Plan Status*, advance notice of proposed rulemaking, IRS, 11/8/2011: Document describes rules the Treasury Department and IRS are considering proposing to define the term “governmental plan” under Internal Revenue Code Section (IRC) 414(d); comments due to IRS by 2/6/2012.
- IRS has said in its 2011-2012 Priority Guidance Plan (dated 10/31/2011) that it plans to release in 2012 guidance on pick-up arrangements under Section 414(h)(2) and the application of normal retirement age rules to governmental plans.
- A bill, the Public Employee Pension Transparency Act (S 347), has been introduced into the Senate.

401(k)/Defined Contribution Plans

- **Fee Disclosure**

EBSA has released two sets of rules—one directed to service providers disclosing fees to plan sponsors, and one to plan administrators disclosing fees to participants. The rules' effective dates were delayed, respectively, to April 1, 2012 and May 31, 2012 (for calendar-year plans). Final service provider disclosure rules are expected in January 2012.

- *Requirements for Fee Disclosure to Plan Fiduciaries and Participants—Applicability Dates*, final rule, EBSA, 7/13/11: Rule delayed applicability dates (see above).
- *SEC Staff No-Action Letter*, Securities and Exchange Commission (SEC) to EBSA, 10/26/2011: Letter confirms that fee disclosure information provided to participants to comply with EBSA's rule will be treated as a communication that satisfies SEC Rule 482 requirements.
- *Technical Release 2011-03R*, EBSA, 12/8/2011: Release sets forth interim policy regarding the use of electronic media to satisfy participant-level fee disclosure requirements.

- **Investment Advice**

- *Definition of the Term "Fiduciary"*: In October 2010, EBSA proposed a new definition of fiduciary pertaining to those giving investment advice to an employee benefit plan or a plan's participants. In September 2011, EBSA announced it would re-propose this definition due to public comments and hearings. After gathering additional research and public input, EBSA plans to release a new proposed rule in early 2012.
- *Investment Advice—Participants and Beneficiaries*, final rule, EBSA, 10/25/2011: Rule implements a prohibited transaction exemption for fiduciary investment advisers; investment advice must be given through the use of a computer model that is certified as unbiased by an independent expert or through an advisor compensated on a "level-fee" basis, meaning that the fees do not vary based on investments selected.
- *Study on Investment Advisers and Broker-Dealers*, staff study, Securities and Exchange Commission, 1/22/2011: Study submitted to Congress recommends uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail investors.

- **Target-Date Fund Disclosure**

- In November 2010, EBSA requested comments on a proposed rule to amend the "qualified default investment alternative regulation" and the "participant-level disclosure regulation" to enhance and provide more specificity as to the information that must be disclosed to participants concerning investments in target-date funds. According to EBSA's guidance priority list, a final rule is expected by the end of 2012 (not yet released as of 12/16/2011).
- *Defined Contribution Plans: Key Information on Target Date Funds as Default Investments Should Be Provided to Plan Sponsors and Participants*, report, GAO, 1/31/2011: Report analyzes the investment composition and performance of target-date funds, how they are selected and monitored by plan sponsors and communicated to participants, and how the Department of Labor and Securities and Exchange Commission are regulating them.

- **403(b) Plans**

- *IRS Revenue Ruling 2011-7*, 2/22/2011: Ruling clarifies when a 403(b) plan has been terminated.

Canada – Retirement Plans

Federal Pension Bills

- **Bill C-25 Pooled Registered Pension Plans Act** (Introduced November 17, 2011)
Legislation implementing the federal portion of the Pooled Registered Pension Plan (PRPP) framework.
 - Provides a legal framework for the establishment and administration of PRPPs that will be accessible to employees and self-employed persons and that will pool the funds in member accounts' to achieve lower costs in relation to investment management and plan administration.
 - Provincial enabling legislation will need to be introduced for the framework to become fully operational.
 - Tax rules for PRPPs are being developed by the government of Canada.

- **Bill C-13 Keeping Canada's Economy and Jobs Growing Act** (December 13, 2011, Third Reading in Senate)
Provisions include:
 - Introduces anti-avoidance rules for Registered Retirement Savings Plans and Registered Retirement Income Funds.
 - Introduces rules to limit tax deferral opportunities for individual pension plans.
 - Clarifies that the "financially dependent" test applies for the purposes of provisions that permit rollovers of the assets of a deceased taxpayer's Registered Retirement Savings Plan or Registered Retirement Income Fund to an infirm child or grandchild's Registered Disability Savings Plan.
 - Amends the pension-to-Registered Retirement Savings Plan transfer limits in situations where the accrued pension amount was reduced due to the insolvency of the employer and underfunding of the employer's registered pension plan.
 - Amends the Canada Pension Plan to include amounts received by an employee under an employer-funded disability plan in contributory salary and wages.
 - Amends the Special Retirement Arrangements Act to permit the reservation of pension contributions from any benefit that is or becomes payable to a person.

Federal Regulations/Guidelines

- **Minister of Finance issued *Regulations Amending Certain Regulations Made under the Pension Benefits Standards Act***, March 25 2011
 - Permits plan sponsors to secure properly structured letters of credit in lieu of making solvency payments to the pension fund, up to a limit of 15% of plan assets.
 - Requires the plan sponsor to fully fund pension benefits on plan termination.
 - Voids any amendments to a pension plan that would reduce the solvency ratio of the pension plan if the plan's solvency ratio would be below a ratio of 0.85.
 - Permits sponsors, plan members and retirees of a distressed pension plan to negotiate their own funding arrangements to facilitate a plan restructuring.

- **Office of the Superintendent of Financial Institutions (OSFI) issued *Stress Testing Guideline for Plans with Defined Benefit Provisions***
Stress testing involves simulation of different shocks and scenarios that could impact a plan's funding policy, investment policy and benefit levels. It may also identify risks to the employer's overall ability to fund a plan. The guideline provides general information to plan administrators on stress testing and expectations regarding the use and frequency of stress testing as a risk management tool. There is no regulatory requirement for an employer to conduct stress testing on its pension plan.
- **CAPSA Guidelines**
 - CAPSA Guideline No. 5 – *Fund Holder Arrangements Guideline* is intended to provide good governance practices for pension plan fund holders.
 - CAPSA Guideline No. 6 - *Pension Plan Prudent Investment Practices* is intended to help plan administrators demonstrate the application of prudence to the investment of pension plan assets. The guideline also includes an associated Self-Assessment Questionnaire on Prudent Investment Practices.
 - CAPSA Guideline No. 7 - *Pension Plan Funding Policy* is intended to provide guidance on the development and adoption of funding policies for pension plans that provide a defined benefit.

Ontario Bills

- **Bill 173 Turning the Corner to a Better Tomorrow (Budget) (May 12, 2011 Royal Assent)**
The Budget reiterates many of the pension changes in Bills 120 and 236. Provisions include:
 - Requires provincially regulated pension plans to file their Statements of Investment Policies and Procedures (SIPPs) with the Financial Services Commission of Ontario.
 - Permits terminating plan members to initiate a direct transfer of their lump-sum pension to the purchase of a life annuity where permitted by the terms of the plan.
 - Considers implementing a new type of pension plan for collectively bargained workforces called a jointly governed target benefit pension plan.
 - Introduces employer premium increases to the Pension Benefits Guarantee Fund.
- **Ontario and Quebec signed the Agreement Respecting Multi-Jurisdictional Pension Plans (MJPPs)**
The agreement would:
 - Set out legally how these plans are regulated and clarify issues unique to MJPPs that are not addressed in existing pension statutes.
 - Clarify the rules that apply to these plans.
 - Allow a single supervisory authority to regulate an MJPP.
 The agreement would apply to a pension plan when the plan is registered with the pension regulator of Quebec or Ontario and the pension plan provides benefits to members, or former members, in both provinces.

Ontario Regulations

- **Regulation 177/11**
Makes changes to the rules for jointly sponsored pensions plans (JSPP) and to certain filing requirements for all plans. Changes to JSPPs include:

- A new process by which a plan is identified as a JSPP and new filing deadline.
- A solvency funding exemption for certain public sector JSPPs.

Changes affecting all pension plans are:

- Changes to requirements that determine annual solvency report filings.
- Changes to required information in the annual statement.
- Changes to contributions and interest that must be made to public sector plans.

- **Financial Services Commission of Ontario (FSCO) finalized Risk-Based Regulation Framework for the risk-based regulation of pension plans in Ontario**

The core of the framework is a Regulatory Response Model that includes a trigger mechanism to identify plans posing the greatest risk. If a plan is selected for review, a risk assessment will be performed. Focus is on five risk areas:

- Funding risk
- Investment risk
- Administration risk
- Governance risk
- Sponsor/industry risk

The proposed framework significantly changes the way FSCO regulates. Implementation will be phased in over the next three years.

- **FSCO New Family Law Forms for Pension Valuation and Division**

Recent changes to family law provisions established a new process for the valuation and division of pension assets following the breakdown of a marriage. The Financial Services Commission of Ontario (FSCO) released draft family law forms to be used in the pension division process.

Draft forms are available to help plan administrators and other stakeholders prepare for the new valuation process. Although the FSCO does not expect to make material changes to the draft forms, they are not final until the final PDF has been posted. Forms are expected to be finalized by December 31, 2011.

Steps to the new process include:

- Requesting a family law valuation by application to the plan administrator.
- The administrator advises the applicant whether an application is incomplete.
- If complete, the administrator provides the valuation using the applicable form (dependent on type of plan and member status).
- The applicant determines treatment of the family law value and takes appropriate legal steps.
- The applicant advises the plan administrator whether or not there will be a pension division.

FSCO plans to develop additional materials, including instructions for statements of family law value forms to be used by the plan administrator.

New Brunswick

- **Task Force on Protecting Pensions**

The Minister of Justice and Consumer Affairs established a task force to examine the long-term stability and security of pensions in New Brunswick. Among the issues that the task force will examine are:

- Rules protecting employees and pensioners.

- Ensuring that the long-term sustainability of pension promises made to workers is honored and protected.
- Reviewing the structures meant to protect pension plans to ensure they are as effective as possible.

Nova Scotia

- **Bill 96 Pension Benefits Act** (Introduced November 15, 2011)

Provisions include:

- Plan members would have access to more information about the solvency of their pension plan, what benefits are available and any proposed changes to it.
- Retirees would be recognized as pension plan participants and at least two retirees would be allowed to sit on an advisory committee that makes recommendations to the plan administrator.
- New design options would include jointly sponsored pension plans cosponsored and comanaged by the employer and employees, with both sharing in the plan's benefits and liabilities.
- Target-benefit plans would combine the qualities of defined benefit and defined contribution plans.
- People in common-law relationships would have greater access to their partner's pension benefits.
- Permitting plans to offer phased retirement plan options.

Quebec

- **Bill No. 32 Budget** (Assent December 9, 2011)

Provisions include:

- A new retirement savings vehicle called a voluntary retirement savings plan (VRSP) to give effect to the federal and provincial governments' Pooled Registered Pension Plan framework.
- Gradual changes to employer and employee contribution rates and individual benefit levels under the Quebec Pension Plan.

- **Bill No. 39 Act to Amend the Act Respecting the Quebec Pension Plan** (Assent December 9, 2011)

Provisions include:

- As of January 2012, the orphan's pension will triple for new and current beneficiaries.
- As of January 2012, the definition of "child of a contributor" will change.
- The Régie considers the "child of a contributor" to be:
 - the contributor's minor biological or adopted child.
 - the minor child who has lived or was living with the contributor for at least one year, if the contributor serves or was serving as mother or father to the child.
 - The new definition will be used to determine eligibility for the orphan's pension or the pension for a disabled person's child in the event of death or disability occurring as of January 1, 2012.
- As of January 2013, retirees under age 65 will be able to receive an additional amount for disability if they become totally disabled.
- As of January 2013 there will be changes in eligibility for survivor benefits.

- As of January 2014, individuals age 60 and over who contributed to the plan for at least one year will be able to apply for their retirement pension even if they are still working.