

## December 2014 Legislative Updates

In December 2014, President Obama signed into law two pieces of legislation impacting employee benefit plans: the Consolidated and Further Continuing Appropriations Act of 2015 (“Appropriations Act”) and the Tax Increase Prevention Act of 2014 (“TIPA”).<sup>1</sup> This bulletin briefly highlights some of the key provisions of these Acts impacting employee benefit plans.

### **Provisions of the Consolidated and Further Continuing Appropriations Act of 2015**

#### ***Special Rule for Determining Normal Retirement Age for Certain Defined Benefit Plans in Existence on December 8, 2014***

ERISA and the Code generally define “normal retirement age” (“NRA”) as the earlier of: (1) the time a participant attains normal retirement age under the plan; or (2) the later of (a) the time a participant attains age 65, or (b) the fifth anniversary of the participant’s commencement of participation in the plan.<sup>2</sup>

The Appropriations Act adds new Code § 411(f).<sup>3</sup> Effective for all periods before, on, and after December 16, 2014, Code § 411(f) provides that a defined benefit plan will not be treated as failing to meet applicable Code and ERISA NRA requirements if the plan, on or before December 8, 2014, provided an NRA which is the earlier of: (1) an age otherwise permitted under Code § 411(a)(8); or (2) the age at which a participant completes the number of years of benefit accrual service (not less than 30) specified by the plan. However, this provision only applies with respect to employees hired on or before January 1, 2017.

#### ***ERISA § 4062(e) Events: Substantial Cessations of Operations***

Prior to the Appropriations Act, under ERISA § 4062(e) an employer-sponsor of an underfunded single employer defined benefit plan was liable to the PBGC if the employer ceased operations at one of its facilities, and as a result, more than 20 percent of the total number of the employer’s employees who were participants in the affected plan were separated from employment (referred to as a “substantial cessation of operations” or a “4062(e) event”). Generally, 4062(e) event liability is equal to the product of the plan’s underfunding<sup>4</sup> and the percentage decrease in active participants as a result of the cessation.<sup>5</sup> Since 2006, PBGC has taken an expansive and aggressive approach to enforcing ERISA § 4062(e), producing liabilities many have criticized as bearing little to no relation to the financial risk that such plans actually pose to the PBGC.<sup>6</sup>

The Appropriations Act modifies ERISA § 4062(e) in an effort to ensure that ERISA § 4062(e) liability is only imposed against employers with respect to plans and workforce reductions that

pose a genuine financial risk to the PBGC. For example, the Act redefines “substantial cessation of operations” to mean a permanent cessation of operations at a facility which results in a workforce reduction in excess of 15% of the employer’s “eligible employees.” Generally, “eligible employees” means all employees eligible to participate in any benefit plan of the employer’s controlled group (contrasted with the prior law, which measured the workforce reduction as a percentage of only those active employees participating in the affected plan<sup>7</sup>), including employees who separated from service in connection with the cessation during the three preceding years, and excluding certain employees whom the employer subsequently replaces with new employees. Additionally, employers with plans with fewer than 100 participants, and certain well-funded plans, are now exempt from ERISA § 4062(e) liability.

### ***Expatriate Health Coverage Clarification Act of 2014***

Prior to the Appropriations Act, the Patient Protection and Affordable Care Act (“PPACA”) generally applied to expatriate health plans (“EHPs”) in the same manner as other group health plans.<sup>8</sup> The Appropriations Act exempts EHPs from virtually all of PPACA (including its benefit mandates, such as the preventive care and summary of benefits and coverage requirements, as well as the PCORI and transitional reinsurance fees).<sup>9</sup> This relief is effective for expatriate health plans issued or renewed on or after July 1, 2015.

Whether or not a plan qualifies as an EHP is a fact-intensive determination, but in general, that term group health plans in which substantially all of the primary enrollees are: (1) non-U.S. citizens who have been temporarily assigned to work in the U.S.; (2) individuals working outside the U.S. for at least 180 days per year; or (3) certain individuals traveling internationally in performance of one or more of the services listed in Code §§ 501(c)(3) and 501(c)(4).

### ***Multiemployer Pension Reform Act of 2014***

The Appropriations Act also includes a number of provisions intended to protect the solvency of financially troubled multiemployer plans and the PBGC itself. Some of the key provisions include the permanent extension of certain provisions of the Pension Protection Act of 2006 (“PPA”),<sup>10</sup> creation of a new zone status for seriously troubled multiemployer plans known as “critical and declining” status and other changes to PPA’s zone status rules, increases to the PBGC premiums owed by multiemployer plans, clarifications about how plans in endangered or critical status calculate a contributing employer’s withdrawal liability, expansion of multiemployer plans’ obligations to furnish documents to participants, beneficiaries and contributing employers upon request, and various other changes and technical corrections. Most of these provisions are first effective for plan years beginning after December 31, 2014.

### **Provisions of the Tax Increase Prevention Act of 2014**

TIPA includes a number of provisions impacting employee benefit plans and employer provided fringe benefits, many of which are minor technical corrections and clerical changes. These include, for example:

- Amendments to Code § 125(b)(2)'s "key employee concentration test"<sup>11</sup> to replace references to "statutory nontaxable benefits" with references to "qualified benefits," and amendments to Code § 125(h)(1) clarifying that a cafeteria plan may distribute unused health FSA balances to reservists called up to active military duty.
- Technical corrections to permit in-plan Roth rollovers in 403(b) plans.<sup>12</sup>
- Retroactive extension of the rules allowing certain tax-free IRA distributions up to \$100,000 where the distribution is made directly to a Code § 170(b)(1)(A) charitable organization.
- Extension through 2014 of provisions of the 2009 Recovery Act<sup>13</sup> which raised the amount that an employer could exclude from an employee's income for transit passes and vanpooling to match the exclusion allowed for employer-provided parking benefits.

**From all of us here at Song Mondress, your employee benefits law firm.**

*Not intended as legal advice.*

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<sup>1</sup> P.L. 113-235 and P.L. 113-295, respectively.

<sup>2</sup> Code § 411(a)(8).

<sup>3</sup> And parallel provisions at ERISA § 204(k).

<sup>4</sup> For this purpose, the plan's underfunding is measured on a PBGC plan termination basis, as if the plan had terminated immediately after the substantial cessation of operations.

<sup>5</sup> 29 C.F.R. § 4062.8(a).

<sup>6</sup> For example, a large employer with a small legacy plan covering only the employees of a particular facility (representing only a small percentage of the employer's total workforce) could trigger significant ERISA § 4062(e) liability by closing that facility, even if the plan happens to be relatively well-funded, and despite the fact that the plan is sponsored by a substantial, financially sound employer.

<sup>7</sup> Thus, while the applicable threshold under the Appropriations Act has decreased (15% down from 20%), the total employee base used to measure the extent of a workforce reduction will have increased in many cases.

<sup>8</sup> However, the IRS, DOL, and HHS had previously issued FAQ guidance providing limited transitional relief from a number these requirements for fully insured expatriate group health insurance coverage, at least for plan years ending on or before December 31, 2016. See FAQs About Affordable Care Act Implementation, Parts XIII, Q&A-1, and XVIII, Q&A 6-7, available at <http://www.dol.gov/ebsa/healthreform/regulations/acaimplementationfaqs.html>.

<sup>9</sup> However, EHPs remain subject to certain PPACA requirements, such as the Code §§ 6055 and 6056 health coverage information reporting provisions.

<sup>10</sup> TIPAA would have temporarily extended some of these provisions through December 31, 2015, but the Appropriations Act's elimination of PPA's sunset provisions makes these extensions permanent.

<sup>11</sup> Which generally provides that a cafeteria plan does not discriminate in favor of key employees if the "statutory nontaxable benefits" provided to key employees do not exceed 25% of the statutory nontaxable benefits available under the cafeteria plan to all employees

<sup>12</sup> Code § 403(b)(7)(A)(ii) generally provides that amounts held in a 403(b) account cannot be paid to or made available to a participant prior to the occurrence of certain events, such as severance from employment, death, or attainment of age 59 ½.

<sup>13</sup> P.L. 111-5, as extended by the Tax Relief Act of 2010 (P.L. 111-312) and the Taxpayer Relief Act of 2012 (P.L. 112-240).