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IRS Announces Plan Limitations for 2011

The IRS has announced the cost-of-living adjustments applicable to pension plan limitations for 2011. While the cost-of-living index for the quarter ended September 30, 2010 is greater than the cost-of-living index for the quarter ended September 30, 2009; it is less than the cost-of-living index for the quarter ended September 30, 2008. Therefore, the limits remain unchanged from the 2010 levels. The chart below sets forth the applicable limitations.

Please contact your Foster Swift employee benefits attorney if you have any questions regarding these limits.

Employee Plan COLA	2010 Limit	2011 Limit
401(k) and 403(b) Employee Contribution Limit	$16,500	$16,500
"Catch-Up Contribution" Limit	$5,500	$5,500
Defined Contribution Maximum	$49,000 (plus "Catch-Up")	$49,000 (plus "Catch-Up")
Highly Compensated Employee	$110,000 (look back year compensation)	$110,000 (look back year compensation)
Annual Compensation Limit	$245,000	$245,000
457 Plan Contribution Limit	$16,500	$16,500
Social Security Wage Base	$106,800	$106,800

In-Plan Roth Rollovers

by: Jaxine L. Wintjen, CP

On November 26, 2010, the IRS issued guidance for 401(k) and 403(b) plans that permit "in-plan Roth rollovers." This new feature allows plan participants to roll over eligible rollover distributions made after September 27, 2010 from a non-Roth account into a designated Roth account in the same plan. A non-Roth account means any plan account that does not hold designated Roth contributions. Surviving spouse beneficiaries and alternate payees who

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are current or former spouses are also eligible to make an in-plan Roth rollover.

PLAN AMENDMENTS. A plan may be amended to allow in-service distributions from the plan's non-Roth accounts conditioned on the participant rolling over the distribution in an in-plan Roth direct rollover. However, the plan cannot impose this condition on any existing distribution options available under the Plan. 401(k) and 403(b) plans have extended deadlines to amend the plan to allow 2010 in-plan Roth rollovers. The amendment must be retroactively effective to the date the plan was first operated to permit in-plan Roth rollovers. The amendment deadlines are described below.

- 401(k) plans have until the later of the last day of the year in which the amendment is effective or December 31, 2011.
- Safe harbor 401(k) plans have until the later of the day before the first day of the plan year in which the safe harbor plan provisions are effective or December 31, 2011.
- 403(b) plans have until the later of the plan's remedial amendment period or the last day of the first plan year in which the amendment is effective.
- Governmental 457(b) plans may adopt an amendment to include a designated Roth account after December 31, 2010, and then allow in-plan Roth rollovers.

TYPES OF IN-PLAN ROTH ROLLOVERS. Two types of in-plan Roth rollovers are permitted.

- In-plan Roth direct rollovers where the plan trustee transfers an eligible rollover distribution from a participant's non-Roth account to the participant's designated Roth account in the same plan.
- In-plan Roth 60-day rollovers where the participant deposits an eligible rollover distribution within 60 days of receiving it from a non-Roth account into a designated Roth account in the same plan.

ADMINISTRATIVE CONSIDERATIONS. A plan may have to allocate in-plan Roth rollovers for a participant to a separate account maintained solely for the rolled over amounts. A distribution rolled over as an in-plan Roth direct rollover is not treated as a distribution for the following purposes:

- Transferring a plan loan to the designated Roth account without changing its repayment schedule;
- Requiring spousal consent;
- Requiring a participant's consent before an immediate distribution of an accrued benefit of more than $5,000; and
- Eliminating a participant's right to optional forms of benefit.

If a plan offers in-plan Roth rollovers, it must include a description of this feature in the written explanation the plan provides to participants who receive an eligible rollover distribution (the Code Section 402(f) Notice). If the plan uses the IRS safe harbor explanation, that explanation should be modified to describe the in-plan Roth rollover feature.

In-plan Roth rollovers are not subject to the 10% additional tax on early distributions (prior to age 59½), nor are they subject to the mandatory 20% withholding rules. An individual who makes an in-plan Roth direct rollover may need to increase his or her federal income tax withholding or make estimated tax payments to avoid an underpayment of tax penalty. However, if the plan distributes any part of the in-plan Roth rollover within a 5-year period, the distribution will be subject to the 10% early distribution tax unless another exception applies. For this purpose, the 5-year period begins January 1 of the year of the in-plan Roth rollover and ends on the last day of the fifth year of that period.

SPECIAL RULES FOR 2010 IN-PLAN ROTH ROLLOVERS. The participant generally reports the taxable amount of an in-plan Roth rollover in the taxable year in which he or she receives the distribution. However, for in-plan Roth rollovers completed in 2010, the participant may:

- Elect to report the entire taxable amount in 2010; or
- Report half of the taxable amount in 2011 and the other half in 2012. In order to be eligible for the 2-year income spread, the distribution to be rolled over in an in-plan Roth rollover must be made no later than December 31, 2010. The plan must have a designated Roth account in place at the time the distribution is rolled over.

Please contact your Foster Swift employee benefits attorney if you have any questions regarding Roth Rollovers.

Heightened Substantiation is no Longer Required for Employer-Provided Cell Phones

by: Lauren B. Dunn

Employer-provided cell phones and other similar telecommunications devices are no longer subject to heightened substantiation requirements under Internal Revenue Code Section 280F(d)(4) in order to be excluded from an employee's taxable income as a working condition fringe benefit under Code Section 132(d). The Small Business Jobs Act of 2010, signed into law on September 27, 2010, removes employer-provided cell phones and other similar devices from "listed property" under Code Section 280F(d)(4). Items included as "listed property" are subject to heightened substantiation requirements that require the maintenance of records sufficient to confirm the time and place of the use, expense, business relationship to and purpose of the employer-provided equipment.

Effective for taxable years beginning after December 31, 2009, the removal of cell phones from "listed property" will make it much easier for employers to exclude the benefit from an employee's taxable income and deduct the cost of the cell phone as an ordinary and necessary business expense under Code Section 162. The employer-provided cell phone must still be established as a business expense, however, and an employer is required to include in the employee's taxable income the appropriate amount of the benefit if the employee uses the cell phone for personal use. The amount includable in the employee's taxable income is based on how much the employee would have to pay for the benefit and not the employer's cost to provide the benefit.

The Joint Committee on Taxation made clear that despite the changed law, the Internal Revenue Service continues to maintain the authority to determine when an employer-provided cell phone is a working condition fringe benefit and excludable from income under Code Section 132(d) as a "qualified business expense"; or, when an employer-provided cell phone is a "*de minimis* fringe benefit" under Code Section 132(e), excludable from an employee's taxable income because the value of the property and its services are so small as to make accounting for the benefit administratively unreasonable or impractical.

Please contact your Foster Swift employee benefits attorney if you have any questions.

It's Time to Update Employee Handbooks

by: Amanda Garcia-Williams

Due to several recent changes in employment law, we highly recommend that all employers update their employee handbooks as soon as possible.

FEDERAL LAW UPDATES. Recent changes in federal law include the passage of the Genetic Information Nondiscrimination Act of 2008 ("GINA"), that went into effect in November 2009. Under GINA, employers are prohibited from discriminating based on genetic information in hiring, termination or referral decisions or in other decisions regarding compensation, terms, conditions, or privileges of employment.

Second, under an amendment to the Fair Labor Standards Act (FLSA) included in the health care reform law enacted in March 2010, employers must now provide reasonable unpaid breaks and a private space to nursing mothers to express milk for up to one year following the birth of their child.

Further, on January 28, 2008, President Bush signed into law the National Defense Authorization Act, which included two major amendments to the Family Medical Leave Act (FMLA), expanding the benefits of the FMLA to assist military members and their families. This law was further expanded by President Obama in 2010. Employers subject to the FMLA should have an employment attorney review all FMLA policies and procedures.

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STATE LAW UPDATES. Employers should be aware that Michigan passed the Michigan Marihuana Act. ("Marihuana" is an alternative spelling used in the Act.) Because the Act is so new, there is very little interpretive guidance; so our advice to employers, at least currently, is that medical marijuana be treated as a prescription drug. If the employee's performance is impaired, the situation should be handled the same as if an employee's performance is affected by any prescribed drug. Note that an employer can still prohibit medical marijuana use in the workplace. All substance abuse policies should be updated to ensure compliance and enforcement under this law.

Finally, effective May 1, 2010, the state banned smoking in all public places, including places of employment. We recommend that employee handbooks include a carefully crafted policy that (1) explains the smoking ban that may be imposed for violators; and (2) provides notice that employees who smoke in violation of the law will be subject to discipline, up to and including discharge.

Please contact your Foster Swift employment attorney if you have any questions regarding your employee handbooks.

Are Your Employees WILBing[1] On Your Time?

by: Melissa J. Jackson

Social media is proliferating in the workplace. Facebook, My Space, Linked In, and Twitter have become commonplace on employees' cell phones and computers. Blogging has become a tool for marketing, as well as for revenge.

- Should an employer be concerned?
- What could a concerned employer do?

The answer to the first question is that all employers should be concerned. Just a few of the risks of this newest trend include a loss of employee productivity, damage to the employer's reputation, and a breach of confidentiality.

The answer to the second question is to determine the risks that most threaten your business and then take steps to minimize those risks. No matter what risks may be inherent in your organization, one of the first steps you should take is to let employees know what is and is not prohibited. The most common way of imparting this information is through a policy in the employee handbook. An effective policy will allow effective monitoring. It will serve as a defense to claims of defamation, improper discipline and termination, and invasion of privacy. It will inform employees that social media may not be used to harass or discriminate against others. It will remind employees that any restrictive covenants, such as non-compete, non-solicitation, and non-disclosure obligations, extend to the realm of social media.

The policy also will assist an employer in enforcing the prohibitions consistently and uniformly. For example, will the employer monitor an employee's blogging on the employer's computers and/or an employee's communications over his or her own computer that involve the employer? Most private employers will be inclined to reserve the right to monitor as broadly as possible. However, the National Labor Relations Board (NLRB) recently brought a charge against an employer because that employer fired an employee for a posting she put on Facebook disparaging her supervisor. The NLRB charged that the employer violated the employee's right to protest her working conditions. A hearing in that case is scheduled for January, 2011.

So, all employers should recognize that social media is useful but also fraught with peril for the unwary. Contact the employment lawyers at Foster Swift for assistance in determining what parameters are appropriate for your business and then publishing a clear and reasonable policy that provides notice to employees of what is prohibited. You no longer have the luxury of being IBT![2]

Please contact your Foster Swift employment attorney if you have any questions.

[1] A translation for the "uninitiated" is Workplace Internet Leisure Browsing

[2] In Between Technology.

Qualified Plans: Approaching Compliance Deadlines

by: Terri L. Bolyard, *Paralegal*

Sponsors of qualified retirement plans should note certain approaching deadlines for amending their plans. Satisfaction of all of the various deadlines will help ensure that affected retirement plans maintain their qualified status.

COMPLIANCE AMENDMENTS REQUIRED FOR 2010

Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act)

The 2008 enactment of the HEART Act expanded the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The provisions of the HEART Act include pension incentives for military personnel by setting certain requirements for the treatment of wages and benefits of employees on military leave. Additional guidance was issued by the IRS during January 2010 to clarify various provisions of the HEART Act. Employer sponsors must now amend their qualified retirement plans to reflect the requirements of the HEART Act. The general IRS deadline for amending qualified retirement plans to reflect the requirements of the HEART Act (as clarified by the 2010 guidance) is the last day of the 2010 plan year (December 31, 2010 for calendar year plans). However, an extended deadline until the last day of the 2012 plan year applies to qualified retirement plans that are sponsored by governmental entities.

Final Code Section 436 Regulations

Final regulations governing benefit restrictions under Code Section 436 were issued by the IRS during October 2009. As a result, employer sponsors must amend their qualified defined benefit plans to comply with these final regulations. The IRS deadline for amending such plans to comply with the final Code Section 436 regulations is the last day of the 2009 plan year (December 31, 2010 for calendar year plans).

EGTRRA RESTATEMENTS FOR CYCLE E PLANS

All qualified retirement plans that are categorized as "Cycle E" plans must be restated and submitted to the IRS for approval on or before January 31, 2011. Cycle E plans include: (a) individually designed plans that are sponsored by employers whose taxpayer identification numbers end with 5 or 0; and (b) plans maintained by governmental entities where the employer sponsor chose to delay the restatement beyond the otherwise applicable January 31, 2009 "Cycle C" deadline.

Contact your employee benefits counsel at Foster Swift for more information regarding the applicable compliance deadlines.

GINA Regulations 2011: Select Key New Requirements That Employers Need to Know

by: Sheralee S. Hurwitz

The Final Regulations of Title II of the Genetic Information Nondiscrimination Act (GINA) were issued on November 9, 2010 and become effective 60 days later on January 10, 2011. They will affect various employment-related issues and require changes to certain employment-related policies and forms. This article provides *selected highlights*, with more information to come in future ELB group newsletters.

GINA generally prohibits employers from (1) intentionally acquiring genetic information about applicants or employees, or (2) from discharging, refusing to hire, or otherwise discriminating on the basis of genetic information. The new regulations clarify what types of specific tests will be considered "genetic tests" under GINA. Some of these include:

- Tests that might determine whether individuals are genetically disposed to breast cancer, colon cancer, or Huntington's Disease;

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- Amniocentesis;
- Newborn screening;
- Carrier screening for risks such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy, or fragile X syndrome; and
- DNA testing to detect genetic markers associated with ancestry information.

CONFIDENTIALITY PROVISIONS HIGHLIGHTS

Under GINA, covered entities are required to treat genetic information in their possession the same way they treat medical information generally. The information must be kept confidential, and if it is in writing, it must be kept apart from other personnel information in separate medical files. Significantly, the new regulations provide that genetic information placed in the personnel file prior to the effective date of GINA does not need to be removed. However, disclosing such information from the file to a third party is prohibited.

The regulations also clarify an employer's obligations if the employer is aware of employees discussing each others' genetic information. The EEOC comments that it does "not think that many charges will be filed alleging that a covered entity violated GINA by allowing co-workers to share genetic information about another individual." Guidance is needed regarding an employer's obligation if employees do share such information. The EEOC states that a "similar standard" would work well to delineate an employer's responsibility to prevent individuals from discussing the genetic information of co-workers. Under that standard, an employer is liable for harassment of an employee by co-workers if the employer knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.

The new GINA regulations further explain what information gathering is acceptable and what is not. In certain circumstances, an employer may legitimately make inquiries of family members that may result in the gathering of information concerning manifestations of a disease or disorder or pathological condition. For example, an employer will not violate GINA by asking someone whose sister also works for the employer to take a post-offer medical examination, so long as the examination does not include requests for genetic information. In other words, employers are not prevented from seeking limited and legitimately required medical information about an employee just because another employee is also a family member.

REQUESTS FOR MEDICAL INFORMATION HIGHLIGHTS

If a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition will not generally be considered "inadvertent" unless the covered entity directs the health care provider *not to provide* any genetic information. If, however, a covered entity uses language such as the following (as set forth in the regulations), any receipt of genetic information in response to the request for medical information *will be deemed inadvertent*:

> "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

If this language is used, an employer has a solid defense to a claim that it purposely violated GINA. An employer's failure to use this notice language, however, will not prevent it from establishing that a particular receipt of genetic information was inadvertent. However, without this language, the proof will be more difficult, and likely will require clear evidence that the request as made was not intended to result in a covered entity obtaining genetic information.

Based on the new guidelines, employers should review their anti-harassment policy and FMLA forms to incorporate the additional language requirements recommended by the GINA regulations.

Please contact your Foster Swift employment, labor and benefits attorney to discuss any GINA questions you may have.

DOL Participant Disclosure Regulations

by: Stephen I. Jurmu

On October 20, 2010, the U.S. Department of Labor published a final regulation implementing new disclosure requirements for participant-directed individual account plans (*e.g.* 401(k) plans). Participant-directed individual account plans allow participants and beneficiaries to direct the investment of the assets held in their individual plan accounts. The new regulation arose out of the Department's growing concern that participants and beneficiaries did not have access to or might not be considering critical information when directing their investments in such plans.

Under the new regulation, plan administrators of participant-directed individual account plans must disseminate certain plan-related and investment-related information to participants and beneficiaries. The regulation also describes the comparative format in which the plan administrator must furnish the investment-related information and provides a model comparative chart as an appendix. The disclosure requirements will apply to plan years beginning on and after November 1, 2011. Compliance will be required for calendar year plans on January 1, 2012.

The Department of Labor issued these final regulations under Section 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), that require plan fiduciaries to act prudently and solely in the interest of plan participants and beneficiaries. The regulation also contains conforming amendments to the regulations issued under ERISA Section 404(c). Accordingly, the disclosure requirements will apply to participant-directed individual account plans regardless of whether the plans elect to comply with ERISA Section 404(c).

The final regulation will affect plan sponsors, fiduciaries, participants, and beneficiaries of participant-directed individual account plans, as well as service providers.

Please contact your Foster Swift employee benefits attorney if you have any questions regarding the new participant disclosure regulation.

Are Changes Already in Store for Michigan's Smoking Ban?

by: Timothy P. Burkhard

Three separate bills introduced in the Michigan House of Representatives propose changes to Michigan's Statewide Smoking Ban that became effective May 1, 2010.

The law, signed by Governor Granholm on December 18, 2009, banned smoking in all public places, including places of employment, with exceptions for the Detroit casinos, cigar bars, tobacco retail stores, home offices, and motor vehicles.

House Bill No. 5803 proposes to allow a food service establishment or place of employment that is not considered a public place to maintain a "legal smoking room" where smoking would be allowed. To qualify as a "legal smoking room" under this proposed legislation, the room would have to meet all of the following requirements:

1. It must be enclosed on all sides by solid walls, windows, or doors;
2. It must have either a separate ventilation system or double-door system to prevent the release of smoke into nonsmoking areas;
3. No individual, including an employee, can be required to go through the smoking room unless they do so on a voluntary basis; and
4. The smoking room must be closed at least one hour before the end of normal business hours to allow ventilation before an employee is required to enter to perform any cleaning or other maintenance.

House Bill No. 6280 proposes to amend the exceptions from the smoking ban to include an organization of the Veterans of Foreign Wars, the American Legion, or any other war veterans' organization.

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House Bill No. 6424 proposes to add a section that allows smoking in a smoking room, porch, or pavilion of a home for veterans if the following requirements are met:

1. The smoking room, porch, or pavilion is separated by a door from the nonsmoking areas; and
2. No individual, including an employee, is required to enter or pass through the smoking area.

Each of the bills have been referred to committee. House Bill No. 5803 is the broadest of the proposed amendments to the smoking ban, as it would allow restaurants, bars and other food services establishments, as well as places of employment to maintain an area where smoking is allowed.

Some bar and restaurant owners may welcome amendments to the smoking ban, as a newly released survey conducted by the Michigan Licensed Beverage Association (MLBA) indicates that from May 2010 until July 2010, overall sales at bars and restaurants dropped over 20% compared to the same periods in 2009. The smoking ban reportedly had a greater effect on small businesses, as it was reported that sales at small businesses declined by over 27% compared to 2009 figures.

The State of Michigan may also be interested in amendments to the smoking ban. The MLBA indicated that Lottery sales have also declined significantly compared to 2009, with a drop in sales of nearly 16%.

The attorneys at Foster Swift will monitor any developments to the smoking ban and will be ready to assist owners, operators and employers should the above changes be adopted and will be ready to ensure compliance should any changes take effect. Please contact us if you have any questions.

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