

MONTHLY BENEFIT NEWS AND DEVELOPMENTS

October/November 2008

Milliman Launches Monthly Pension Index

Milliman has launched its monthly index of the funded status of the 100 largest defined benefit pension plans sponsored by U.S. public companies. The September index finds that the funded status for the pensions of the Milliman 100 companies dropped by \$9 billion during the month. As of September 30, the funded ratio had decreased to 98.4%, well below the 104.9% seen at the end of 2007 and down from 99.3% at the end of August. During the first nine months of 2008, the pensions' asset returns dropped 11.73%, while their total funded status fell from a surplus of \$61 billion to a deficit of \$18 billion, a \$79 billion drop.

Go to: www.milliman.com

Upcoming Key Dates

11/2/08 – Daylight-saving time ends.

12/15/08 (financial periods beginning after) – Application of GASB Statement 45 for governments with total annual revenues of less than \$10 million.

12/31/08 – Deadline for compliance with final 409A regulations on nonqualified deferred compensation plans.

12/31/08 (remuneration paid after) – Differential wages paid to employees on active duty are treated as “wages” for federal income tax withholding purposes and (for plan years after) as “compensation” for retirement plan purposes.

(continued on next page)

This MBND covers federal news and developments from August through October 13. Congress is in recess until mid-November. The December MBND will be the next issue.

Legislative Activity on the Benefits Front

Congress has approved and the President has signed into law the “Emergency Economic Stabilization Act of 2008” (H.R.1424, P.L.110-343), a Senate-revised measure aimed at addressing the problems confronting the current financial markets. The new law includes numerous provisions from other pending bills, including mental health parity, popular tax extenders for businesses and individuals, disaster relief, and other fringe benefits, compensation, and employment-related components.

Executive compensation restrictions also are included, but they directly affect only those executives whose firms take advantage of the Treasury Department’s financial sector rescue package (i.e., if the financial institution sells its “troubled assets” to Treasury or if Treasury buys assets at auction). The law also might have implications for pension plan investments, depending on how regulations apply the requirement that the Secretary take into account protections for “retirement security” when purchasing mortgage-based securities from “financial institutions.”

Mental Health and Substance Use Disorder Benefits Parity

The law also contains provisions to amend the Employee Retirement Income Security Act, the Public Health Service Act, and the Internal Revenue Code to require group (and individual) health plans and insurance that offer mental health or substance use disorder benefits to provide such benefits on a par with the plan’s medical/surgical benefits. An exemption applies to employers with fewer than 51 workers and to employers that demonstrate (through actuarial certification) that the actual total cost for the mental health coverage exceeds 2% in the first plan year that the provision applies (or 1% in later plan years). This provision becomes effective for plan years beginning on or after Oct. 3, 2009. For most plans this will be Jan. 1, 2010. (See [Client Action Bulletin 08-20R](#).)

Other Benefits, Compensation, and Employment Provisions

The new law also includes the following provisions:

- **Extension and modification of the alternative minimum tax (AMT) credit for incentive stock options (ISOs).** The law would abate any underpayment of the AMT tax as applied to ISOs.
- **Transportation fringe benefit for bicycle commuters.** The law extends the fringe benefit tax rules to employers that offer bicycle storage and other benefits to employees who bike to work and excludes the amounts from employees’ gross incomes, effective beginning in 2009.
- **FUTA surtax extension.** The 0.2% “temporary” surtax that was set to expire at the end of 2008 is extended through 2009.

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Upcoming Key Dates – cont.

12/31/08 – Deadline for certain 403(b) plans to have information-sharing agreements.

1/1/09 – Effective date for DOL's *proposed rule* on disclosure of fees and investment information to defined contribution plan participants.

1/1/09 – Compliance by 403(b) plans to have a written plan document.

1/1/09 (plan years beginning on/after) – Effective date of IRS's *proposed rule* on cafeteria plans.

1/1/09 (plan years beginning on/after) – Required electronic filing for Form 5500 documents.

1/1/09 – Effective date for group health plans to collect and report data under CMS's Medicare Secondary Payer program.

1/1/09 (plan years beginning on/after) – Effective date for single employer defined benefit plan compliance with IRS's *proposed* minimum funding requirements.

1/1/09 – "Catch-up" contributions to health savings accounts increases to \$1,000.

1/1/09 – Fringe benefit tax rules apply to bicycle commuting.

1/31/09 – Final day of EGTRRA remedial amendment period for retirement plans in Cycle C.

2/1/09 – Start of EGTRRA remedial amendment period for retirement plans in Cycle D.

5/21/09 (plan years beginning after) – Genetic information nondiscrimination rules apply to health plans.

10/3/09 (plan years beginning after) – Effective date for mental health/substance use disorder benefits parity requirements.

Legislative Activity on the Benefits Front – cont.

- **Extension of certain employment tax credits.** The law extends through 2009 the business tax credit for employers of qualified employees that work and live on or near an Indian reservation. Wages for which the Work Opportunity Tax Credit (WOTC) is available are not qualified wages for the Indian employment tax credit. In addition, the law extends the WOTC for employees affected by Hurricane Katrina through August 28, 2009.
- **Contribution of certain settlements to retirement plans.** The law allows commercial fishermen and others whose livelihoods were negatively affected by the 1989 Exxon Valdez oil spill to use three-year income averaging for any settlement or judgment-related income they receive in connection with pending litigation and permit them to contribute up to \$100,000 of such funds to eligible retirement plans.
- **Current inclusion of deferred compensation paid by certain tax indifferent parties.** The law modifies the tax treatment (under new tax code section 457A) of offshore nonqualified deferred compensation from certain "tax indifferent" parties, for services performed beginning in 2009. This provision is primarily aimed at certain types of U.S. hedge fund managers.
- **Disaster area tax relief.** The law provides tax relief for victims of the floods, storms, and tornadoes in the Midwest earlier this year. As in the case of the prior Hurricane Katrina relief law, the new law allows plans to be amended to: give individuals a limited time to recontribute amounts withdrawn from a 401(k) or 403(b) retirement plan if the amounts were to be used to purchase a home during the declared disaster period; and permit 401(k), 403(b), or governmental 457(b) specified loans to participants who sustained economic losses due to the disasters. The law also waives the 10% penalty tax for specified amounts withdrawn from a plan for qualified "disaster recovery assistance distributions." In addition, employers located in the disaster area with 200 or fewer employees are eligible for a 40% tax credit for wages paid up to \$6,000 if paid after the applicable disaster date and before January 1, 2009, if they continued to pay their employees while their business was inoperable. No similar relief is provided for employees or employers affected by Hurricanes Ike and Gustav.

Other newly enacted laws of interest to employers include:

- "Michelle's Law" (P.L.110-381, signed on Oct. 9), which requires group health plans and insurance to extend coverage for dependent college students on medical leave for one year after the first day of the medically necessary leave of absence or until the date on which such coverage would otherwise terminate under the terms of the plan. The law is effective in plan years beginning one year after enactment.
- S.3406 (P.L.110-325, signed on Sept. 25), modifies prior law to prohibit employment discrimination against a qualified individual on the basis of disability. The "ADA Amendments Act of 2008" is aimed at overturning recent U.S. Supreme Court rulings that narrowed the definition of "disability" and redefines that term by providing new meanings for "major life activities" and "being regarded as having such an impairment."

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From CMS

- The Centers for Medicare & Medicaid Services (CMS) announced the cost-of-living adjustments applicable in 2009 to components in the Medicare program.
- CMS also issued a proposed information collection notice, stating that the agency intends to implement the recent Medicare law's mandatory Medicare Secondary Payer reporting by group health plan arrangements by way of an "information collection" activity, rather than by a proposed rule.

Go to: www.cms.hhs.gov

BLS Reports

- The Bureau of Labor Statistics reports that between 1995 and 2007 the ratio of full-time to part-time employment among older workers tilted dramatically in favor of full-time employment.
- The BLS also issued a report on employee benefits in the U.S. that finds that two-thirds of public and private workers have access to retirement benefits and nearly three-quarters have access to healthcare benefits.

Go to: www.bls.gov

CRS on Fair Share Laws

The Congressional Research Service has issued a report, *Legal Issues Relating to State Health Care Regulation: ERISA Preemption and Fair Share Laws*, discussing legal challenges and examining the Massachusetts law.

Go to: <http://openocrs.com>

Regulatory Roundup

From the Department of the Treasury/IRS:

- *Revenue Procedure 2008-62*, setting forth the procedure by which the sponsor of a defined benefit plan, other than a multiemployer plan, may request and obtain approval for the use of plan-specific substitute mortality tables in accordance with the tax code and ERISA.
- *Rev. Proc. 2008-61*, explaining areas in which rulings and determination letters will not be issued as to the tax consequence of arrangements described in section 409A of the Internal Revenue Code.
- *Rev. Proc. 2008-56*, relaxing certain restrictions that currently apply to the issuance of opinion and advisory letters for new preapproved plans (i.e., master and prototype or volume submitter plans).
- *Rev. Proc. 2008-50*, updating the Employee Plans Compliance Resolution System (EPCRS) for sponsors of section 401(a), 403(a), 403(b), 408(k), or 408(p) retirement plans.
- *Revenue Ruling 2008-45*, stating that a transfer of a tax-qualified pension plan from an employer to an unrelated taxpayer when the transfer is not connected with a transfer of significant business assets, operations, or employees is not permissible under current law.
- *Notice 2008-98*, extending the effective date for governmental plan compliance with the final rule on pension plan distributions at normal retirement age, to plan years starting on or after Jan. 1, 2011.
- *Notice 2008-87*, providing relief for funding deadlines and other requirements for plans in certain counties affected by Hurricane Ike.
- *Notice 2008-85*, providing updated static mortality tables to be used in applying the minimum funding requirements to single employer defined benefit pension plans that do not choose to use generational mortality tables and are not approved to use employer-specific substitute mortality tables. (These tables are also used with multiemployer plans for applying certain funding requirements.)
- *Notice 2008-82*, protecting reservists from losing funds in their health flexible spending arrangements (health FSAs) after being called to active duty.
- *Notice 2008-81*, providing guidance with regard to the Treasury Department's temporary program to help money market funds maintain \$1.00 per share net asset values.
- *Notice 2008-74*, delaying the effective date – to 2010 – of previous guidance on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringe benefits.
- *Notice 2008-73*, extending the transition relief available under *Notice 2008-21* for small single employer defined benefit plans with end-of-year valuation dates.

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SEC Roadmap to IFRS

The Securities and Exchange Commission voted to publish a proposed roadmap that could lead to the use of International Financial Reporting Standards (IFRS) by U.S. corporations in their filings with the SEC beginning in 2014.

Go to: www.sec.gov

EEOC on ADA

The Equal Employment Opportunity Commission issued a question-and-answer guide addressing how the Americans with Disabilities Act applies to a wide variety of performance and conduct issues.

Go to: www.eeoc.gov

CBO Reports

▪ The Congressional Budget Office updated its report on Social Security, estimating that outlays will exceed revenues in 2019 and that the Social Security trust funds will be exhausted in 2049 if the current laws remain unchanged.

▪ The CBO also issued *The Effects of Recent Turmoil in the Financial Markets on Retirement Security*.

Go to: www.cbo.gov

Social Security Booklet

The Social Security Administration issued a 42-page chartbook, *Fast Facts and Figures About Social Security, 2008*, highlighting basic program data about the Social Security (retirement, survivors, and disability) and Supplemental Security Income programs.

Go to: www.ssa.gov

Regulatory Roundup – cont.

- A *proposed rule* modifying existing rules for notifying plan participants of their right to defer distributions from tax-qualified retirement plans, to implement the Pension Protection Act's changes to the content and timing of some of the notices.
- *Private Letter Rulings 200836034* and *200836035* – which apply solely to the taxpayers requesting the rulings and may not be cited as precedent – concluding, in part, that the surplus assets transferred from a terminated defined benefit plan to a suspense account established in an ongoing 401(k) plan designated as a “qualified replacement plan” may be allocated to the 401(k) plan participants’ accounts as employer nonelective contributions, but not as matching contributions.
- *Frequently Asked Questions* (posted on the website at: www.irs.gov) on determination letters for governmental retirement plans.

From the Department of Labor:

- A *final rule* addressing the content of the policies and procedures that an investment manager must adopt before engaging in cross-trades of securities in employee benefit plans.
- A *final rule* on the distribution of benefits for missing nonspouse beneficiaries in terminated and abandoned 401(k) plans.
- A *final rule* establishing a safe harbor for the selection of an annuity provider for individual account plans, and an *amendment to Interpretive Bulletin 95-1*, limiting the application of that Bulletin to the selection of annuity providers for defined benefit plans.
- *Opinion Letter* asserting that an employer must compensate an employee for all hours worked, even if they work through a required meal break in violation of company policy.
- A *proposed rule* about providing investment advice to participants in participant-directed 401(k) and other individual account plans.
- A *notice of proposed class exemption* from certain prohibited transaction restrictions for fiduciary advisers that provide investment advice to participants under an eligible investment advice arrangement meeting either the “level fee” or “computer model” requirement.

Court Rejects ERISA Preemption of San Francisco Healthcare Law

The U.S. Court of Appeals for the Ninth Circuit has ruled that the Employee Retirement Income Security Act does not preempt a San Francisco law that requires covered employers to make minimum healthcare expenditures on behalf of their employees (*Golden Gate Restaurant Association v. City & County of San Francisco* (No. 07-17370, 9/30/08)). Under the city ordinance, medium and large employers operating within the city could pay into their own employee benefits plans or into a fund maintained and administered by the city. The three-judge panel said that an employer “has no responsibility other than to make the required payments for covered employees, and to retain records to show that it has done so.” In addition, the court said the ordinance has no “connection” to a plan: it does not require any employer to adopt an ERISA plan or other health plan, nor does it require any employer to provide specific benefits through an existing ERISA plan or other health benefit plan.