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Employment, Labor & Benefits Quarterly

Foster Swift Employment, Labor & Benefits Group

What's Inside:

We have a new look!

Recently, Foster Swift has undergone a re-brand. Through the end of 2009 and the first quarter of 2010, we are rolling out our new logo, colors and web site. Our old copper and teal colors have been replaced with a fresh blue and gray.

IRS Announces Pension Plan Limitations for 2010

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

Employee Plan COLA	2009 Limit	2010 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

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

Nonspouse Direct Rollovers Mandatory for 2010 Plan Year

New Section 402(c)(11) of the Internal Revenue Code was added by the Pension Protection Act of 2006. The new law allows a nonspouse beneficiary to elect a direct rollover of his or her distribution from a qualified plan to an individual retirement account (IRA). The IRA is treated as an inherited IRA of the beneficiary. This distribution was an optional form of distribution for plan years 2007 to 2009. However, nonspouse direct rollovers will be a mandatory option for plan years beginning after 2009. As a result, all qualified plans must allow a nonspouse beneficiary to elect a direct rollover to an IRA for plan years beginning after 2009. In conjunction with a distribution to a spouse following the participant's death or divorce from the spouse, the spouse beneficiary (or if applicable, alternate payee) must be allowed to elect a direct rollover to another qualified plan, if that plan accepts direct rollovers, or to an IRA.

Here We Go Again ... Congress Has Expanded the FMLA Yet Another Time

For the second time in the last year, Congress has expanded the scope of the Family Medical Leave Act (FMLA). On October 28, 2009, President Obama signed the Fiscal Year 2010 National Defense Authorization Act (NDAA) into law. This revision of the FMLA further expanded the military family leave entitlements. Less than a year ago, the Department of Labor issued regulations implementing and clarifying new forms of military-related FMLA leave. Now, Congress has expanded the scope of these provisions. The NDAA extends eligibility for "qualifying exigencies" and military caregiver leave. The House approved the Act in a 281-146 vote, and the Senate voted 68 to 29 to pass it. Although this portion of the NDAA did not have an effective date, the staff of the Subcommittee on Military Personnel of the House Armed Services Committee has indicated that it took effect when the President signed it.

Employment, Labor & Benefits attorneys named 2010 Top Lawyers by *dbusiness*, Detroit's premier business journal

Michael R. Blum - *Employment & Labor*
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Expanding on the 2008 legislation, this law now extends the military caregiver leave provision to veterans. Previously, military caregiver leave was only available to care for current members of the Armed Forces, Guard or Reserves. Caregiver leave provides eligible employees, who are the spouse, son, daughter, parent or next of kin of covered servicemembers in the Armed Forces, with 26 workweeks of leave during a 12-month period to care for a family member who, because of a serious injury or illness that was incurred or aggravated while on active duty, is undergoing medical treatment, recuperation, or therapy, otherwise in outpatient status, or is otherwise on the temporary disability retired list. This leave is available to care for a veteran for up to 5 years after he or she leaves military service, even if the injury did not manifest itself until the servicemember became a veteran. Furthermore, it permits the leave for serious injuries or illnesses that are the result of pre-existing conditions that were aggravated by service while on active duty.

The Department of Labor's FMLA regulations relating to qualifying exigency leave also previously limited access to the leave to Reserve and National Guard members only. The newly enacted law extends the 12 weeks of exigency leave to cover active duty members in the regular service as well. Qualified Exigency Leave is now available when a family member of an eligible employee who is in the regular armed forces is deployed to a foreign country. Qualifying exigency leave includes: short-notice deployment; military events and related activities; child care and school activities; financial and legal arrangements; counseling, rest and recuperation; post-deployment activities; and any other event the employer and employee agree is a qualifying exigency.

So, employers need to amend their FMLA policies yet again to reflect these expanded military family leave rights. And it may not be over yet. President Obama proposed during his campaign for the Presidency to expand the FMLA to include employers with as few as 25 employees (the current threshold is 50) and to encourage states to adopt paid-leave systems, in addition to including leave for elder care, 24 hours of leave annually for parents to participate in children's academic activities, provisions relating to domestic violence and assault, and expanding the care provisions to individuals who reside in an employee's home for six months or more. Hold onto your hats. We'll keep you posted.

Court Holds that Welfare Plan QDROs are Not Preempted by ERISA

The trial court in *Metro. Life Insurance Company v. Hanson*, 2009 WL 3268640 (D.N.H. 2009), held that a qualified domestic relations order (QDRO), which awarded benefits under an ERISA welfare benefit plan to the participant's children, was enforceable with respect to a welfare benefit plan. The insurer brought an action in federal court asking the court to determine whether the participant's surviving spouse should receive the benefits as awarded under a QDRO or whether the participant's wife should receive benefits under the beneficiary designation in effect at the time of the participant's death.

QDROs are usually used to assign to an alternate payee certain benefits earned by the participant under a qualified pension plan. In this case, the surviving spouse argued that the QDRO rules are not enforceable with respect to a welfare benefit plan. The trial court disagreed, reasoning that the QDRO rules are not limited to pension plans. The trial court stated that the "overwhelming weight of authority" supported applying the QDRO rules to welfare benefit plans and cited cases from several other federal circuits in support of its decision.

Continuation Coverage Rights Under Michelle's Law

Effective for plan years beginning on or after October 9, 2009 (January 1, 2010 for calendar year plans), Michelle's Law protects certain dependent children whose eligibility for coverage under a group health plan is based on the child's full-time student status. The dependent child may remain covered under the group health plan for up to 12 months if (1) the child's student status changes as the result of a serious illness or injury, (2) the child would consequently lose group health plan coverage, and (3) the following criteria are satisfied:

- the child must have been eligible for coverage under the group health plan based on his full-time student status; and
- the employee must provide a written statement from the child's physician certifying that:
    - the child suffers from a serious illness or injury that commenced while he was enrolled in a post-secondary educational institution; and
    - it is medically necessary that the child take a leave of absence or otherwise change his enrollment in the institution in a way that would otherwise cause him to lose student status-based eligibility under the group health plan.

If the criteria are met and eligibility for a dependent child's coverage does not end for any other reason that would otherwise end coverage under the terms of the group health plan (such as exceeding the age limit for coverage or marriage), then coverage under the group health plan will continue for a maximum period of 12 months.

The employee must notify the Plan Administrator of any change in the dependent child's health status to qualify for continued health coverage under Michelle's Law.

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Governmental Plan Compliance Deadlines

Qualified retirement plans that are maintained by governmental employers must comply with various tax law changes. The deadlines by which they must comply with those changes have, however, been extended in several instances. The most notable of those extensions are discussed below.

1. **The EGTRRA Restatement Requirement.** Every governmental qualified retirement plan must be amended and restated to comply with EGTRRA. Any governmental employer that elected the delayed deadline for the EGTRRA restatement must complete that restatement on or before January 31, 2011. In order to obtain a retroactive determination letter from the IRS regarding that restatement, the document must also be filed with the IRS on or before January 31, 2011.

2. **Pension Protection Act Amendments.** Various provisions of the Pension Protection Act of 2006 must be reflected in governmental qualified retirement plan documents. Because of a postponed effective date for governmental retirement plans, these amendments must be adopted on or before the last day of the first plan year that begins on or after January 1, 2011. Thus, for example, a governmental retirement plan having a plan year that begins on July 1 must complete these amendments on or before June 30, 2012.

3. **Normal Retirement Date Amendments.** Any governmental qualified retirement plan that provides for a normal retirement age earlier than 62 must, in most circumstances, be amended to comply with new normal retirement date rules. These amendments must be adopted on or before the last day of the first plan year that begins on or after January 1, 2013. Thus, for example, a governmental retirement plan whose plan year begins on October 1 must adopt these amendments on or before September 30, 2014.

For more information about labor and employment and employee benefits law related issues, please contact any member of the Foster Swift Employment, Labor & Benefits Group.

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