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The following news summaries were developed by Gabriel, Roeder, Smith & Company to inform clients and other benefit professionals of news in the benefits industry. Our thanks to Mary Ann Vitale for her diligent work on this issue. To receive this publication electronically, send an email to web.admin@gabrielroeder.com with the message "SUBSCRIBE NEWS SCAN" in the subject line. To stop receiving this publication electronically, send the message "UNSUBSCRIBE NEWS SCAN" in the same manner. Copies of this and other benefit-related publications are available on the GRS web site at www.gabrielroeder.com.

IRS Updates Federal-State Reference Guide

On December 5, 2005, the Internal Revenue Service (IRS) announced an update of Publication 963, the *Federal-State Reference Guide*, providing guidelines for state and local governments regarding Social Security and Medicare coverage, and related payroll tax withholding for state, local, and Indian tribal government employees. Publication 963 is available on the IRS's website at: <http://www.irs.gov/pub/irs-pdf/p963.pdf>.

DOL Issues Final USERRA Regulations

On December 19, 2005, the U.S. Department of Labor (DOL) finalized regulations implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA is a federal law that establishes employment and reemployment rights for employees who voluntarily or involuntarily leave their civilian jobs to perform military service. The final rule covers both pension and group health plans as defined in the Employee Retirement Income Security Act (ERISA). Generally, employees who return to their jobs after military service have the right to the same seniority, status, pay and benefits they would have attained had they not been on military leave, provided certain criteria are met. Under USERRA, employers are prohibited from discriminating against employees on the basis of veteran status, military service or application for military service.

Additionally, the DOL published final regulations requiring employers to provide employees with notice of USERRA's rights, benefits and obligations to be posted where employers normally place notices for employees. Both regulations became effective on January 18, 2006.

The final USERRA regulations and Notice of USERRA Rights and Benefits for use by private sector and state government employers are available respectively on the DOL's website at: http://www.dol.gov/vets/reg/fedreg/final/USERRA_Final_Rule.pdf and http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

* The authors of these news summaries are not attorneys and the statements made are not intended as legal advice or opinion. Qualified legal counsel should be consulted to ensure plan provisions and documents comply with applicable laws and regulations.

GASB Provides Plain-Language Summary of Statements No. 43 and No. 45

On January 3, 2006, *BenefitsLink* announced that the Governmental Accounting Standards Board (GASB) staff prepared a document titled *Other Postemployment Benefits: A Plain-Language Summary of GASB Statements No. 43 and No. 45*. Other postemployment benefits (OPEBs) are non-pension benefits provided after a person leaves employment, such as retiree health care. The GASB's final standards for OPEBs were published in 2004 as Statements Nos. 43 and 45, which provide detailed descriptions of the accounting rules for OPEB-related expenses, expenditures, liabilities, and assets as shown in the government's annual financial report. Statement No. 43 applies to OPEB plans through which the benefits are provided and Statement No. 45 applies to governmental employers or other sponsors of OPEB benefits.

The 30-page summary is presented in a question and answer format and is available on the GASB's website at: http://www.gasb.org/project_pages/opeb_summary.pdf

Montana Introduces Bill to Establish Pension Oversight Committee

On November 30, 2005, the Montana State Administration and Veteran's Affairs Interim Committee was established as an advisory oversight committee to review all state public pension House bills. The special legislative committee approved a bill (H.B. 2) which would require the committee to review administrative rules and draft legislation, perform program evaluation, and monitor the activities of the boards of directors' for the Public Employees Retirement System (PERS), Teachers' Retirement System (TRS) and State Board of Investments. The committee will also advise state legislators about the estimated financial effects of public pension bills on the actuarial soundness of the retirement systems.

On December 19, 2005, Governor Brian Schweitzer signed H.B. 2 into law along with H.B. 1 which transfers \$100 million to the TRS and \$25 million to the PERS from the state's general fund surplus.

H.B. 1 and H.B. 2 are available respectively at:

<http://data.opi.mt.gov/bills/Specsess/1205/billpdf/HB0001.pdf>

<http://data.opi.mt.gov/bills/Specsess/1205/billpdf/HB0002.pdf>

Nevada Will Pay Portion of Medicare Part D Premiums for Seniors in State Drug Plan

On November 9, 2005, the Nevada Legislative Interim Finance Committee agreed to pay a maximum of \$23.46 per month (the benchmark Medicare premium for persons with low-incomes) for individuals enrolled in the state's prescription drug program beginning when Medicare Part D takes effect on January 1, 2006. The drug plan, known as Senior Rx, is a cost-sharing program available for Nevada citizens age 62 and older who have lived in the state at least one year with incomes less than \$23,175 for individuals and \$30,168 for couples. Under the state's program, there are no premiums or deductibles. Copayments are \$10 for generic drugs and \$25 for non-generic or medically necessary drugs. The maximum benefit is \$5,000 per individual per year.

Information on Senior Rx is available at: <http://nevadaseniorr.nv.gov/>

Pennsylvania Integrates State Drug Program and Medicare Part D Plans

On November 30, 2005, the Pennsylvania Department of Aging and U.S. Department of Health and Human Services (HHS) announced an agreement to allow elderly Pennsylvania residents who are enrolled in the state's subsidized prescription drug program to maintain the same benefit level at a reduced cost to the state when also enrolled in a Medicare Part D prescription drug program. The state would supplement the Medicare drug program using the state's Pharmaceutical Assistance Contract for the Elderly (PACE) plan. PACE provides low-cost prescription coverage to about 300,000 low- and moderate-income Pennsylvania

senior citizens who are ineligible for Medicaid. Currently, the PACE program costs the state \$415 million to operate, but the Medicare Part D federal subsidies are expected to reduce the state's expenses. Under the agreement, the state will identify and qualify four or five Medicare prescription drug plans (out of 29 available statewide) that will coordinate with PACE.

Source: Bureau of National Affairs, *Pension and Benefits Reporter*, December 13, 2005.

BNA Publishes Special Report on Protecting Medicare Part D Plans Against Fraud, Waste and Abuse

On January 10, 2006, BNA's *Pension & Benefits Reporter* featured a special report on protecting Medicare Part D plans. The report was written by Kirk J. Nahra, a partner with Wiley Rein & Fielding LLP, specializing in health care, compliance, privacy, information security and insurance fraud issues. Despite concern about fraud, waste and abuse (FWA) throughout the Part D implementation process, the Centers for Medicare and Medicaid Services (CMS) had not issued FWA guidance before the January 1 start date of the Part D program. In an effort to protect Part D plans from fraudulent practices and meet anticipated CMS requirements, Nahra outlines the top ten steps necessary for implementing an effective FWA compliance plan. The report also focuses on integrating internal and external anti-fraud efforts.

The Sky is Falling, the Feds are Coming: Top 10 Tips for Protecting Part D Plans is available to Bureau of National Affairs subscribers at: <http://bna.com>

Michigan Court Rules Company Cannot Eliminate Promised Retiree Health Benefits

On December 22, 2005, the U.S. District Court for the Eastern District of Michigan ruled that a Michigan company cannot eliminate health benefits for retirees age 65 and older, or for their surviving spouses and eligible dependents (*Cole v. ArvinMeritor*, E.D. Mich., No. 2:03-cv-73872, 12/22/05). Additionally, the court found that the company unlawfully reduced and cancelled retiree health benefits in 2003 and 2005. The judge's injunction ordered reinstatement of benefits prior to the reductions and required the employer to make full payment of health benefits costs for retirees, surviving spouses, and dependents.

The case involved an auto parts supplier in southeastern Michigan. In 1962, the firm entered into a contract with the United Auto Workers (UAW) establishing employer-paid health benefits for retirees. These benefits were improved and expanded in later agreements. Then, in 2003 and 2005, the company unilaterally canceled retiree dental and vision coverage, while increasing deductibles, co-payments, and out-of-pocket expenses. It also announced it would eliminate health benefits starting in 2006 for retirees age 65 or over and for their spouses and dependents. In response, the UAW and several retirees sued the company under Section 301 of the Labor Management Relations Act (LMRA) and Section 301 of ERISA.

By granting the injunction, the judge cited precedents in both the district and Sixth Circuit courts, referred to as the *Golden-Meridian* precedents, whereby eligibility for retiree health coverage was directly related to pension entitlement. The court concluded that the "explicit language of the agreements ties retiree health benefits to pension status and specifically promises, without time limitation, that the health benefits 'at the time of retirement...shall be continued thereafter' for the duration of retirement."

The court also established that the employer's promise to provide lifetime retiree health benefits was confirmed over several decades in numerous documents such as collective bargaining agreements and summary plan descriptions. The court rejected the company's argument that the contracts limit retiree health benefits to the durational clauses of the agreements and found that "general durational clauses do not override specific promises of lifetime benefits."

The company is planning to file an appeal with the U.S. Sixth Circuit Court of Appeals.

Source: Bureau of National Affairs, *Pension and Benefits Reporter*, January 10, 2006.

New Jersey Court Invalidates Post-Death Domestic Relations Order

On December 29, 2005, the U.S. District Court for the District of New Jersey ruled that a domestic relations order (DRO) was unenforceable under ERISA because it gave rights that did not exist at the time of the participant's death (*Sanzo v. NYSA-ILA Pension Trust Fund*, D.N.J., No. 04-300, unpublished).

Under the original DRO, the ex-spouse was given rights to receive monthly payments once the participant began receiving retirement benefits. However, the participant worked until his death and so never began receiving benefits. After the participant's death, the ex-spouse obtained an amended domestic relations order (ADRO) stating she was deemed the "alternate payee" to be treated as the surviving spouse for purposes of a pre-retirement survivor annuity.

After the pension fund denied the ex-spouse's claim, she sued the fund. However, the court determined that the ADRO was not a qualified domestic relations order (QDRO) because it created rights for the surviving spouse which did not exist in the original DRO. The participant died without entering into a QDRO providing for a pre-retirement survivor annuity; therefore, his death eliminated any right to a pre-retirement survivor annuity. The court granted summary judgment in favor of the pension fund.

Source: Bureau of National Affairs, *Pension and Benefits Reporter*, January 10, 2006.

Kaiser Study Indicates Majority of Employers Will Continue Retiree Drug Coverage

On December 7, 2005, the Kaiser Family Foundation and Hewitt Associates released their *2005 Survey on Retiree Health Benefits* which found that about 79 percent of large employers would continue offering retiree drug coverage after the Medicare Part D benefit began on January 1, 2006. Generally under Part D, employers have a number of options with regard to prescription drug coverage, including:

- Continue offering benefits that are at least "actuarially equivalent" to Part D and receive tax-free subsidies of 28 percent of allowable drug costs between \$250 and \$5,000 per retiree in 2006;
- Supplement Medicare Part D coverage;
- Become a Medicare drug plan and contract directly with Medicare; or
- Eliminate drug coverage for retirees.

In 2006, the annual cost savings for employers that continue offering benefits and receive the Part D subsidy are estimated to be \$626 per retiree. For employers that supplement the Medicare Part D drug plan, the annual savings are estimated to be \$826 per retiree.

The Kaiser survey also found that many employers adopted cost-containment strategies designed to shift costs to retirees in 2005. According to the survey:

- 71 percent increased retirees' premiums;
- 34 percent increased the copayments or coinsurance;
- 24 percent increased annual deductibles;
- 19 percent increased the maximum out-of-pocket expenses; and
- 12 percent eliminated subsidized retiree health benefits for future retirees.

The survey also found that 29 percent of retirees who enroll in a Medicare prescription drug plan would lose both employer-sponsored medical and drug coverage.

The report is available on Kaiser Family Foundation's website at: www.kff.org/medicare/upload/7439.pdf

IRS Issues Letter Ruling on Purchasing Service Credit Through 403(b) and 457(b) Transfers

On September 20, 2005, the IRS issued a private letter ruling (PLR 200550042) regarding service credit purchases provided by a governmental plan. The IRS was asked to rule on two key issues: (1) whether the plan's definitions of "other service" and "summer months service" constituted "permissive service credit" as defined in the Internal Revenue Code and (2) whether the service could be purchased with direct trustee-to-trustee transfers from 403(b) or 457(b) plans without the transfer being included in the employee's gross income.

The letter was issued to a governmental retirement system that administers several contributory defined benefit retirement plans for state employees (Plan X), state police officers (Plan Y), county employees, school boards, and local governments (Plan Z). Plan X provides that any employee participating in one of more of the plans administered by the system prior to July 15, 2002, who has accrued at least 48 months of service at age 65 (or at least 60 months of service if under 65) and who has at least 180 months of total service may purchase up to five years of "other service" credit that is not otherwise purchasable under the plans.

Plan X also provides that employees of schools, school boards, or institutions of higher education participating in Plans X or Z, and who receive credit for less than 12 months of service each year, may purchase the additional "summer months service" credit (up to 3 months) needed to total one year. Moreover, for employees who have service credit prior to July 1, 1992, half of the cost of the service credit may be paid by the employer.

Code § 415(n)(3)(A) provides that "permissive service credit" means service credit recognized by a governmental plan for purposes of calculating a participant's benefit, which the participant has not received under the plan, and which the participant may only receive by making a voluntary additional contribution which does not exceed the amount necessary to fund the benefit attributable to the service credit.

After discussion with the IRS, the system revised its provision for purchasing "other service" to allow it only if the purchased service corresponds to a period of employment (in the public or private sector) that was not previously credited under the system. Given this change, the IRS agreed that the plan's definition of "other service" constituted permissive service credit under Code § 415(n)(3)(A) since it relates to an actual period of employment for which the member has not received credit under the plan and which the member could only purchase by making an additional voluntary contribution to the plan.

The IRS also ruled that "summer months service" constituted permissive service credit, since the member would not otherwise have received credit for the additional months of service under the plan. Furthermore, the member must make an additional voluntary contribution to receive the service credit.

Regarding service credit purchases through direct trustee-to-trustee transfers from 403(b) or 457(b) plans, the IRS found that since "other service" and "summer months service" are permissive service credit within the meaning of Code § 415(n)(3)(A), amounts transferred from a 403(b) arrangement or a governmental 457(b) plan through a direct trustee-to-trustee transfer are not includible in a member's gross income at the time of the transfer, to the extent that such transferred amounts are used to pay the member's cost associated with purchasing the service credit.

It should be noted that private letter rulings are only directed to the taxpayer requesting them and may not be used or cited as precedent.