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The 9/11 Terrorist Attacks: They Changed the Benefits World Too

By Russell E. Greenblatt, Daniel B. Lange and Laurence A. Shapero, Katten Muchin Zavis Rosenman
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At the risk of repeating the obvious: It is apparent by now that no person in this country and, perhaps, no person on this planet, has been unaffected by the September 11, 2001 terrorist attacks on New York's World Trade Center and on the Pentagon. Whether it is because we live in New York or Washington, D.C., or because we lost friends, family or coworkers, because we could not turn away from the horrific and frequently repeated media images of the attacks, or for one of countless other reasons, the world changed for all of us that day. Again, this much is obvious.

Nonetheless, we suspect that few would have anticipated the buzz of employee benefits activity taking place in the aftermath of the terrorist attacks. For those of us who may sometimes worry that our benefits work draws us into minutiae and isolates us from the more important issues of the day, the tragic consequences of the terrorist attacks may actually have served to remind us of the importance and far-reaching impact of the work we do. Now, more than ever, it is abundantly clear that employer-provided benefits, the tax-incentives that encourage employers to provide such benefits and the regulatory structures that protect them, are critical parts of the economic safety net for the vast majority of people in this country.

The sudden death of so many people, the loss of so many jobs, the severe but impressively brief disruptions to financial markets, the precipitous decline in the value of employees' retirement investments, and the swift activation of so many military reservists, have all combined to place tremendous pressures on our employer-provided benefit system. This, in turn, has led to short-term regulatory or enforcement relief in certain benefit matters, and has increased congressional and public debate about many aspects of employer-provided benefit structures. In this Federal Benefit Developments column, we review and discuss a few of these issues.

Filing and Other Deadlines Extended

Within several days of the terrorist attacks, the Internal Revenue Service (IRS), the Pension Benefit Guaranty Corporation (PBGC), and the Pension and Welfare Benefit Administration (PWBA) each published notices extending the filing deadline for the Form 5500 annual report for employee benefit plans.¹ Relief was provided for businesses located in presidentially designated federal disaster areas

Russell E. Greenblatt and Daniel B. Lange are attorneys in the Employee Benefits and Executive Compensation Department of the Chicago office of the law firm Katten Muchin Zavis Rosenman. Laurence A. Shapero is an attorney at the law offices of Riddell Williams P.S. in Seattle, Washington, where he represents employers and benefit plan sponsors in employment and employee benefits matters.

(including businesses in New York City or Arlington County, Virginia) and for other businesses with tax records located in those designated disaster areas. Filing relief included the following:

- Those with Form 5500 filings originally due between September 11, 2001 and November 30, 2001, were granted an additional six months plus 120 days to file.
- Form 5500 filers that, as of September 14, already had received a filing extension that was to expire between September 11 and November 30 were granted an additional 120 days to file.
- Form 5500 filers with difficulty meeting filing deadlines because of disruption of transportation and delivery of documents by mail or private delivery service resulting from the terrorist attacks and who do not otherwise qualify for the filing extensions were granted until November 15, 2001 to file their Form 5500.

The PBGC also granted certain relief with respect to premium payments for employers affected by the terrorist attacks.²

Ask PWBA

We believe that the U.S. Department of Labor (DOL), including the PWBA, has done an excellent job of developing web-based information sources for employers, employees, and benefits practitioners. In our view, the DOL website has stood head and shoulders above the IRS site both for ease of use and for the accessibility and abundance of benefits information. In the wake of the terrorist attacks, however, the PWBA really outdid itself by posting on its website an outstanding set of “September 11 Frequently Asked Benefit Questions and Answers” (“FAQs”).³

In fact, the so-called September 11 FAQs are far more than that. They serve as a concise, well-written summary of the many benefits issues faced by virtually any employee or beneficiary when there is a sudden loss of employment due to death, disability, layoff, or for any other reason. FAQs addressed by the PWBA on this site include the following:

- COBRA employer-employee communication requirements
- COBRA coverage issues, including circumstances in which COBRA may not be available
- Healthcare alternatives to COBRA and sources of additional healthcare benefit information
- Domestic partner coverage issues
- Employer retiree health benefit obligations
- Pension plan administration in the wake of a business interruption
- Sources of assistance in the event of missed pension payments
- Advice for pension beneficiaries of deceased employees
- Employer discretion to continue or discontinue pension plans
- Rights and requirements regarding employee benefits for veterans of uniformed service
- Requirements for employers re: missing participant
- Federal disaster relief available for employers

In our practices, we find that small and medium-sized employers are sometimes reluctant to seek legal counsel for information or advice on benefit matters until far too late. In this context, the PWBA's September 11 FAQs fill a tremendous information gap for both employers and employees. We encourage readers to review the FAQs and to encourage their clients or business associates to read this information and to make their own determination as to whether this may be a helpful source of knowledge for employers and their employees.

Revenue Procedure 2001-53

In early November, the IRS published Revenue Procedure 2001-53, which identifies each tax-related deadline that may be temporarily waived or altered by the IRS in the event of a presidentially-declared disaster. Section 8 of the Revenue Procedure identifies a variety of pension, health, and cafeteria plan requirements for which relief can be granted by the IRS under the appropriate circumstances. Importantly, this document does not provide any such relief in any particular instance. It does, however, provide an excellent source of information for employers that are in a presidentially-declared disaster area, either in connection with the September 11 terrorist attacks or for any other reason.

Veterans Rights

Federal laws have long provided veterans with certain employment and employee benefit protections in connection with their military service. After the 1991 Gulf War, however, these laws were updated, clarified, and expanded in the Uniformed Services Employment And Reemployment Rights Act (USERRA).⁴ With the recent activation of reservists in response to the September 11 terrorist attacks, employers should revisit their policies to be certain they are in compliance with these USERRA requirements.

The DOL has published excellent educational materials for veterans and employers,⁵ and there are other sources of general information about USERRA requirements. Many of these sources appear to be comprehensive, but employers and benefits practitioners should be aware that these secondary materials (at least the ones we have found) barely scratch the surface. This is true, in part, because relatively few veterans have returned from military service to their prior employer during the period that USERRA has been in effect. Consequently, while there is an abundance of case law under the statutes in effect prior to USERRA, there have not been many opportunities for courts to interpret the expanded provisions of USERRA. As reservists return to previous employment in the next year or so, USERRA may, for the first time, be vigorously tested in the courts. Employers should take this into account as they establish or revise their veterans benefits practices and policies.

The secondary materials also seem to suggest that USERRA questions can be neatly categorized into little boxes with answers that are self-evident under the statute. Your client's questions, however, may not always fit so neatly into one of the boxes.

A comprehensive review of USERRA is beyond the scope of this column; however, we do offer these few tidbits of advice: If you encounter a USERRA question for which you do not immediately know the answer, consider starting your search for answers at the DOL's veterans website. If you find, as we sometimes have, that the answers are not there, you may wish to consider reviewing three U.S. Supreme Court decisions that discuss the *seniority escalator principle* and the *perquisites of seniority analysis* that lie at the heart of many veterans rights issues. These decisions are: *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977); and *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

Donations of Vacation, Sick, or Personal Leave

In Notice 2001-69, the IRS has responded to the desires of many American workers to help those affected by the events of September 11, by adopting a rather remarkable enforcement position with respect to constructive receipt of certain employer-provided benefits.

Notice 2001-69 permits a worker to forego vacation, sick, or personal leave and, in turn, allows an employer to donate the value of that time to one or more charitable organizations (described in Section 170(c) of the Internal Revenue Code). An employer program established under Notice 2001-69 is beneficial to both employer and employee because the money donated under that program will not be considered by the IRS to have been constructively received by the employee. Because there is no constructive receipt, neither the employer nor the employee incur any employment taxes on the value of the amount that is donated under the program. Importantly, an employer program under Notice 2001-69 permits an employee to avoid tax obligations on donated amounts even if the employee (like many middle-income taxpayers) does not or cannot itemize deductions on his or her tax return.

Before implementing a program under Notice 2001-69, there are several issues which an employer must address in order to ensure compliance with the Notice and with other state and federal laws. Such compliance may be rendered more difficult because Notice 2001-69 is silent on several points.

For example, the Notice states that “[t]he Service will not assert that payments made by an employer . . . constitute gross income or wages of an employee Similarly the Service will not assert that the opportunity to make such an election results in constructive receipt of gross income or wages for employees.” These statements are not so clear as they might seem.

Probably the most significant question is whether an employer program under Notice 2001-69 may allow an employee to designate which organization will receive the value of his or her foregone leave. The authority listed in the Notice itself is not helpful in resolving the question. The Notice points out that under “general constructive receipt principles, when income is made available so that the taxpayer may draw upon it at any time, the income is constructively received by the taxpayer unless the taxpayer’s control of its receipt is subject to substantial limitations or restrictions.” The Notice proposes that these requirements be set aside based on the idea that “constructive receipt principles depend on the facts and circumstances of each case.” In support of this “facts and circumstances” authority, the IRS cites *Commissioner v. Giannini*, 129 F.2d 638 (9th Cir. 1942). In *Giannini*, the employee was entitled to \$1.5 million of compensation. He told the employer that he refused the money and suggested that the employer do something “worth while” with it. The employer donated the money to a local university in the employee’s name. The IRS attempted to include it in the employee’s income. In finding that the contribution was not income to the employee, the court recognized that the employee gave up all right to the money and did not direct how the money should be used.

While *Giannini* clearly supports the notion that constructive receipt depends on the facts and circumstances of each particular case, it also suggests that if an employee is able to direct whether he should receive his salary, and, if not, how such amounts should be distributed, then the employee is in constructive receipt of it. Again we ask the question, what will be the IRS’s position if the employee is permitted to select the beneficiary of a donation under Notice 2001-69? Informally at least, the IRS has taken the position over the phone that the employee may permissibly make the designation as long as it is the employer that is actually making the donation.

The question of how the Service will treat donations under Notice 2001-69 is complicated by the question of whether it has the authority to make such a decision in the first place. With all due respect, the Notice, though laudable, appears to constitute rule-making in a manner that either fails to comply with the Administrative Procedures Act or, worse yet, is contrary to the law. Of course, it is always possible that Congress could step in and pass legislation specifically condoning this treatment if a serious challenge were to arise.

Assuming for the moment that the Notice is valid, other issues remain, including the potential for abuse, especially by small employers.

For example, the president of a small business who has a personal favorite charity might direct the business to make a large charitable donation. The president then might claim that the donation has been made, consistent with Notice 2001-69, in lieu of his or her own vacation or sick pay. Because compensation for such individuals often is not consistent from one year to the next, it may be very

difficult for the IRS to ensure that such donations are made in accordance with the terms and spirit of the Notice. In speaking with the IRS regarding such questions, we were advised that the IRS will not challenge programs if an employer of any size implements a leave-based donation program in accordance with a written document outlining the critical terms (that is, amount of days eligible, value of the days, and so on). While the potential for abuse exists, the net result would be perhaps a larger amount of money going to charity. Because the Notice only pertains to contributions made through 2002, perhaps the potential abuse is limited or will be addressed at such time as more substantive rules can be promulgated for administration of such a program on a long-term basis.

Assuming an employer wants to implement a program under Notice 2001-69, there are other state and federal laws that should be considered. If the employer maintains its vacation, sick, and personal leave program as a plan under ERISA, the administrator of the plan is under a fiduciary obligation to administer it in accordance with the plan documents. Therefore, the plan would have to be formally amended to allow the employee-participants to designate employer charitable contributions in lieu of benefit payments.

The employer may have bargained with an employee organization over the terms and conditions of employment, including provisions relating to the vacation, sick, and personal leave of the employees. Under the Labor Management Relations Act, any change to the terms of the agreement—even a voluntary and beneficial one—would have to be bargained with the employee organization.

In addition to federal laws, there may be state labor laws which can affect a program described in the Notice. Before implementing such a program, an employer will want to examine the state wage and hour laws or secure labor counsel to ensure that it is not violating such laws to permit an employee to forgo the payment for guaranteed time off.

Besides legal issues, administrative issues need to be considered. An employer must keep accurate records of the amount of days donated by each employee and the value of all donated time. Like all tax deductions and employment matters, accurate records must be kept to show, in the event of an audit, how the money was handled. Employers that deal with payroll processing companies will need to work with them to ensure that accurate checks are cut to employees and that accurate reporting is made to the IRS and on employees' W-2 forms. Perhaps an additional field will have to be added to paychecks to reflect the amount of compensation diverted to a charity. Also, an employer that implements a program which allows employees to choose the recipient of the donations will need to set up an administrative process to ensure that the correct amount is donated and that such donations are made in a timely manner and reported to the employees. In order to take advantage of the program described in Notice 2001-69, all donations must be made by the employer before January 1, 2003. In addition, the record-keeping and administrative changes required to implement a leave-based donation program may be short-lived. While the Notice appears to envision the possibility that the program could last for many years, it currently only lasts through 2002. If the availability of the program is not extended, all changes made in the program's implementation would have to be discontinued at the end of the year.

Overall, the idea behind Notice 2001-69 is to ensure that tax consequences will not hinder giving to charity in this time of national need. Indeed, Notice 2001-69 actually provides additional tax incentives for giving. For this we applaud the IRS. In order to take advantage of such benefits, however, employers should consider both the legal and the administrative issues before they leap too quickly into establishing such a program.

NOTES

1. The most straightforward notice on this point was PWB Press Release 01-36.
2. This information is published in the Federal Register and also can be found at www.pbgc.gov. Type "September 11" into the "Search this site" box. This entry will bring you to the PBGC compliance relief page.
3. See www.dol.gov/dol/pwba/. The menu on this web page provides clear directions to the September 11 FAQ page.
4. 38 U.S.C. §4301 et seq.
5. See www.dol.gov/dol/vets/.

KMZRosenman KATTEN MUCHIN ZAVIS ROSENMAN

www.kmzr.com

525 West Monroe Street
Suite 1600
Chicago, IL 60661-3693
Tel 312.902.5200
Fax 312.902.1061

575 Madison Avenue
New York, NY 10022-2585
Tel 212.940.8800
Fax 212.940.8776

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
Tel 310.788.4400
Fax 310.788.4471

1025 Thomas Jefferson St., N.W.
East Lobby, Suite 700
Washington, DC 20007-5201
Tel 202.625.3500
Fax 202.298.7570

401 South Tryon Street
Suite 2600
Charlotte, NC 28202-1935
Tel 704.444.2000
Fax 704.444.2050

260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
Tel 650.330.3652
Fax 650.321.4746

One Gateway Center
Suite 2600
Newark, NJ 07102-5397
Tel 973.645.0572
Fax 973.645.0573

September 11 attacks, series of airline hijackings and suicide attacks committed in 2001 by 19 militants associated with Islamic extremist group al-Qaeda against targets in the United States, the deadliest terrorist attacks on U.S. soil in U.S. history. Over 3,000 people died in the attacks and rescue efforts. American Airlines flight 11 and United Airlines flight 175 were flown into the World Trade Center's north and south towers, respectively, and American Airlines flight 77 hit the Pentagon. United Airlines flight 93 crashed in a field near Shanksville, Pennsylvania, after passengers attempted to overpower the hijackers. The 9-11 Commission (formally the National Commission on Terrorist Attacks Upon the United States), set up in 2002 by Pres. September 11, 2001, is a day that shaped history and impacted the world for generations to come. From news coverage to strengthened airport security, here's how the world changed after the 9/11 attacks. One of the most persistent effects of the 9/11 attacks has been the ongoing war in Afghanistan. Shortly after the attacks, the United States under President George W. Bush began bombing Afghanistan. Because the Taliban-run government refused to give up suspected terrorist leader Osama Bin Laden, the United States began bombing the country in October. By November, a number of countries, including the US and the UK had formed the Northern Alliance and had taken control of the capital Kabul. The 11 Most Compelling 9/11 Conspiracy Theories. Purported theories about what really happened on September 11 are apparently still up for debate. Written By NewsOne Staff. Right before the September 11th attacks, some fishy business happened within the stock market and insurance firms. An "extraordinary" amount of put options were placed on United Airlines and American Airlines stocks, the same airlines that were hijacked during the attacks. Soon afterward, numerous tapes came out claiming he changed his mind and took full responsibility. Many skeptics believe that Bin Laden was targeted because of his stake in the stock market, as well as because of former President George W. Bush's personal business ventures in the Middle East. America did not benefit in the least from 9/11, though some Americans, like Dick Cheney, made tens of millions of dollars profiting off the deaths of many Americans as a result of it. America is far worse off because of 9/11 and will never... The Pentagon calls the attack on the WTC the most successful military action in the history of warfare because 11 men changed the course of the entire world. The United States lost enormous freedoms. It's now possible for the government to spy on Americans, torture Americans. The September 11 attacks also changed American air travel as airlines began to require stringent security checks designed to prevent the types of weapons the hijackers used from slipping through. Finally, the 9/11 attacks resulted in changes to the federal government and an expansion of executive power. The 9/11 Memorial and Museum opened on the site of the former World Trade Center on September 11, 2011, and features reflecting pools in the footprints of where the Twin Towers once stood. Katherine Huiskes. Philip Zelikow, Executive Director of the National Commission on Terrorist Attacks Upon the United States, also known as the "9/11 Commission," reports the Commission's findings on how terrorists planned, financed, and carried out the September 11, 2001 hijackings.