

Executive Compensation, Benefits, Employment and Labor Focus

October 2009

Executive Pay Standards in Store for All US Companies



After federal lawmakers and regulators converged on the scene of the economic crisis, “executive pay practices” of financial institutions were identified among the primary suspects of their investigations. Potentially implicated were their compensation committees, “conflicted” advisors and boards of directors, which are intricately linked to executive pay decisions. As a result, a series of executive pay and corporate governance standards were quickly enacted into law and regulations promulgated. These standards currently apply only to financial institutions and companies that received bailout funds from the federal government. In efforts to further protect the interests of shareholders, public corporations and the economy as a whole, lawmakers and regulators have proposed to broaden the application of executive pay standards to cover nearly all financial companies and US public companies. The summary below and accompanying table identify these initiatives.

Compensation Reforms

- 1. Pay for performance.** The US Department of the Treasury (“Treasury”) would call for compensation plans to be tied to performance in order to link the incentives of executives and other employees with long-term value creation. In accordance with Treasury Secretary Geithner’s June 10 speech, incentive-based pay can be undermined by compensation practices that set the performance bar too low, or that rely on benchmarks that trigger bonuses even when a company’s performance is subpar relative to its peers. To align with long-term value creation, performance-based pay should be conditioned on a wide range of internal and external metrics, not just stock price. Various measurements can be used to distinguish a company’s results relative to its peers, while taking into account the performance of an individual, a particular business unit and the company at large.
- 2. Pay limitation.** S. 1006 would provide that compensation for an employee of a company in any single taxable year may not exceed an amount equal to 100 times the average compensation for services performed by all employees of that company during such taxable year, unless 60 percent or more of the shareholders voted to approve such compensation within the preceding 18 months. “Compensation” would include all elements of pay, as the Securities Exchange Commission (“SEC”) and Treasury would deem appropriate. The compensation for part-time employees would be calculated on an annualized basis for this purpose.

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3. Deduction limitation.

- S. 1007 would disallow a company's deduction for any excessive compensation paid to an employee (i.e., the amount by which an employee's compensation during the taxable year exceeds the amount which is equal to 100 times the average compensation of all employees during the taxable year). Similar to S. 1006, "compensation" would include all elements of pay, as the SEC and Treasury would deem appropriate and the compensation for part-time employees would be calculated on an annualized basis.
- S. 1491 would equate the tax deduction for compensation paid with stock options to the amount the company treated as an expense for accounting purposes and would allow the deduction in the same period that the accounting expense is recognized, without regard to the timing of exercise. In addition, compensation paid with stock options would not qualify for the "performance-based compensation" exception to the US\$1 million limit on deductible compensation under S. 162(m) of the Internal Revenue Code ("Code").

4. Compensation that accounts for the time horizon of risk.

- Pursuant to Secretary Geithner's June 10 speech, Treasury would call for companies to pay top executives (and lower level employees involved in designing, selling and packaging simple and complex financial instruments) in ways that are tightly aligned with the long-term value and soundness of the company. Accordingly, compensation conditioned on longer-term performance would automatically lose value if positive results one year are followed by poor performance in another. As Secretary Geithner suggests, asking executives to hold stock for a longer period of time may be the most effective means of accomplishing this, although companies should have the flexibility to determine how best to align incentives in different settings and industries.
- H.R. 3269 would apply Treasury's proposal to all financial institutions (i.e., depository institutions, broker-dealers, credit unions, investment advisors, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and any other financial institution that federal regulators deem appropriate) with more than US\$1 billion in assets. The bill would require financial institutions to disclose to the appropriate federal regulator the structures of all incentive-based compensation arrangements to determine whether the compensation is structured to account for the time horizon of risks.

5. Aligning compensation with sound risk management.

- Pursuant to Secretary Geithner's June 10 speech, Treasury would call for (i) compensation committees to conduct and disclose risk assessments of pay packages to ensure that compensation design does not encourage imprudent risk-taking that puts the health of the company in danger and (ii) companies to explore methods to provide its risk managers with the appropriate tools and authority to improve their effectiveness at managing the complex relationship between incentives and risk-taking.
- H.R. 3269 would apply Treasury's proposal to all financial institutions with more than US\$1 billion in assets and would require federal regulators to proscribe any inappropriate or imprudently risky compensation. In addition, financial institutions would be required to disclose to the appropriate federal regulator the structures of all incentive-based compensation arrangements to determine whether the compensation is aligned with sound risk management.
- The Federal Reserve System ("Federal Reserve") is expected to issue proposed regulations within the upcoming weeks, which would enable the Federal Reserve to review the compensation policies of banks and, if necessary, reject the policies it believes encourage bank employees (e.g., executives, traders, loan officers) to take unnecessary risks.

6. Golden parachutes.

- Pursuant to Secretary Geithner's June 10 speech, Treasury would call for companies to examine whether their golden parachute arrangements (payments to executives in connection with a merger, acquisition or other corporate transaction) and supplemental retirement benefits truly incentivize performance and whether such arrangements reward top executives even if their shareholders lose value.
- S. 1074 and H.R. 3269 would require companies to make a clear and simple disclosure and give shareholders a separate advisory vote on any golden parachutes that previously have not been subjected to a shareholder vote or have been renegotiated or newly granted at the time of a corporate transaction.

7. Say on pay.

- S. 1006 would require at least a 60 percent shareholder approval of compensation as an exception to the “100 times” pay limit, as discussed under the “Pay Limitation” heading above.
- S. 1074, H.R. 3269 and Treasury’s June 10 fact sheet (and subsequent recommended legislation) would require companies to give shareholders an annual non-binding advisory vote on executive compensation packages and an advisory vote on golden parachutes. H.R. 3269 would further require every institutional investor to report at least annually how it voted on any shareholder vote, unless such votes are otherwise required to be reported publicly by SEC rule.
- H.R. 2861 and H.R. 3272 would similarly require a nonbinding shareholder vote on executive compensation packages.

8. Clawback provisions.

- H.R. 2861 would require a company’s board of directors (or a committee thereof) to develop and disclose a policy for reviewing unearned bonus payments, incentive payments or equity payments that were awarded to executive officers owing to fraud, financial results that require restatement or some other cause. Recovery or cancellation of any unearned payments would be required to the extent it is feasible and practical.
- H.R. 3269 would prohibit clawbacks of executive compensation approved by a majority of “say on pay” votes, except as provided by contract or in the case of fraud on the part of the executive to the extent provided by law.

- 9. Severance pay limitations.** H.R. 2861 would prohibit a company’s board of directors (or a committee thereof) from entering into agreements that provide severance payments to senior executive officers who are terminated by reason of poor performance, as determined by the board of directors.

10. Enhanced proxy disclosures.

- S. 1006 would require, for purposes of the “100 times” rule discussed under the “Pay Limitation” heading above, companies to disclose the amount of compensation paid to the lowest and highest paid employees, the average amount of compensation to all employees, the number of employees paid in excess of the “100 times” threshold and the amount of their compensation.
- H.R. 2861 would require the SEC to consider methods to improve disclosure of specific performance targets that are used to determine incentive compensation when it is claimed that disclosure would result in competitive harm (e.g., submit a request for confidential treatment of the performance targets under the SEC rules).
- The SEC proposed a series of changes to enhance proxy disclosures, which would require companies to (i) discuss and analyze its broader compensation policies and actual compensation practices for employees generally (including non-executive officers) if risks arising from those policies and practices may have a material effect on the company; (ii) disclose the aggregate grant date fair value of stock and option awards calculated under the Statement of Financial Accounting Standards No. 123 (revised), rather than the dollar amount recognized for financial statement reporting purposes for the fiscal year; (iii) expand the disclosures for directors and nominees to provide more information about a director’s credentials, directorships with companies in the past five years, potential conflicts and involvement in legal proceedings over the past ten years (instead of five years); (iv) disclose the leadership structure (e.g., whether and why the company has chosen to combine or separate its CEO and chairman positions, and how the board of directors’ role in the company’s risk management process affects the way it has organized its leadership structure); (v) disclose fees and services of compensation consultants related to executive or director compensation and (vi) disclose, on Form 8-K, the results of a shareholder vote within four business days after the meeting date (instead of in its period report on Form 10-Q and 10-K).

11. Compensation committee independence.

- Pursuant to the June 10 fact sheet issued by Treasury (and subsequent recommended legislation), Treasury would call for (i) each member of the compensation committee to meet independence requirements similar to those for audit committee members under Sarbanes-Oxley and (ii) for companies to provide their compensation committee with the authority and funding to hire independent compensation consultants and legal counsel.
- H.R. 3269 would prohibit each committee member from accepting any consulting, advisory, compensatory or other fee from the company or a related entity, other than in his or her capacity as a member of the compensation committee, the board of directors or any other board committee. The bill would further require a company to provide its compensation committee with the authority and funding to hire independent compensation consultants, outside counsel, and other advisors who can help ensure that the committee negotiates for pay packages in the best interests of the shareholders. The compensation committee would not be required to implement or act consistently with the advice or recommendations of the compensation consultant and may exercise its own judgment. Each company would be required to disclose, in the proxy or consent material, whether the compensation committee obtained advice of an independent consultant. If the compensation committee opts not to use its own advisor, it must explain that decision to the shareholders.
- H.R. 3272 would require the compensation committee to be comprised entirely of independent members.

12. Consultant independence. H.R. 2861, H.R. 3269 and Treasury's June 10 fact sheet (and subsequent recommended legislation) would require the compensation consultants and legal counsel ("advisors") to satisfy independence standards established by the SEC. H.R. 3269 and Treasury's fact sheet would merely instruct the SEC to issue rules implementing this provision, while H.R. 2861 provides guidelines for determining an advisor's independence. Under H.R. 2861, independence would be based on the extent the advisor provides other services to a company in conjunction with the negotiation of employment contracts, the advisor's equity interests in the company and whether an advisory company's incentive compensation plan links the compensation of its individual advisors to the advisory company's provision of other services to the company.

13. Majority voting for directors. S. 1074 and H.R. 2861 would require that directors in uncontested elections be elected by a majority of the votes cast as to each nominee (although H.R. 2861 would only impose this requirement to the extent permitted by state law). In contested elections where the number of nominees exceeds the number of directors to be elected, directors must be elected by the vote of a plurality of the shares represented at any meeting and entitled to vote on the election of directors.

14. Shareholder access to the proxy. S. 1074, H.R. 2861 and the proposed SEC rules would generally provide shareholders owning a threshold percentage of a company's stock for a specified period of time the right to nominate directors for inclusion in the company's proxy statement.

15. No broker discretionary voting in uncontested director elections. The SEC amended New York Stock Exchange Rule 452 to prohibit brokers from voting proxies in uncontested director elections without instructions from beneficial owners, which is effective for shareholder meetings held on or after January 1, 2010. Currently, if a beneficial owner does not provide voting instructions to its broker at least ten days before a scheduled meeting, Rule 452 permits the broker to vote on behalf of the beneficial owner with respect to "routine" proposals. Uncontested elections are currently considered "routine" matters on which brokers may cast discretionary votes. The amendment to Rule 452, however, will add director elections to the list of items identified as "non-routine," thereby eliminating the broker discretionary votes in director elections which were typically cast in favor of the management's nominees. H.R. 2861 proposes the same prohibition.

16. Independent chairman of the board of directors.

- S. 1074 and H.R. 2861 would require each company to provide in its governing documents or a public statement of corporate policy that the chairman of the board of directors must be an independent director who has not previously served as an executive officer of the issuer. H.R. 2861 further clarifies that an "independent director" would be one who, during the preceding five years, has not been (i) employed by the company in an executive capacity; (ii) an employee, director or greater-than-20 percent owner of a company that is a paid advisor or consultant to the company; (iii) employed by a significant customer of the

company; (iv) a party to a personal services contract with the company or a senior executive officer; (v) an employee, officer or director of an organization that receives the greater of US\$100,000 or one percent of the total annual donations from the company; (vi) a relative of an executive of the company; or (vii) engaged in any other relationship with the company or its senior executives that the SEC determines would not render that director an independent director.

- H.R. 3272 would prohibit an individual from serving as an executive officer of a company while serving as the chairman of the board of directors for that company.

17. Mandatory annual director elections. S. 1074 would require each company to provide in its governing documents that each member of the board of directors of the company shall be subject to an annual election by the shareholders.

18. Establishment of a risk committee.

- S. 1074 would require companies to establish a risk committee comprised entirely of independent directors, which would be responsible for the establishment and evaluation of risk management, pursuant to rules that would be set forth by the SEC.
- H.R. 3272 would similarly require companies to establish a risk committee, comprised entirely of independent members who periodically review the risk management policies for the company. In addition, companies would be required to appoint a chief risk officer who would establish, evaluate and enforce risk management policies and procedures of the company and report directly to the risk management committee.

Status of Reformations as of September 30, 2009

- A. S. 1006 (Sen. Durbin)** – Introduced May 7, 2009; referred to Senate Committee on Banking, Housing and Urban Affairs.
- B. S. 1007 (Sen. Durbin)** – Introduced May 7, 2009; referred to Senate Committee on Banking, Housing and Urban Affairs; discharged and referred to Senate Finance Committee on June 1, 2009.
- C. S. 1074 (Sen. Schumer)** – Introduced May 19, 2009; referred to Senate Committee on Banking, Housing and Urban Affairs.
- D. H.R. 2861 (Rep. Peters)** – Introduced June 12, 2009; referred to House Committee on Financial Services.
- E. H.R. 3269 (Rep. Frank)** – Introduced July 21, 2009; referred to House Committee on Financial Services; reported the bill to the House on July 28, 2009; the House passed H.R. 3269 on July 31, 2009 by a vote of 237-185; referred the bill to the Senate Committee on Banking, Housing and Urban Affairs on August 2, 2009.
- F. H.R. 3272 (Rep. Ellison)** – Introduced July 21, 2009; referred to House Committee on Financial Services.
- G. S. 1491 (Sen. Levin and Sen. McCain)** – Introduced July 22, 2009; referred to Senate Finance Committee.
- H. Treasury statement and fact sheets:** On June 10, 2009, Treasury Secretary Geithner introduced a set of broad-based principles involving compensation reform. Several principles were included in Treasury's draft legislation recommended to Congress on July 17, 2009 and incorporated within H.R. 3269.
- I. SEC proposed rule:** On July 16, 2009, the SEC published the text of proposed amendments, previously approved on July 1, 2009.
- J. NYSE Rule 452 amendment.** On July 1, 2009, the SEC approved the amendment to NYSE Rule 452.
- K. SEC proxy access rules.** On May 20, 2009, the SEC announced its proxy access proposed rules. On June 10, 2009, the SEC published the rule for public comments.
- L. Federal Reserve proposed regulations.** In the upcoming weeks, the Federal Reserve is expected to issue regulations on bank compensation policies.

Compensation Reform Matrix

| Reformation Initiatives | | A | B | C | D | E | F | G | H | I | J | K | L |
|-------------------------|--|---|---|---|---|---|---|---|--|---|--|---|--|
| | | S. 1006 Excessive Pay Shareholder Approval Act (5/7/09) | S. 1007 Excessive Pay Capped Deduction Act of 2009 (5/7/09) | S.1074 Shareholder Bill of Rights Act of 2009 (5/19/09) | H.R. 2861 Shareholder Empowerment Act of 2009 (6/12/09) | H.R. 3269 Corporate and Financial Compensation Fairness Act of 2009 (7/21/09) | H.R. 3272 Corporate Governance Reform Act of 2009 (7/21/09) | S. 1491 Ending Excessive Corporate Deductions for Stock Options Act (7/22/09) | Treasury statement/ fact sheet (6/10/09) | SEC proposed proxy access rules (6/10/09) | SEC approved amendment to NYSE Rule 452 amendment (7/1/09) | SEC proposed proxy disclosure rules (7/16/09) | Federal Reserve System proposed review of bank pay |
| 1 | Pay for performance | | | | | | | | • | | | | |
| 2 | Pay limitation | • | | | | | | | | | | | |
| 3 | Deduction limitation | | • | | | | | • | | | | | |
| 4 | Compensation that accounts for the time horizon of risk | | | | | • | | | • | | | | |
| 5 | Aligning compensation with sound risk management | | | | | • | | | • | | | | • |
| 6 | Golden parachutes | | | • | | • | | | • | | | | |
| 7 | Say on pay | • | | • | • | • | • | | • | | | | |
| 8 | Clawback provisions | | | | • | • | | | | | | | |
| 9 | Severance pay limitations | | | | • | | | | | | | | |
| 10 | Enhanced proxy disclosures | • | | | • | | | | | | | • | |
| 11 | Compensation committee independence | | | | | • | • | | • | | | | |
| 12 | Consultant independence | | | | • | • | | | • | | | | |
| 13 | Majority voting for directors | | | • | • | | | | | | | | |
| 14 | Shareholder access to the proxy | | | • | • | | | | | • | | | |
| 15 | No broker discretionary voting in uncontested director elections | | | | • | | | | | | • | | |
| 16 | Independent chairman of the board of directors | | | • | • | | • | | | | | | |
| 17 | Mandatory annual director elections | | | • | | | | | | | | | |
| 18 | Establishment of a risk committee | | | • | | | • | | | | | | |

IRS Issues Notices and Guidance on Retirement Savings

On September 5, 2009, President Obama and Secretary of the Treasury Tim Geithner announced new initiatives to promote retirement savings. As part of those initiatives, the Internal Revenue Service (the "IRS") issued several Notices and Revenue Rulings to encourage greater retirement savings through vehicles such as automatic enrollment in employer-sponsored individual account defined contribution plans, such as 401(k)s and SIMPLE IRAs, as well as to clarify the rules on plan amendments regarding contributions of unused paid time off, and to provide model notices for eligible rollover distributions. A summary of these Notices and Revenue Rulings is below.

Rev. Rul. 2009-31: Annual Paid Time Off Contributions Under Qualified Retirement Plans

In Revenue Ruling 2009-31, the IRS concluded that amendments to a tax-qualified retirement plan to require annual nonelective contributions, or to permit annual elective contributions, to the plan of the dollar equivalent of unused paid time off will not cause the plan to lose its tax-qualified status. However, such contributions must satisfy the applicable nondiscrimination requirements and limitations under the Code for the year in which the contributions are made. The IRS clarified that assuming that the applicable tax qualification requirements are satisfied, a participant does not include in gross income contributions to the plan of the dollar equivalent of unused paid time off until distributions are made to the participant from the plan. For purposes of Revenue Ruling 2009-31, paid time off refers to paid sick and vacation leave without regard to whether the leave is due to illness or incapacity.

Rev. Rul. 2009-32: Paid Time Off Contributions at Termination of Employment Under Qualified Retirement Plans

Whereas Revenue Ruling 2009-31 addresses plan amendments with respect to annual contributions of the dollar equivalent of unused paid time off, Revenue Ruling 2009-32 addresses plan amendments with respect to contributions of the dollar equivalent of unused paid time off at a participant's termination of employment. The IRS arrived at the same conclusions in Revenue Ruling 2009-32 as it did in Revenue Ruling 2009-31 (see above).

Rev. Rul. 2009-30: Automatic Contribution Increases under Automatic Contribution Arrangements

Often, defined contribution plans provide for automatic enrollment of new employees in the plan. Such arrangements are called "automatic contribution arrangements," which provide that an employee will be automatically enrolled in the plan, and will be treated as having made an election to have a specified percentage of his or her compensation contributed to the plan, unless the employee either elects to contribute a different amount to the plan or affirmatively opts out of contributing to the plan. All automatic contribution arrangements must meet certain requirements, including complying with restrictions on distributions of contributions and satisfying nondiscrimination standards, so that they will be considered "qualified cash or deferred arrangements," or "qualified CODAs," for purposes of Code Section 401(k). Contributions made under qualified CODAs are often referred to as "elective contributions." Two specific types of automatic contribution arrangements that are considered qualified CODAs are "qualified automatic contribution arrangements," or "QACAs," and "eligible automatic contribution arrangements," or "EACAs." Under a QACA, all eligible employees (current and new hires) who have not made an affirmative election to defer or decline participation are treated as having elected to defer an amount equal to a certain percentage of compensation, and an employer that implements a QACA may provide for a lower amount of matching contributions than under a regular automatic contribution arrangement and still qualify for relief from performing required nondiscrimination tests. Under an EACA, participants are treated as having elected to defer an amount equal to a uniform percentage of compensation provided under the plan until they specifically opt out of the arrangement, and an employer that implements an EACA is provided with an extended period to refund any excess contributions, as determined by the nondiscrimination tests, without incurring excise taxes. If a plan's automatic enrollment provisions meet either the QACA or the EACA requirements under Code Section 401(k) (or both), then those provisions are considered to automatically be qualified CODAs. (For more information on automatic contribution arrangements, QACAs and EACAs, see White & Case's August 2008 article entitled "Navigating the ACA, EACA, QACA and QDIA Rules," available here: http://www.whitecase.com/ecbelfocus_0808_4/.)

In Revenue Ruling 2009-30, the IRS provided additional guidance on whether automatic contribution arrangements under which the default contribution percentage automatically increases in future years should be considered qualified CODAs. Specifically, the IRS concluded that where an automatic contribution arrangement provides for an automatic increase in an eligible employee's default contribution percentage for plan years after the first plan year in which the employee participates, and that increase is based in part on future increases in the employee's base pay, the resulting default contribution will still be considered an "elective contribution," and therefore, the arrangement will still be a qualified CODA. The IRS similarly concluded that an automatic contribution arrangement will not fail to qualify as a QACA or an EACA where the arrangement provides that an eligible employee's default contribution percentage will increase annually on a date other than the first day of the plan year.

Notice 2009-65: Adding Automatic Enrollment to Section 401(k) Plans—Sample Amendments

Notice 2009-65 provides two sample amendments that plan sponsors can adopt in order to add an automatic enrollment feature to their plans. Both sample amendments are designed to meet Code requirements, and IRS guidelines, for qualified CODAs. The first sample amendment is designed to add a basic automatic contribution arrangement to a 401(k) plan; the second sample amendment is designed to add an EACA to a 401(k) plan. Both amendments may need to be modified to conform to a plan's individual terms and administrative procedures, and must be adopted by the later of (1) the plan year in which the amendment will be effective, pursuant to the deadlines provided in IRS Revenue Procedure 2007-44, or (2) the deadline under the Pension Protection Act of 2006 (the "PPA") for adopting amendments made pursuant to the PPA. The sample amendments are available here: <http://www.irs.gov/pub/irs-drop/n-09-65.pdf>.

Notice 2009-66: Automatic Enrollment in SIMPLE IRAs

SIMPLE IRAs are simplified tax-favored retirement plans for small employers. Generally, in order to establish a SIMPLE IRA, the employer must have 100 or fewer employees and cannot sponsor any other retirement plans. Notice 2009-66 provides guidance, in the form of Questions and Answers ("Q&As"), to assist employers that sponsor a SIMPLE IRA in adding an automatic enrollment feature to such plans. Among other things, the Q&As confirm that a SIMPLE IRA may include an automatic contribution arrangement, and that such an arrangement can

provide for a default contribution percentage that increases annually based on the number of years, or portions of years, for which default salary reduction contributions have been made for the employee, and provide additional notice requirements for SIMPLE IRAs that include an automatic contribution arrangement. (Note that 401(k) plans already had the right to add an automatic contribution arrangement.)

Notice 2009-67: Adding Automatic Enrollment to SIMPLE IRAs—Sample Amendment

Notice 2009-67 provides a sample amendment that a prototype sponsor of a SIMPLE IRA can use in drafting an amendment to add an automatic contribution arrangement feature. The sample amendment is designed to meet Code requirements, and IRS guidelines, for such arrangements. The sample amendment may need to be modified by the prototype sponsor to conform the language to meet the SIMPLE IRAs terms and administrative procedures, and employers that wish to add an automatic enrollment feature will need to adopt the amendment provided by their prototype sponsor prior to the effective date of the automatic contribution arrangement. The sample amendment is available here: <http://www.irs.gov/pub/irs-drop/n-09-67.pdf>.

IRS Notice 2009-68: Model Notices for Eligible Rollover Distributions

Code Section 402(f) requires plan administrators of qualified retirement plans to provide a written explanation to any recipient of an eligible rollover distribution within a reasonable period of time before the plan makes such distribution. In Notice 2009-68, the IRS issued two safe harbor explanations that employers may use to satisfy the Section 402(f) notice requirement. The first explanation applies to a distribution not from a designated Roth account, and the second explanation applies to a distribution from a designated Roth account. Notice 2009-68 reflects changes made to the Code by the Economic Growth and Tax Relief Reconciliation Act of 2001 and the PPA that affect the information required to be provided in a Section 402(f) notice. Notice 2009-68 also explains rules that apply in special situations, such as when a distribution is made to a nonresident alien. The safe harbor explanations in Notice 2009-68 modify and supersede the explanations in Notice 2002-3, which will continue to be safe harbor explanations with respect to notices provided through December 31, 2009.

White & Case would be happy to provide counsel to you in amending your plans to take advantage of the retirement savings options discussed above.

Employers should prepare now for 2009 – 2010 Flu Season

Under the “General Duty Clause” of the federal Occupational Safety and Health Act (“OSHA”), employers in the United States have a legal obligation to provide their employees with a safe work environment that “[is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees.” Given the requirements of OSHA’s General Duty Clause, and for other important business reasons, employers should take steps now to prepare for the effects of a possible 2009 – 2010 flu pandemic.

In this connection, employers should be aware that the Centers for Disease Control and Prevention (“CDC”) recently released a new “[Guidance for Businesses and Employers to Plan and Respond to the 2009 – 2010 Influenza Season](#)” and, in conjunction with the Department of Health and Human Services and the US Department of Homeland Security, also issued “[Preparing for the Flu \(Including 2009 H1N1 Flu\)—A Communication Toolkit for Businesses and Employers](#).” The Guidance recommends that employers take actions now to decrease the spread of seasonal flu and 2009 H1N1 flu in the workplace.* The Toolkit contains such things as questions and answers about the Guidance, fact sheets for employers and employees, a workplace poster (“STOP! Do You Feel Sick?”) for workplace entrances and template e-mails/letters for companies to send to their employees.**

Among other things, the Guidance recommends that employers: (i) review or establish flexible influenza pandemic plans; (ii) allow sick workers to stay home without fear of losing their jobs; (iii) develop other flexible leave policies for employees who have to stay home to care for sick family members or for children if schools dismiss students or child programs close; (iv) share their influenza pandemic plans with employees and explain what human resources policies, workplace and leave flexibilities, and pay and benefits, will be available to them; and (v) add a “widget” or “button” to company web pages or employee websites so employees can access the latest information (e.g., www.cdc.gov/widgets/).

If the current flu conditions remain at a similar severity as in Spring/Summer 2009, the Guidance recommends the following employer responses, among others:

- Advise employees to be alert to signs of fever and other signs of flu-like illness (such as fevers or chills and cough or sore throat, which may also be accompanied by a runny nose, body aches, headache, tiredness, diarrhea or vomiting) before reporting to work each day and stay home if they are ill. Employees who appear to have flu-like illness upon arrival at the office should be promptly separated from other employees and asked to go home. Employees who are ill also should not travel.
- Employees who become ill with flu-like illness during the work day should be promptly separated from other employees and asked to go home. If they can tolerate it, provide such employees with a surgical mask to wear before they go home if they cannot be separated from other employees. Inform fellow employees of their possible exposure to flu-like illness but maintain confidentiality as required by federal (and state) law.
- Employees with flu-like illness should stay at home until at least 24 hours after they are free from fever (100° or greater), or signs of a fever, without the use of fever-reducing medications. [The CDC had previously recommended that employees stay home for the longer of seven days after becoming ill or 24 hours after the symptoms resolve, which the CDC now recommends only if the flu conditions increase in severity (see below).] Expect sick employees to be out for about three to five days in most cases.
- Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are well aware of the policies. “Allow and encourage sick workers to stay home without fear of losing their jobs.” Do not require a doctor’s note for employees who are ill with flu-like illness because doctors’ offices may be too busy to provide such documentation on a timely basis.

* The Guidance does not apply to healthcare employers and those with “high and very high exposure tasks and operations.” Separate information is available for such employers.

** Other resources include, but are not limited to, OSHA’s previously issued “[Guidance on Preparing Workplaces for an Influenza Epidemic](#),” the Department of Homeland Security’s “[Planning for 2009 H1N1 Influenza: A Preparedness Guide for Small Businesses](#)” and the website www.flu.gov (“one-stop access to US Government H1N1, avian and pandemic flu information”). Employers also should be aware that the federal Equal Employment Opportunity Commission has issued [Employment Discrimination and the 2009 H1N1 Flu Virus \(Swine Flu\) and ADA-Compliant Employer Preparedness for the H1N1 Flu Virus](#) and [Pandemic Preparedness in the Workplace and the Americans With Disabilities Act](#) to assist employers in complying with discrimination laws while addressing potential H1N1 flu issues.

- Employees who are well but have family members at home with flu-like illness can go to work as usual, but these employees should monitor their health every day. Employers should maintain flexible policies to permit employees to stay home to care for their ill family members.
- Educate employees on proper cough and sneeze etiquette and hand hygiene and provide such things as tissues, no-touch disposal receptacles and alcohol-based hand sanitizers (including in conference rooms). Educate employees that some people are at a higher risk (e.g., pregnant women, employees who are 65 years of age or older and adults with chronic lung disease such as asthma, heart disease, diabetes, diseases that suppress the immune system and other chronic medical conditions) and encourage such employees to contact their healthcare provider as soon as possible. Frequently clean all commonly touched surfaces in the workplace, such as workstations, countertops and doorknobs. Encourage employees to get vaccinated for seasonal flu and, when available, for 2009 H1N1 flu.
- Prepare for increased numbers of employee absences because of illness of the employees and/or their family members. Be prepared to allow employees to stay home to care for children if schools are dismissed or child care programs are closed, but strongly recommend that parents not bring their children with them to work while schools are dismissed. Ensure that leave policies are flexible and not punitive.

If the flu conditions increase in severity compared to the Spring/Summer 2009, the Guidance recommends the following additional or different employer responses, among others:

- At the beginning of the workday or with each new shift, ask all employees about symptoms consistent with a flu illness, such as fevers or chills AND cough or sore throat. Employees with flu-like illness should be advised not to come to work or travel and to remain at home for at least seven days, even if symptoms resolve sooner. If employees are still sick seven days after they become ill, they should remain at home until at least 24 hours after symptoms have resolved.
- Consider how to reduce the number of people that high-risk employees come in contact with—for example, by permitting telecommuting, reassigning duties or allowing such employees to stay home from work. Consider increasing social distancing for all employees by avoiding crowded work settings, canceling business-related face-to-face meetings, spacing employees farther apart, canceling non-essential travel, increasing telecommuting and staggering shifts.

If we can assist you with your pandemic flu planning or any employment issues relating to the 2009 – 2010 flu season, please do not hesitate to contact us.

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