

RETIREMENT PLAN UPDATE: 2009 DEADLINE FOR AMENDMENTS

All qualified retirement plans and 403(b) plans must be amended by the last day of the 2009 plan year (December 31, 2009 for calendar year plans) to meet requirements of the Pension Protection Act of 2006 (later deadlines may apply to certain government plans and collectively bargained plans).

The highlights of the required changes include:

- Vesting – Maximum three year “cliff” vesting or six year graded vesting schedules were first introduced by the Pension Protection Act of 2006 (“PPA”) for employer matching contributions only. Those schedules are now applicable for all employer contributions to defined contribution plans, and the corresponding amendment for affected plans is required at this time.
- Roth IRA Rollovers – Qualified retirement plans, 403(b) plans and 457(b) plans maintained by governmental bodies must permit any recipient of an eligible rollover distribution (any lump sum distribution that is not a required minimum distribution or an in-service hardship distribution) to elect a direct rollover to a Roth IRA. The amount of any rollover to a Roth IRA will be taxed to the recipient, except to the extent of any after-tax contributions, in effect converting the distribution to an after-tax Roth IRA contribution. Mandatory income tax withholding and the 10 percent penalty tax for distributions to those under age 59-1/2 will not apply if certain conditions are satisfied. Currently, only recipients with modified adjusted gross incomes that do not exceed \$100,000 can roll over to a Roth IRA. For taxable years starting on or after January 1, 2010, the income limit does not apply and all recipients of eligible rollover distributions can direct the distributions to their Roth IRAs.
- Diversification Rights – Participants must have the right to diversify any 401(k) contributions currently invested in publicly traded employer securities into at least three alternative investments (for participants with at least three years of service, the right to diversify must also extend to any employer contributions invested in such employer securities).

- Hardship Distributions – Hardship distributions can be expanded to include hardships involving a participant’s “primary beneficiary,” which need not be a spouse or dependent family member. This optional provision allows plans to permit hardship distributions with respect to non-family beneficiaries, such as domestic partners.
- Non-Spouse Beneficiaries – Under the PPA, a retirement plan death benefit may be transferred to the “inherited IRA” of a non-spouse beneficiary if the plan so provides. Plans which permit this non-spouse rollover option have to be amended by the end of the 2009 plan year. However, starting with the 2010 plan year, this provision will be mandatory under the Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”), and plan administrators will be required to make this option available starting January 1, 2010 for most calendar year plans.
- Qualified Optional Survivor Annuity – The PPA requires plans subject to the qualified joint and survivor annuity (QJSA) requirement to provide an optional form of payment, the QOSA, for married participants. The level of the survivor benefit is 75 percent of the amount payable while the retired participant is alive if the QJSA provides a survivor benefit of less than 75 percent (this would be typical of most plans). If the survivor benefit under the Plan’s QJSA is 75 percent or more, then the survivor benefit under the QOSA must be 50 percent of the amount payable while the retired participant is alive.

The above is not a complete listing of PPA requirements. Other PPA provisions requiring current plan amendments apply to cash balance plans, 401(k) and 403(b) plans providing automatic participant contributions and defined benefit plans, which have new rules for funding and actuarial assumptions.

Additional requirements for 2009 apply under other statutory and regulatory provisions. For example, WRERA allows a waiver by retirement plans and IRAs of the required minimum distributions (RMDs) for distributees age 70½ and older (this waiver applies only to such distributions required for the 2009 plan year so that 2008 RMDs were still payable to subject participants by no later than April 1, 2009). Also, under the Heroes Earnings Assistance Tax Relief Act of 2008 (“HEART”), retirement plans must provide beneficiaries of a participant who dies during qualified military service benefits that would have been available had the participant returned to covered employment and then terminated on account of death. Both the RMD waiver under WRERA and the HEART death benefit provisions are effective now although no corresponding plan amendments are required at this time (the respective deadlines are the 2010 plan year for the WRERA amendments and the 2011 plan year for the HEART amendments).

Recommendations: Prompt action is required to assure PPA compliance for all retirement plan documents. Related administrative matters also require attention. The 2009 plan changes will require a summary of material modification for timely distribution to participants. Changes to distribution and beneficiary designation forms will also be required for most plans. Cycle “D” filers (including “custom” plans maintained by employers whose FEINs end in “4” or “9”) also should submit a determination application to the IRS by January 31, 2010. Also bear in mind

that WRERA and HEART mandate administrative changes now although no corresponding plan amendments are required at this time.

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