Fall 2009/Volume 9

employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service
Tax Exempt and Government
Entities Division

A Publication of Employee Plans

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And Our Regular Columns

Dos and Don’ts of Hardship Distributions

Given the current economic climate, a greater number of participants may request a hardship distribution from his or her retirement plan. To avoid jeopardizing the qualified status of the plan, employers and plan administrators must follow both the plan document and legal requirements before making hardship distributions.

Some retirement plans, such as 401(k) and 403(b) plans, may allow participants to withdraw from their retirement accounts because of a financial hardship, but these withdrawals must follow IRS guidelines. For example, a plan may only make a hardship distribution:

- if permitted by the plan;
- because of an immediate and heavy financial need of the employee and, in certain cases, of the employee’s spouse, dependent or beneficiary; and
- in an amount necessary to meet the financial need.

Before making hardship distributions:

1. Review the terms of the plan, including:
    i. whether the plan allows hardship distributions;
    ii. the procedures the employee must follow to request a hardship distribution;
    iii. the plan’s definition of a hardship; and
    iv. any limits on the amount and type of funds that can be distributed for a hardship from an employee’s accounts.
2. Obtain a statement or verification of the employee’s hardship as required by the plan’s terms.
3. Determine that the exact nature of the employee’s hardship qualifies for a distribution under the plan’s definition of a hardship.
4. Document, as may be required by the plan, that the employee has exhausted any loans or distributions, other than hardship distributions, that are available from the plan or any other plan of the employer in which the employee participates.
5. If the plan’s terms state that a hardship distribution is not considered necessary if the employee has other resources available, such as spousal and minor children’s assets, document the employee’s lack of other resources.
6. Check that the amount of the hardship distribution does not exceed the amount necessary to satisfy the employee’s financial need. However, amounts necessary to pay any taxes or penalties because of the hardship distribution may be included.
7. Ensure that the amount of the hardship distribution does not exceed any limits under the plan and consists only of eligible amounts. For example, a plan could limit hardship distributions to a specific dollar amount and require that they be made only from salary reduction contributions.
8. If the plan’s terms require that the employee is suspended from contributing to the plan and all other employer plans for at least 6 months after receiving a hardship distribution, inform the employee and enforce this provision.

If a plan does not properly make hardship distributions, it may be able to correct this mistake through the Employee Plans Compliance Resolution System (EPCRS).

IRS Retirement Plans Online Navigator

IRS EP has launched a new Web guide to help employers review retirement plan options and to make it easier for their employees to save for the future. The “IRS Retirement Plans Navigator” encourages small business owners to establish retirement plans by helping them choose a plan for their business. It also promotes tax law compliance with information and resources on maintaining plans and correcting plan errors.

Please add www.retirementplans.irs.gov to your organization’s Web site so your clients and others visiting your site can benefit from its information and resources.

When Limits Collide, Which One Wins?

Employers and plan administrators have to be aware of various annual limits that apply to defined contribution (DC) plans. However, many times these limits seem to be at odds with each other.

Some of the limits that apply to DC plans are:

- Annual additions to a participant's account under §415(c);
- Elective deferrals under §401(a)(30) (referencing §402(g));
- Catch-up contributions under §414(v);
- Annual compensation under §401(a)(17); and
- Deductible contributions by the employer under §404(a)(3).

Limits

Annual limits expressed as dollar amounts are subject to annual cost-of-living adjustments.

Section 415(c) limits the amount of annual additions to an employee's account. For 2009, the maximum annual additions are the **lesser** of 100% of a participant's compensation or $49,000. This annual addition limit applies to:

- Employer contributions (matching and nonelective);
- Employee contributions (pre-tax elective deferrals and designated Roth contributions, other than catch-up contributions, and after-tax); and
- Forfeitures.

Under §402(g), employees may make elective deferrals of $16,500 for 2009. This limit applies to:

- Pre-tax elective deferrals, and
- Designated Roth contributions.

A plan that allows employees to make elective deferrals may also allow participants who are age 50 or older by the end of the taxable year to make catch-up contributions under §414(v). For 2009, the maximum catch-up contribution is $5,500.

Section 401(a)(17) limits the amount of a participant's annual compensation that may be taken into account for an employee for contributions to the plan. The limit for 2009 is $245,000.

Under §404(a)(3), an employer may deduct employer contributions up to 25% of the total §401(a)(17) compensation paid to all benefitting plan participants. Salary reduction contributions can be deducted on top of the 25% limit. The amount of §401(a)(17) compensation used to calculate the 25% of compensation **includes** salary reduction contributions and certain other employee benefits. For SIMPLE 401(k) plans, the deductible amount is the required §401(k)(11) contribution. Employers can only deduct amounts up to the §415(c) limits.

Colliding Limits

In applying these various limits, the plan administrator must be familiar with the amounts of these limits for the applicable year, the terms of the plan and each employee's compensation amount.

Catch-up contribution limits vs. elective deferrals/§415 limits

If the plan allows catch-up contributions, then the §402(g) limit is increased for that participant by the amount of the allowed catch-up contribution under §414(v), but still cannot exceed 100% of the employee's compensation. This means that a 55-year-old employee whose annual compensation is $20,000 in 2009 can still only defer $20,000 to his or her 401(k) plan. If this employee's annual compensation was more than $22,000, he or she could defer $22,000 for 2009 ($16,500 plus $5,500 catch-up contributions).

Similarly, catch-up contributions, if permitted by the plan, would allow a maximum contribution of $54,500 ($49,000 plus $5,500 catch-up contributions) to be made to an eligible participant's account for 2009, limited only by the participant's compensation and the employer's deductible limit as discussed below.

Compensation limits vs. elective deferrals/§415 limits

Confusion may arise on how to reconcile the limits under §401(a)(17), §415(c) and §402(g) when an employee's annual compensation exceeds the current §401(a)(17) limit. For example, can a 40-year-old employee earning $30,000 per month (annual compensation of $360,000) who elects to defer a flat dollar amount of $1,375 per month ($16,500 for the year) in 2009 to his or her 401(k) plan continue to make elective deferrals after September, at which time his or her year-to-date compensation exceeds $245,000? The answer is yes, because the plan is not required to determine a participant's §401(a)(17) compensation based on the earliest payments of compensation during a year. Unless the plan's terms provide otherwise, the $16,500 §402(g) elective deferral limit is applied uniformly to the $245,000 §401(a)(17) compensation that the employee receives throughout the year, regardless of whether deferrals are expressed as a dollar amount or a percentage of compensation in the employee's salary reduction agreement.

Deduction vs. compensation/§415 limits

The §404(a)(3) deduction is limited by the §401(a)(17) compensation and the §415(c) annual addition limits. So the maximum deduction allowed, other than for SIMPLE 401(k) plans, is the lesser of:

- 25% of the total §401(a)(17) compensation of all benefitting plan participants; or
- The maximum combined §415(c) dollar limit for all benefitting plan participants.

Failing to comply with any of the above mentioned limits, except the §404(a)(3) limit, can lead to plan disqualification. Please visit our Employee Plans Compliance Resolution System (EPCRS) Web page for information and resources on correcting plan errors.

Tax Return Preparer Review

IRS Commissioner Doug Shulman will make recommendations by the end of 2009 for the IRS's review of the tax return preparer community. The IRS's goal is to increase taxpayer compliance and ensure uniform high ethical standards for tax preparer conduct. Potential recommendations include:

- a new model for the regulation of tax return preparers;
- service and outreach for return preparers;
- return preparer education and training; and
- enforcement for return preparer misconduct.

The IRS held its first of several public meetings scheduled with constituent groups on July 30, 2009, in Washington, D.C. The second meeting, made up of a governmental panel, was held on September 2, 2009, and featured federal and state officials.

Information for future public meetings, including schedules and agendas, will be available on the Tax Professionals page on our Web site.

Critical Priorities…With Monika Templeman
Today's Discussion: Loans and Hardships in 401(k) Plans

In each issue, Monika Templeman, Director of EP Examinations, responds to questions and offers insights on retirement plan topics uncovered during audits. You may provide feedback or suggest future topics for discussion by e-mailing her at: RetirementPlanComments@irs.gov.

Monika, the current economic condition in this country has plan sponsors and plan participants worried about their 401(k) retirement accounts, both today and in the future.

As a society we're getting older and less frugal. This is particularly alarming in light of the current economic factors impacting our nation. Although more than $11.7 trillion is currently invested in retirement plans, this amount was approximately $16 trillion in September 2008. This obviously reflects that the economic downturn impacted retirement plans. Almost everyone lost money in their retirement accounts and many people either have lost jobs or are facing the possibility of losing their jobs. We are finding that many participants are now looking to their retirement plans for temporary relief of their financial distress. We are doing our best to assist plan sponsors and participants to understand the rules for different ways money can be taken out of the plan. We want to caution plan participants to save for retirement and avoid depleting these savings for anything short of an emergency. Only 44% of families nearing retirement have an IRA with an average account balance of $60,000 or more. The question isn't at what age do you want to retire, it's at what income.

To make ends meet, participants are looking at plan loans for temporary relief. Which types of plans can offer plan loans?

Some plans, such as profit-sharing, 401(k) and money purchase plans, are permitted to offer loans to plan participants. The availability of loans will be stated in the plan document. IRA-based plans, such as SEPs, SIMPLE IRAs and SARSEPs, and traditional and Roth IRAs, are not permitted to provide loans.

Are there limitations on the amount of the loan?

The amount participants may take for a loan is limited to the lesser of: 50% of their vested account balance or $50,000. The law, and some plans, allow loans of $10,000 if 50% of a participant's vested account balance is less than $10,000.

Loans need to be repaid back to the account. What are the requirements for loan repayments?

The participant must make payments at least quarterly, over a period not exceeding five years. There is an exception to the five-year rule for loans taken out for the purchase of the participant's primary home.

When are there taxability issues with plan loans?

Loans that initially don't meet the requirements of the Code because they aren't limited to 50% of the vested account balance or they exceed $50,000 are treated as a distribution when the loan is made and taxed accordingly. Missing payments cause the loan to go into default whereupon the outstanding balance on the loan will be taxed as if distributed to the participant. Sometimes, this is just a payroll mix-up. Suddenly, the loan payments are no longer coming out of the participant's payroll check. If the error is not corrected, then the law treats the loan as a deemed distribution and it is includible in the participant's income. Some plans allow for a "cure period" in which participants can make up missed payments.

The number one taxability issue we see with loans occurs when a participant terminates employment with an outstanding loan balance. In this situation, plans usually offset the distribution of the participant's account by the amount of the outstanding loan balance. For tax purposes, the amount of the distribution includes the loan balance at the time of the offset. If the participant wants to roll over his or her **entire** benefit, then he or she must come up with money to cover both the loan offset and the 20% mandatory withholding that applies to the full amount including the loan offset. The 10% additional early distribution tax applies if the person is under age 55 unless another exception to this early withdrawal tax applies.

Can owner-employees borrow from the plan?

An owner-employee is allowed to borrow from the plan. However, he or she must follow the same rules as any other participant. The loan must be a formal loan meeting all of the loan requirements regarding amounts and repayment. If it does not, then it may be a prohibited transaction. What is **not allowed** is the employer dipping into plan assets – maybe informally borrowing a little just to tide him or her over – to meet payroll or pay other bills and then repay it later. This is **never** permitted.

Another problem we frequently encounter in tough economic times is when an employer withholds salary deferrals from employees' pay intending to deposit the money in its plan, but doesn't. The employer "borrows" the money, maybe to cover payroll, or rent or whatever, thinking that it won't hurt to wait a few weeks until the withheld salary deferrals are deposited into the plan's funding vehicle. Again, this is **never** okay. The Department of Labor looks very harshly on this fiduciary violation. The money must be deposited into the plan as soon as the money can reasonably be segregated from the employer's assets.

Let's turn our attention to hardship distributions. What type of plans can offer hardship distributions?

You'll only find hardship distributions in defined contribution plans, such as 401(k), 403(b) and 457 plans.

What are the requirements for hardship distributions?

The regulations for 401(k) plans require that there has to be an "immediate and heavy financial need," as defined in the plan. A distribution is deemed to be for an "immediate and heavy financial need" if it is for medical expenses, the purchase of a principal residence, tuition and related education expenses, the prevention of eviction or foreclosure, funeral expenses and repairing casualty damage to the employee's house. Also, a distribution must be necessary to satisfy an immediate and heavy financial need as defined by plan terms. The participant must first exhaust all loans and distributions, other than hardship distributions, available under all plans of the employer. Some plans may also require that the employee not have other resources available to meet the need, including his or her spouse's and minor children's assets.

I think it is important to note that, under a directive contained in the Pension Protection Act of 2006, the 401(k) hardship rules have been modified to treat a participant's beneficiary the same as a participant's spouse and dependents for purposes of qualifying for certain hardship distributions. Certain hardship distributions (medical, tuition and funeral expenses) can now be made to a participant based upon the need of a grandchild or domestic partner if that individual has been designated as a beneficiary under the plan.

When are there taxability issues with hardship distributions?

Employees should remember that hardship distributions are not tax-free money. Generally, they are subject to income tax in the year of distribution and, if the employee is under the age of 59 ½, to the10% early distribution tax unless another exception to this early distribution tax applies. However, these distributions are not subject to the mandatory 20% income tax withholding.

Any final words of caution you wish to provide to the plan sponsors?

Yes. If you wish to allow loans, hardship distributions, and even the modified hardship rule for the participant's beneficiary, the plan must include the language allowing for these features. Too many times my examination agents find that the plan sponsor allows plan loans and hardship distributions because they may have read or heard that they are permitted by law, but their plan specifically prohibits them or is silent. I would suggest that every plan sponsor **read their plan** before they offer any of these features to their participants.

A Message from the Advisory Committee on Tax Exempt and Government Entities (ACT): Stakeholders: please participate!

Important official survey asks how the new retirement plan IRS determination letter process is working and how it might be improved

An IRS advisory council is studying the retirement plan document determination letter process. A new online survey form asks for the views of employers, benefits attorneys, third-party administrators, consultants, providers of master & prototype documents and other stakeholders. In 2005 the IRS radically changed the determination letter process by creating 5-year and 6-year cycles for amending and filing individually designed, volume submitter and M&P retirement plan documents. Further changes were made in 2007. The advisory council wants to know how the process is working and how it might be improved, including the process for making required amendments or restatements. To learn more or take the survey now, click on the following address or copy and paste it into your web browser: http://www.surveymonkey.com/s.aspx?sm=EL2r2msS3KJI07X_2fq67w6w_3d_3d.

Employee Plans Published Guidance

(July 2009 - September 2009)

Regulations

T.D. 9459, 74 Fed. Reg. 45993	Allows §414(d) governmental plans (including governmental §403(b) contracts and governmental §457(b) plans) to continue using a reasonable good faith interpretation of §401(a)(9) to comply with the required minimum distribution rules instead of complying with the regulations under §401(a)(9).
REG-159704-03, 74 Fed. Reg. 48030	Updates the eligibility requirements and standards for performing actuarial services for ERISA-covered employee pension benefit plans as well as actuarial continuing education requirements.

Revenue Rulings

Rev. Rul. 2009-18, 2009-27 I.R.B. 1	Lists all guidance that is obsolete or superseded by the 403(b) final regulations under §1.403(b)-1 through 11.
Rev. Rul. 2009-30, 2009-39 I.R.B.	Gives two examples of how a 401(k) plan sponsor may automatically increase an eligible employee's default contribution percentage.
Rev. Rul. 2009-31, 2009-39 I.R.B.	Provides that qualified plans may be amended to permit certain annual contributions of the dollar equivalent of unused paid time off as employer contributions or elective 401(k) contributions.
Rev. Rul. 2009-32, 2009-39 I.R.B.	States that qualified plans may, under certain circumstances, allow employees upon termination of employment to contribute the dollar equivalent of unused paid time off to the plan.

Revenue Procedures

Rev. Proc. 2009-36, 2009-35 I.R.B. 304	States that a §414(d) governmental plan's remedial amendment cycle will not end before the end of the 91st day after the close of the first legislative session that begins more than 120 days after the plan's determination letter (provided its determination letter application was submitted timely to the IRS). The sponsor of an individually designed governmental plan may elect Cycle E (instead of Cycle C) as the plan's initial (EGTRRA) remedial amendment cycle.

Rev. Proc. 2009-43, 2009-40 I.R.B.	Provides for automatic IRS approval of a revocation request under WRERA §204 (revoking an election to treat the plan as being funded at the prior year's certified level with IRS's approval) if certain requirements are met. This Rev. Proc. also states special rules for automatic IRS approval of revocation requests made pursuant to the resolution of arbitration and that the IRS will consider revocation requests that do not satisfy the standard for automatic approval if the requests are submitted in accordance with IRS's normal ruling letter procedures.

Notices

Notice 2009-65, 2009-39 I.R.B.	Provides sample automatic enrollment plan language that a 401(k) plan sponsor can adopt with automatic IRS approval.
Notice 2009-66, 2009-39 I.R.B.	Includes guidance to help small employers use automatic enrollment for their SIMPLE IRA plans.
Notice 2009-67, 2009-39 I.R.B.	Provides sample automatic enrollment plan language that a SIMPLE IRA prototype plan sponsor can adopt with automatic IRS approval.
Notice 2009-68, 2009-39 I.R.B.	Contains two updated safe harbor 402(f) notices plans may provide recipients of an eligible rollover distribution. These updated notices reflect law changes (such as information on a distribution from a designated Roth account under an employer plan) and explain rules that apply in special situations (such as when a distribution is made to a surviving spouse or other beneficiary).
Notice 2009-71, 2009-35 I.R.B. 262	Announces the IRS's plan to issue guidance for eligible combined plans under §414(x) and requests comments on issues related to these combined plans.
Notice 2009-75, 2009-39 I.R.B.	Describes the federal income tax consequences of rolling over an eligible rollover distribution from §401(a) qualified plans, §403(a) annuities, §403(b) plans or eligible §457(b) governmental plans to a Roth IRA.

401(k) Phone Forum Rescheduled to September 30, 2009

The 401(k) Phone Forum originally scheduled for August 6, 2009, has been rescheduled to September 30, 2009, at 2:00 p.m. EST. Speakers will be Roger Kuehnle, Senior Tax Law Specialist, and Lisa Mojiri-Azad, Senior Technical Reviewer, Office of Division Counsel/ Associate Chief Counsel, TE/GE.

Those registered for the originally scheduled event in August do not need to reregister. New participants can register here.

We're Glad You Asked!

We had to let 4 of our 10 employees go this year leaving only 6 employees remaining in our retirement plan. My accountant told me this may constitute a "partial termination." What does this mean?

Generally, if more than 20% of your total plan participants left in one year because of a lay-off, then your plan may have incurred a partial termination. The law requires that all "affected participants" be fully vested in their account balance upon the date of full or partial plan termination. This means that affected employees must become 100% vested in all employer contributions regardless of the plan's vesting schedule.

Generally, an "affected participant" in a partial termination is any one who has left employment for any reason, during the period in which the partial termination occurred, and who still has an account balance under the plan. Some plans wait until a participant has 5 consecutive 1-year breaks in service before they forfeit his or her nonvested account balance. For these plans, participants who left during the determination period and who have not had 5 consecutive 1-year breaks in service are affected participants.

Additional Resources:

Code §411(d)(3)
Revenue Ruling 2007-43

Does the 2009 required minimum distribution (RMD) waiver apply to defined benefit plans?

No, 2009 RMDs are waived only from defined contribution plans (DC) and IRAs. They are still required from most defined benefit plans (DB). However, in some rare instances, a DB plan may provide a benefit based in part on the balance of a participant's separate account. This type of an account, known as §414(k) account, is treated as a DC plan and is covered by the 2009 RMD waiver.

Additional Resources:

Code §401(a)(9)
Notice 2009-9
§201 of the Worker, Retiree, and Employer Recovery Act of 2008

Web Spins - The Retirement Plans Site

We're back: Web Spins - the column that takes you for a quick spin around the "Retirement Plans Community" Web page. We've been busy since our last column. Be sure to check out our latest postings:

Retirement & Savings Initiatives
On September 5, 2009, the Obama administration announced new Retirement & Savings Initiatives. The initiatives expand opportunities for automatic enrollment in plans, permit workers to save payments they would receive for unused vacation or other similar leave in their retirement plan, help employees and employers better understand their tax-favored savings options and make it easier to save tax refunds.

- Life Events That Can Affect Retirement Savings
  Starting a job, marriage, divorce, retirement, death – major life events affect your retirement planning. Learn more about how major life events may influence your retirement.

- Information about Rollovers
  We've updated our resources for retirement plan rollovers.

403(b) Retirement Plan Mini-Course for Employers
A presentation for employers and sponsoring organizations with 403(b) plans.

403(b) Retirement Plan Mini-Course for Employees
A presentation for employees on how a 403(b) plan works.

TE/GE ACT Report Issued June 10, 2009
The ACT presented four recommendations to the IRS Commissioner and TE/GE.

401(k) Phone Forum - September 30, 2009 (Rescheduled Date)
A discussion of recent 401(k) guidance is rescheduled for September 30, 2009.

401(k) Checklist and Fix-It Guide Updated
We've updated the 401(k) Checklist and Fix-It Guide to include participant loan issues. Also, the two publications now work hand-in-hand. The checklist helps plan sponsors keep their plan compliant by asking 10 "yes" or "no" questions. If you answer "no" to any of the questions or would like to learn more, select "(More)" and you will be directed to the Fix-It Guide where you will find tips and examples on how to find, fix and avoid the mistake.

Ways to Avoid Delays: Determination Letter Application Processing Procedures

Determination letter application packages are now scanned into the Tax Exempt Determinations System (TEDS). This streamlined process requires that you do not use staples, rubber bands, or binding when submitting your application package. If multiple applications are submitted in the same mailing, please separate them with dividers or different colored papers.

You can avoid delays in processing by organizing application packages as follows:

1. Cover letter:
   The cover letter should *state significant and relevant information* for the plan being submitted such as: whether the plan is part of a controlled or affiliated service group, or that it is being submitted with a related plan, whether the application is being filed on or off-cycle, if the plan was involved in a merger, if it is a part of a multiple employer plan, or whether this plan was submitted under the Voluntary Correction Program or is currently being audited.

   If *applications for two or more plans* of the same employer are submitted together, each application should include a cover letter that identifies the name of the employer and the plan numbers as well as the employer identification numbers of all the related plans being submitted together.

2. Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request* (with user fee payment, if applicable):

   Submit correct user fee:
   If eligible for user fee exemption, the certification on Form 8717 must be signed and dated. Stamped signatures are not acceptable.

   If a request is made for a Demonstration 5 (Average Benefit Test) or Demonstration 6 (General Test), include the additional user fee in accordance with the Form 8717 Column A fees.

3. Form 2848, *Power of Attorney and Declaration of Representative* and/or Form 8821,*Tax Information Authorization*.

4. Most current determination letter and all amendments not covered by a prior letter. If the plan has never received a letter, provide a signed and dated copy of the prior plan document or adoption agreement (with the applicable opinion/approval letter). See "*Verification of Prior Plan Document in the Absence of a Determination Letter*."

5. Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, if applicable.

6. Application Form (Form 5300, 5307, 5310):

   Form 5307 application:

   Please use the most current Form 5307, revised March 2008, to allow for optical scanning. Applications postmarked after July 31, 2009, submitted on an older version will be returned - see *EPN Summer 2008*.
   Place a list of volume submitter modifications after the meeting minutes in #10.
   EGTRRA good faith and interim amendments need only be submitted for volume submitter plans that do not authorize the practitioner to amend on behalf of the adopting employer.

Form 5310 application:

Place Form 6088 after Form 2848 in #3.
Terminating plans should include a formal resolution to terminate the plan (for example, Meeting Minutes or Board of Directors Resolution);
Terminating plans are processed as "on-cycle" cases (see Revenue Procedure 2007-44). Terminating plans must be amended for all laws in effect as of the date of termination.

7. Attachments relating to application questions (such as a controlled group statement).
8. Schedule Q, *Elective Determination Requests*.
9. Demonstrations.
10. Notice to Interested Parties (for Form 5310 applications).
11. Meeting minutes, resolutions or other formal actions approving amendments, restatements, or actions involving the plan such as a merger or termination.

12. Restated plan for the applicable Cumulative List. (Note: A "working copy" must be restated – see section 7.04 of Revenue Procedure 2009-6).

    Pre-Approved Plans: Plan document changes/corrections that were required for pre-approved (master & prototype or volume submitter) plans' qualification as part of their initial review should be incorporated in the plan sponsors' master plan documents so that adopting employer submissions will not require amendments for the same issues.

    Merged Plans: If submitting a plan that has been involved in a merger, the application must demonstrate that all merged plans are qualified as of the date of merger for the surviving plan to receive a letter. See related article on merged plans in *EPN Winter 2009*.

13. EGTRRA good faith amendments, interim and discretionary amendments in chronological order with the most current on top. (See Revenue Procedure 2007-44 and Announcement 2008-23 for additional guidance).

14. Current trust agreement.

15. All other pertinent documents, such as merger agreements or compliance statements.

For general case processing procedures for Employee Plans Determination Letters, see Revenue Procedure 2009-6, Determination Resources and the EP Determination Letter Resource Guide on our Web site.

Retirement & Savings Initiatives: Helping Americans Save for the Future

On September 5, 2009, as part of the Retirement & Savings Initiatives, the IRS and Treasury issued four notices and three revenue rulings to promote retirement plan savings.

The notices contain:

- sample amendments to add an automatic enrollment feature (also known as an automatic contribution arrangement) to 401(k) and SIMPLE IRA plans;
- guidance on using an automatic contribution arrangement (ACA) in SIMPLE IRA plans; and
- two updated safe harbor explanations (§402(f) notices) for eligible rollover distributions.

The revenue rulings clarify the rules on:

- increasing ACA default contribution percentages; and
- contributing unused vacation and sick pay to a retirement plan, both annually and upon termination of employment.

See the *EPN Special Edition* for more details.

The EPCU Insider

Master & Prototype (M&P) Project

Welcome back to "The EPCU Insider!" In this column, we provide the latest news from our shop so you can be informed if you happen to receive a letter from us. The EPCU addresses pension compliance by using questionnaire studies to pinpoint troublesome areas with minimal burden to taxpayers.

Our recent M&P Project has focused on compliance issues with sponsors and adopting employers. EP specialists reviewing M&P determination letter applications and those examining M&P plans have discovered that some adopting employers are not aware of their responsibilities to timely amend their plans for current law. The EPCU is sending compliance contact letters to M&P sponsors and adopting employers requesting information on their practices and procedures that:

- measure the communication between M&P sponsors and adopting employers; and
- ensure that sponsors are notifying adopting employers of their need to understand and timely amend their plan documents.

The M&P Project involved two phases. First, we sent a contact letter to a sample of M&P sponsors requesting a list of their adopting employers and verification of the M&P sponsor's administrative practices and procedures directed at three key responsibilities. Next, we sent a contact letter to the adopting employers requesting information on fulfillment of those same sponsorship obligations.

Although many of the responsibilities associated with adopting and amending an M&P plan appear to have been shifted from the adopting employer to the M&P sponsor, it is not sufficient for the M&P sponsor to merely provide the adopting employer with an approved plan document.

As a condition of an M&P plan receiving an opinion letter, the M&P sponsor agrees to comply with the responsibilities outlined in Revenue Procedure 2000-20[1]. Sponsors have three key obligations to their adopting employers. They must make reasonable and diligent efforts to ensure that adopting employers:

1. are aware of and receive all plan documents and amendments, including an approved copy of the plan, any subsequent amendments and the most recently issued opinion letter;
2. complete and sign new adoption agreements or signature pages when necessary (such as if the plan has been restated, if modifications are made to prior elections or if new elections are selected); and
3. timely amend their plan when necessary to retain approved status (for example, when any provisions fail to meet the requirements of law, regulations or other guidance affecting qualification).

The M&P Project is listed under Current Projects on the EPCU's Web page and includes frequently asked questions and information about the project's process.

We encourage you to e-mail any comments for the M&P Project or any other project, especially if these suggestions focus on areas of potential noncompliance, to EPCU@irs.gov.

[1] The M&P Project focused on GUST 1 Opinion Letter issuance at the onset of the project in 2008.

Highlights of the *Retirement News for Employers*

The *Retirement News for Employers* has information for small businesses with retirement plans. Encourage your clients to join the thousands of existing subscribers to this free newsletter.

The Summer 2009 Edition featured:

- "Know the Rules before You Break Open Your Retirement Piggy Bank" – notes the differences in the Code §72(t) exceptions for distributions from IRAs vs. distributions from retirement plans.
- "SIMPLE IRA Plans: The 2-Year Rule on Early Distributions" – describes the two-year rule for SIMPLE IRA distributions, the increase in Code §72(t) additional tax to 25% and lists the exceptions to the tax.
- "Fixing Common Plan Mistakes" – explains how a plan can correct the failure of not applying its automatic enrollment provision to eligible employees.
- "We're Glad You Asked!"

  Q&A discusses controlled group rules involving family attribution and the need to aggregate all entities.

  Q&A discusses the maximum contribution that can be made when a person participates in both a SEP plan and a SIMPLE IRA plan.

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PBGC Insights

Identifying Plan Assets for the 2008 Form 5500: The 2008 Schedule R (Form 5500) requires defined benefit plans with 1,000 or more participants to provide a breakdown of plan assets into 5 broad categories: stocks, investment-grade debt, high-yield debt, real estate and other. In reference to this requirement, PBGC received the following question: If plan assets are held in investment accounts or trusts that invest in several of these asset categories, in which category should we list these accounts?

Answer: Assets held in investment accounts, trust funds or other commingled accounts should be separated into the five asset classes. For example, the share of total plan assets held as stocks should be based on the value of stocks held directly by the plan plus the value of stocks held in the trusts, accounts, funds, etc. in which it invests. The other categories (investment-grade debt, high-yield debt, real estate or other) should be treated similarly.

Proposed rule on USERRA Benefits Under Title IV: On July 29, 2009, PBGC published in the *Federal Register* a proposed rule that would amend PBGC's benefit payments regulation to implement provisions of The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA provides that an individual who leaves a job to serve in the uniformed services is generally entitled to reemployment by the previous employer. Upon reemployment, the individual must receive credit for benefits, including employee pension plan benefits, that would have accrued but for the employee's absence due to the military service. Comments on the proposed rule must be submitted by September 28, 2009.

Under PBGC's current benefit payments regulation, a benefit is guaranteed only if the participant satisfies the conditions for benefit entitlement on or before the plan's termination date. The proposed rule would provide that if a service member is reemployed within the USERRA time limits, even if the reemployment occurs after the plan's termination date, PBGC would treat the service member as having satisfied the reemployment condition as of the termination date. The change would apply to reemployments under USERRA initiated on or after December 12, 1994.

2009 Premiums

- The 2009 inflation-adjusted flat premium rate is $34 per participant for single-employer plans. The flat premium rate for multiemployer plans is $9 per participant.
- Filing due dates vary depending on the size of the plan (based on the participant count for the prior plan year) and the date that the premium payment year starts:
  - If you have a large plan (500 or more participants) or mid-sized plan (100-499) with a premium payment year that started January 1, 2009, your Comprehensive Filing is due October 15, 2009.
  - If you have a small plan (fewer than 100) with a premium payment year that started January 1, 2009, your Comprehensive Filing is due April 30, 2010.

Sign Up for My PAA Webcasts

- Webcasts are planned for September 23, 2009 and September 30, 2009 (both Wednesdays). PBGC staff will review how to e-file via My PAA, pass along filing tips and answer questions from Webcast participants.
- For details or to sign up, see What's New for Practitioners

Sign Up for Filing Reminders, What's New, Interest Rate Updates

- Filing Reminders: e-mail filing reminders on the Practitioners Filing Reminders page.
- What's New: e-mail updates about new premium filing or regulatory developments on the What's New for Practitioners page.
- Interest Rate Updates: monthly updates of PBGC's interest rates on the Monthly Interest Rate Update page.

Premium E-Filing Tips

- Start early, to get questions answered before your filing due date.
- Review My PAA Online Demos to refresh your knowledge of the My PAA screens.
- Review My PAA Information in the Online Premium Filing (My PAA) page for answers to many common questions.
- Contact PBGC: If you need assistance, call (800) 736-2444 and select the "premium" option or send an e-mail to premiums@pbgc.gov. (PBGC's business hours are 8:00 a.m. to 5:00 p.m. EST, Monday through Friday, except federal holidays.)

IRS employees contributing to this edition of the *Employee Plans News* are:

Anita Bower
Kathy Davis
Roger Kuehnle
Jennifer Frederick
Gail Jones
Teresita Laureano
Mark O'Donnell
Nancy Payne
Bonnie Schaumberg
Brenda Smith-Custer
Monika Templeman
Mikio Thomas
Kathy Tuite

DOL Corner

The Department of Labor's Employee Benefits Security Administration (DOL/EBSA) announced new guidance as featured below. You can subscribe to DOL/EBSA's Web site homepage for updates.

Use of Summary Prospectus Requirements

On September 8, DOL/EBSA issued Field Assistance Bulletin (FAB) 2009-03 describing the circumstances under which a participant-directed individual account plan may satisfy the prospectus delivery requirements of ERISA §404(c) by furnishing a "Summary Prospectus" pursuant to requirements established by the Securities and Exchange Commission (SEC).

Under the new SEC rules, the Summary Prospectus is a short-form document, written in plain English and user-friendly format. It provides a summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. In addition, if a participant or beneficiary wishes additional information, the Summary Prospectus provides an Internet address that leads directly to the broader statutory prospectus as well as a telephone number and e-mail address for obtaining free of charge in paper or by e-mail the statutory prospectus and other information.

The guidance provided by the FAB enables plans to take advantage of updated prospectus disclosure changes adopted by the SEC to improve investor disclosure materials.

403(b) Plans

On July 20, DOL/EBSA issued Field Assistance Bulletin (FAB) 2009-02 providing guidance on certain Form 5500 requirements dealing with tax-sheltered annuity programs.

In 2007, DOL/EBSA made changes to annual reporting rules to, among other things, require that not-for-profit employers with Code §403(b) retirement plans covered by ERISA comply, starting this year, with the same financial reporting rules that apply to 401(k) plans.

The FAB provides transition relief for plan administrators of §403(b) plans who make a good faith effort to comply with applicable annual reporting requirements for the 2009 plan year. The FAB allows 403(b) plans to avoid the administrative burden and expense of having to collect and include in their 2009 Form 5500 financial report information on certain individual annuity contracts and mutual fund custodial accounts of current and former employees which were entered into before 2009 and for which the employer has no ongoing contribution obligation.

The FAB complements the transition relief issued by the IRS under new final regulations.

Getting Ready for the 2009 Form 5500 and Electronic Filing

DOL/EBSA is continuing to make filers and other plan officials aware of the upcoming changes to the Form 5500 and the filing process beginning with the 2009 plan year filings. Information on the new EFAST2 system has been posted on the EFAST Web site. The EFAST2 system will be will be available on January 1, 2010. Also available are archives of the two DOL/EBSA webcasts. Subscribe to DOL/EBSA's homepage for notification of upcoming webcasts on changes to filing the Form 5500.

Free Compliance Assistance Events

For dates and locations of free compliance assistance events sponsored by EBSA for both retirement and health benefit plans, visit EBSA's homepage.

Employee Plans News

Employee Plans News is a free, quarterly newsletter providing retirement plan information for retirement plan practitioners. *EPN* is prepared by the IRS's Employee Plans (Tax Exempt and Government Entities) office.

For your convenience, *EPN* includes Internet links – identified by the blue underlined text – to referenced materials.

How to Subscribe

EPN is distributed exclusively through IRS e-mail. Sign up for your free subscription by going to the **Retirement Plans Community** web page and selecting "Newsletters" in the left pane. Prior editions of the *EPN* are also archived there.

Send Comments/Suggestions to:

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1111 Constitution Ave., N.W., PE-4C3
Washington, DC 20224

FAX: (202) 283-9525

E-Mail: **RetirementPlanComments@irs.gov**

Have a Question?

For taxpayer assistance with retirement plans technical and procedural questions:

Please call (877) 829-5500 or visit the "Contact EP/Services" section at **www.irs.gov/ep**.

For questions relating to retirement income, IRAs, Roth IRAs, educational IRAs, medical savings accounts and §125 cafeteria plans:

Please call (800) 829-1040.

Calendar of EP Benefits Conferences

UPCOMING EVENTS... Name	Date(s)	Location	Co-Sponsor(s) Please Contact	For Further Information,
20th Annual SWBA/ IRS Employee Benefits Conference	11/19/09 - 11/20/09	Dallas, TX	SouthWest Benefits Association (SWBA)	www.swba.org
Los Angeles Benefits Conference	01/20/10 - 01/21/10	Los Angeles, CA	ASPPA & National Inst. of Pension Administrators (NIPA)	www.asppa.org
RECENT EVENTS... Name	**Date(s)**	**Location**	**Co-Sponsor(s)**	**For Information, See**
Northeast Area Benefits Conference (2 Locations)	07/16/09 - 07/17/09	Boston, MA & New York, NY	ASPPA & NE Area Pension Liaison Group	www.irs.gov/ep
22nd Annual Cincinnati Employee Benefits Conference	06/11/09 - 06/12/09	Cincinnati, OH	Cincinnati Bar Association	
Great Lakes Benefits Conference	04/20/09 - 04/21/09	Chicago, IL	ASPPA & cooperating sponsors	
Benefits Conference of the South	01/15/09 - 01/16/09	Atlanta, GA	ASPPA	

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