

## Part III - Administrative, Procedural and Miscellaneous

### **Relief Related to Plan Amendment of Definition of Normal Retirement Age**

#### **Notice 2007-69**

##### **I. Purpose**

This notice provides temporary relief, until the first day of the first plan year that begins after June 30, 2008, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with the regulations relating to a plan's normal retirement age that were recently issued under § 401(a) of the Internal Revenue Code. This notice also identifies potential violations of the vesting and accrued benefit requirements for defined benefit plans under § 411 that may arise from a definition of normal retirement age based on a minimum period of service. Finally, this notice requests comments from sponsors of governmental plans as defined in § 414(d)) and other plans not subject to the requirements of § 411 on whether such a plan may define normal retirement age based on years of service.

##### **II. Background**

###### **A. Regulations on Definition of Normal Retirement Age**

Section 411(a)(8) provides that the term "normal retirement age" means the earlier of (A) the time a plan participant attains normal retirement age under the plan or (B) the later of age 65 or the fifth anniversary of the time a plan participant commenced participation in the plan. A plan's normal retirement age is relevant for a number of purposes, including for purposes of determining the date at which a participant is eligible to receive his or her normal retirement benefit and calculating the amount of the benefit received.

On May 22, 2007, final regulations on distributions from a pension plan upon attainment of normal retirement age were published in the Federal Register as TD 9325 (72 FR 28604) ("2007 regulations"). The 2007 regulations modified § 1.401(a)-1 of the Income Tax Regulations, which generally requires a pension plan to be maintained primarily to provide systematically for the payment of definitely determinable benefits after retirement, by adding in part new paragraphs (b)(2), (3) and (4).

Section 1.401(a)-1(b)(2) of the 2007 regulations provides an exception to the rule that pension benefits be paid only after retirement by permitting a pension plan, as defined in § 1.401-1(a)(2)(i) and § 1.401-1(b)(1)(i), to commence payment of retirement benefits to a participant after the participant has attained normal retirement age even if the participant has not yet had a severance from employment with the employer maintaining the plan.

Section 1.401(a)-1(b)(2)(i) of the 2007 regulations provides, as a general rule, that the normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

Section 1.401(a)-1(b)(2)(ii) of the 2007 regulations provides, as a safe harbor, that a normal retirement age of at least age 62 is deemed to be not earlier than the typical retirement age for the industry in which the covered workforce is employed. Thus, a plan satisfies this safe harbor if its normal retirement age is age 62, or if its normal retirement age is the later of age 62 or another specified date, such as the later of age 62 or the fifth anniversary of plan participation (but not later than the later of age 65 or the fifth anniversary of plan participation, in the case of a plan subject to § 411).

Section 1.401(a)-1(b)(2)(iii) of the 2007 regulations provides that, if a plan's normal retirement age is between the ages of 55 and 62, the determination of whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances. The preamble to the regulations provides that it is generally expected that a good faith determination made by the employer (or, in the case of a multiemployer plan, made by the trustees) that the typical retirement age for the industry in which the covered workforce is employed is an age between age 55 and age 62 will be given deference, assuming that the determination is reasonable under the facts and circumstances.

Section 1.401(a)-1(b)(2)(iv) of the 2007 regulations provides that a normal retirement age that is below age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed, unless the Commissioner determines that under the facts and circumstances the normal retirement age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

Section 1.401(a)-1(b)(2)(v) of the 2007 regulations provides that in the case of a plan where substantially all of the participants are qualified public safety employees (within the meaning of § 72(t)(10)(B)), a normal retirement age of age 50 or later is deemed not to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered work force is employed.

Section 1.401(a)-1(b)(3) of the 2007 regulations provides that, for purposes of whether a pension plan is maintained primarily to provide systematically for the payment of definitely determinable benefits after retirement, "retirement" does not include a mere reduction in hours worked. Thus, benefits may not be distributed prior to normal retirement age solely due to a reduction in the number of hours that an employee works.

Section 1.401(a)-1(b)(4) of the 2007 regulations provides that paragraphs 1.401(a)-1(b)(2) and (3) are generally effective as of May 22, 2007, the date of their publication in the Federal Register. In the case of a governmental plan (as defined in § 414(d)), paragraphs (b)(2) and (b)(3) are effective for plan years beginning on or after January 1, 2009. In the case of a plan maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on May 22, 2007, paragraphs (b)(2) and (b)(3) do not apply before the first plan year that begins after the last of the agreements terminates determined without regard to any extension thereof (or, if earlier, May 24, 2010).

A provision of a plan that results in the failure of the plan to satisfy § 1.401(a)-1(b)(2) or (3) is a disqualifying provision described in § 1.401(b)-1(b)(3)(i). Therefore, the remedial amendment period rules of § 1.401(b)-1 apply. For example, in the case of a plan with a calendar plan year that is maintained by an employer with a calendar taxable year (and the plan is not a governmental plan and is not maintained pursuant to a collective bargaining agreement), the plan's remedial amendment period with respect to § 1.401(a)-1(b)(2) and (3) ends on the date prescribed by law for the filing of the employer's income tax return (including extensions) for the 2007 taxable year.

Under section 5 of Rev. Proc. 2007-44, 2007-28 I.R.B. 54, the remedial amendment period with respect to § 1.401(a)-1(b)(2) and (3) will be extended to the end of a plan's applicable 5-year or 6-year remedial amendment cycle (described in section 6.01 of Rev. Proc. 2007-44) that includes the date on which the remedial amendment period would otherwise end, if, by that date, the plan sponsor either adopts a good faith interim amendment to comply with § 1.401(a)-1(b)(2) and (3) or reasonably and in good faith determines that no amendment is required. Under § 1.401(b)-1(e)(3), the filing of a determination letter application within a plan's remedial amendment period tolls the running of the period until the end of 91 days after the determination letter is issued.

Section 1.411(d)-4, Q&A-12, of the 2007 regulations provides an exception to the anti-cutback rules of § 411(d)(6) for conforming amendments during a transitional period that ends on the last day of the plan's applicable remedial amendment period under § 1.401(b)-1. This relief from the anti-cutback rules is limited to the elimination, as a result of an amendment that raises the plan's normal retirement age from one that is inappropriately low to one that satisfies the requirements of § 1.401(a)-1(b)(2), of a participant's right to an in-service distribution at the earlier age. In order to comply with § 411(a) and 411(d)(6), a plan subject to § 411 for which the normal retirement age has been raised to comply with the 2007 regulations must ensure that a participant who became or would have become eligible for payment of benefits at the normal retirement age under the prior plan terms, and who has severed from employment with the employer or employers maintaining the plan, continues to be eligible for payment at the same age and in at least the same amount as under the prior plan terms with respect to benefits accrued prior to the applicable amendment date (within the meaning of § 1.411(d)-3(g)(4)).

Notice 2007-3, 2007-2 I.R.B. 254, contains the 2006 Cumulative List of Changes in Plan Qualification Requirements. This notice provides that the 2007 regulations (which are listed as item 2 in Part V of the notice) will be taken into account in the Service's review of individually designed and multiple employer plans that are submitted for determination letters, and pre-approved defined benefit plans that are submitted for opinion or advisory letters, between February 1, 2007 and January 31, 2008 ("the Cycle B submission period").

### **B. Impact of Presumption under the 2007 Regulations that Normal Retirement Age Less than Age 55 is not Reasonable**

As described above, § 1.401(a)-1(b)(2)(iv) provides that a normal retirement age below age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed, unless the Commissioner determines otherwise under the facts and circumstances. Some plan sponsors have expressed concern to the Service and Treasury that, although they believe they will be able to demonstrate that their plan's definition of normal retirement age of less than age 55 satisfies the requirements of the 2007 regulations, until they receive a determination to that effect from the Service, the presumption under the regulations that the plan does not satisfy those requirements creates uncertainty. This is of particular concern to sponsors of plans that provide in-service distributions upon attainment of normal retirement age because, if the plan is required to be amended to raise the normal retirement age retroactively, in-service distributions made between the effective date and adoption date of the amendment would not satisfy the plan qualification requirements.

Sponsors of plans that do not provide in-service distributions upon attainment of normal retirement age have also expressed concerns about the immediate effective date of the 2007 regulations. However, uncertainty as to how a plan must be amended to comply with the 2007 regulations may have less effect on current plan operations for these plans, because a plan that does not provide in-service distributions upon attainment of normal retirement age may be amended to retroactively raise the normal retirement age in a way that is consistent with the plan's operation between the effective date and adoption date of the amendment. For example, such a plan may be amended to give participants who sever employment with a vested accrued benefit the right to receive an early retirement benefit upon attainment of the pre-amendment normal retirement age (or severance from employment, if later) in the same amount that would have been paid as the normal retirement benefit if the plan had not been amended. See § 1.411(d)-4, Q&A-12(b), for an example of a plan amendment that retroactively raises the plan's normal retirement age without violating § 411(d)(6) or other plan qualification requirements.

The concerns that have been expressed by plan sponsors are illustrated in the case of

some plans that define normal retirement age as the earlier of a fixed age or the completion of a lengthy period of service (e.g., 30 years). The sponsors of these plans have asserted that the normal retirement age under their plan is the typical retirement age for the industry in which the covered workforce is employed, even though it is possible for participants to attain the normal retirement age as early as age 47 or 48. These sponsors have stated that the immediate effective date of the 2007 regulations may lead employers, particularly those that sponsor plans that offer in-service distributions upon attainment of normal retirement age, to take unnecessary action if the plan is later found upon review by the Service to have a normal retirement age that is reasonably representative of the industry in which the covered workforce is employed.

In response to these concerns, the Service and Treasury are providing the temporary relief described below in Part III of this notice.

### **III. Relief Provided**

Two forms of relief are provided, as described in sections A and B, below. The relief is available to plans that meet the eligibility requirements in section A or B, and that might otherwise be required to be amended to raise the plan's normal retirement age effective before the first day of the first plan year beginning after June 30, 2008, in order to satisfy the 2007 regulations. Thus, the relief does not apply to governmental plans, but it does apply to a plan maintained pursuant to one or more collective bargaining agreements that have been ratified and are in effect on May 22, 2007, if the first plan year beginning after the last of the agreements terminates (determined without regard to any extension thereof) begins before July 1, 2008.

#### **A. Temporary Relief for Plans with Normal Retirement Age Lower Than Age 62**

The Service will not propose to disqualify a plan solely because the plan fails to satisfy the requirements of § 1.401(a)-1(b)(2) and (3) if the plan satisfies the following conditions:

1. The plan, immediately prior to May 22, 2007, provided a definition of normal retirement age that was earlier than age 62.
2. No possible plan participant hired at age 18 or older could attain the plan's normal retirement age before the age of 40.
3. Unless the plan sponsor reasonably and in good faith determines that no amendment is necessary, the sponsor adopts a good faith interim amendment to comply with § 1.401(a)-1(b)(2) and (3) effective no later than the first day of the first plan year beginning after June 30, 2008, and the plan is operated in compliance with such amendment as of the amendment's effective date.

4. The plan sponsor adopts the interim amendment by the later of (a) the last day of the first plan year beginning after June 30, 2008, or (b) the due date (including extensions) for filing the employer's income tax return for the employer's taxable year that includes the first day of the first plan year beginning after June 30, 2008. (In the case of a tax exempt employer, see section 5.06(2) of Rev. Proc. 2007-44 for the rules for determining the employer's tax filing deadline for this purpose.)

In addition, relief is provided for the rare and unusual circumstance where the plan sponsor has acted in good faith in making a determination that the plan's normal retirement age is not earlier than the typical retirement age for the industry in which the covered workforce is employed, but the plan's normal retirement age actually is earlier than the typical retirement age for the industry in which the covered workforce is employed. In such a case, if the plan sponsor applies for a determination letter within the applicable remedial amendment cycle, the Service will require corrective action to be taken prospectively only from the date of issuance of the determination letter, so that the plan's normal retirement age will not be required to be raised retroactively. For this purpose, "the applicable remedial amendment cycle" is the plan's remedial amendment cycle under Rev. Proc. 2007-44 that includes the interim amendment deadline determined under condition 4, above. Any plan amendment that is determined to be necessary to comply with § 1.401(a)-1(b)(2) and (3) will not be required to be adopted earlier than the 91<sup>st</sup> day after the date of the Service's determination letter. The relief under this paragraph applies only if the plan's normal retirement age is not earlier than age 55.

#### **B. Temporary Presumption of Reasonableness for Plans with Normal Retirement Age Lower Than Age 55**

Eligible plans with a normal retirement age lower than 55 will temporarily be accorded the same presumption as plans with a normal retirement age between age 55 and 62. Thus, for periods prior to the date on which the Service rules on an eligible plan's normal retirement age, the plan sponsor's good faith determination of the typical retirement age for the industry in which the covered workforce is employed will generally be given deference, assuming that the determination is reasonable under the facts and circumstances.

A plan is eligible for the relief under this Part III.B if it satisfies the following conditions:

1. The plan, immediately prior to May 22, 2007, provided a definition of normal retirement age that was earlier than age 55.
2. No possible plan participant hired at age 18 or older could attain the plan's normal retirement age before the age of 40.

3. The plan sponsor submits a request for a letter ruling on whether its definition of normal retirement age satisfies the standard in the 2007 regulations, in accordance with the procedures described in Part IV below, by June 30, 2008.

If the Service determines during the ruling process that the plan's normal retirement age does not reasonably represent the typical retirement age for the industry in which the covered workforce is employed, the Service will require corrective action to be taken prospectively only from the date of issuance of the ruling letter, so that the plan's normal retirement age will not be required to be raised retroactively. In addition, for purposes of § 401(b) and the regulations thereunder, the letter ruling request will be treated as an application for a determination letter on the qualification of the plan, so that any plan amendment that is determined to be necessary to comply with § 1.401(a)-1(b)(2) and (3) will not be required to be adopted earlier than the 91<sup>st</sup> day after the date of the Service's ruling.

#### **IV. Application Procedures for Letter Ruling on Definition of Normal Retirement Age**

An application for a letter ruling as to whether a plan's normal retirement age reasonably represents the typical retirement age for the industry in which the covered workforce is employed is to be made in accordance with the procedures governing letter rulings requests in Rev. Proc. 2007-4, 2007-1 I.R.B. 118. The request must include the user fee for a letter ruling under section 6.01(10) of Rev. Proc. 2007-8, 2007-1 I.R.B. 230.

The statement and analysis of facts of the letter ruling request must:

1. Indicate whether and when a determination letter for the plan with respect to the plan's current remedial amendment cycle has been or will be filed.
2. Describe the industry in which the covered workforce is generally employed.
3. Identify the sources and date of compilation of data that was used in determining the typical retirement age for the industry, which may include data concerning employee retirement from the plan sponsor. (It is expected that the data will include the actual ages of termination of employment of career employees, i.e., employees whose principal career has been in the employment of the plan sponsor.)
4. Present and analyze the data the plan sponsor used to determine the typical retirement age.
5. Describe any other relevant information (whether or not used by the plan sponsor in determining the typical retirement age).

The Service reserves the right to request any other information it considers necessary.

## **V. Application of Accrual Rules in the Case of Normal Retirement Age Based on Years of Service**

The 2007 regulations do not provide a safe harbor or other guidance with respect to a normal retirement age that is conditioned (directly or indirectly) on the completion of a stated number of years of service. The Service and Treasury expect that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service typically will not satisfy the vesting or accrual rules of § 411. See, e.g., § 1.411(b)-1(b)(2)(ii)(F). The relief described in Part III of this notice is limited to compliance with the 2007 regulations and thus, for example, does not extend to any violation of § 411(a)(1) or 411(b)(1) that may arise from a plan's definition of normal retirement age as other than a stated age.

The fact that plans are limited in their ability to provide a normal retirement age that is based on completion of a stated number of years of service does not mean that plans cannot provide benefits that are based on completion of a stated number of years of service. For example, an early retirement benefit, including an unreduced early retirement benefit, is permitted to be conditioned on completion of a stated number of years of service (such as 30 years of service). However, an early retirement benefit is generally only permitted to commence with an annuity starting date that is after severance from employment (except to the extent permitted under § 401(a)(36), as added by the Pension Protection Act of 2006, Pub. L. 109-280).

## **VI. Request for Comments**

Sponsors of governmental plans and other plans not subject to the requirements of § 411 are asked to submit comments on whether normal retirement age under such a plan may be based on years of service. Comments are requested on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)-1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules. Comments should be submitted by Nov. 25, 2007, to CC:PA:LPD:PR (Notice 2007-69), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2007-69), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., N.W., Washington D.C. Alternatively, comments may be submitted via the Internet at [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov). Please include "Notice 2007-69" in the subject line of any electronic communication. All materials submitted will be available for public inspection and copying.

## **VII. Effect on Other Documents**

Rev. Proc. 2007-4 is modified.



Notice 2007-3 is modified to provide that the 2007 regulations will be taken into account in the Service's review of a plan that is submitted for a determination letter during the Cycle B submission period only if the plan is an individually designed or a multiple employer plan that, by its terms, is not eligible for the relief in this notice. Thus, for example, the 2007 regulations will be taken into account in the Service's review of an individually designed or a multiple employer plan that is submitted during the Cycle B submission period if, under the plan, a participant hired at age 18 or older could attain the plan's normal retirement age before the age of 40. The 2007 regulations will also be taken into account in the Service's review of pre-approved defined benefit plans that are submitted for opinion or advisory letters during the Cycle B submission period.

### **DRAFTING INFORMATION**

The principal authors of this notice are Diane S. Bloom and James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern time at 1-877-829-5500 (a toll-free call) or e-mail [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).