

# employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service  
Tax Exempt and Government  
Entities Division

A Publication of Employee Plans

**Voluntary Correction Program** explains types of nonamenders, clarifies which schedules to use and when a determination letter application should be filed with a nonamender application...[more on page 2](#)

**Automatic Enrollment Final Regulations** reflect certain provisions of the Pension Protection Act of 2006 and the Worker, Retiree, and Employer Recovery Act of 2008 relating to automatic contribution arrangements...[more on page 2](#)

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**Attention All 2009 Form 1099-R Issuers:** Beginning in 2009, if a retirement plan distributes any excess contributions or excess aggregate contributions, along with earnings thereon, the distribution must be reported on Form 1099-R as taxable to the recipient in the year of distribution...[more on page 10](#)

**403(b) Phone Forum:** Please join Bob Architect, from IRS Employee Plans, at 2:00 p.m. ET on April 16, 2009, as he discusses the 2009 calendar year transitional relief from the written plan requirement for 403(b) plans and other 403(b) issues...[more on page 13](#)

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## Know a Nonamender? Here's what you need to know NOW. . .

Voluntary Correction has written an [exposé](#) of the nonamender process under the Voluntary Correction Program (VCP). This explanation will tell you all you need to know about filing for relief under VCP for nonamender failures, including when you can file (with examples of when Appendix D or F should be used) and when a determination letter should be filed as part of a VCP submission. Check it out! •

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## Final Regulations Issued for Automatic Contribution Arrangements

On February 24, 2009, the IRS and Treasury released [Final Regulations on Automatic Contribution Arrangements](#). These regulations reflect certain provisions of the [Pension Protection Act of 2006](#) and the [Worker, Retiree, and Employer Recovery Act of 2008](#) (WRERA) relating to automatic contribution arrangements.

An automatic contribution arrangement is a retirement plan feature that allows an employer to automatically reduce an employee's pay by a default percentage stated in the plan and contribute that amount to the employee's plan account (automatic enrollment contribution), **unless** the employee affirmatively chooses not to contribute or to contribute a different amount. Plans that allow employees to contribute can use an automatic contribution arrangement, including:

- 401(a) qualified plans (for example, 401(k) plans),
- 403(b) plans,
- 457(b) plans maintained by a governmental employer,
- SARSEPs, and
- SIMPLE IRA plans.

### Types of Automatic Contribution Arrangements

An [eligible automatic contribution arrangement](#) (EACA) is an automatic contribution arrangement that may allow employees to withdraw automatic enrollment contributions, up to 90 days from the date these contributions first start, without incurring the 10% early withdrawal tax. The default percentage must be applied uniformly to all eligible employees and they must be given notice before each plan year or when eligible to join the plan if that occurs after the beginning of the plan year.

A [qualified automatic contribution arrangement](#) (QACA) is an automatic contribution arrangement that must also provide [notice](#) and meet [certain "safe harbor" provisions](#) that exempt it from annual [actual deferral percentage](#) and [actual contribution percentage](#) testing. A QACA must have a specified schedule of minimum default percentages starting at 3% and gradually increasing to 6%. The default percentages can be higher but cannot exceed 10%. The default percentage must be applied uniformly to all employees, and the employer must make either a:

- a) matching contribution of 100% of an employee's elective contributions up to 1% of compensation and a 50% match for all elective contributions above 1% and up to 6% of compensation; or
- b) nonelective contribution of 3% of compensation to all participants, including those who choose not to make any elective contributions.

A plan may not distribute these matching or nonelective contributions, nor any of their earnings, on account of an employee's hardship.

WRERA eliminated the requirement that an EACA invest default elective contributions in [qualified default investment alternatives](#) and clarified that if these contributions are withdrawn by an employee, they are not considered when determining that employee's annual maximum contributions under [§402\(g\)\(1\)](#).

## Summary of the Final Regulations:

### Minimum default percentage requirement

An employee's initial period determines when an employee's default percentage increases. The regulations clarify that an employee's initial period in a QACA is based on the date that an employee first had any automatic enrollment contributions made to the plan, even if terminated and then rehired. However, the plan may treat an employee who has not had any automatic enrollment contributions for an entire plan year as a new employee. A participant who terminates and is rehired after at least one plan year will begin a new initial period and may begin automatic enrollment contributions at the minimum default percentage instead of an escalated one.

### Affirmative elections

The regulations clarify that a QACA may exclude only those eligible employees from an automatic contribution arrangement that have affirmatively elected not to participate. However, plans can specifically provide that an employee's affirmative election can expire either annually or upon some stated event. It can then require an employee to make a new affirmative election before automatically enrolling that employee in the plan's automatic contribution arrangement.

### Uniformity requirement for QACAs

The regulations state a QACA meets uniformity requirements even if it bases the default percentage on the number of complete or partial years an employee has had automatic enrollment contributions. A plan may also increase the default percentage mid-year, as long as:

- the percentage is uniformly based on the number of complete or partial years an employee has had automatic enrollment contributions, and
- it satisfies the minimum default percentage requirement throughout the plan year.

### Timing requirement for notices

An automatic contribution arrangement notice will be timely if provided to eligible employees at least 30 days (and no more than 90 days) before the beginning of each plan year. If an employee becomes eligible to join the plan after the 90th day before the plan year begins, the plan must give the notice no more than 90 days before and no later than the date the employee becomes eligible. If it is not practical to give the notice before an employee becomes eligible, the plan can still meet the notice timing requirements by:

1. giving notice to the employee before the pay date for the pay period in which the employee becomes eligible, and
2. allowing the employee to make contributions from any compensation he or she received after becoming eligible.

### When automatic enrollment contributions must begin

A plan may not begin to deduct any automatic enrollment contributions from an employee's pay until that employee has a reasonable time to make an affirmative election after receiving notice. The regulations require the automatic enrollment contributions to begin no later than 30 days or the pay date for the second pay period beginning after an employee receives the notice, whichever is earlier. No matter when an employee's first automatic enrollment contribution is made, the plan must use the participant's safe harbor compensation as of the eligibility date to compute the QACA rate of employer nonelective or matching contributions.

### Compensation definition

For plan years beginning on or after January 1, 2010, a QACA must use the **safe harbor definition of compensation** for determining automatic enrollment contributions.

### Covered employees in EACAs

The final regulations modify the coverage rules in the proposed regulations and now require that an EACA plan document state which employees the plan will cover, including whether it will consider an employee who made an affirmative election to be a “covered employee.” An EACA is not required to provide a non-covered employee with EACA notices.

However, an EACA that does not cover all employees eligible to participate in the plan is not entitled to the extended 6-month period for correcting excess contributions and excess aggregate contributions without incurring excise taxes.

### Uniformity requirement for EACAs

The regulations provide that the automatic enrollment contributions under an EACA be uniform for all eligible employees, but a plan may have multiple EACAs, each covering a separate group of employees. To ensure the automatic enrollment contributions are uniform, the plan must aggregate all EACAs in the plan. However, aggregation is considered after applying the mandatory disaggregation rules in Code §410(b). For example, if multiple EACAs cover different groups of collectively bargained employees or different employers in a multiple employer plan, they do not have to be aggregated and could use different default percentages.

### Permissible withdrawals under EACAs

The regulations allow EACAs to set a period of less than 90 days (but no less than 30 days) for an employee to elect to withdraw his or her automatic enrollment contributions, measured from the date of the first of these contributions. If an employee elects to withdraw his or her automatic enrollment contributions, then the election becomes effective no later than the earlier of:

- the pay date for the second payroll period after the election, or
- the first pay date at least 30 days after the employee’s election.

The plan must use its ordinary procedures when processing permissible withdrawal distributions and not charge higher fees than those charged for other distributions.

### Forfeiture of employer matching contributions under an EACA

The regulations clarify that an employee who makes a permissible withdrawal of automatic enrollment contributions forfeits any associated matching contributions, adjusted for gains or losses. The plan may state that matching contributions do not have to be made for automatic enrollment contributions that are withdrawn prior to the date that the plan otherwise allocates matching contributions.

Generally, the final regulations are effective for plan years beginning on or after January 1, 2008. •

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## Sample Plan Language - Transfer of an ESOP’s S Corporation Shares to Prevent a Nonallocation Year

We have posted [sample plan language](#) for ESOPs, which revises the language released in the July 1, 2008 Special Edition of *Employee Plans News*. The language may serve as part of a comprehensive set of plan provisions designed to prevent the occurrence of a nonallocation year.

An 1120S corporation ESOP has a nonallocation year when disqualified persons are deemed to own 50% of the outstanding stock of the S corporation, taking into account [synthetic equity](#). During a nonallocation year, disqualified persons may not accrue or be allocated any portion of plan assets consisting of employer securities. Such prohibited transactions in a nonallocation year are treated as deemed distributions from the plan. In addition, upon the occurrence of a nonallocation year, the S corporation is liable for a 50% tax applied to the disqualified persons’ synthetic equity and deemed owned shares. A nonallocation year may also cause the plan to be disqualified and the corporation’s tax status to be altered.

The sample language incorporates commenters' suggestions to provide flexibility in transferring shares. This was in response to concern over the mechanics of the previously posted plan language, which when applied, would allow a plan administrator to transfer only a specific number of shares in order to keep a disqualified person's deemed share ownership at 49.9% of the outstanding shares. The sample language gives the plan administrator some leeway in determining the number of shares that need to be transferred. It also offers wording that allows for a plan to maintain a disqualified person's share ownership at a percentage not exceeding 49% of shares but no less than 40% of the outstanding shares. •

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## The EPCU Insider

### The Multiemployer Actuarial Certification Project – Defined Benefit Plan Actuarial Certification Errors

Welcome back to "The EPCU Insider!" In this column, we provide the latest news from our shop so you can be informed in case you happen to receive a letter from us. The Employee Plans Compliance Unit addresses pension compliance in a whole new way by using compliance checks and questionnaire studies to pinpoint areas of non-compliance with minimal burden to compliant taxpayers. (See the [Winter Edition](#) for the EP Exam Director's discussion.)

Today's focus is the [Multiemployer Actuarial Certification Project](#).

Code §432 requires a defined benefit plan to have an actuarial certification of the plan's funding status for each plan year. It must be completed by the 90th day of the plan year and must be provided to the Secretary of the Treasury. A plan's failure to obtain actuarial certification of its status is considered a failure to file the annual report under ERISA §502(c)(2), resulting in a penalty of up to \$1,100 per day.

The plan actuary must certify:

- whether the plan is in [endangered status](#) for such plan year.
- whether the plan is or will be in [critical status](#) for such plan year.
- for a plan that is in a funding improvement or rehabilitation period, whether the plan is making the scheduled progress to meet the requirements of its funding improvement or rehabilitation plan.

The annual certification of plan status must be transmitted to the Secretary of the Treasury by mailing the certification to the [EPCU](#). We will first contact plan sponsors who fail to file their certifications timely, and later, send letters for other issues.

**The Errors** - Be thorough when submitting the certification. Help us to avoid making numerous follow-ups when the following items are missing from certifications:

- Employer Identification Number (EIN)
- 3-digit plan number
- plan sponsor's address
- plan sponsor's phone number

- unclear or missing plan year ending date
- using an EIN or plan number that pertains to another entity maintained by the plan sponsor

### **Content of Annual Certification**

The annual certification must contain the following information:

- **Plan identification:** The annual certification must include the name of the plan; the plan number; the name, address and telephone number of the plan sponsor and the plan year for which the certification is being made.
- **Enrolled actuary identification:** The annual certification must include the name, address and telephone number of the enrolled actuary signing the certification; the actuary's enrollment identification number; the actuary's signature and the date of the signature.
- **Information on plan status:** The annual certification must state whether the plan is in endangered status (which includes seriously endangered status), critical status or neither endangered nor critical status.
- **Information on scheduled progress:** If the annual certification is made as to a plan year that is within the plan's funding improvement period or rehabilitation period arising from a prior certification of endangered or critical status, the actuary must also certify whether or not the plan is making scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.
- **Penalty for failure to secure timely actuarial certification:** A failure of a plan's actuary to certify the plan's status by the date specified is a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary of Labor under §101(b)(4) of ERISA.

A multiemployer plan is in endangered status if the plan is not in critical status and, as of the beginning of the plan year:

- (1) the plan's funded percentage for the plan year is less than 80%, or
- (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the six succeeding plan years (taking into account amortization extensions under §431(d)).

Under §432(i), a plan's funded percentage is the percentage determined by dividing the value of the plan's assets by the accrued liability of the plan.

A multiemployer plan is in critical status for a plan year if it meets any of four specified tests as of the beginning of the plan year. These tests are found in sections 432(b)(2)(A)-(D) of the Code.

You can find information on all of our [EPCU projects](#) on our web site. •

## ERPA - CPE Sponsor Program

Professional organizations or societies that want to become approved ERPA sponsors for continuing professional education must file [Form 8498-EP](#), *Program Sponsor Agreement for Continuing Education for Enrolled Retirement Plan Agents*, with the IRS. In addition, the potential sponsor must give the IRS a written outline and/or textbook for the program(s). Professional organizations or societies must request sponsorship status from the Director of Office of Professional Responsibility and furnish information in support of their request.

In order to become an approved ERPA CPE sponsor, a program must:

- be developed by individuals qualified in the subject matter (i.e., retirement plan matters);
- provide current subject matter;
- have instructors, discussion leaders and speakers who are qualified with respect to program content;
- have some means for evaluation of technical content and presentation;
- provide certificates of completion to successful participants; and
- maintain records to verify the participants' attendance and successful completion for a period of 3 years.

In general, [Circular 230](#) requires an ERPA to complete a prescribed number of CPE credits, including ethics training, during each enrollment cycle (consult Circular 230 for more details regarding CPE requirements). In order to meet this requirement, ERPAs must complete their CPE credits with a sponsor who has been approved by the IRS Director, OPR as having a program specific to retirement plan matters.

For further information on the sponsor program for [ERPAs](#), see [Circular 230](#) or e-mail your questions to [tege.ep.erpa@irs.gov](mailto:tege.ep.erpa@irs.gov).

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## 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.

### ERPA Questions and Answers

We have updated the [Enrolled Retirement Plan Agent Program](#) web page with two new questions – "Where can I earn CPE credits?" and "How does an organization become a sponsor for ERPA CPE credits?"

### Correcting Plan Errors – VCP Fill-In Appendices

We have posted [fill-in appendices](#) to help plan sponsors complete a Voluntary Correction Program application.

### Guidelines Regarding Rollovers as Business Startups (ROBS)

We have posted [procedures](#) for examination and determination agents to address issues involving a version of a qualified plan marketed to business owners. This is done to access accumulated tax-deferred retirement funds, without paying applicable distribution taxes, while covering new business start-up costs. These arrangements are known as Rollovers as Business Startups, or ROBS.

### IRS Requests Comments on Pilot Government Plan Questionnaire

IRS published pilot [Government Plan Questionnaire](#) for public comment. The first step in this phase of the Governmental Plans Initiative was the mailing of the questionnaire to a pilot group of governmental plans. A final questionnaire will be sent to a larger group of governmental plans at a later date.

### FY 2009 Employee Plans Work Plan

We posted EP's [operating priorities, goals and objectives](#) for the upcoming year.



## Employee Plans Published Guidance

(January - March 2009)

### Regulations

[T.D. 9447 – 74 Fed. Reg. 8200](#)

Automatic contribution arrangement regulations for §401(k) and other eligible plans that automatically enroll employees into the plan.

### Revenue Procedures

[Rev. Proc. 2009-4, 2009-1 I.R.B. 118](#)

Annual EP/EO revenue procedure on letter rulings.

[Rev. Proc. 2009-5, 2009-1 I.R.B. 161](#)

Annual EP/EO revenue procedure on technical advice.

[Rev. Proc. 2009-6, 2009-1 I.R.B. 189](#)

Annual EP determination letter revenue procedure.

[Rev. Proc. 2009-8, 2009-1 I.R.B. 229](#)

Annual EP/EO revenue procedure on user fees.

### Revenue Rulings

[Rev. Rul. 2009-2, 2009-2 I.R.B. 245](#)

Lists the covered compensation tables for 2009 to be used in determining defined benefit plan contributions and permitted disparity.

### Notices

[Notice 2009-3, 2009-2 I.R.B. 250](#)

Notice provides relief during 2009 for §403(b) plan sponsors' requirement to have a written §403(b) plan in place by January 1, 2009, and briefly describes other §403(b) programs that the IRS intends to establish.

[Notice 2009-9, 2009-5 I.R.B. 419](#)

Notice provides guidance to financial institutions for reporting rules applicable to the waived 2009 RMD due to the Worker, Retiree, and Employer Recovery Act of 2008. WRERA §201 waives any RMDs for 2009 from IRAs and retirement plans that hold participant benefits in individual accounts.

[Notice 2009-22, 2009-14 I.R.B.](#)

Notice gives interim rules regarding asset valuation methods that single employer defined benefit pension plans are permitted to use for minimum funding purposes according to changes made by WRERA. This notice also provides automatic approval for a change in asset valuation method to adopt any permissible asset valuation method for plan years beginning during 2009. •



## Critical Priorities...With Monika Templeman

### Today's Discussion: Update on the Enrolled Retirement Plan Agent Program

Monika, in the [Fall Edition](#) of *Employee Plans News* you discussed the Enrolled Retirement Plan Agent program. Before we give the readers an update, could you give them a synopsis of the ERPA program?

Yes. An "Enrolled Retirement Plan Agent," or "ERPA," is an individual who has been approved by the IRS to practice before the IRS on certain retirement plan issues. An ERPA is similar to an Enrolled Agent. The rules governing ERPAs are set forth in [Circular 230](#). I believe that the ERPA program will ensure professional and ethical standards, accountability and really help to level the playing field in the EP community. Our [ERPA](#) web page has FAQs with information on applying to become an ERPA and taking the test.

### The first ERPA-Special Enrollment Examination (SEE) was conducted earlier this year. How did it go?

The first examination period was a success! Over 500 examinations were completed nationwide. We also received about 450 responses from a survey applicants completed after the test. Their feedback is helping us to improve the ERPA examination process and address applicants' concerns.

### So, based on the demographics identified in the survey, who exactly is a potential ERPA?

The majority of applicants identified themselves as plan administrators or plan consultants with more than 20 years of experience. 71% of applicants stated their primary motivation for taking the ERPA-SEE was to represent clients before the IRS, while 16% took it to increase their pension knowledge. About half of the applicants indicated that they spent 40 hours or less studying for the examination.

### Any statistics obtained about the test?

Overall, 41% of the applicants noted that the test was of average difficulty. Another 41% thought the test was a little more difficult. The examination consists of two parts. The average time to take each part was about two to two and one-half hours.

### What comments did you receive about the examination itself?

We received feedback about the wording of some of the questions and on test study materials. We will be reviewing all of the comments received and making adjustments to improve the process for future ERPA applicants. We will continue this review after every testing period.

### What do you envision for future ERPA applicants?

I see us continuing to improve the test content based on feedback from the prior testing periods and developing practice exams and study materials to assist applicants in preparing for the examination. We want to make the entire process as optimal as possible. The goal is to test an applicant's knowledge and competency while reducing the procedural "headaches."

### If an applicant passes the examination, what is his or her next step?

Once an applicant passes the test, the next step is to [apply](#) for enrollment as an ERPA with the IRS. The Office of Professional Responsibility will process the application and conduct background and tax compliance investigations. The purpose of the tax compliance investigations is to verify the applicant filed and paid taxes timely; they are not audits. Once approved, the applicant will be granted Enrolled Retirement Plan Agent status, assigned an enrollment number and issued an enrollment card.

### When is the next ERPA-Special Enrollment Examination period and how does one apply?

The next SEE takes place from July 7 to August 31, 2009. Applicants must apply by July 6 for the ERPA-Special Enrollment Examination through [www.erpaexam.org](http://www.erpaexam.org). I am thrilled that the ERPA program is coming to fruition and that third party administrators and benefits consultants will soon be back in the fold under the new ERPA designation.

Thanks for some of your time today, Monika. Readers can go to this [e-mail address](#) and provide Monika comments on this article or provide ideas for future articles. •

## Attention All 2009 Form 1099-R Issuers

Beginning in 2009, if a retirement plan distributes any excess contributions or excess aggregate contributions, along with earnings thereon, the distribution must be reported on Form 1099-R as taxable to the recipient in the year of distribution. The 2009 [Form 1099-R](#) must be provided to recipients by February 1, 2010 (since January 31, 2010 is a Sunday).

Generally, an excess contribution is a highly compensated employee's elective contribution that exceeds the amount allowed by a 401(k) plan's actual deferral percentage (ADP) test and an excess aggregate contribution is a matching contribution and/or after-tax employee contribution for a highly compensated employee that exceeds the amount allowed by a plan's actual contribution percentage (ACP) test. A plan can make corrective distributions to rectify either type of excess.

A plan makes corrective distributions to remedy failed ADP and ACP tests in the year following the year of the test. **For plan years beginning before 2008**, except for excesses of less than \$100, a distribution of excess contributions or excess aggregate contributions was included in the recipient's gross income for his or her taxable year ending with or within the plan year of the excess. However, excesses of \$100 or more or excesses distributed more than 2 ½ months after the plan year were includible in the recipient's gross income for the year distributed. **For plan years beginning on or after January 1, 2008**, a distribution of excess contributions or excess aggregate contributions should be included in the recipient's gross income in the year it is distributed. If a plan returns excess contributions or excess aggregate contributions, then the payer should complete Form 1099-R by:

- stating the amount of the distribution in Box 1;
- reporting the taxable amount of the distribution in Box 2a; and
- classifying it as taxable in the **year distributed** by using Code 8 in Box 7.

A separate Form 1099-R is used for distributions from a designated Roth account. See [Instructions for Forms 1099-R and 5498](#) for complete details on how to complete this form. •

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## Highlights of the *Retirement News for Employers*

The *Retirement News for Employers* is filled with information of interest to retirement plan sponsors in the small employer community. Ask your clients to join the thousands of existing subscribers to this free newsletter.

The [Winter 2009 Edition](#) featured:

- "Did You Amend Your SIMPLE IRA Plan for EGTRRA?" reminds SIMPLE IRA and other IRA-based plan sponsors they can use the Employee Plans Compliance Resolution System to update their plans for EGTRRA.
- "We're Glad You Asked!" answers "no" to a question on making a salary deferral in 2009 for the 2008 plan year and "yes" to permissible rollover of the waived 2009 required minimum distribution.
- "Fixing Common Plan Mistakes" describes how to correct excess contributions to a plan participant.
- "The Biggest Mistake" is not amending plan documents to reflect current law according to "Desk Side Chat with Monika Templeman," Director of EP Examinations.

[Subscribe](#) to the *Retirement News for Employers* newsletter. •

## The Corner of Forms & Pubs

Welcome back to *The Corner of Forms & Pubs* – the EP version of Hollywood & Vine. The information here at the Corner is brief and topics needing further details will get their own full-length articles.

### New Forms

The following forms have recently been created for the new ERPA program:

- **Form 23-EP**, *Application for Enrollment to Practice Before the Internal Revenue Service as an Enrolled Retirement Plan Agent (ERPA)*, is the application that a candidate would use to practice before the IRS as an Enrolled Retirement Plan Agent.
- **Form 8498-EP**, *Program Sponsor Agreement for Continuing Education for Enrolled Retirement Plan Agents*, is the form that an organization would use to become an approved ERPA sponsor for continuing professional education. See “ERPA - CPE Sponsor Program” on page 7.

Additional information concerning the ERPA program is available on our **ERPA** web page.

### Updated Publications

The following publications have been revised:

- **Publication 560**, *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*
- **Publication 571**, *Tax-Sheltered Annuity Plans (403(b) Plans) For Employees of Public Schools and Certain Tax-Exempt Organizations*
- **Publication 575**, *Pension and Annuity Income*
- **Publication 590**, *Individual Retirement Arrangements (IRAs)*

### IRS Calendar Is Online

Do you need a calendar? The *IRS 2009 Tax Calendar for Small Businesses & Self-Employed* (**Publication 1518**) contains hundreds of reminders for everything from payroll deposit dates to information on the Economic Stimulus Act of 2008. Look for “*Ready, Set, Retire!*” in March’s page for retirement plan tidbits. You can view the **calendar online**, download it or even watch a **video** about it.

All of the above-mentioned products (with the exception of the 2009 calendar) are available on the **Retirement Plans Community** web page under “EP Forms/Pubs/Products” or can be ordered by calling (800) TAX-FORM.

### 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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Washington, DC 20224

FAX: (202) 283-9525

E-Mail:  
[RetirementPlanComments@irs.gov](mailto: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](http://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.

## We're Glad You Asked!

Each issue of the *EPN* looks at a common question we receive and provides an answer and additional resources in response to the question.

### ***We just laid off 10 employees and don't plan to rehire them. What should we do with their 401(k) plan account balances?***

Review your plan document to determine how to handle a terminated employee's account balance. A plan may not make a distribution of a participant's vested account balance if it exceeds \$5,000 without that participant's consent. In some cases, the participant's spouse must also consent. If a participant's vested account balance does not exceed \$5,000, but is more than \$1,000, the plan must roll over the amount **directly into an IRA**, unless the participant elects to receive a distribution of the balance or to have the balance directly transferred to another plan or IRA.

If the vested account balance exceeds \$5,000, before the plan can make any distributions, it must give written notice to the participant explaining:

- All available optional forms in which benefits can be paid under the plan;
- The participant's right to delay payment until normal retirement age; and
- Information regarding the direct rollover option and the tax impact of taking a lump sum distribution, including that the distribution is taxable and the plan will automatically withhold 20% federal income tax from any amount they receive.

Plans must notify participants (up to 180 days, but no less than 30 days, before making a distribution) of the effect of taking a distribution immediately instead of deferring it until retirement. See [Notice 2007-7, Q&A #33](#) for a description of this notice's content.

Section 401(k) plans may allow distributions in the form of annuities or installment payments in addition to lump sums. If the plan offers annuities, it must offer a qualified joint and survivor annuity for married participants and a single-life annuity for unmarried participants. The participant, and spouse, if applicable, can waive the annuity and choose another form of distribution, such as a lump sum.

Also, you didn't mention how many participants that you have, but, generally, if more than 20% have left in a year, then your plan may have incurred a partial termination and must 100% vest the participants who terminated.

#### **Additional Resources:**

[Publication 560](#), *Retirement Plans for Small Business (SEP, SIMPLE and Qualified Plans)*

[Publication 575](#), *Pension and Annuity Income*

[Code §401\(a\)\(31\)](#)

[Treasury Regulations 1.402\(f\)-1](#)

[Treasury Regulations 1.411\(a\)-11](#)

[Revenue Ruling 2007-43](#)

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**Kathy Tuite**

## We're Glad You Asked!

***Does a plan sponsor that has an extension to file its tax return for a taxable year but files prior to the extended due date still have until the extended due date to deposit the employer's profit-sharing or SEP contribution and get the deduction for that taxable year?***

Yes. Code §404(a)(6) allows the employer to take a deduction for a plan contribution if it is made no later than the employer's tax return filing date, plus extensions. For example, the unextended due date for a corporate employer's 2008 calendar year tax return (Form 1120) was March 16, 2009 (because March 15<sup>th</sup> was a Sunday). If the 1120's tax return filing date was extended to Sept. 15, 2009, but it is filed on March 20, 2009, the employer still has until Sept. 15, 2009 to make the contribution and deduct it on the 2008 return. If the employer files a Schedule C, then the filing date is based on the filing of the employer's 1040 tax return, due April 15, 2009. If this employer files an extension until Oct. 15, 2009 but files the return before that date, he or she still has until Oct. 15, 2009 to make the employer contribution to the retirement plan.

Remember that the contribution may be deducted for 2008 **OR** 2009, but cannot exceed the limit under §404(a)(3) of 25% of compensation paid during the year for which it is applied.

### **Additional Resources:**

Revenue Ruling 66-144, as amplified by Revenue Ruling 84-18, 1984-1 C.B. 88

Revenue Ruling 76-28, as amended by Revenue Ruling 76-77, 1976-1 C.B. 107

**Publication 560**, *Retirement Plans for Small Business (SEP, SIMPLE and Qualified Plans)*•

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## 403(b) Phone Forum

Please join Bob Architect, from IRS Employee Plans, at 2:00 p.m. ET on April 16, 2009, as he discusses the 2009 calendar year transitional relief from the written plan requirement for 403(b) plans and other 403(b) issues. The forum will last approximately one hour.

Limited registration is now open until April 10, 2009. **No registration will be accepted after that date.**

**Conference Access Code** - 724590

### **Times of EP Phone Forum:**

Eastern: 2:00 p.m. Central: 1:00 p.m. Mountain: 12:00 p.m. Pacific: 11:00 p.m.

Register at **EP Phone Forum**

You will be assigned a Personal Identification Number that must be used to join the conference. If you have never registered with AT&T phone forum, you will need to click on "create a profile" first.

- Dial in on April 16, 2009, 15 to 20 minutes before the scheduled time
- Toll free: (866) 216-6835
- Enter the access code, then the pound (#) sign
- Enter your PIN, then the pound (#) sign
- Your line will be placed on hold until the conference begins

## Continuing Professional Education Credits

An enrolled agent may earn one CPE credit so long as he or she attends the phone forum presentation for 50 minutes. As with all our seminars, other professional groups should consult with their respective licensing agencies regarding acceptability of credit. IRS will send a Certificate of Completion via e-mail to the participants who meet the above requirement in about a week after the forum.

Each participant must:

- register individually
- use his or her own PIN to receive credit
- use an individual phone line to determine the attendance and length of time that he or she remains on the phone forum.

If you have question(s), please contact us at [TE/GE-EP-CEO Phone Forum](#).



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 or [PPA](#) page for updates.

## The American Recovery and Reinvestment Act of 2009 (ARRA)

If you have a group health plan subject to COBRA, the ARRA includes provisions that may apply to your plan. The ARRA expands eligibility for COBRA continuation coverage and provides a premium reduction to certain qualified individuals. Eligible individuals pay only 35% of their COBRA premiums and the remaining 65% is reimbursed to the employer, insurer or health plan through a tax credit. The premium reduction applies to periods of health coverage beginning on or after Feb. 17, 2009, and lasts for up to nine months.

Individuals who are eligible for COBRA coverage because of an employee's involuntary termination of employment that occurred from Sept. 1, 2008 through Dec. 31, 2009, and who elect COBRA may be eligible to pay the reduced premium amount. Those who are eligible for other group health coverage (such as a spouse's plan) or Medicare are not eligible for the premium reduction. There is no premium reduction for premiums paid for periods of coverage prior to Feb. 17, 2009.

Individuals involuntarily terminated from Sept. 1, 2008 through Feb. 16, 2009 who did not elect COBRA when it was first offered OR who did elect COBRA but are no longer enrolled (for example because they were unable to continue paying the premium) have a new election opportunity. This election period begins on Feb. 17, 2009, and ends 60 days after the plan provides the required notice. This special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee's involuntary termination). COBRA coverage elected in this special election period begins with the first period of coverage beginning on or after Feb. 17, 2009.

Plan administrators must provide notice about the premium reduction to all individuals, whether they have COBRA coverage or not, who had a qualifying event from Sept. 1, 2008 through Dec. 31, 2009. In addition, individuals eligible for the special COBRA election period must receive a notice informing them of this opportunity by April 18, 2009. The model notices issued by DOL/EBSA can be found at [www.dol.gov/COBRA](http://www.dol.gov/COBRA).

DOL/EBSA has a dedicated [COBRA](#) web page. The Agency, joined by the U.S. Department of the Treasury and the Internal Revenue Service, will be holding a webcast on March 24 and will be conducting outreach around the country. Subscribe to DOL/EBSA's COBRA page for notification of updates as guidance and information on outreach events are added.

## Guidance on Defined Benefit Plan Annual Funding Notice

On Feb. 10, DOL/EBSA issued [Field Assistance Bulletin 2009-01](#) (FAB) addressing a need for interim guidance pending the adoption of regulations or other guidance under ERISA §101(f) by announcing a “good faith” enforcement policy. The FAB also includes technical assistance in the form of questions and answers and model annual funding notices.

The PPA amended ERISA to require plan administrators of defined benefit pension plans to provide participants and others with information annually about the funding status of their plans. Many of these plans must furnish their first annual funding notice no later than April 30, 2009.

## Guidance on Fiduciary Duties in Response to Recent Events Involving the Madoff Investment Firm

On Feb. 5, DOL/EBSA announced [guidance](#) on the duties of employee benefit plan fiduciaries in light of alleged abuses involving Bernard L. Madoff Investment Securities LLC.

DOL/EBSA provided the guidance to fiduciaries, investment managers and other investment service providers to plans who believe they may have exposure to losses on investments with entities related to the Madoff firm. The guidance also provides steps that can be taken to assess and protect the interests of plans, participants and beneficiaries under ERISA.

**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. •

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## PBGC Insights

### 4010 Final Rule

On March 16, 2009, PBGC published a [final rule](#) that amends its regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010). The final rule implements Pension Protection Act of 2006 (PPA) changes to ERISA §4010 and makes other modifications and clarifications to the reporting requirements. The [e-4010 filing application](#) has been updated to conform to the new rules. The first filings under the new rules are due April 15, 2009.

### Reportable Events Guidance for 2009 Plan Years

On Jan. 9, 2009, PBGC issued [Technical Update 09-1](#) providing guidance on how changes made by the PPA apply to PBGC's Reportable Events regulation (29 CFR part 4043). Basically, for Reportable Events purposes, a plan's unfunded vested benefits and the value of its assets and vested benefits are determined for a plan year beginning in 2009 in the same manner as for premiums for the preceding plan year.

### Minimum Lump Sum Assumptions for Terminating Single Employer Plans

On Dec. 31, 2008, PBGC issued [Technical Update 08-4](#), to provide guidance on minimum lump sum assumptions for plans that terminate in standard terminations (and in certain distress terminations) after the effective date of PPA changes to interest and mortality assumptions for minimum lump sums in ongoing plans.

### Multiemployer Withdrawal Liability Final Rule

On Dec. 30, 2008, PBGC published in the *Federal Register* a [final rule](#) that implements PPA changes to the withdrawal liability methods for multiemployer plans and makes other changes to the multiemployer program.

### Single-Employer Plan Annual Funding Notices

Under ERISA §101(f) and guidance issued by the Department of Labor, starting with plan years beginning on or after Jan. 1, 2008, single employer plans with liabilities that exceed plan assets by \$50 million or more must provide PBGC with a copy of the Annual Funding Notice by the Annual Funding Notice due date. Single employer plans with liabilities that exceed plan assets by



less than \$50 million must provide PBGC with a copy of the Annual Funding Notice within 30 days of receiving a written request from PBGC. See Department of Labor [Field Assistance Bulletin No. 2009-01 \(Feb. 10, 2009\)](#).

Single-employer plans required to provide PBGC with a copy of the Annual Funding Notice should e-mail it to [single-employerAFN@pbgc.gov](mailto:single-employerAFN@pbgc.gov), or send it to:

PBGC  
 ATTN: Single-Employer AFN Coordinator  
 1200 K Street, NW, Suite 270  
 Washington, DC 20005-4026

### No Missed-Quarterly Reporting Waiver for 2009

PBGC is not granting an automatic waiver for 2009 of the requirement to notify PBGC of missed quarterly contributions under ERISA §4043 and PBGC's Reportable Events regulation (29 CFR Part 4043). PBGC will still grant case-by-case waivers where appropriate.

For the latest information about premium filing and to learn more about PBGC services for practitioners visit the [Practitioners page](#) on PBGC's web site. •

## Calendar of EP Benefits Conferences

### UPCOMING EVENTS...

Name	Date(s)	Location	Co-Sponsor(s)	For Further Information, Please Contact
Great Lakes Benefits Conference	04/20/09-04/21/09	Chicago, IL	ASPPA & cooperating sponsors	<a href="http://www.asppa.org">www.asppa.org</a>
Mid-Atlantic Benefits Conference	04/29/09-04/30/09	Washington, DC	ASPPA	<a href="http://www.asppa.org">www.asppa.org</a>
22nd Annual Cincinnati Employee Benefits Conference	06/11/09-06/12/09	Cincinnati, OH	Cincinnati Bar Association	<a href="http://www.cincybar.org">www.cincybar.org</a>
Northeast Area Benefits Conference (2 Locations)	07/16/09-07/17/09	Boston, MA & New York, NY	ASPPA & NE Area Pension Liaison	<a href="http://www.asppa.org">www.asppa.org</a>

### RECENT EVENTS...

Name	Date(s)	Location	Co-Sponsor(s)	For Information, See
Los Angeles Benefits Conference	01/28/09-01/30/09	Los Angeles, CA	ASPPA & National Inst. of Pension Administrators (NIPA)	<a href="http://www.irs.gov/ep">www.irs.gov/ep</a>
Benefits Conference of the South	01/15/09-01/16/09	Atlanta, GA	ASPPA	
SWBA/IRS 19th Annual Employee Benefits Conference	11/20/08-11/21/08	Dallas, TX	Southwest Benefits Association (SWBA)	

