

EMPLOYEE PLANS - ISSUE FOCUS
TERMINATIONS
March 12, 2010

On July 31, 2007, February 29, 2008, and March 9, 2009 we issued guidance regarding plans which terminated in the 2007, 2008 and 2009 plan years. Since that time, we have identified plans which are terminating in the 2010 plan year without required amendments for the 2009 Cumulative List (Notice 2009-98) and subsequent legislation.

Under Rev. Proc. 2010-6 (as annually updated), a terminating plan must be amended for all current law which is applicable to the plan even if the date by which the plan is required to be amended has not yet passed. Therefore, even though remedial amendment periods for the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Pension Protection Act of 2006 (PPA '06), the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) may not be closed, or may have been extended by subsequent legislation or guidance, a terminating plan is required to be properly amended to conform to these statutory provisions.

This report will update those previously provided Issue Foci with the "New" items listed on the 2009 Cumulative List identified below, as well as other provisions of PPA '06, HEART and WRERA which would be applicable to plans terminating in their 2010 plan year.

Please note that this update is not an all inclusive list of required plan changes. Therefore, determination specialists should review terminating plans for compliance with all applicable law in effect at the date of termination (e.g. Code § 414(x), other HEART provisions not listed below, etc.).

The following guidance contains sample or model amendments which may be of use in reviewing plan language or requesting amendments: Notice 2001-57 (miscellaneous EGTRRA amendments); Rev. Rul. 2001-62 (applicable mortality table); Rev. Proc. 2002-29 (required minimum distribution amendments); Rev. Proc. 2003-13 (required language for deemed IRAs); Notice 2005-5 (automatic rollover); Notice 2006-44 (Roth § 401(k) plans); and Notice 2009-65 (automatic contribution features).

Appendix

EXPLANATION OF THE “NEW” QUALIFICATION REQUIREMENTS FROM NOTICE 2009-98 (2009 CL)

401(a): Notice 2008-98, 2008-2 C.B. 1080, provides that the Service and Treasury intend to amend the normal retirement age regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2011.

Change: Delays the application of the final normal retirement age regulations (§ 1.401(a)-1(b)(1)(i)) for governmental plans.

Effective Date: Delays the effective date till plan years beginning on or after January 1, 2011. Plan sponsors may rely upon Notice 2008-98 until the regulations are amended.

Plan Language: None Required.

401(a)(9): Final regulations under § 401(a)(9) were published on September 8, 2009 (74 Fed. Reg. 45993), which permit a governmental plan to comply with the required minimum distribution rules of § 401(a)(9) by using a reasonable and good faith interpretation of the statute.

Change: The final regulations amend the regulations under section 401(a)(9) to treat a governmental plan as having complied with the rules of section 401(a)(9), for all years to which 401(a)(9) applies, if the governmental plan applies a reasonable and good faith interpretation of section 401(a)(9).

Effective Date: September 8, 2009

Plan Language: Required only if there is conflicting language already in the plan document.

401(a)(35): WRERA § 109(a) amended the definition of one-participant retirement plan under § 401(a)(35)(E)(iv).

Change: Section 401(a)(35)(E)(iv) of the Code was amended to read as follows:

`(iv) ONE-PARTICIPANT RETIREMENT PLAN- For purposes of clause (iii), the term `one-participant retirement plan' means a retirement plan that on the first day of the plan year--
`I covered only one individual (or the individual and the individual's spouse) and the individual (or the individual and the individual's spouse) owned 100 percent of the plan sponsor (whether or not incorporated), or
`II covered only one or more partners (or partners and their spouses) in the plan sponsor.'

The revised definition expanded the definition of what a “one-participant retirement plan” is. Such a plan is exempt from the diversification requirements instituted under Code § 401(a)(35).

Effective Date: Plan Years beginning after December 31, 2006.

Plan Language: Required for DC plans with conflicting language.

401(k) & 401(m):

PPA '06 § 827 added § 401(k)(2)(B)(i)(V) which permits reservists called to active duty after September 11, 2001 and before 2008 to take in-service distributions from a § 401(k) plan. (2008 C. L.).

- **Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to active duty after December 31, 2007.**

Change: PPA '06 § 827 added IRC § 401(k)(2)(B)(i)(V) which creates a new exception to the 10% early withdrawal penalty on premature distributions for “qualified reservist distributions.” A “qualified reservist distribution” is a distribution attributable to elective deferrals made under a § 401(k) or § 403(b) plan that is made to a reservist called up to active duty between September 11, 2001 and December 31, 2007, for a period in excess of 179 days or for an indefinite period, provided that such distribution is made during the individual’s period of active duty. Additionally, the individual who received such a distribution is allowed to repay all or part of the distribution within the later of (1) two years after the period of active duty, or (2) two years after August 17, 2006.

The HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to active duty after December 31, 2007.

Effective Date: Applies to individuals ordered or called to active duty on or after December 31, 2007.

Plan Language: Optional.

PPA '06 § 902 added § 401(k)(13) with respect to qualified automatic contribution arrangements. (2008 C. L.).

- **Final regulations under § 401(k) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200).**
- **Rev. Rul. 2009-30, 2009-39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements.**
- **Notice 2009-65, 2009-39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans.**
- **Final regulations under § 401(m) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200).**

Change: The final regulations contain amendments to the regulations in order to reflect certain provisions of § 902 of PPA '06 with respect to automatic contribution arrangements, taking into account certain changes made by § 109(b) of WRERA.

Rev. Rul. 2009-30 provides guidance as to acceptable plan situations with regard to “escalator” provisions which increase the amount of the automatic contribution.

Effective Date: The Final Regulations with regard to § 401(k) and (m) are effective as of February 24, 2009. Except as otherwise provided in the regulations, qualified automatic contribution arrangement provisions apply to plan years beginning on or after January 1, 2008. The final regulations to eligible automatic contribution arrangement provisions apply for plan years beginning

on or after January 1, 2010.

Notice 2009-65 contains sample amendments to assist plan sponsors who want to adopt automatic contribution arrangements or eligible automatic contribution arrangements.

Plan Language: Optional. However, if a plan provides for an automatic contribution, the plan language must satisfy the Final Regs.

402(c)(11): WRERA § 108(f) requires that plans provide for nonspouse beneficiary rollovers under § 402(c)(11), effective for plan years beginning after December 31, 2009.

Change: PPA '06 § 829(a)(1) added IRC section 402(c)(11) to allow nonspouse beneficiaries to directly roll over distributions from a qualified plan to an individual retirement plan. WRERA changed the Code to make it a mandatory requirement.

Effective Date: Plan years beginning after December 31, 2009.

Plan Language: Required.

**402(f):
Notice 2009-68, 2009-39 I.R.B. 423, provides two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer to satisfy § 402(f).**

Change: The Notice provides language which may be provided to the potential recipients of an eligible rollover distribution. Use of this model language will be considered as satisfying the content requirements of Code § 402(f).

Effective Date: The plan administrator may use the safe harbor explanations provided under Notice 2002-3, appropriately modified to reflect statutory changes since Notice 2002-3, until December 31, 2009. After that date the revised safe harbor explanations in this Notice should be used. [Note that the language provided by these Notices is not required to be used in order to satisfy § 402(f), the administrator may use different language in the explanation and still satisfy the content requirements of the Code.]

Plan Language: None required.

WRERA § 108(f)(2) amended § 402(f)(2)(A) with respect to the definition of eligible rollover distribution for purposes of the section 402(f) notice and mandatory withholding.

Change: PPA '06 created nonspouse beneficiary rollover rights (See the item above with regard to Code § 402(c)(11)). WRERA changed the definition of an “eligible rollover distribution” to include the nonspouse beneficiary rollover.

Effective Date: Plan years beginning after December 31, 2009.

Plan Language: None required.

402(g)(2): WREERA § 109(b)(3) amended § 402(g)(2)(A)(ii) to eliminate the distribution of gap period earnings with excess deferrals.

Change: Distribution of the deferrals made in excess of the § 402(g) limit may only distribute the income associated with those contributions earned during the plan year. Income earned between the end of the taxable year and the date of actual distribution may no longer be distributed pursuant to this section of the Code.

Effective Date: Plan years that begin after December 31, 2007.

Plan Language: Plans must include gap-period earnings in the distribution of excess deferrals, effective for excess deferrals attributable to the taxable year beginning on or after January 1, 2007. Plans are required to eliminate gap-period earnings for plan years beginning in 2008.

411(a)(13): PPA '06 § 701(b)(2) added § 411(a)(13) with respect to special vesting rules for applicable defined benefit plans, such as cash balance plans. (2008 C. L.)

- **WREERA § 107(b)(2) amended § 411(a)(13)(A).**

History: PPA '06 added § 411(a)(13) to the Code, which required a three-year cliff vesting schedule. For plans that were in existence on June 29, 2005, the requirements of § 411(a)(13)(B) will apply to years beginning after December 31, 2007, unless the plan sponsor elects to apply the provision to plan years beginning on or after June 29, 2005 and before January 1, 2008. For plans not in existence on June 29, 2005, the effective date is plan years ending on or after June 29, 2005.

Change: Technical corrections made to the references in Code § 411(a)(13)(A).

- (2) Section 411(a)(13)(A) of the 1986 Code is amended—
- (A) by striking “paragraph (2)” in clause (i) and inserting “subparagraph (B)”,
- (B) by striking clause (ii) and inserting the following new clause:
- “(ii) the requirements of subsection (a)(11) or (c), or the requirements of section 417(e), with respect to accrued benefits derived from employer contributions,”
- and
- (C) by striking “paragraph (3)” in the matter following clause (ii) and inserting “subparagraph (C)”.

Also included was an effective date provision which states that the vesting requirements of § 411(a)(13)(B) do not apply to a participant who does not have an hour of service after the effective date.

Effective Date: Section 411(a)(13)(A) is effective for distributions made after August 17, 2006.

Plan Language: Required for cash balance plans and other hybrid plans.

411(b)(5): PPA '06 § 701(b)(1) added § 411(b)(5) with respect to applicable defined benefit plans, such as cash balance plans, and special rules relating to age. (2008 C. L.)

- **WRERA § 107(b)(1) amended § 411(b)(5).**

Change: IRC § 411(b)(5), as added by PPA '06 § 701(b)(1), provides that the requirement under § 411(b)(1)(H)(i) to not reduce or cease a participant's rate of benefit accrual solely due to the attainment of any age is met by a defined benefit plan if a participant's accrued benefit is not less than the accrued benefit of any similarly-situated younger individual who is or could be a participant. Technical corrections were made to the PPA'06 language in § 411(b)(5)(A)(iii) [disregard of subsidized early retirement benefits] and § 411(b)(5)(C) [certain offsets permitted].

Effective Date: Periods beginning on or after June 29, 2005.

Plan Language: Required for cash balance plans and other hybrid defined benefit plans.

414(w): PPA '06 § 902(d)(1) added § 414(w) with respect to eligible automatic contribution arrangements. (2008 C. L.).

- **WRERA § 109(b)(4), (5), and (6) amended § 414(w)(3), (5), and (6) respectively.**
- **Final regulations under § 414(w) with respect to eligible automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200).**
- **Rev. Rul. 2009-30, 2009-39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements.**
- **Notice 2009-65, 2009-39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans.**

Change: PPA '06 added IRC § 414(w), which allows for the withdrawal of contributions made pursuant to an automatic contribution arrangement. Withdrawals must be within set time frames, are includible in income for the year of distribution, and are allowable distributions not subject to the IRC § 72(t) early distribution penalty tax.

WRERA expanded coverage to also include SIMPLE IRA's and SARSEP's and deleted the requirement that the contributions be invested in accordance with § 404(c)(5) ERISA.

Rev. Rul. 2009-30 provides guidance as to acceptable plan situations with regard to "escalator" provisions which increase the amount of the automatic contribution.

Notice 2009-65 includes a model amendment which would allow an employer to add an automatic contribution arrangement or an eligible automatic contribution arrangement to the plan.

Effective Date: Plan years beginning after December 31, 2007. The Final regulations apply to plan years beginning on or after January 1, 2010. The plan must operate in accordance with a good faith interpretation of the § 414(w) provisions for the 2008 and 2009 plan years.

Plan Language: Optional. However, if a plan provides for an automatic contribution, the plan language must satisfy the final regulations as of the appropriate effective date.

415:

WRERA § 103(a) changed the deadline to adopt PFEA amendments from the end of the 2008 plan year to the end of the 2009 plan year.

Change: The amendments required by PFEA were to have been adopted by the last day of the first plan year beginning on or after January 1, 2008. WRERA extended the date till the last day of the 2009 plan year.

Effective Date: First plan year beginning on or after January 1, 2004.

Plan Language: Required for DB plans.

WRERA § 103(b)(2)(B)(i) amended § 415(b)(2)(E)(v).

Change: The Mortality Table to be used in adjusting the form of benefit, or if payable before age 62 or after 65, for 415 purposes is the “applicable mortality table” under Code § 417(e)(3)(B). Prior to the WRERA change this Code section referenced the “prevailing commissioners’ standard table” under § 807(d)(5)(A).

Effective Date: Plan years beginning after December 31, 2008. However, the employer may elect to have the amendment apply to any year beginning after December 31, 2007, and before January 1, 2009, or to any portion of any such year.

Plan Language: Required for DB plans.

417: WRERA § 103(b)(2)(A) amended § 417(e)(3)(D)(i).

Change: Technical correction changing the reference for determining the “applicable segment rates” for the purposes of the “applicable interest rate”. The prior reference was to “clause (ii)” under § 417(e)(3)(D) which did not describe a period to be used for determining the adjusted segment rates. The reference was changed to “subparagraph (C)” which provides that the month prior to the date of distribution will be used in determining adjusted segment rates.

Effective Date: Plan years that begin after December 31, 2007.

Plan Language: DB plans with conflicting language should be amended.

432: PPA '06 § 212(a) added § 432 which requires that a funding improvement plan or a rehabilitation plan be adopted for multiemployer plans in endangered or critical status and provides for certain benefit reductions. (2008 C. L.)

- **WRERA § 204 provides a temporary delay of designation of multiemployer plans in endangered or critical status.**
- **Notice 2009-31, 2009-16 I.R.B. 856, as modified by Notice 2009-42, 2009-20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WRERA § 204.**
- **Rev. Proc. 2009-43, 2009-40 I.R.B. 460, provides procedures with respect to the revocation of elections by multiemployer plans to freeze funded status under WRERA § 204.**

Change: PPA '06 added Code § 432 to provide additional funding requirements for multiemployer plans found to be in “critical” or “endangered” underfunded status. WRERA provides that the

multiemployer plan sponsor may elect to use the prior year's status for the plan year which began in the period between October 1, 2008 and September 30, 2009 (i.e., January 1, 2009 for a calendar year plan).

Notice 2009-31 provides examples of the effect of an election under this section, how it may interact with the election under WRERA § 205 (see the issue below), providing Notice to the Participants, and how and when the election must be submitted to the Service. [Notice 2009-42 extended one of the due dates by which the election must be made.]

Rev. Proc. 2009-43 provides guidance as to how a sponsor may revoke the § 204 election.

Effective Date: First plan year beginning during the period beginning on October 1, 2008 and ending on September 30, 2009.

Plan Language: None required.

- **WRERA § 205 provides a temporary extension of the funding improvement or rehabilitation periods for multiemployer plans in endangered or critical status for 2008 or 2009.**
- **Notice 2009-31, 2009-16 I.R.B. 856, as modified by Notice 2009-42, 2009-20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WRERA § 205.**

Change: WRERA provides that if a plan is in endangered or critical funding status for the 2008 or 2009 plan year, the plan sponsor may elect to extend the funding improvement and rehabilitation periods.

Notice 2009-31 provides examples of the effect of an election under this section, how it may interact with the election under WRERA § 204 (see the issue above), providing Notice to the Participants, and how and when the election must be submitted to the Service. [Notice 2009-42 extended one of the due dates by which the election must be made.]

Effective Date: Plan years beginning after December 31, 2007.

Plan Language: None required.

Hurricane Relief:

Notice 2008-87, 2008-42 I.R.B. 930, provides relief in connection with certain employee benefit plans because of damage caused by Hurricane Ike.

Change: The Notice extended the dates by which an "Affected Plan" (located in specific counties of Texas) may make contributions to satisfy funding, apply for a funding waiver, providing certain notices, adopting a funding improvement or rehabilitation plan (multiemployer only) or determining the plan's funding status as critical or endangered (multiemployer only).

Effective Date: Generally extended the above dates till December 15, 2008, if the deadline would have ended on or before that date.

Plan Language: None required.

Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, provides temporary tax relief for areas damaged by 2008 Midwestern severe storms, tornados, and flooding by applying § 1400Q and KETRA to any Midwestern disaster area.

Change: Subsection of the Act entitled “*Heartland and Hurricane Ike Disaster Relief*”. Extended the provisions previously elucidated in KETRA (as amended by GO ZONE) to certain Midwestern states which were declared disaster areas by the President on or after May 20, 2008 and before August 1, 2008. Qualified distributions made on or after the applicable disaster date and before January 1, 2010 would not be subject to the §72(t) tax to the extent it does not exceed \$100,000. An optional 3 year payback period is permitted for such distributions. The loan limits under IRC § 72(p) were increased to \$100,000 for those affected. Loan payments are suspended for a one year period.

Effective Date: Amendments, if necessary, must be made on or before the last day of the first plan year beginning on or after January 1, 2010.

Plan Language: Use of the provisions is optional. Conforming plan amendments required if provisions used.

Miscellaneous:

Rev. Rul. 2009-31, 2009-39 I.R.B. 395, provides guidance with respect to annual paid time off contributions.

Change: Revenue Ruling which provides that the contribution of the equivalent dollar amount of unused paid time off is acceptable as long as it satisfies other applicable provisions of the Code such as the limitations of 415 and 402(g). [The examples provided in this Rev. Rul. relate to Participants who continue employment with the employer. See the explanation for Rev. Rul. 2009-32, below, which provides guidance with regard to the contribution of such amounts upon termination of employment.]

If the contribution is considered as an employer nonelective contribution, the plan would not be considered as a design-based safe harbor and would have to perform testing under IRC §401(a)(4).

If the participant may elect to receive part, or all, of the amount in cash or contribute it to the plan, it would be considered as an elective deferral.

Effective Date: In order for the plan to make such contributions, it must be prospectively amended to provide specific language regarding the contributions.

Plan Language: Optional.

Rev. Rul. 2009-32, 2009-39 I.R.B. 398, provides guidance with respect to paid time off contributions at termination of employment.

Change: Revenue Ruling which provides that the contribution of the equivalent dollar amount of unused paid time off is acceptable as long as it satisfies other applicable provisions of the Code such as the limitations of 415 and 402(g). [The examples provided in this Rev. Rul. relate to Participants who have terminated employment. See the explanation for Rev. Rul. 2009-31, above, which provides guidance with regard to the contribution of such amounts for continuing Participants.]

This Revenue Ruling expands upon the findings in Rev. Rul. 2009-31 and provides various examples to highlight that since the Participant may not have any compensation for the plan year in which the contribution is proposed to be made, the amount could exceed the limitations of 415(c)

Effective Date: In order for the plan to make such contributions, it must be prospectively amended to provide specific language regarding the contributions.

Plan Language: Optional.

WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2009 PROVISION

401(a)(9)(H): Section 201(a) of WRERA added § 401(a)(9)(H) which provides a suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans.

- **Notice 2009-82, 2009-41 I.R.B. 491, provides guidance relating to the suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans.**

Change: WRERA added Code § 401(a)(9)(H). This revision provides that the 2009 Required Minimum Distribution (RMD), for DC plans, to be paid on or before April 1, 2010, may be waived.

The Notice provides guidance (including Q&A's) with regard to the waiver of the RMD and model amendments that the plan sponsor may adopt to provide the Participant with the option whether or not to waive the RMD.

Effective Date: Calendar years' beginning after December 31, 2008, but generally only applies for the required minimum distribution which was to be made for 2009.

Plan Language: Optional, but the plan may need to be amended to comply with plan operation.