

EMPLOYEE PLANS - ISSUE FOCUS
TERMINATIONS
June 1, 2011

On July 31, 2007, February 29, 2008, March 9, 2009, and March 12, 2010 we issued guidance regarding plans which terminated in the 2007, 2008, 2009 and 2010 plan years. Since that time, we have identified plans which are terminating in the 2011 plan year without required amendments for the 2010 Cumulative List (Notice 2010-90) and subsequent legislation.

Under Rev. Proc. 2011-6 (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 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 2010 Cumulative List identified below.

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), guidance issued after October 1, 2010, etc.).

Appendix

EXPLANATION OF THE “NEW” QUALIFICATION REQUIREMENTS FROM NOTICE 2010-90 (2010 CL)

Notice 2009-86, 2009-46 I.R.B. 629, 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, 2013.

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, 2013. Plan sponsors may rely upon Notice 2009-86 until the regulations are amended.

Plan Language: None Required.

401(a)(9): PPA § 823 instructs the Secretary of the Treasury to issue regulations under which, for all years to which § 401(a)(9) applies, a § 414(d) governmental plan shall be treated as having complied with § 401(a)(9) if it complies with a reasonable good faith interpretation of § 401(a)(9).

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

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

Change: WREERA added Code § 401(a)(9)(H). This section 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&As) 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.

401(a)(35): Notice 2009-97, 2009-52 I.R.B. 972, extends the deadline to amend for § 401(a)(35) to the last day of the first plan year that begins on or after January 1, 2010.

Change: The Notice provides an extended deadline (extended to the last day of the first plan year that begins on or after January 1, 2010) for adopting an interim or discretionary plan amendment to meet certain diversification requirements with respect to investments in employer securities.

Effective Date: The requirements of § 401(a)(35) generally apply to plan years that begin after December 31, 2007.

Plan Language: Required for DC plans (other than stand alone ESOPs) that allow investment in employer securities. While the Notice provided an extended deadline, a terminating plan, to which the provision applies, must be amended even though that deadline might not have passed.

401(a)(35): Final regulations under § 401(a)(35) were published on May 19, 2010 (75 Fed. Reg. 27927).

Changes:

- 1.) The proposed regulations provided that certain investment funds that include employer securities as part of a broader fund were treated as not holding employer securities. The final regulations provide that, in the case of a multiemployer plan, an investment option will not be treated as holding employer securities to the extent the employer securities are held indirectly through an investment fund managed by an investment manager if the investment is independent of the employer and the percentage limitation rule is satisfied.
- 2.) The final regulations provide that the determination of whether the value of employer securities exceeds 10 percent of the total value of the fund's investments for the plan year, is made as of the end of the preceding plan year. The determination can be based on the information in the latest disclosure of the fund's portfolio holdings that was filed with the Securities and Exchange Commission in that preceding plan year. The final regulations also provide that in a case where a fund that indirectly holds employer securities fails to meet the requirement that the investment be independent of the employer (including the situation where the fund no longer meets the percentage limitation rule), the plan does not fail to satisfy the diversification requirements under section 401(a)(35) merely because it does not offer those rights for up to 90 days after the investment fund is treated as holding employer securities.
- 3.) The final regulations clarify that the plan is permitted to allow reinvestment of dividends paid on employer securities. The final regulations also clarify that the frozen fund exception is only available for a plan that does not have another employer securities fund.
- 4.) The final regulations provide a transitional rule for certain leveraged ESOPs. An employer stock fund does not fail to be a frozen fund merely because of the allocation of employer securities that are released as matching contributions from the plan's suspense account that holds employer securities acquired with an exempt loan under section 4975(d)(3). This transitional rule only applies to employer securities that were acquired in a plan year beginning before January 1, 2007, with the proceeds of an exempt loan within the meaning of section 4975(d)(3) which is not refinanced after the end of the last plan year beginning before January 1, 2007.

5.) The final regulations provide that a plan is generally permitted to allow transfers to be made into or out of a stable value fund more frequently than a fund invested in employer securities. Thus, a plan that includes a broad range of investment alternatives does not impose an impermissible restriction merely because it permits transfers into and out of the stable value or similar fund more frequently than the other funds. The final regulations provide that a stable value or similar fund means an investment product or fund designed to preserve or guarantee principal and provide a reasonable rate of return, while providing liquidity for benefit distributions or transfers to other investment alternatives.

6.) The final regulations expand the list of permitted indirect restrictions to provide that a plan may provide for transfers out of a qualified default investment alternatives (QDIA), within the meaning of Department of Labor Regulation section 2550.404c-5(e), more frequently than a fund invested in employer securities.

7.) The final regulations provide that any applicable tax consequences are disregarded in determining whether a plan imposes an indirect restriction or condition on an individual's right to divest an investment in employer securities. Accordingly, a plan is permitted to provide that an individual may not reinvest divested amounts in the same employer securities account but is permitted to invest such divested amounts in another employer securities account where the only relevant difference between the separate accounts is the section 402(e)(4) cost (or other basis) of the trust in the shares held in each account.

8.) Section 1107 of PPA '06 provides that any amendment which is made pursuant to a provision of PPA '06 will not fail to meet the requirements of section 411(d)(6) unless otherwise provided by the Secretary of the Treasury. An amendment to an ESOP which is now subject to the diversification requirements under section 401(a)(35) that eliminates the distribution option available for ESOPs subject to the diversification requirements under section 401(a)(28), as permitted under section 1107 of PPA '06, would not violate the anti-cutback rules under section 411(d)(6).

Effective Date: The final regulations are effective for plan years beginning on or after January 1, 2011. For plan years beginning prior to January 1, 2011 a plan may rely on Notice 2006-107, the proposed regulations or the final regulations to satisfy Code Section 401(a)(35).

Plan Language: Required for DC plans with conflicting language.

401(a)(37): Section 104(a) of the HEART Act added Code § 401(a)(37) with respect to benefits payable on the death of a plan participant while performing qualified military service.

- **Notice 2010-15, 2010-6 I.R.B. 390, provides guidance regarding HEART Act § 104(a).**

Change: Section 401(a)(37) requires that the survivors of a participant who dies while performing qualified military service be entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) that would be provided under the plan if the participant had resumed employment and then terminated employment on account of death. The types of benefits subject to § 401(a)(37) include accelerated vesting, ancillary life insurance benefits, and other survivor's benefits provided under a plan that are contingent on a participant's termination of employment on account of death.

Effective Date: Applicable to deaths and disabilities occurring on or after January 1, 2007.

Plan Language: Required.

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. (2009 C.L.)**
- **Notice 2010-15, 2010-6 I.R.B. 390, provides guidance regarding HEART Act § 107.**

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.

402A: SBJA § 2112 added § 402A(c)(4) which permits rollovers from a plan account other than a designated Roth account to the plan’s designated Roth account.

- **Notice 2010-84, 2010-51 I.R.B. December 20, 2010, provides guidance regarding § 402A(c)(4).**

Change: Section 2112 of SBJA adds § 402A(c)(4) to the Code to permit plans that include a qualified Roth contribution program to allow individuals to roll over amounts from their accounts other than designated Roth accounts to their designated Roth accounts in the plan. Currently, only § 401(k) plans and § 403(b) plans are permitted to include qualified Roth contribution programs. For taxable years beginning after 2010, § 2111 of SBJA permits governmental § 457(b) plans to include designated Roth accounts.

Effective Date: Effective for distributions made after September 27, 2010.

Plan Language: Optional.

411(a)(13):

- **Notice 2009-97, 2009-52 I.R.B. 972, extends the deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) to the last day of the first plan year that begins on or after**

- January 1, 2010.**
- **Final Regulations under § 411(a)(13) were published on October 19, 2010 (75 Fed. Reg. 64123).**
 - **Notice 2010-77, 2010-51 I.R.B. 851, extends the deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) to the last day of the first plan year that begins on or after January 1, 2011.**

Change: Notice 2009-97 provides an extended deadline (extended to the last day of the first plan year that begins on or after January 1, 2010) for adopting an interim plan amendment to comply with the vesting requirements for cash balance (and similarly styled DB plans). Notice 2010-77 further extended this deadline till the last day of the first plan year beginning on or after January 1, 2011.

However, 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 the remedial amendment period has been extended, a terminating plan is required to be properly amended to conform to these statutory provisions.

Effective Date: For plans that were in existence on June 29, 2005, the effective date applies to plan 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. However, the change does not apply to participants who fail to complete an hour of service on or after this effective date.

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

411(b)(5):

- **Notice 2009-97, 2009-52 I.R.B. 972, extends the deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(b)(5) to the last day of the first plan year that begins on or after January 1, 2010.**
- **Final Regulations under § 411(b)(5) were published on October 19, 2010 (75 Fed. Reg. 64123).**
- **Notice 2010-77, 2010-51 I.R.B. 851, extends the deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(b)(5) to the last day of the first plan year that begins on or after January 1, 2011.**

Change: Notice 2009-97 provides an extended deadline (extended to the last day of the first plan year that begins on or after January 1, 2010) for adopting an interim plan amendment to comply with the vesting requirements for cash balance (and similarly styled DB plans). Notice 2010-77 further extended this deadline till the last day of the first plan year beginning on or after January 1, 2011.

However, 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 the remedial amendment period has been extended, a terminating plan is required to be properly amended to conform to these statutory provisions.

Effective Date: For plans that were in existence on June 29, 2005, the effective date applies to plan 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.

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

414(u):

Section 104(b) of the HEART Act amended § 414(u) of the Code by adding § 414(u)(9) regarding how a plan may provide benefit accruals for a person who dies or becomes disabled while performing qualified military service.

- **Notice 2010-15, 2010-6 I.R.B. 390, provides guidance regarding HEART Act § 104(b).**

Change: Section 104(b) of the HEART Act adds a new § 414(u)(9) to the Code. Under § 414(u)(9), an employer sponsoring a retirement plan may, for benefit accrual purposes, treat an individual who dies or becomes disabled while performing qualified military service as if the individual had resumed employment in accordance with the individual's USERRA reemployment rights on the day preceding the death or disability and then terminated employment on the actual date of death or disability. Section 414(u)(9) also provides that this provision applies only if all individuals performing qualified military service with respect to the employer maintaining the plan who die or become disabled as a result of performing qualified military service prior to reemployment by the employer are credited with service and benefits on reasonably equivalent terms.

Effective Date: Applicable to deaths and disabilities occurring on or after January 1, 2007.

Plan Language: Optional.

Section 105(b)(1) of the HEART Act added § 414(u)(12) with respect to the treatment of differential wage payments during the period a person, while on active duty, is performing service in the uniformed services.

- **Notice 2010-15, 2010-6 I.R.B. 390, provides guidance regarding HEART Act § 105(b)(1).**

Change: Section 105(b)(1)(A) of the Act adds § 414(u)(12)(A) to the Code, which provides that, for purposes of applying the Code to retirement plans subject to § 414(u), (1) an individual receiving a differential wage payment is treated as an employee of the employer making the payment, (2) the differential wage payment is treated as compensation, and (3) the plan is not treated as failing to meet the requirements of any provisions described in § 414(u)(1)(C) by reason of any contribution or benefit which is based on the differential wage payment. The provisions described in § 414(u)(1)(C) include various nondiscrimination requirements, including requirements under §§ 401(a)(4), 401(k)(3), and 401(m).

Differential wage payments are not required to be treated as compensation for purposes of determining contributions and benefits under a plan. However, such payments are treated as compensation for purposes of applying the Code. Accordingly, these payments must be treated as compensation under § 415(c)(3) and § 1.415-2(d).

Effective Date: Plan years beginning after December 31, 2008.

Plan Language: Required.

414(x): PPA '06 § 903(a) added § 414(x) with respect to special rules for eligible combined plans that consist of a defined benefit plan and a qualified cash or deferred arrangement.

Change: Section 414(x) of the Code, added by section 903(a) of PPA '06 and amended by section 109(c) of WRERA, provides special rules for eligible combined plans.

Under § 414(x)(2)(A) of the Code, an “eligible combined plan” is a plan: (1) that is maintained by an employer that is a small employer at the time the plan is established; (2) that consists of a defined benefit plan and an applicable defined contribution plan; (3) the assets of which are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of the Code; and (4) that meets the benefit, contribution, vesting, and nondiscrimination requirements under § 414(x). Section 414(x)(2)(A) also provides that a “small employer” is generally an employer (taking into account the rules of § 414(b), (c), (m), and (o)) that employed an average of at least 2 but not more than 500 employees on each business day during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. In the case of an employer that was not in existence throughout the preceding calendar year, the determination of whether the employer is a small employer is based on the average number of employees it is reasonably expected the employer will employ on business days in the current calendar year. Section 414(x)(7) defines an “applicable defined contribution plan” as a defined contribution plan that includes a qualified cash or deferred arrangement.

Section 414(x)(1) provides that, except as otherwise provided in § 414(x), the requirements of the Code are applied to a defined benefit plan or applicable defined contribution plan that is part of an eligible combined plan in the same manner as if each such plan were not a part of the eligible combined plan. Further, in the case of the termination of both the defined benefit plan and the applicable defined contribution plan forming an eligible combined plan, the defined benefit plan and the applicable defined contribution plan must be terminated separately by the plan administrator.

See § 414(x) and Notice 2009-71 for additional requirements such as minimum benefit accruals, minimum contributions, vesting, nondiscrimination, uniform benefits, rights and features, permitted disparity, and top-heavy requirements.

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

Plan Language: Required for eligible combined plans.