

MAKING YOUR 2011 RESOLUTION LIST? Start the New Year Right by Considering the Changes to Your Pension and ERISA Plans

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What better way to kick off the new year than by reading about pension plans and ERISA matters? Sounds like fun, right? Probably not. Without trying to be a killjoy, however, here is an easy-to-read and practical guide to help you in that pursuit. What follows are “to do” lists for three qualified pension plans that you may require your immediate attention.

[Qualified Plans “To Do” List (all 401(k), traditional pension plans, etc.)]

No good news here. Unfortunately if your company sponsors any type of qualified plan (such as a 401(k), profit sharing plan, cash-balance plan, traditional pension plan, etc.), then you are going to have to make some changes by the end of the 2010 plan year (*i.e.*, December 31, 2010, for calendar year plans).

As a general matter, if you made any design changes to the 2010 plan during the year you must amend it to reflect those changes by the last day of the 2010 plan year. Additionally, if your qualified plan is individually designed and the EIN associated with the plan ends in a 5 or a 0 (*i.e.*, falls in Cycle E) you must restate the plan on or before December 31, 2010, and submit it for an EGTRRA determination letter on or before January 31, 2011.

Even if you do not fall within Cycle E, the Worker, Retiree, and Employer Recovery Act of 2008 provides that, effective for plan years beginning after December 31, 2009, plans are required to provide a direct rollover option for non-spouse beneficiaries. Plan sponsors should adopt a plan amendment reflecting this change by the end of the 2010 plan. In addition, the Heroes Earnings Assistance and Relief Tax Act of 2008 made changes that impact qualified plans, some mandatory (*e.g.*, plans must provide additional death benefits - other than benefit accruals - when a participant dies during active military duty, and differential wage payments must be treated as compensation), others optional (*e.g.*, plans may provide contributions or benefit

accruals if a participant dies or becomes disabled during active military duty). Some of the changes took effect as early as January 1, 2007, while others were effective January 1, 2009. Either way, plan sponsors must adopt a conforming amendment by the end of the 2010 plan year.

Finally, if you have not already done so, plan sponsors should update their Section 402(f) eligible rollover distribution notices to comply with the IRS model rollover notices published by the IRS in 2009.

[Defined Contribution Plans (including Section 401(k) Plans and non-Section 401(k) Plans) “To Do” List]

No good news here either. In addition to the items on the Qualified Plans “to do” list, there are a number of notices that all defined contributions plans must provide at least 30 days - but not more than 90 days - before the beginning of each plan year (*i.e.*, December 2, 2010 for calendar year plans), including a safe harbor notice if your plan has a Section 401(k)/401(m) contribution safe harbor, an annual automatic enrollment notice if your plan has adopted an automatic contribution arrangement, an eligible automatic contribution arrangement (“EACA”), a qualified automatic contribution arrangement (“QACA”), or any combination thereof. If you do not have either a QACA or an EACA but wish to add one of these to your plan for the 2011 plan year, you must adopt an amendment doing so by December 31, 2010 for calendar year plans.

December 31, 2010, is also the deadline for plan sponsors who wish to implement provisions allowing for in-plan Roth conversions in 2010 (*i.e.*, participants in Section 401(k) or Section 403(b) may convert pre-tax amounts into after-tax amounts - commonly called “Roth amounts” - inside a plan). For Roth conversions that occur in 2010, favorable income inclusion rules apply, such that income from a 2010 Roth conversion may be spread out over the participant’s 2011 and 2012 tax years.

As a reminder, for those of you who are relying on the qualified default investment alternative safe harbor, you also must give an annual notice at least 30 days - but not more than 90 days - before the beginning of each plan year (*i.e.*, December 2, 2010 for calendar year plans). Also, if your plan will be waiving its 2009 required minimum distributions ("RMDs"), plan sponsors must adopt amendments conforming to the published IRS requirements by the last day of the first plan year beginning on or after January 1, 2011 (*i.e.*, December 31, 2011 for calendar year plans) to reflect the waiver of 2009 RMDs. In the meantime, plans must be administered in accordance with the new rules.

Finally, with respect to defined contribution plans holding publicly traded employer securities, plan sponsors must amend their plans by the end of the 2010 plan year to reflect the diversification requirements of Section 401(a)(35) the Code (although the final regulations are not effective until plan years beginning on or after January 1, 2011).

[Defined Benefit Plans "To Do" List]

In addition to the items on the Qualified Plans "to do" list, hybrid plans (including cash balance plans) must be amended on or before the last day of the first plan year beginning on or after January 1, 2010 (*i.e.*, December 31, 2010 for calendar year plans), to use a three-year cliff vesting schedule for all participants who have an hour of service beginning on or after January 1, 2008. Also, since Notice 2009-97 extended the deadline for plan sponsors to

amend their plans to comply with Section 436 of the Code (which imposes benefit restrictions on certain underfunded defined benefit pension plans), plan sponsors must amend their plans to comply with these new regulations (unless further guidance is issued) on or before the last day of the first plan year beginning on or after January 1, 2010 (*i.e.*, December 31, 2010 for calendar year plans).

Single employer defined benefit plan sponsors are required to provide plan participants with an annual notice of the plan's funding status within 120 days of the end of the plan year to which the notice relates (however, plans with fewer than 100 participants do not have to provide the notice until the Form 5500 annual report is due for the plan year). In addition to the annual funding, ERISA requires a plan administrator to provide a notice to participants if the plan is subject to a restriction on payment of benefits. These restrictions, as well as an obligation to notify the PBGC within 105 days following the end of the plan sponsor's fiscal year (which is April 15, 2011 for calendar year taxpayers), become applicable if the plan's adjusted funding target attainment percentage is less than 80%. However, plan administrators are not required to provide this notice to participants and beneficiaries in pay status

Finally, sponsors of defined benefit pension plans that maintain an Intranet website for the purpose of communicating with employees (and not the public) are required to post portions of the defined benefit plan's Form 5500 on the company's Intranet.



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