

FORD & HARRISON^{LLP}

THE RIGHT RESPONSE AT THE RIGHT TIME

LEGAL ALERT



Legal Alert: It's Plan Amendment Time Again

11/5/2009

Plan sponsors should be aware of upcoming deadlines for adoption of amendments to their qualified retirement plans. Certain amendments are required by the end of the 2009 plan year (December 31, 2009 for calendar year plans), while others are required by the plan sponsor's 2009 tax-filing deadline. In some cases, there may also be amendments required to be adopted by January 31, 2010.

PPA Amendments

The first category of amendments is those that are required (or permitted) in order to comply with changes made by the Pension Protection Act of 2006 ("PPA"). Even though the PPA amendments were enacted with various effective dates, some as early as 2006, and plans may have already had to comply in operation with those changes, documentary amendments are generally only required by the end of the 2009 plan year (December 31, 2009 for calendar year plans). Primary among the PPA changes are those affecting defined benefit plan funding and applying funding-based benefit restrictions; those changes are required to be made by year-end. Other changes made by the PPA (some of which are required and some of which are optional) include:

- allowing direct rollovers from qualified plans to Roth IRAs (mandatory);
- modifying the qualified preretirement survivor annuity options (mandatory, where applicable);
- expanding hardship withdrawal provisions in 401(k) plans (optional);
- authorizing "Qualified Reservist Distributions" (optional);
- increasing to 180 days the current 90-day notice and consent periods for both direct rollover elections and qualified joint and survivor elections and consents (optional);
- eliminating the requirement that 401(k) plans distribute "gap period" earnings when correcting excess deferrals (mandatory); and
- permitting non-spouse beneficiaries to roll over plan distributions (mandatory for plan years beginning after 2009; optional for prior years).

Discretionary (Optional) Amendments

A plan sponsor often has a great deal of flexibility concerning the design or administration of its plan, and generally is free to make various changes that are not required by amendments to the law or regulations. When such a change, that is not mandated by a change in the law, is made, a "discretionary" plan amendment usually is required to be adopted by the end of the plan year in which the amendment is effective. Some of these discretionary amendments might be adding (or changing) any of the following plan provisions:

- plan loans;
- hardship distributions;
- "designated Roth contributions";
- automatic 401(k) enrollment feature (an automatic contribution arrangement); or
- participant-directed investments.

Plan sponsors should review their plans to determine whether there are any such discretionary amendments that need to be adopted at this time.

Required Determination Letter Applications

Cycle D Filings Due by January 31, 2010

The IRS prescribes procedures under which individually-designed plans are required to be amended, and submitted for determination letters, based on a five-year cycle determined according to the last digit of the plan sponsor's EIN. Sponsors whose EINs end in "4" or "9" are assigned to "Cycle D," and have an amendment/submission deadline of January 31, 2010. This means that all required amendments must be adopted by that date (discretionary amendments that are effective in 2009, as well as required PPA amendments, must still be adopted by the end of the 2009 plan year, as described above).

In connection with those amendments, the IRS maintains listings of statutory and regulatory changes that must be complied with by the plans to which each five-year cycle applies. Notice 2008-108 is the "Cumulative List of Changes in Plan Qualification Requirements" for Cycle D plans, and reflects all changes that are required to be adopted for such a plan by January 31, 2010.

Plans other than Cycle D Filings

Individually-designed plans that are not Cycle D plans (whose sponsors have EINs ending in other than "4" and "9") will be subject to different amendment deadlines; for example, sponsors with EINs ending in "5" or "0" are Cycle E, and their plans must be amended/submitted by January 31, 2011. However, even between five-year cycles, plans may be required to adopt interim "good faith" amendments when required by the IRS on the basis of, e.g., changes in regulations. Such interim amendments are required to be adopted prior to the sponsor's tax-filing deadline (with extensions, if applicable) for the year in which the amendment is effective.

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