



Vol. XIV, No. 12 – December 3, 2009

## Internal Revenue Service

### IRS Releases Priority Guidance Plan for 2009-2010

On November 24, 2009, the Treasury Department's Office of Tax Policy and the Internal Revenue Service published the 2009 – 2010 Priority Guidance Plan. [http://www.irs.gov/pub/irs-utl/2009 - 2010\\_priority\\_guidance\\_plan.pdf](http://www.irs.gov/pub/irs-utl/2009 - 2010_priority_guidance_plan.pdf) The priority guidance plan include the following projects:

- Guidance on 403(b) plan terminations.
- Revenue procedure on 403(b) prototype program.
- Guidance on distributions from 457(b) plans for unforeseeable emergencies.
- Guidance under 457(f) on ineligible plans.
- Guidance on governmental plan status under 414(d).
- Guidance on 409A.
- Final regulations on diversification requirements under 401(a)(35), as added by the Pension Protection Act of 2006. Proposed regulations were previously published.
- Final regulations on suspension or reduction of safe harbor nonelective contributions under 401(k) and (m). Proposed regulations were published on May 18, 2009.
- Guidance relating to lifetime income from defined contribution plans.

### IRS Notice Extends Normal Retirement Age Compliance Requirement for Governmental Plans

According to IRS Notice 2009-86, which was released November 3, 2009, the IRS announced that it intends to extend the time by which a governmental plan must comply with final regulations on distributions from a pension plan upon attainment of normal retirement age to plan years beginning on or after January 1, 2013. <http://www.irs.gov/pub/irs-drop/n-09-86.pdf> Governmental plan sponsors may rely on this notice with respect to the extension until the final regulations are amended. The deferral will permit the IRS to consider comments received with respect to the effect of the normal retirement age regulations on governmental plans.

Final regulations released May 22, 2007 <http://edocket.access.gpo.gov/2007/pdf/E7-9643.pdf> require a pension plan's normal retirement age to be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. The 2007 final regulations provide that a normal retirement age of 62 or later (or age 50 or later, in the case of a plan in which substantially all of the participants are qualified public safety employees) is deemed to satisfy this requirement, and a normal retirement age lower than 55 is presumed not to satisfy the requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. In accordance with the final regulations, whether a normal retirement age that is at least 55 but below 62 satisfies the requirement is based on facts and circumstances.

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor.*

## IRS Representatives Speak at Recent Forums

IRS representatives provided updates at the annual Association of School Business Officials meeting (ASBO) held in Chicago from October 23 – October 26, 2009. Ed Salyers, Senior Auditor, discussed plan documents, issues raised in 403(b) plan audits, as well as communication with deselected vendors. It is important to note that the information below reflects Mr. Salyers' comments on various issues but cannot be relied upon as formal guidance.

- All vendors submitting 403(b) prototype plan documents will receive favorable opinion letters at the same time so as to not give any one vendor an advantage in the marketplace. The IRS is reviewing comments on the draft List of Required Modifications (LRMs), including many requesting a vesting schedule in the prototype plan.
- Audit guidelines, updated for the final 403(b) regulations, are expected to be released in the first quarter of 2010.
- Universal availability is an area of IRS focus and audits are expected. Salyers suggested that 403(b) plans would be better off including all eligible employees rather than excluding those who normally work 20 hours or less per week. If a plan has a universal availability defect, a plan-wide defect will exist.
- Excess deferrals can be problematic, especially if the plan also has a 15 years of service catch-up provision. Salyers cautioned schools that they should have calculations ready to back up the maximum allowable contribution. Common mistakes include:
  - Determining 15 years of service based on all service with any employer, rather than solely based on the current employer.
  - Determining 15 years of service on an elapsed time method rather than determining whether the participant has performed 15 years of full-time service.
  - Since the age 50+ catch-up does not seem to be troublesome upon audit, Salyers indicated that there was no reason not to allow it as an optional feature under the plan. Further, unlike the 15 years of service catch-up, the age 50+ catch-up requires minimal documentation.
- Auditors will be looking for plan document defects in the 2009 tax year.
- If a deselected vendor declines to share information, Salyers noted that the IRS has the authority to send a summons to obtain vendor records, especially if the vendor will not provide that information to the employer under audit.
- If an employee takes a loan in excess of the maximum allowable loan because not all vendor information was available, the participant will bear the tax consequences. According to Salyers, the employer would not be impacted as long as it had made a good faith effort to obtain the information from the deselected vendor.

On October 28, 2009, the IRS held a phone forum on retirement plan distributions conducted by Marty Pippins and Rhonda Migdail, from IRS EP Rulings & Agreements. The IRS recently released final regulations involving minimum distribution requirements for governmental plans, and Notice 2009-82. <http://www.irs.gov/pub/irs-drop/n-09-82.pdf> Notice 2009-82 provides guidance relating to the ability for certain plan participants to skip their required minimum distributions (RMD) for 2009 without penalty. This provision was enacted under 401(a)(9) for the 2009 distribution year under the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). The waiver applies to the following defined contribution plans as well as IRAs: 401(a), 401(k), 403(a), 403(b), governmental 457(b) plans and IRAs. The waiver does not apply to tax exempt 457(b) plans.

During the phone forum, the IRS indicated that it will be looking to see whether the plan language on required minimum distributions, as amended by the end of 2011, matches how the plan actually operated in 2009. In addition, Marty Pippins said that while the recently released guidance permits participants to roll over required minimum distributions, participants can only roll back one distribution in 2009 if more than one distribution was taken.

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor.*

## IRS Publishes Fall Edition of *Retirement News for Employers*

The fall edition of *Retirement News for Employers* contains several important articles with extensive links, including an explanation of the new Roth IRA rollover rules effective in 2010. [http://www.irs.gov/pub/irs-tege/rne\\_fall09.pdf](http://www.irs.gov/pub/irs-tege/rne_fall09.pdf) Highlights of this issue include the following topics:

- **2010 Roth IRAs and Rollovers** – Beginning in 2010, a taxpayer will be able to roll over to a Roth IRA without having to consider income or filing status. Roth IRA rollovers can be made from a:
  - Traditional IRA
  - SEP IRA
  - SIMPLE IRA
  - Eligible rollover distribution from the participant's or the deceased participant's employer sponsored retirement plan. Such plans include 401(a)/(k), 403(b) and governmental 457 (b) plans.

As explained in the publication, a special 2-year option will apply for conversions and rollovers in 2010 only. Under this 2-year option, only half the taxable portion of the rollover is included in gross income for 2011 and half in 2012. A taxpayer could elect to include the entire amount in gross income for 2010.

- **How to Adopt a SEP or SIMPLE IRA Plan** – An explanation of eligible employers as well as links to specific resources are included.
- **Permissible IRA Investments** – The article includes a list of investments, such as life insurance contracts, art and antiques, that may not be held in an IRA.
- **Impact on Employees Who Opt Out of Automatic Enrollment** – The plan terms must be followed. Therefore, employees who decline to participate in the plan's automatic enrollment feature must still receive any employer contributions they would be eligible to receive. In addition, these employees' accounts would be entitled to receive any forfeiture allocations, as set forth in the plan document.
- **Importance of Internal Controls and Plan Self Correction** – Monika Templeman, Director of EP Examinations, emphasizes the need for plan sponsors to administer their plans in accordance with the law and the plan language.
- **Savers Credit** – An explanation that could be reproduced and provided to employees is included in the publication.

## Revised Final Regulations on Section 204(h) Notices Released

On November 24, 2009, the IRS published revised final regulations addressing Section 204(h) notices. <http://edocket.access.gpo.gov/2009/pdf/E9-28078.pdf> These revisions were prompted by changes made by the Pension Protection Act of 2006 (PPA). Section 411(d)(6) generally provides that a plan is treated as not satisfying the minimum vesting requirements if the accrued benefit of a participant is decreased by an amendment to the plan. Provisions under Section 204(g) of ERISA contain corresponding rules. The PPA permits certain plan amendments to be retroactively effective without violating the anti-cutback rules of Section 411(d)(6) or Section 204(g) of ERISA.

As provided in the final regulations, the amendment must be made on or before the last day of the first plan year beginning on or after January 1, 2009. Note that for governmental plans, the amendment must be made on or before the last day of the first plan year beginning on or after January 1, 2011.

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor.*

## Privacy Concerns Prompt Announcement of Pilot Program Allowing Truncation of Social Security Numbers

The IRS recently released Notice 2009-93, which creates a pilot program allowing certain information return filers to shorten social security numbers on paper payee statements by replacing the first five digits of the nine-digit number with asterisks or Xs (for example, a social security number 123-45- 6789 would appear on the paper payee statement as \*\*\*-\*\*-6789 or XXX-XX-6789). <http://www.irs.gov/pub/irs-drop/n-09-93.pdf>

The pilot program, which is intended to thwart identity theft, is for calendar years 2009 and 2010 for qualifying filers. This notice only applies to paper payee statements in the Form 1098 series, Form 1099 series, and Form 5498 series. This notice also invites public comment.

## Department of Labor

### Department of Labor Goes Back to Work on Investment Advice Rules

The Department of Labor's Employee Benefits Security Administration (EBSA) published a notice in the Federal Register on November 20, 2009 withdrawing the final rule on the provision of investment advice under the ERISA's prohibited transaction provisions. <http://edocket.access.gpo.gov/2009/pdf/E9-27889.pdf>

Public comments on investment advice guidance previously released raised concerns as to whether the conditions of the final rule and the class exemption associated with the rule could adequately protect the interests of plan participants and beneficiaries. The DOL indicated that it intends to propose a revised rule limited to the application of the statutory exemption relating to investment advice soon.

### Department of Labor Releases Frequently Asked Questions on EFAST2 System

All pension plans that are subject to ERISA are required to submit an annual return/report (Form 5500 series). For plan years beginning on or after January 1, 2009, such forms must be submitted electronically. Beginning January 2010, an all-electronic system called EFAST2 will receive those electronic annual returns/reports. The Department of Labor's Employee Benefit Security Administration has produced Frequently Asked Questions (FAQs) to provide additional information. <http://www.dol.gov/ebsa/faqs/faq-EFAST2.html>

One of the areas addressed is whether a third party preparer that represents small businesses that do not have their own computers can register for Filing Signer credentials on their behalf. According to Answer 32, a third party preparer *cannot* register for Filing Signer credentials. The EFAST2 process for obtaining Filing Signer credentials is designed so that the person signing electronically must be the person registering for the credentials. Access to any computer with an Internet connection is all that is required to register. To address this issue, the FAQ states that the client may come to the third party administrator's (TPA) office, use a personal computer at home, or go to a public library or copying center with a computer, and register for credentials using free email accounts or an email account provided by the TPA.

According to Answer 33, a plan administrator cannot delegate responsibility for electronic submission of the Form 5500 because the plan administrator must examine the filing before it is signed and submitted. Since the EFAST2 PIN is the plan administrator/sponsor/DFE's electronic signature for purposes of the Form 5500, PINs must be protected and not shared.

*The non-ING Web site link mentioned in this material is provided for your information only. Although deemed reliable, accuracy cannot be assured. ING does not exercise control over, endorse nor accept responsibility for the content, product and/or services provided at non-ING sites.*

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor.*