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Executive Branch

White House Releases Fact Sheet Outlining Retirement Security Initiatives

On January 25, 2010, the White House released a fact sheet previewing recommendations to support middle class families, including retirement security initiatives. http://www.whitehouse.gov/sites/default/files/Fact_Sheet-Middle_Class_Task_Force.pdf According to the fact sheet, the initiatives would make it easier to save for retirement with voluntary Automatic IRAs for workers without access to existing retirement plans through their jobs, larger tax credits to match retirement savings, and new safeguards to protect retirement savings. The specific proposals include the following:

- *Establishing Automatic IRAs* – A system of automatic IRAs in the workplace would be established by requiring employers who do not currently offer a retirement plan to enroll their employees in a direct-deposit IRA unless the employee opts out. The voluntary contributions would be matched by the Saver's Tax Credit for eligible taxpayers.
- *Saver's Credit Would be Simplified and Expanded* – The Administration proposes to help working families save for retirement by expanding and simplifying the Saver's Credit to match 50 percent of the first \$1,000 of contributions by families earning up to \$65,000 and providing a partial credit to families earning up to \$85,000. More families would be able to take advantage of this tax credit as the Administration will propose to make this tax credit refundable.
- *Updating 401(k) Regulations to Improve Transparency and Reliability* – Elements of the proposals include improving fee transparency, availability of unbiased investment advice, promoting the accessibility of annuities and other forms of guaranteed lifetime income and requiring clear disclosure regarding target-date funds.

Internal Revenue Service

HEART Act Guidance Released

The IRS recently released Notice 2010-15 to provide guidance on certain aspects of the Heroes Earning Assistance and Relief Act of 2008 (HEART Act). <http://www.irs.gov/pub/irs-drop/n-10-15.pdf> Framed as a series of questions and answers, the notice provides information relating to:

- survivor and disability payments with respect to qualified military service,
- the treatment of differential military pay as wages,
- distributions from retirement plans to individuals called to active duty,
- contributions of military death gratuities to Roth IRAs and Coverdell education savings accounts, and
- employer credit for differential wage payments to employees who are active duty members of the uniformed services

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In accordance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), an employee who leaves a civilian job for qualified military service generally has reemployment rights as well as entitlement to receive certain pension, profit-sharing, and similar benefits that would have been received but for the employee’s absence during military service.

Further, the HEART Act added IRC Section 401(a)(37) effective for deaths and disabilities occurring on or after January 1, 2007, which states that additional benefits (but not benefit accruals) may be due if a participant dies while performing qualified military service. This qualification requirement applies not only to 401(a) plans but also to 403(b) plans and governmental 457(b) plans.

Following are selected highlights of some topics clarified by the notice. For more information, including context, please consult the actual questions and answers.

- *Vesting* – For purposes of determining applicable death benefits under the plan, a deceased participant’s qualified military service is counted when calculating vesting service.
- *Benefit Accrual* – For benefit accrual purposes, an employer sponsoring a retirement plan may (but is not required to) permit an individual who dies or becomes disabled while performing qualified military service to be treated 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. Because this provision is permissive rather than mandatory, they may be applied beginning as of any date on or after January 1, 2007.
- *Deemed Employee Contributions* – An individual who dies or becomes disabled while performing qualified military service is deemed to have made employee contributions or elective deferrals for the purpose of determining benefits that are contingent on employee contributions or elective deferrals. The notice provides additional plan design opportunities for those who become disabled while in military service.
- *Differential Wages* – An individual receiving a differential wage payment is treated as an employee of the employer making the payment and the differential wage payment is treated as compensation, subject to various nondiscrimination requirements. Note, however, that differential wage payments are not required to be treated as compensation for purposes of determining contributions and benefits under a plan.
- *Timing of Distributions* – For purposes of applying rules that permit distributions upon severance from employment under 401(k), 403(b), and 457(b), an individual is treated as having been severed from employment during any period the individual is performing service in the uniformed services while on active duty for a period of more than 30 days. A plan may decide to offer a distribution if there is a “deemed” severance with respect to military service.

A qualified reservist distribution can be made without regard to otherwise applicable restrictions under 401(k) and 403(b) on in-service distributions of amounts attributable to elective deferrals. In addition, it is not subject to the 10% premature distribution penalty tax.

- *Remedial Amendments* – Generally, a plan subject to these new provisions under the HEART Act is treated as being operated in accordance with its terms if a plan amendment is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans).

Notice Provides Voluntary Correction Methods for Nonqualified Deferred Compensation Plans Subject to Section 409A

On January 19, 2010, the IRS released Notice 2010-6, which provides methods for taxpayers to voluntarily correct many types of failures to comply with the document requirements applicable under IRC Section 409A to nonqualified deferred compensation plans and thereby avoid or reduce the current income inclusion and additional taxes under 409A. http://www.irs.gov/irb/2010-03_IRB/ar08.html This document correction program is intended to encourage taxpayers to review nonqualified deferred compensation plans to identify provisions that fail to comply with the plan document requirements and to correct those plan provisions promptly. Accordingly, this notice provides:

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- Clarification that certain language commonly included in plan documents will not cause a document failure.
- Relief permitting correction of certain document failures without current income inclusion or additional taxes, provided, in certain circumstances, that the corrected plan provision does not affect the operation of the plan within one year following the date of correction.
- Relief limiting the amount currently includible in income and the additional taxes for certain document failures if correction of the failure affects the operation of the plan within one year following the date of correction.
- Relief permitting correction of certain document failures without current income inclusion or additional taxes, if the plan is the service recipient's first plan of that type (disregarding any plans not subject to 409A or any plans under which all deferred amounts have previously been paid or forfeited) and the failure is corrected within a limited period following adoption of the plan.
- Transition relief permitting corrections of certain document failures without current income inclusion or additional taxes, if the document failure is corrected by December 31, 2010, and any operational failures resulting from the document failure are also corrected by December 31, 2010.

This notice also clarifies certain aspects of Notice 2008-113, which addresses certain failures of nonqualified deferred compensation plans to comply with 409A in operation (operational failures). <http://www.irs.gov/pub/irs-drop/n-08-113.pdf>

IRS Updates Tax Publications

The IRS recently released the following updated tax publications:

- Publication 525 – Taxable and Nontaxable Income <http://www.irs.gov/pub/irs-pdf/p525.pdf>
- Publication 560 – Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans) <http://www.irs.gov/pub/irs-pdf/p560.pdf>
- Publication 571 – Tax-Sheltered Annuity Plans (403(b) Plans) For Employees of Public Schools and Certain Tax-Exempt Organizations <http://www.irs.gov/pub/irs-pdf/p571.pdf>
- Publication 575 – *Pension and Annuity Income* <http://www.irs.gov/pub/irs-pdf/p575.pdf>
- Publication 590 – *Individual Retirement Arrangements (IRAs)* <http://www.irs.gov/pub/irs-pdf/p590.pdf>

Special Edition of *Employee Plan News* Released January 2010

A special edition of *Employee Plan News* dated January 2010 has been released. <http://www.irs.gov/pub/irs-tege/se0110.pdf>

Topics covered include the following:

- A reminder that the Cycle D determination letter submission period ends on February 1, 2010 for an individually designed plan that is a single employer plan, if the last digit of the plan sponsor's employer identification number is 4 or 9.
- For employers entitled to use a six-year remedial amendment cycle in Revenue Procedure 2007-44, the IRS reminds employers that the deadline is April 30, 2010 to adopt the final approved version of the EGTRRA defined contribution pre-approved plan and submit applications for determination letters.

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Department of Labor

Department of Labor Releases Final Safe Harbor Rule for Employee Contributions to Small Pension Plans

On January 14, 2010, the Department of Labor published a final rule to protect employee contributions deposited to small pension plans with fewer than 100 participants by providing a safe harbor period of *seven business days* following receipt or withholding by employers. <http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=608020124738+0+2+0&WAIAction=retrieve> It is important to note that this is a safe harbor, rather than the exclusive method for satisfying the plan asset regulations.

“This rule [which is consistent with the proposed rule] will give employers greater clarity in remitting participant contributions to small pension and welfare plans in a timely manner,” said Phyllis C. Borzi, Assistant Secretary of Labor for the Department of Labor’s Employee Benefits Security Administration in a news release. “We estimate participant accounts could grow by \$19 to \$44 million as a result of these rules.” <http://www.dol.gov/ebsa/newsroom/2010/10-56-NAT.html>

Prior to the release of the final rule, employers of all sizes were required to transmit employee contributions to pension plans as soon as they could reasonably be segregated from the general assets of the employer, but no later than the 15th business day of the month following the month in which contributions are received or withheld by the employer.

While the proposed rule stated that the DOL was evaluating the contribution practices of large employers, the DOL did not expand the safe harbor to cover plans with 100 or more participants. The reason stated was the lack of information and data sufficient to evaluate current practices of such employers and assess the costs, benefits and risks to participants associated with extending the safe harbor to large plans.

EFAST2 Online Form 5500 Filing System Operational

On January 8, 2010, the Department of Labor’s Employee Benefits Security Administration (EBSA) announced that the EFAST2 online filing system is operational to receive and process Form 5500 filings required under ERISA. <http://www.dol.gov/ebsa/newsroom/2010/ebsa010810.html> As explained in the press release, filers must submit the 2009 and 2010 annual return/report forms and schedules electronically through EFAST2. Prior year delinquent or amended Form 5500 filings also now must be filed electronically except that timely 2008 plan year filings may still be filed through the original EFAST on paper until October 15, 2010 or electronically through June 30, 2010.

According to Phyllis Borzi, Assistant Secretary of EBSA, “Now that the EFAST2 system is operational, the Federal government and public will for the first time have real time, online access to financial information about private-sector employee benefit plans.” Significant changes for the 2009 and 2010 forms include:

- Mandatory electronic filing
- Introduction of the new Form 5500-SF for eligible small plan filers
- Expanded disclosure on Schedule C of indirect service provider compensation
- Expanded reporting by 403(b) plans
- Removal of IRS Schedules E and SSA. Rather than filing information on participants with deferred vested benefits who separated from the service with the 5500, such information must be filed directly with the Internal Revenue Service.

The EBSA has provided resources to help plan sponsors, including:

- A video on electronic filing http://http.earthcache.net/htc-01.media.qualitytech.com/COMP008760MOD1/EBSA2_en/index.htm
- A Toll-free assistance at 1.866.463.3278 with the EFAST2 system and the Form 5500 and 5500-SF Forms <http://www.dol.gov/ebsa/5500main.html>
- Questions and answers <http://www.dol.gov/ebsa/faqs/faq-EFAST2.html>

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Additional Publications Recently Released by the Department of Labor

Fact Sheet on Definition of Fiduciary Regulation (Investment Advice)

<http://www.dol.gov/ebsa/regs/unifiedagenda/ebsafall2009/1210-AB32fs.html> The fact sheet serves as a reminder that the Department of Labor's Employee Benefit Security Administration (EBSA) plans to publish a proposed regulation in June 2010 to amend the current regulatory definition of "fiduciary" to include more persons, such as pension consultants, as fiduciaries.

Profit Sharing Plans for Small Businesses <http://www.dol.gov/ebsa/pdf/profitsharing.pdf> This detailed brochure was a joint project with the IRS.

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