



November 2009

## **Employee Benefit Plan Year End Action Items**

The following information contains important action items plan sponsors may want to evaluate prior to year end. The items include amendments, notices and other compliance matters that may be necessary for tax-qualified retirement plans, 403(b) plans, nonqualified deferred compensation and welfare plans. These items do not represent an exhaustive list, but is intended to provide a reminder of the general issues that may need to be reviewed and considered.

### **Written Plan Document Deadline for Code Section 403(b) Plans**

Final regulations under Code Section 403(b) were issued in July 2007 and, among other things, require that Code Section 403(b) arrangements be maintained pursuant to a written plan document. Sponsors of Code Section 403(b) plans will need to update existing plan documents or adopt new plan documents by **December 31, 2009** to comply with these final regulations.

### **IRS Determination Letter Program**

The IRS's determination letter program provides a staggered cycle for individually designed and adopters of prototype plans to request a favorable determination letter for their qualified retirement plans. The deadline to submit an application to the IRS is **January 31, 2010** for employers with an employer identification number ending in a four or a nine (Cycle D). Therefore, plan sponsors who will be submitting an application to the IRS to obtain a favorable determination for their plan must ensure they have adopted the required amendments and gathered the other required information to ensure the timely submission to the IRS.

### **Cost of Living Adjustments**

Plan sponsors should review the recently issued cost of living adjustments (COLA) to determine what, if any amendments, may be needed to their various employee benefit plan documents (including summary plan descriptions), or 2010 open enrollment materials. In addition, these amounts may need to be input into the payroll or other Human Resource Information System used by the employer to monitor contributions into an employee benefit plan. These amounts should be communicated to plan participants. Please see our recently updated 2010 ERISA Amounts Chart at: [www.odmd.com](http://www.odmd.com).

### **Annual Notice Requirements**

Depending upon the type of qualified plan and the plan's features, one or more annual notices may be required. Plan sponsors should carefully review the following notices to determine whether any are required to be issued for their plans:

- ***Annual Safe-Harbor 401(k) Plan Notices***  
*Safe-Harbor Plan Notice.* Safe-harbor 401(k) plans must provide an annual safe-harbor notice to all plan participants describing the safe-harbor contribution and other material plan features. The safe-harbor notice must be provided at least 30 days and no more than 90 days prior to the beginning of the plan year. A calendar plan will need to provide the applicable notice by **December 1, 2009**.

- ***Qualified Default Investment Alternative Notices***  
Participant-directed 401(k) plans that invest participant contributions for which no affirmative investment election has been made into a qualified default investment alternative (QDIA) must provide an annual notice. The notice must be distributed to all participants that have been or may be defaulted into a QDIA. The notice must be provided at least 30 days before the beginning of each plan year. For calendar year plans, notice must be provided by **December 1, 2009**.
- ***401(k) Plan Annual Automatic Enrollment Notices***  
A sponsor of a 401(k) plan that automatically enrolls participants must provide an annual notice to all eligible employees describing the circumstances under which contributions may be automatically contributed to the plan. This notice must be distributed at least 30 days prior to the beginning of each plan year. For calendar year plans, the notice must be provided by **December 1, 2009**.
- ***Defined Benefit Plan Annual Funding Notice***  
Plan sponsors of single and multiemployer defined benefit pension plans must provide an annual funding notice to participants, beneficiaries, and labor organizations representing participants. The notice must contain certain information about the plan, including, among other items, the plan's funding status for the previous two years and a statement of the plan's assets and liabilities.

For a plan with a June 30, 2009 year end, the notice is due **October 31, 2009**.

- ***Notice of Consequences of Failure to Defer Benefits***  
The Pension Protection Act of 2006 (PPA) added an additional requirement regarding the consent requirement for a distribution from a defined contribution or defined benefit plan exceeding \$5,000. The PPA requires that participants must also be informed of the consequences of failing to defer their distributions until normal retirement age. A “good-faith” standard applies to this notification requirement which is in effect for plan years beginning after **December 31, 2006** until the final regulations are issued.

### **Summary Annual Report**

Most ERISA covered pension and welfare plans which required a filing of the Form 5500 must comply with the rules requiring a summary annual report (SAR). The SAR is due nine months after the close of the plan year or two months after the filing of a Form 5500 which was properly extended. Therefore, 2008 calendar year plans which filed an extension request with Form 5558 in a timely manner, have until **December 15, 2009** to distribute the SAR to participants.

### **Cafeteria Plan and Flexible Spending Accounts**

- Nondiscrimination testing for cafeteria plan and flexible spending accounts should be completed prior to year end to determine if any processes can be implemented to ensure the compliance rules are satisfied.
- Plan year cafeteria plans should remind employees that unused amounts become forfeitures at the end of the plan year, (December 31) unless the plan has adopted an amendment to extend the time up to two and a half months (March 15<sup>th</sup> for calendar year plans) after the plan year end.
- Any other 2009 changes to the provisions or operations of the cafeteria plan and the flexible spending accounts are generally required to be adopted by **December 31, 2009** for calendar year plans.

## ***Participant Benefit Statements***

Depending upon the type of qualified retirement plan, specific participant benefit statement requirements apply, as described below.

- *Participant-Directed Defined Contribution Plans.* Participant-directed defined contribution plans are required to provide participant statements on a quarterly basis. Plan sponsors are deemed to provide statements in a timely manner if they are provided within 45 days following the end of the calendar quarter.
- *Nonparticipant-Directed Defined Contribution Plans.* Plans that do not permit participants to individually direct their account balances are required to provide statements at least once each calendar year. Plan sponsors are deemed to provide statements in a timely manner if they are provided on or before the date on which the Form 5500 annual report is filed by the plan (including extensions).
- *Defined Benefit Pension Plans.* Plan sponsors of defined benefit pension plans must either provide participant benefit statements every three years to vested participants who are active employees or provide an annual notice to participants describing how a benefit statement may be obtained. If a plan sponsor decides to provide an annual notice instead of providing a benefit statement every three years, the notice must be provided by **December 31, 2009**.

## **Plan Amendments**

Amendments to comply with the various provisions of the PPA, including certain technical corrections in the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), are generally required to be adopted by the last day of the first plan year beginning on or after **January 1, 2009**. Thus, plans with calendar-year plan years must adopt these amendments by **December 31, 2009**. Collectively bargained and governmental plans may have later effective dates and/or amendment deadlines. Plan sponsors of plans that are not collectively bargained, governmental, or multiemployer plans should review the list below to determine if any amendments are required for their plans by the end of the 2009 plan year.

## ***Required Amendments***

Below is a list of some amendments relating to changes in the laws that need to be adopted by the end of the 2009 plan year, if applicable. Other amendments referred to as discretionary amendments (i.e., changes not required by law, such as plan design changes) must be adopted by the end of the plan year in which the amendment is effective (unless earlier adoption is necessary to avoid a benefit cutback). Thus, calendar year plans must be amended by **December 31, 2009** for optional changes that took effect in 2009.

## ***Defined Contribution Plan Amendments***

- *Accelerated Vesting of Employer Nonelective Contributions.* All employer nonelective contributions to qualified defined contribution plans (including ESOPs) are required to vest, at a minimum, under a three-year cliff or a six-year graded schedule. This change is effective for contributions allocated in plan years beginning after December 31, 2006.
- *Gap Period Earnings Not Permitted on Corrective Distributions (ADP/ACP Testing).* Distributions of income or losses allocable to corrective distributions for ADP/ACP testing failures for the "gap period" between the end of the taxable year and the date of distribution are no longer permitted. This change is effective for plan years beginning after December 31, 2007.
- *Expansion of Hardship Rules.* Code Section 401(k) plans may permit participants to obtain a hardship distribution for expenses such as medical costs or college tuition for the participant's beneficiary that would qualify as a hardship, even if the beneficiary is not the spouse or a dependent of the participant. This is an optional provision that was available for distributions made on or after August 17, 2006. If this operation was implemented during the 2009 plan year or earlier, an amendment is required by the end of the 2009 plan year.

- *Required Minimum Distribution Waiver in 2009.* The WRERA modified the required minimum distribution (RMD) rules for 2009 by waiving any 2009 RMD for defined contribution plans (i.e., 401(k) and 403(b)). A plan sponsor will be required to take action only if it permits a participant to waive the RMD rules in 2009 or implement other related optional changes by the end of the 2009 plan year. Generally the IRS permits an adoption of the amendment to comply with RMD waiver changes until the last day of the 2011 plan year.

***Defined Benefit Plan Amendments***

- *Three-Year Cliff Vesting for Cash Balance Plans.* Benefits under a cash balance (or hybrid) plan in existence on June 29, 2005 must use a three-year cliff vesting schedule for all participants who have an hour of service in a plan year beginning after December 31, 2007.
- *Rollovers of After-Tax Contributions to Code Section 403(b) Plans and Defined Benefit Plans.* Effective for taxable years beginning after December 31, 2006, nontaxable distributions from qualified plans also may be rolled over directly to a defined benefit plan or Code Section 403(b) plan; provided that such amounts (and earnings) are accounted for separately by the receiving plan.
- *Rollovers by Nonspouse Beneficiaries.* Nonspouse beneficiaries of deceased participants may make an eligible rollover distribution in a direct trustee-to-trustee transfer to an "inherited" IRA. WRERA made this provision mandatory for plan years beginning after December 31, 2009.

If you would like more information or have any questions, please contact Louis F. LiBrandi at (212) 286-2600; [lbrandi@odmd.com](mailto:lbrandi@odmd.com) or Tim Desmond at (914) 381-8900; [tdesmond@odmd.com](mailto:tdesmond@odmd.com).

Best regards,

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