

IRS Publishes Guidance to Encourage Retirement Savings

Early Saturday morning, September 5, 2009, the IRS issued a flurry of guidance intended to encourage retirement savings initiatives by employers and individuals. The guidance was published before President Obama's weekly radio address and was designed to complement his message. Contemporaneous statements by senior administration officials confirmed that the collection of three Revenue Rulings and four Notices would require no statutory changes. These statements bordered on the tautological, since the new guidance added little, if anything, to pre-existing regulatory and other administrative pronouncements. Here's a brief summary of the "new" guidance.

Revenue Ruling 2009-30 addresses and approves two forms of automatic contribution arrangements (ACAs). The first is an arrangement that provides an automatic annual increase in the default contribution percentage equal to the greater of (i) one percent (1%) or (ii) thirty percent (30%) of a participant's annual increase in compensation. The Ruling concludes that this arrangement is permissible under sections 401(a), 401(k) and 401(m) of the Internal Revenue Code. The formula for the automatic annual increase in the default percentage results in a non-uniform default percentage (i.e., because the default percentage may be based on an individual's compensation increase), but this is permissible since the arrangement is not intended to be a qualified automatic contribution arrangement (QACA) (i.e., one that satisfies section 401(k) non-discrimination safe harbor requirements) or an eligible automatic contribution arrangement (EACA) (i.e., one that permits a refund of default contributions at the participant's request during the first ninety (90) days of automatic enrollment), each of which requires a uniform default contribution percentage. The Revenue Ruling provides no relief, however, from the uniform default contribution percentage requirement under Title I of ERISA, which may be a condition for preemption of state wage payment laws that would otherwise require employee consent for payroll deductions. The Title I requirement is within the jurisdiction of the Department of Labor and would require additional relief from that agency.

The second ACA addressed by Revenue Ruling 2009-30 involves a mid-year automatic increase in the default contribution percentage. The arrangement is intended to be a QACA, which must provide automatic increases of at least one (1%) percent in the default contribution percentage by the beginning of each subsequent plan year of participation. The mid-year increase described in the Revenue Ruling actually occurs before the date required each year for a QACA, so the arrangement satisfies the prescribed requirements. The Revenue Ruling also explains that the mid-year annual increase could occur later than the required date for the QACA annual increase, so long as the initial default contribution percentage under the arrangement was higher than the initial default contribution percentage required for a QACA. While it may be helpful for the IRS to draw this picture for plan sponsors, the conclusions themselves are fairly clear under existing section 401(k) regulations.

Revenue Rulings 2009-31 and 2009-32 authorize both the elective (i.e., 401(k)) and non-elective (i.e., as an employer contribution) contribution to a qualified defined contribution plan of accrued, unused paid time off (PTO) benefits, either annually or at termination of employment. Contribution of these amounts as elective deferrals (i.e. 401(k) contributions) is already clearly permitted by existing final regulations under sections 401(k) and 415 of the Internal Revenue Code. Contribution of these amounts on a non-elective basis was approved several years ago by an IRS private letter ruling (PLR). The PLR initially generated some excitement among employers, until they realized that these non-elective contributions of PTO had to satisfy non-discrimination general testing requirements. Because the contributions would never be a uniform percentage of participant compensation, and because the contributions, as a percentage of compensation for highly compensated and non-highly compensated employees, could not be predicted for any given year, employer enthusiasm waned quickly. Revenue Rulings 2009-31 and 2009-32 confirm that these non-discrimination testing requirements apply to non-elective contributions of PTO. Consequently, they are unlikely to spark a dramatic increase in these sorts of arrangements.

The four Notices released on September 5 are even less remarkable.

- Notice 2009-65 provides sample amendments for adding an ACA or an EACA to a 401(k) plan. Employers

seriously interested in adding these kinds of arrangements to their plans have already figured out how to do so.

- Notices 2009-66 and 2009-67 confirm that ACAs are permissible for SIMPLE plans and provide sample amendments for adding such arrangements. While helpful, this is hardly revelatory.
- Notice 2009-68 updates the section 402(f) notice explaining the tax rules for qualified plan distributions to reflect statutory changes during the last few years. The Notice provides separate explanations for distributions from Roth accounts and distributions from non-Roth accounts. A participant receiving a distribution from both Roth and non-Roth accounts must be given both explanations. These explanations may offer an easy avenue for many plan administrators to update their compliance efforts, but the explanations do not provide new information of any kind.

Bottom line: this guidance was not a reason to get up early on Saturday morning of Labor Day weekend.

If you have questions or would like additional information about these or other administrative issues relating to qualified defined contribution plans, please feel free to contact Brian Dougherty at 215-587-5919 or bdougherty@postschell.com

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