

Retirement Plan Update

This *Client Alert* describes several legal developments that may require plan amendments or other legal action by the end of the year.

For more information regarding these tax notices, please contact your Vorys attorney or the following attorney:

Jonathan Beck
jpbeck@vorys.com
614.464.6251

Safe-Harbor Tax Notices

Participants who receive a distribution from a qualified plan or tax-sheltered annuity which may be rolled over into an IRA or an eligible retirement plan are required to receive a special tax notice describing the income tax effects of the distribution. The IRS recently issued Notice 2009-68, that provides two revised tax notices that are updated for current tax law. Plan Administrators should check with their third party administrators to ensure that the notices used by their plan are up-to-date. Plan Administrators should start to use the revised no later than notice by January 1, 2010.

Contributions of Unused Paid Time Off

The IRS issued Revenue Rulings 2009-31 and 2009-32 that describe situations under which a defined contribution plan may convert a participant's accrued but unused paid time off (such as accrued vacation or sick pay) into a retirement plan contribution. Amounts may be contributed as a non-elective employer contribution or a salary deferral contribution. For example, under certain circumstances, a participant may elect to contribute unused vacation pay accrued after the end of a year or after termination of employment to a qualified plan. Please contact us if you are interested in exploring this option further.

End of the Year Notices and Statements

Depending on the features of a sponsor's retirement plan, the plan administrator may be required to provide one or more of the following annual notices or statements below to plan participants. Sponsors should ensure that the notices and statements are prepared and distributed on a timely basis.

401(k) Plan Safe-Harbor Notice

Safe-harbor 401(k) plans must provide an annual notice to all participants informing the participants of the amount of the required safe-harbor contribution, the circumstances in which a cash or deferred election can be made and certain other information about the plan. The notice is generally required to be provided at least 30 days and not more than 90 days prior to the beginning of a plan year. During the plan year the notice must also be provided to each new participant prior to such person's participation date.

401(k) or 403(b) Plan Automatic Enrollment Notice

Sponsors of plans that automatically enroll and make salary deferral contributions on behalf of participants must provide an annual notice to all eligible employees describing the circumstances under which contributions will automatically be contributed to the plan. The notice should also specify the default investment fund in which the contributions will be invested should the participant not provide an investment direction. This notice is required to be provided prior to the beginning of a plan year, and also to each new participant prior to such person's participation date.

Defined Benefit 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.

The notice must generally be provided within 120 days following the end of the plan year. Small plans (covering fewer than 100 participants) must provide the notice by the filing due date of the plan's IRS Form 5500. Additional notice requirements apply if the plan is subject to benefit restrictions due to failure to meet certain funding targets.

Participant Benefit Statements

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

- *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 of the applicable calendar year.
- *Participant-Directed Defined Contribution Plans.* Participant-directed defined contribution plans generally are required to provide participant statements on a quarterly basis. Plan sponsors are deemed to timely provide statements 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 timely provide statements if they are provided on or before the date on which the Form 5500 annual report is filed by the plan (including extensions).

Required Minimum Distributions

Generally, distributions from a retirement plan are required to commence by the April 1 of the calendar year following the later of the calendar year in which a participant reaches age 70 ½ or retires; however, distributions to participants who own more than 5% of the plan sponsor are required to commence not later than by the April 1 following the calendar year in which the participant attains age 70 ½. Such distributions are called "required minimum distributions." The Worker, Retiree, and Employer Recovery Act of 2008 provides that most distributions made during the 2009 calendar year to defined contribution plan participants that would otherwise be treated as required minimum distributions will not be treated as required minimum distributions and are not required to be distributed. The IRS issued Notice 2009-82 that provides two sample amendments that give participants a choice as to whether to waive or receive what would have otherwise been a required minimum distribution for 2009, and permits the plan to specify how such amounts are to be treated in the absence of the participant's election. Please note that your plan will be required to be amended if the plan permits participants to elect to waive such distribution.

This client alert is for general information purposes and should not be regarded as legal advice.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.