



December 31, 2010 Deadline is Approaching for Required Qualified Retirement Plan Amendments

This alert is a reminder that certain amendments to qualified retirement plans need to be made by December 31, 2010 (for a calendar year plan). Additional amendments will be required in 2011.

HEART Act

Either a defined benefit or a defined contribution plan may need to be amended to comply with the Heroes Earnings Assistance Relief Tax Act of 2008 (“HEART Act”) by providing that compensation for I.R.C. §415 benefit or contribution limitation purposes includes military leave differential pay and that qualified military service must be recognized for certain vesting purposes. These amendments are required by IRS Notice 2010-15 and may not have been included in HEART Act amendments adopted in 2009.

This illustrates the requirement that a qualified retirement plan must comply in form with many specific statutory and regulatory rules, even though some required plan amendments may not currently (or ever) apply to the plan in operation.

WRERA/2009 Waiver of Minimum Required Distributions

Defined contribution plans need to memorialize how the plan implemented the waiver of minimum required distributions in 2009, as permitted by the Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”). This amendment is not required until the end of the plan year beginning in 2011 (December 31, 2011 for plans with a calendar year plan year), but we recommend this amendment be included with the HEART Act amendment.

This is a poster child example of a required plan amendment that should not be required (but is).

Divestment of Publicly Traded Employer Securities

Defined contribution plans that hold publicly traded employer securities purchased from employee contributions must be amended by December 31, 2010 to allow any plan participant with at least three years of service to elect to sell such employer securities and invest the proceeds in the plan in one or more of at least three diversified investment options. This

diversification requirement also applies to the beneficiary of a deceased participant or an alternate payee under a qualified domestic relations order.

This amendment only needs to be adopted by retirement savings plans that are invested in publicly traded employer securities.

Roth 401(k) Rollovers Within the Same Plan in 2010—Deferred Amendment Deadline

On November 26, 2010, the IRS issued Notice 2010-84 which addresses a multitude of issues relating to the rollover of eligible rollover distributions to a designated Roth Account in the same 401(k) plan. One of the issues relates to the required timing of plan amendments for in-plan Roth 401(k) rollovers. The Notice defers the required plan amendment to the later of December 31, 2011 or the last day of the plan year in which the Roth 401(k) in-plan rollover amendment is effective. The Notice also requires that by December 31, 2010 the plan must have a qualified Roth contribution program in place in order to also provide in-plan Roth 401(k) rollovers. The term qualified Roth contribution program is defined as giving eligible employees an opportunity in 2010 to make elective deferrals from compensation to a Roth 401(k) designated account in the same plan.

Defined Benefit Plans; I.R.C. §436 Benefit Restrictions; Plan Amendment Deadline Extended

The Pension Protection Act of 2006 added restrictions on benefit payments by single employer defined benefit plans that are underfunded, as defined in I.R.C. §436 and the Treasury Department regulations thereunder. An example of these restrictions is the prohibition of lump sum payments by a plan that is less than 60% funded for current liabilities. Another example is a partial restriction on the amount of lump sum payments by a plan is less than 80% funded, but more than 60% funded for current liabilities. The IRS recently announced that plan provisions implementing these provisions for single employer defined benefit plans will not be required until the end of the plan year beginning on or after January 1, 2011, pursuant to IRS Notice 2010-77 (which will be published on December 20, 2010).

Please let us know if we can be of assistance with respect to any of these qualified plan amendments.

November 30, 2010