

EMPLOYEE BENEFITS DEVELOPMENTS MAY 2008

Hodgson Russ Newsletter
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Practices & Industries

Employee Benefits

Multiemployer Plans: New Endangered/Critical Plan Guidance

Internal Revenue Code (Code) Section 432 was added by the Pension Protection Act of 2006 (PPA), and generally provides additional funding rules for multiemployer plans that are in endangered or critical status. In March, the Internal Revenue Service (IRS) published proposed regulations that provide guidance regarding the determination of when a plan is in endangered status or critical status, and the associated notices that must be provided in connection with that determination. The regulations, however, do not provide guidance with respect to all issues relating to a multiemployer plan that is in endangered or critical status. For example, no guidance is provided on the parameters for the adoption of a funding improvement plan or rehabilitation plan. Guidance with respect to additional issues is expected to be included in a second set of regulations that are expected to be issued this year. The regulations apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008. (73 Fed. Reg. 14417.)

In March, the Employee Benefits Security Administration also published a set of proposed regulations intended to facilitate plan sponsors' compliance with their obligation to notify participants, beneficiaries, the bargaining parties, the Pension Benefit Guarantee Corporation, and the Department of Labor (DOL) if their multiple employer plan is in endangered or critical status. The proposed regulations also contain a model notice. The IRS advises that it will consider the sponsor of a plan in critical status that uses the model notice to notify participants and others of the status of the plan to have satisfied the notice content requirements of Code Section 432. While the model notice contained in the proposed regulations specifically relates to plans in critical status, the DOL believes that the model may be useful in preparing notices required to be furnished by plans in endangered status as well. This regulation will be effective 60 days after the date of publication of the final regulation in the Federal Register. However, the DOL and the IRS, will, for purposes of notices required to be furnished prior to the effective date of a final regulation, view utilization of the model notice contained in the proposed regulations, if accurately completed and timely furnished, as satisfying the notice requirements. (73 Fed. Reg. 15688.)

DOL Issues Checklist For Wellness Program Compliance

Recently, the Department of Labor issued Field Assistance Bulletin No. 2008-02 (Bulletin), which includes a checklist to help plan sponsors determine whether their wellness programs are subject to, and comply with, the final Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination regulations. The final regulations on the nondiscrimination provisions of HIPAA were issued in December 2006. The regulations generally prohibit group health plans from basing eligibility, premiums or benefits on an individual's health factor. While a wellness program that is associated with a group health plan is subject to the HIPAA non-discrimination rules, if the wellness program meets certain criteria, it is exempt. The Bulletin is designed to guide plan sponsors through a series of "yes" or "no" questions relating to their wellness programs to determine applicability to, and compliance with, the final regulations. The Bulletin also provides a number of examples that clarify provisions of the final regulations. Plan sponsors should use this checklist to review their wellness programs and confirm compliance with the final HIPAA regulations, which became effective January 1, 2008.

PBGC Premium Payment Rules

The Pension Benefit Guaranty Corporation (PBGC) has finalized its premium payment regulations for defined benefit plans. New statutory rules adopted under the Pension Protection Act of 2006 are the basis for the new rules. Covered defined benefit plans are subject to rules for both a flat rate and a variable rate premium. The 2008 flat rate premium is \$33 per participant. The variable rate premium is based on the plan's unfunded vested benefits measured on the valuation date for the premium payment year. Generally, the first day of the plan year is the valuation date for this purpose. The new rules have divided filing plans into three categories: small plans with fewer than 100 participants; mid-size plans with 100 or more participants, but fewer than 500; and large plans with 500 or more participants. Small calendar year plans will have until April 30, 2009 for all premium payments for the 2008 plan year. Calendar year mid-size plans will have until October 15, 2008 for both the flat rate and any variable rate premiums. Large calendar year plans were required to file the preliminary flat rate premium by February 29, 2008 and have until October 15, 2008 for flat rate premium reconciliation and payment of any variable rate premium. Along with these new rules, PBGC has eliminated the old filing forms and created a new "Comprehensive Filings" process through its web-based online system. All defined benefit plan sponsors should be checking with their plan actuaries to make sure that premium payments and deadlines are met. (A description of the revised 2008 premium payment rules can be found at:

www.pbgc.gov/practitioners/premium-filings/content/page1142.html)

IRS Announces Issuance of Opinion and Advisory Letters for Pre-Approved Defined Contribution Plans

In Announcement 2008-23, the Internal Revenue Service (IRS) announced that it would be issuing opinion and advisory letters for pre-approved (master and prototype and volume submitter) defined contribution plans on or about March 31, 2008. The IRS also announced that employers using these pre-approved plans to restate a plan to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 and other changes to the plan qualification requirements will be required to adopt the pre-approved plan document by April 30, 2010. For those plan sponsors utilizing the Hodgson Russ Defined Contribution Prototype Plan, our IRS letters have been received and the prototype documents are available for those wishing to update the plan document in advance of the April 30, 2010 deadline.

IRA Provides Guidance on Certain Pension Protection Act 2006 Distribution Issues

Notice 2008-30, the Internal Revenue Service (IRS) provided guidance with respect to certain distribution-related provisions under the Pension Protection Act of 2006 (PPA). Some highlights include the following:

- **Gap Period Income.** Under recently finalized IRS regulations, distributions of excess deferrals must include gap period earnings, the gains on the deferrals after the end of the tax year accruing through the date seven days before the date of the corrective distribution. This rule on gap period earnings is in effect for taxable years beginning on or after January 1, 2007. According to the Notice, an interim plan amendment to include gap period earnings and distributions of excess deferrals must be adopted by the last day of the first plan year beginning on or after January 1, 2009. Individually designed plans submitted in cycle B or cycle C will be asked to amend the document provision on gap period earnings if it is not currently in the submitted plan document.
- **Rollover to Roth IRAs.** Guidance on the rules applicable to rollovers from pre-tax accounts to Roth IRAs are provided.
- **Qualified Optional Survivor Annuity.** Defined benefit plans and money purchase plans are now required to provide an additional survivor annuity option (referred to as the Qualified Optional Survivor Annuity or QOSA) for plan years beginning on or after January 1, 2008. The QOSA is an annuity for the life of a married participant with either 75% or 50% of the annuity continuing to the spouse after the participant's death. The Notice provides guidelines regarding the required notice that must be given to participants. If a plan already contains a benefit form that satisfies the QOSA requirement, no additional benefit form is required. Plans that must add a QOSA must adopt a plan amendment by the last day of the plan's 2009 plan year (the general amendment deadline for PPA related provisions).

“Springing” PBGC Termination Premium

On February 8, 2006 the President signed the Deficit Reduction Act of 2005 (DRA), an appropriations bill designed to reduce the deficit in connection with the fiscal year 2006 budget. One section of this legislation amended ERISA to provide for an additional premium for defined benefit plans terminated in a distress or involuntary termination. If a plan is terminated in the context of a bankruptcy court reorganization proceeding, liability for the premium does not arise until the employer is discharged from the reorganization proceeding. The premium is \$1,250 per participant for the year of the termination and each of the following two years.

In a recent case, Oneida Ltd. (Oneida) and several of its affiliates filed petitions under the Bankruptcy Code for reorganization. As part of the reorganization Oneida terminated its defined benefit pension plans. In anticipation of an assessment by the PBGC of the termination premium, Oneida sued the PBGC seeking a declaratory judgment that the “springing” PBGC termination premiums were pre-bankruptcy claims in disguise, which should be discharged as part of the bankruptcy proceeding. The PBGC argued that the premiums were not “claims” under the Bankruptcy Code because the obligation to pay the premiums was not enforceable until after Oneida emerged from bankruptcy (i.e., the “springing” premium liability was a post-reorganization liability of the entity emerging from bankruptcy).

The Court agreed with Oneida finding that the “springing” premiums were, in fact, pre-petition “claims,” which were discharged by Oneida's reorganization in bankruptcy.

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While this Court may not have the final word, the ruling can be used by plan sponsors in bankruptcy to encourage PBGC to include this alleged post-reorganization claim as part of any bankruptcy reorganization settlement of PBGC claims. (*Oneida Ltd. v. Pension Benefit Guaranty Corporation* (Bankr. S.D.N.Y., 2007)).

