

## MEMO

To: Clients and Friends  
From: Smith & Downey  
Date: October 21, 2009  
Re: Upcoming Deadlines and Recent Developments

### I. Qualified Plan and 403(b) Plan Amendments Due by Year End

December 31 is the deadline for a number of required (and several optional) amendments to calendar year tax-qualified, 403(b) and governmental 457(b) retirement plan documents. (The deadline for non-calendar year plans is the last day of the plan year beginning in 2009, and, in some cases, delayed deadlines apply to governmental or collectively bargained plans.) Note that, although the amendments are not required until the end of this year (or later, as noted above), each plan must have been operated in compliance with the changes by earlier dates.

The required amendments for defined contribution (including 403(b)) plans include those dealing with the faster vesting for employer non-matching contributions, direct rollovers for non-spouse death benefit beneficiaries (actually optional for 2009, but required for 2010), “gap period” income changes, the extension of the distribution notice period to 180 days, the new Qualified Optional Survivor Annuity (if applicable), diversification rights (if employer publicly-traded stock is an investment option), rollovers to Roth IRAs from non-Roth accounts, rollovers of after-tax contributions into a plan that will accept and account for those contributions, and failure to defer payment notices. The rollover amendments also apply to governmental 457(b) plans.

The required amendments for defined benefit plans include those dealing with the new Qualified Optional Survivor Annuity, the extension of the distribution notice period to 180 days, interest rate and mortality assumptions, direct rollovers for non-spouse death benefit beneficiaries (again, actually optional for 2009, but required for 2010), rollovers to Roth IRAs from non-Roth accounts, rollovers of after-tax contributions into a plan that will accept and account for those contributions, failure to defer payment notices, the new benefit limitation for underfunded plans, the new funding acceleration rules for at risk plans, and the new, faster vesting for cash balance and other “hybrid” plans.

Optional changes to plans, that if utilized in the current year require plan amendments by the deadlines above, include those dealing with Qualified Reservist Distributions, hardship distributions to beneficiaries, and defined benefit plan in-service distributions at age 62.

In addition to these required document changes, operational changes to comply with the HEART Act must be implemented now, although Plan amendments are not required until the last day of the plan year that begins in 2010. (These HEART Act changes also apply to 457(b) and 403(b) plan sponsors.) Finally, plans utilizing the waiver for the 2009 minimum required distributions must be amended by the end of their 2011 year to reflect this. Therefore, many employers are amending for the HEART Act and MRD waiver issues as part of their year-end 2009 document work.

To ensure the continued tax-qualified status of their plans, plan sponsors should review their plan documents now to determine whether all of the required amendments have been adopted (and whether any of the desired optional amendments have been adopted).

## II. 403(b) Amendments Due by Year End

In addition, and as we previously have reported, the final Code section 403(b) regulations became effective on January 1, 2009, and 403(b) plans have been required to operate in compliance with those regulations since that date.

The rapidly-approaching deadline for adopting amended 403(b) plan documents for compliance with the requirements of those regulations is December 31, 2009. (The document changes adopted by December 31, 2009 must be retroactive to January 1, 2009.)

Naturally, all employers that maintain 403(b) plans should check to make sure that the plans have been operated in compliance with the regulations since January 1, and that compliant plan document amendments are signed by the December 31 deadline.

## III. January 31, 2010 IRS Determination Letter Filing Deadline

Employers that sponsor tax-qualified retirement plans (other than pre-approved plans) and whose employer identification numbers end in 4 or 9 have a January 31, 2010 deadline for filing those plans under the IRS's determination letter program. This January 31, 2010 filing deadline also applies to multiemployer plans.

To avoid losing track of this deadline during the upcoming year-end crush, many of our clients with EINs ending in 4 or 9 are already preparing, or have filed, their determination letter requests. Employers whose EIN ends in 4 or 9 who have not started the determination letter process should consider starting that process now.

## IV. GINA Regulations

The IRS, DOL and HHS recently released regulations under the Genetic Information Nondiscrimination Act of 2008. These regulations are effective for plan years beginning on or after December 7, 2009 (i.e., on January 1, 2010 for calendar-year plans). As discussed at our most recent seminar, GINA amended HIPAA to prohibit employer-sponsored health plans (or insurers) from collecting, using or disclosing genetic information concerning employees or their family members either (1) before or in connection with enrollment or, (2) at any time, for "underwriting purposes".

For purposes of these rules, "genetic information" is broadly defined to include family medical history. "Underwriting purposes" is broadly defined to include anything that relates to a

determination of eligibility for benefits or the determination of premiums or other contribution amounts, including discounts, rebates, incentives and copayments.

The new regulations provide that wellness programs that otherwise meet the requirements of the prior HIPAA wellness program regulations violate GINA if they provide rewards for completing health risk assessments (often called “HRAs”) that request genetic information, including questions about family medical history.

The regulations also provide that a health risk assessment that includes questions about family medical history and that is completed prior to or in connection with enrollment violates GINA, even if no incentive is provided for completing the assessment.

(Fortunately, the regulations provide that, for purposes of determining whether a health plan expense is medically appropriate, plans may continue to use the minimum necessary amount of the patient's genetic information.)

Separate proposed regulations issued by HHS also would modify the current HIPAA privacy regulations: (1) to provide that genetic information is health information; (2) to prohibit health plans from using or disclosing PHI that is genetic information for underwriting purposes (even if an individual has signed an authorization); (3) to require that HIPAA privacy notices for health plans that perform underwriting be revised to state that genetic information will not be used for underwriting purposes; and (4) to modify various definitions to be consistent with GINA. (These changes to the HIPAA privacy rules are expected to be effective 180 days after they are finalized by the regulators.)

In two informal opinion letters issued this year, the EEOC has indicated that any health risk assessment that includes disability-related inquiries (and most health risk assessments include such questions) likely violates the Americans with Disabilities Act unless the health risk assessment is completely voluntary. Based on this still-informal position, the EEOC would not consider a health risk assessment in connection with an employer’s health plan to be voluntary if there is any significant penalty imposed for failing to complete it (or if any significant incentive is offered for completing it). All employers that offer an incentive or impose a penalty in connection with a health risk assessment or similar wellness programs that might involve disability-related questions should consider how this EEOC position would apply to their plans.

Naturally, all employers with, or considering, wellness programs and/or health risk assessments should review those practices (and all related notices and election forms) in light of these new GINA rules and the continually evolving EEOC position on the impact of the ADA.

## V. 457 Developments

Tax-exempt and government employers have been struggling, since August 1986, to comply in good faith -- in the absence of meaningful IRS guidance -- with the deferred compensation and severance provisions of Internal Revenue Code Sections 457(f) and 457(e)(11).

Earlier this month, the two IRS officials primarily responsible for providing guidance and enforcement in this area spoke about the current IRS positions with respect to 457(f) and 457(e)(11).

As they have stated repeatedly since 1986, they "expect to issue guidance" on these issues. They noted that they received a number of comments from the public on their most recent commentary on these issues (Notice 2007-62, issued July 23, 2007), which was a subject of one of our earlier e-Alerts and which caused many of our clients to alter radically the way they looked at 457(f) and 457(e)(11) issues.

As they have stated for some time, the officials suggested that covenants not to compete do not create valid forfeiture risks in 457(f) plans, with one of the regulators going so far as to say she has "never seen an effective covenant not to compete" risk in a 457(f) plan. They also noted their views that the following should not be respected: "rolling risks of forfeiture", severance plans that defer amounts until retirement or that pay on voluntary termination, and flexible executive benefit programs that permit executives to select among benefits, with any undirected amount defaulting to a 457(f) plan.

Employers with 457(f) and/or 457(e)(11) plans should consider whether these latest IRS comments suggest changes in their plan design or administration, and of course should be on the lookout for additional IRS guidance on these issues.