

Service

Employee Benefits &
Executive
Compensation

2008 Year-End Action Items for Employee Plans

The following is a list of some important year-end employer action items relating to both qualified and non-qualified plans. Some of these items require action by November 30, 2008.

Section 409A Compliance Deadline for Non-Qualified Retirement Plans: All nonqualified deferred compensation plans and arrangements must be amended to comply with Code Section 409A by December 31, 2008. Failure to do so may result in severe tax consequence to employees, including the imposition of a 20% penalty tax.

The 409A transition rules expire December 31, 2008. Pursuant to these transition rules, participants may change their distribution elections to accelerate payment to 2009 or to delay payments scheduled to occur in 2009. Such distribution election changes must be made by December 31, 2008.

Pursuant to the 409A transition rules, participants who are eligible for bonuses that would otherwise be paid in 2009 may elect to defer such bonuses no later than December 31, 2008.

Section 457(f) Deferred Compensation Plans for Tax-Exempt Employers: In 2007, the IRS issued informal guidance stating that it would be issuing new regulations under Code Section 457(f) that would adopt some of the principles adopted with respect to Section 409A. Although such regulations have not been issued, 457(f) plans, nonetheless, must be amended to comply with Code Section 409A by December 31, 2008.

Section 415 Amendments for Qualified Plans: All tax qualified plans (both defined contribution and defined benefit) must comply with final regulations issued under Code Section 415 relating to the maximum annual contributions or benefits that may be provided under the plan. Virtually all plans we have

reviewed for Section 415 compliance have required an amendment. For calendar year plans, these amendments must be adopted no later than December 31, 2008.

403(b) Written Plan Documents: As of the date of this notice, final regulations issued under Code Section 403(b) require that all plans be set forth in writing no later than January 1, 2009. This requirement applies to both ERISA and non-ERISA plans. Existing plan documents may need to be amended to incorporate the requirements of the final regulations.

401(k) Safe Harbor 401(k) Notices: 2009 safe harbor notices for calendar year plans must be provided to participants by December 1, 2008.

401(k) Automatic Enrollment: Required annual notices for automatic enrollment arrangements (permitting the return of default election deferrals) and qualified automatic contribution arrangements must be provided to participants by December 1, 2008.

Qualified Default Investment Alternatives for Participant Directed Plans: Participant notices for plan sponsors who desire safe harbor relief from fiduciary liability for qualified default investment alternatives must be provided by December 1, 2008, for calendar year plans.

Defined Benefit Plans-Alternative Notice Compliance: The Pension Protection Act of 2006 requires defined benefit pension plans to furnish participants a benefit statement at least once every 3 years. The first 3-year cycle began in 2007, and the benefit statement for this first cycle must be provided by the last day of the 2009 plan year. Alternatively, a plan may elect to provide participants an annual notice of the availability of the benefit statement and the ways in which a participant may obtain the statement. If a plan has elected this alternative, the annual alternative notice must be provided to participants by December 31, 2008.

Discretionary Amendments to Qualified Retirement Plans: Generally, discretionary amendments must be executed before the end of the plan year in which they are implemented (December 31st for calendar year plans). Examples of discretionary amendments that are required by December 31, 2008 if implemented for the 2008 plan year include, but are not limited to: nonspousal rollovers, automatic enrollment, Roth 401(k) contributions and new safe harbor hardship distribution criteria. The IRS publishes a list of recent guidance that may require discretionary amendments on its website at <http://www.irs.gov/retirement>.

IRS Determination Letters for Cycle C Filers: Under the IRS's determination letter program, each individually designed retirement plan maintained by an employer with an employer tax ID number ending in 3 or 8 must be restated and submitted to the IRS for a determination letter no later than January 31, 2009. Individually designed governmental plans are in Cycle C; however, the IRS recently issued guidance ([click here for more information](#)) that allows governmental plans to choose to file in

either Cycle C or Cycle E (between February 1, 2010 and January 31, 2011). It is imperative that you contact us immediately if you would like our assistance with Cycle C plans.

Miscellaneous Action Items in View of Recent Market Turbulence:

Defined Benefit Plans: Under the Pension Protection Act of 2006, severe consequences may result from underfunded status. You should discuss with your actuary the potential for funding risks to your plan and, if necessary, consider potential actions such as contributions or benefit reductions. **Defined Contribution Plans:** Most of these plans are designed to be "404(c)" plans, which means that participants are responsible for their selections among the available alternatives. However, a plan fiduciary is nevertheless responsible for determining that the investments offered to participants are prudent and properly diversified. The current market meltdown highlights the need for periodic reviews of investment offerings.

Review Investment Policies and Retirement Committee Charters: Employers should review and amend, as needed, their investment policies and other governing documents (e.g., retirement committee charters) to make sure that the recent market downturn does not demonstrate a need to revise the policy. Retirement Committee minutes should be documented accordingly.

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