

Internal Revenue Service

Determination Letter Program Substantially Revised

Announcement 2015-19, which was released July 21, 2015, details significant changes to the Employee Plans determination letter program for qualified retirement plans. <http://www.irs.gov/pub/irs-drop/a-15-19.pdf> Determination letter procedures contained in Rev. Proc. 2007-44 and Rev. Proc. 2015-6 will be revised. Revenue Procedure 2007-44 sets forth procedures for issuing determination letters and describes the 5-year remedial amendment cycle for individually designed plans.

Recognizing that the IRS' limited resources need to be effectively deployed, the IRS will take the following actions, effective January 1, 2017:

- Eliminate the staggered 5-year determination letter remedial amendment cycles for individually designed plans. The determination letter program for individually designed plans will be limited to the initial plan qualification and qualification upon plan termination.
- A transition rule will apply to the remedial amendment period for certain plans currently on the 5-year cycle.

As stated in the announcement, the following tools are under consideration by the IRS and Department of Treasury to make compliance with plan document requirements easier:

- Provide model amendments.
- Eliminate the adoption of certain plan provisions or amendments to the extent that such language is not pertinent to a plan.
- Expand plan sponsors' options to document qualification requirements through incorporation by reference.

On or before October 1, 2015, written comments are requested by the IRS on the following:

1. What changes should be made to the remedial amendment period that would otherwise apply to individually designed plans under 401(b)?
2. What additional considerations should be taken into account in connection with the current interim amendment requirement?
3. What guidance should be issued to assist plan sponsors that wish to convert an individually designed plan into a pre-approved plan?
4. What changes should be made to other IRS programs (including the Employee Plans Compliance Resolution System (EPCRS)) to assist implementation of the modifications to the determination letter program.

Small Businesses Encouraged to Take Advantage of Penalty Relief Program for Delinquent Filings

In IR-2015-96, which was released July 14, 2015, the IRS encourages small businesses that may have been unaware of retirement plan reporting requirements to take advantage of a penalty relief program outlined in Rev. Proc. 2015-32. <http://www.irs.gov/pub/irs-news/IR-15-096.pdf> | http://www.irs.gov/irb/2015-24_IRB/ar08.html Failure to file annual Form 5500 series may result in a penalty of \$15,000 per return. Under the program offered by the IRS, the significant penalties are reduced to \$500 per return submitted, up to a maximum of \$1,500 per plan.

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While the program is generally open to small businesses with plans covering a 100 percent owner or the partners in a business partnership, and the owner's or partner's spouse (but no other participants), and certain foreign plans, it is important to note that the program is not open to those who have already been assessed a penalty for late filings.

IRS Nixes Use of Lump Sum Payments to Replace Retirees' Lifetime Income

Notice 2015-49, which was published July 27, 2015, states that the Treasury Department and IRS plan to amend the required minimum distribution regulations to eliminate the use of lump sum payments to replace annuity payments being paid by defined benefit plans. <http://www.irs.gov/pub/irs-drop/n-15-49.pdf> As explained in the notice,

A number of sponsors of defined benefit plans have amended their plans to provide a limited period during which certain retirees who are currently receiving joint and survivor, single life, or other life annuity payments from those plans may elect to convert that annuity into a lump sum that is payable immediately. These arrangements are sometimes referred to as lump sum risk-transferring programs because longevity risk and investment risk are transferred from the plan to the retirees.

While the regulations have not been amended yet, the Treasury Department and IRS intend that the amended regulations apply as of July 9, 2015, unless a transition exception detailed in the notice pertains to a plan.

Employee Plan News Published by the IRS

On July 27, 2015, Issue No. 2015-8 of *Employee Plan News* was published.

<http://www.irs.gov/Retirement-Plans/Employee-Plans-News#072715> Two articles of interest include the following:

- **Definition of Qualified Public Safety Employee Expanded - Defending Public Safety Employees' Retirement Act** (<https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>) (P.L. 114-26), which was recently enacted, broadens the definition of "qualified public safety employee" for employees exempt from the 10 percent additional tax on early distributions from retirement plans starting upon separation of service on or after age 50, and adds defined contribution plans to this exemption. In addition to police, firefighters and emergency medical services employed by a state or political subdivision of a state, public safety employees now include federal law enforcement officers, federal customs and border protection officers, federal firefighters and air traffic controllers. Distributions made after December 31, 2015 benefit from this new law.
- **Failure to File Certain Returns Penalties Increased - Trade Preferences Extension Act** (<https://www.congress.gov/bill/114th-congress/house-bill/1295/text?q=%7B%22search%22%3A%5B%22%5C%22pl114-27%5C%22%22%5D%7D&resultIndex=1>) (P.L. 114-27, Title VIII, Section 806) increased penalties for failing to file information returns and payee statements on time, including Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.* These increases help offset costs of the legislation enacted.

Review of Required Distribution Requirements Recommends Improvements to Taxpayer Education

Dated May 29, 2015, released July 15, 2015, the Treasury Inspector General for Tax Administration (TIGTA) published a report *Improvements Can Be Made to Educate and Notify Taxpayers of Required Minimum Distribution Requirements from Individual Retirement Arrangements*, which concluded that taxpayers frequently fail to take required minimum distributions from their Individual Retirement Arrangements (IRA) when compulsory.

http://www.treasury.gov/tigta/press/press_tigta-2015-21.htm. Such failures result in lost tax revenue as well as severe penalties to taxpayers, compromising their retirement income.

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As a result of prior audits by TIGTA, the IRS has increased its efforts to educate taxpayers and tax preparers, but more improvements are necessary. The most recent audit found some taxpayers are not taking distributions as required. Recommendations made in the report and the IRS' responses include the following:

- Communicate with taxpayers directly, in easily understood language, about the required distributions rules they are obligated to take. Acknowledging that communicating with taxpayers turning 70 ½ would enhance compliance; budget constraints preclude implementation of notices to such taxpayers by the IRS.
- To the extent that any changes in the notice program are made, additional noncompliant individuals should be identified by modifying the methodology for the required minimum distribution notices.
- While TIGTA believes it would be beneficial to inform estates of inherited distribution requirements, the IRS disagrees.

IRS Information Letter Explains Taxation of Health or Long-Term Care Premiums Made by Retired Public Safety Officers

In a letter from the IRS dated May 29, 2015 and released June 26, 2015 to Virginia Senator Timothy Kaine on behalf of a constituent, the IRS explained that a retired public safety officer need not include as medical expenses any health or long-term care premiums paid with tax-free distributions from an eligible governmental retirement plan. INFO 2015-0017, <http://www.irs.gov/pub/irs-wd/15-0017.pdf> This provision applies only to distributions that would otherwise be included in income.

While certain taxpayers may exclude from gross income distributions of up to \$3,000 annually from an eligible governmental plan used to pay qualified health insurance or long-term care premiums of an eligible retired public safety officer and his or her spouse and dependents, the exclusion only applies if the employer offers this election to retirees. Such a plan provision is permissive but not mandatory.

Department of Labor

Comment Period on Conflicts of Interest in Investment Advice Closed

The comment period for the recently proposed conflict of interest rule and related proposed prohibited transaction exemptions closed on July 21, 2015. Links to 825 comments that have been received from all parties that have a stake in retirement benefits can be found at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>. Note that the comment letter from Daniel M. Gallagher, Securities and Exchange Commissioner, expressed significant concerns about the failure of the DOL to work successfully with the Securities and Exchange Commission (SEC). <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00659.pdf> Using blunt language, Gallagher stated:

Strikingly, the Fiduciary Proposal does not contemplate or even mention SEC rules or the SEC's existing regime for regulating broker-dealers and investment advisers. If the DOL were actually serious about working together with the SEC on an implementable standard, it could have – and should have – included in its proposal some type of substituted compliance mechanism, in which compliance with an SEC fiduciary standard would satisfy the DOL rules. Instead, DOL is choosing to substitute its judgment for that of the expert regulator of broker-dealers, in the process denying investors a choice in products, services and financial professionals.

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The Department of Labor previously announced that the Employee Benefits Security Administration (EBSA) will hold a public hearing on August 10, 11, and 12, and continuing through August 13, 2015 (if necessary) to consider the implications of adopting the proposed conflict of interest rule and proposed new and amended exemptions.

<https://www.federalregister.gov/articles/2015/06/18/2015-14921/hearing-on-definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>

In a related development, the Department of Labor is actively soliciting individual experiences about how conflicts of interest have impacted retirement savings. <http://www.dol.gov/featured/protectyoursavings/>

Department of Labor Secretary Perez and the White House Promise Guidance on State-based Retirement Plans

On July 13, 2015, the Department of Labor published a blog [Clearing a Path for State-based Retirement Plans](https://blog.dol.gov/2015/07/13/clearing-a-path-for-state-based-retirement-plans/) by Secretary of Labor Thomas Perez, which discussed President Obama's plan to expand retirement savings opportunities by facilitating initiatives by states to provide retirement savings opportunities through workplace retirement plans.

<https://blog.dol.gov/2015/07/13/clearing-a-path-for-state-based-retirement-plans/> This initiative was highlighted in the Conference on Aging hosted by the White House on July 13, 2015. <https://www.whitehouse.gov/the-press-office/2015/07/13/fact-sheet-white-house-conference-aging> In addition, a Fact Sheet released by the Department of Labor also discussed this topic. <http://www.dol.gov/ebsa/newsroom/fswhconferenceonaging.html>

Recognizing that federal legislation introduced to improve retirement savings opportunities has been stymied due to Congressional inaction, President Obama and Secretary Perez seek to leverage the momentum in states that have already enacted laws that requires employers not currently offering a retirement plan to automatically enroll their workers in an IRA. According to the White House press release, such laws are under consideration in more than 20 states.

Secretary Perez indicated that a major roadblock currently exists.

... states have also expressed concern about a lack of clarity as to whether their efforts would be preempted or nullified by the federal Employee Retirement Income Security Act, or ERISA. Although the federal courts, not the Department of Labor, are the ultimate arbiter on that question, the department can try to help reduce the risk of litigation challenges to state retirement savings initiatives.

To address this concern, the Department of Labor has committed to publishing a proposed rule by the end of 2015, which will clarify how states can move forward, including a roadmap to help employers to offer coverage and be able to automatically enroll employees.

Field Assistance Bulletin Provides Clarification of Annuity Selection Safe Harbor

Promoting lifetime income opportunities for participants in defined contribution plans is a continuing focus of the Department of Labor. While guidance has previously been provided about the duty of an employer to select and monitor annuity providers for benefit distributions from 401(k) and other defined contribution plans, plan sponsors have been concerned about their continuing fiduciary duty to monitor an insurer's solvency. Field Assistance Bulletin (Bulletin) 2015-02, which was published July 13, 2015, is intended to provide clarification about the extent of employers' fiduciary duty.

<http://www.dol.gov/ebsa/regs/fab2015-2.html> As explained in the Bulletin, guidance is provided to also explain the application of ERISA's statute of limitations to claims relating to annuity selection and assist the Employee Benefits Security Administration's national and regional offices in responding to questions from employers and other interested parties.

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As explained in the Bulletin,

... questions continue to be raised about how to reconcile the "time of selection" standard in the Safe Harbor Rule -- which embodies the general principle that the prudence of a fiduciary decision is evaluated under ERISA based on the information available at the time the decision was made -- with ERISA's duty to monitor and review certain fiduciary decisions. Confusion or lack of clarity regarding the nature and scope of fiduciary responsibilities to act prudently in making, monitoring and reviewing annuity selections under a defined contribution plan could lead plan sponsors or their advisors in some instances to overestimate or otherwise misunderstand the duration or extent of those fiduciary responsibilities. This, in turn, could create or reinforce disincentives for plan sponsors to offer their employees an annuity as a lifetime income distribution.

There are several detailed examples in the Bulletin, which clarifies that an employers' fiduciary duty to monitor an insurer's solvency generally ends when the plan no longer offers the annuity as a distribution option, not when the insurer finishes making all promised payments. While some plan sponsors might be motivated to offer lifetime income annuities to defined contribution participants as a result of the Bulletin, others may determine that their fiduciary liability would be reduced if they do not offer lifetime income annuities.

Additional information can be found on the Department of Labor Fact Sheet – White House Conference on Aging <http://www.dol.gov/ebsa/newsroom/fswconferenceonaging.html> and the Fact Sheet: White House Conference on Aging. <https://www.whitehouse.gov/the-press-office/2015/07/13/fact-sheet-white-house-conference-aging>

Department of Labor Bureau of Labor Statistics March 2015 Report Released

On July 24, 2015, the U. S. Bureau of Labor Statistics released the findings of a March 2015 report that found that retirement benefits were available to 66 percent of private industry workers in the United States. <http://www.bls.gov/news.release/pdf/ebs2.pdf> Data was sourced from the National Compensation Survey (NCS), which the news release explains comprehensive measures of compensation cost levels and trends as well as incidence and provisions of employee benefit plans. The following findings were revealed:

Employer-provided retirement benefits were available to 31 percent of private industry workers in the lowest wage category (the 10th percentile). By contrast 88 percent of workers in the highest wage category (the 90th percentile) had access to retirement benefits. In state and local government, 61 percent of workers in the lowest wage category had access to retirement benefits, compared with 98 percent of workers in the highest wage category.

Chart 1. Access to retirement benefits by lowest and highest wage categories, March 2015



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Table 1 in the report includes detailed information about access to retirement benefits, participation in retirement benefits as well as “take-up” rates. The take-up rate defined an estimate of the percentage of workers with access to a plan who participate in the plan, rounded for presentation. This data is broken down by “goods producing industries” as well as “service providing industries” with precise information on educational institutions. In addition, the data is broken down by employer size and geographic area.

Social Security Administration

Social Security Board of Trustees Annual Report Released

On July 28, 2014, the Treasury Department released a Fact Sheet discussing the Social Security and Medicare Boards of Trustees annual financial review of these programs. <http://www.treasury.gov/press-center/press-releases/Pages/jl0127.aspx> According to the report, Social Security's retirement and disability programs have sufficient resources to cover benefits for the next 19 years, until 2034, with 79 percent of benefits payable at that time. This date is one year longer than last year's report. Note, however, that the projected depletion date for the separate Social Security's Disability Insurance (DI) Trust Fund is actually in late 2016.

After the trust fund is exhausted, annual revenues from the dedicated payroll tax will be sufficient to fund three-quarters of scheduled benefits through 2089. The Social Security Administration press release and report can be found at <http://www.ssa.gov/news/#/post/7-2015> and <http://www.ssa.gov/oact/TRSUM/index.html>

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