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E*Alert

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New Notices and Waivers Required Before Retirement Plans Can Release Benefit Payments

By: Alan M. Levy

The Pension Protection Act of 2006 (“PPA”) has modified the requirements for informing retirement plan participants and their spouses of benefit options, and for spousal consents to benefit distributions for all such payments made on or after January 1, 2007. However, the Internal Revenue Service has not yet issued final regulations on how to comply with the new law. Therefore, IRS has issued “guidance” on the new requirements until those regulations take effect, and has indicated a plan administrator will not be penalized for a “reasonable attempt” to comply with the new statute during the interim.

The pre-PPA rules required a participant’s written consent (which could be his/her application for benefits) to a distribution executed in the 30 to 90-day period prior to the payment if the benefit had a present value greater than \$5,000.00, Internal Revenue Code (“IRC”), 26 U.S.C. §411(a)(11). They also required that a married participant subject to a qualified joint and survivor annuity (“QJSA”)¹ provide proof that his/her spouse consented to the distribution, including waiver of the QJSA if the participant was to receive the full benefit; a 30 to 90-day period prior to payment applied to presentation of the waiver, IRC, 26 U.S.C. §417(a).

The PPA, 26 U.S.C. §1102, now requires, in regard to distributions made on or after January 1, 2007, that:

1. The 90-day maxima for these rules be changed to 180 days;

¹ A QJSA is a reduced benefit to the participant and a further (smaller) benefit to his/he surviving spouse.

2. The spouse's QJSA waiver be signed within the 180 days immediately prior to initial benefit payment; and
3. The notice include a description of the participant's right, if any, to defer the date of initial payment, as well as the consequences of such deferral.

Until final regulations are available, the retirement plan administrator will be deemed to have satisfied the statute if, in a notice written in a manner understandable to the average participant and his/her spouse, the administrator describes:

1. How the benefit will change (e.g., increase with further earnings on funds) if it is deferred, and the program is a defined benefit plan;
2. The investment options if the benefit is deferred and the program is a defined contribution plan; and
3. Any special rules in the program's summary plan description which may have a material effect on the decision to defer.

IRS Notice 2007-7, Q&A 32-33.

As a fiduciary, the plan administrator must assure that no retirement benefits are paid out until these notices are properly and timely made, and the written spousal consent is given for whichever version of the QJSA arrangement the participant seeks to utilize.

If there are any questions about the correct notice and waiver/consent forms to use during this period prior to issuance of final IRS regulations, please contact Alan Levy, at Lindner & Marsack, who focuses on employee benefit questions.

If you have any questions about the issues raised by this e-alert, please feel free to contact Alan M. Levy at (414) 273-3910 or by e-mail at alevy@lindner-marsack.com

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