

EMPLOYEE BENEFITS DEVELOPMENTS



December 30, 2002 to January 10, 2003

IRS/DOL Rulings, Opinions, Etc.

IRS Allows Retroactive Adoption of Deemed IRAs. A retirement plan sponsor may adopt a plan amendment to provide for “deemed IRAs” after the plan begins accepting employees’ deemed IRA contributions. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) added Internal Revenue Code § 408(q) under which a qualified plan may elect to allow employees to make voluntary employee contributions to separate IRA or Roth IRA accounts or annuities established under the plan. For plan years beginning after 2002 but before 2004, a qualified plan may accept employee contributions to a deemed IRA before the plan has been amended to provide for deemed IRAs, if the deemed IRA provisions are put into the plan document before the end of the plan year beginning before 2004. Revenue Procedure 2003-13 contains a sample plan amendment that may be used, in conjunction with applicable IRA language, to adopt a retroactive plan amendment providing for deemed IRAs. (Revenue Procedure 2003-13)

Guidelines for Waiver of 60-Day Rollover Requirement. The Internal Revenue Service (IRS) has provided guidance on applying for a waiver of the 60-day rollover requirement for eligible rollover distributions from retirement plans and IRAs. If an individual fails to roll over an eligible rollover distribution to another eligible plan or IRA within 60 days of having received the distribution, the amount will be included in the individual’s income. EGTRRA gave the IRS the authority to waive the 60-day requirement where the failure to waive the requirement would be “against equity or good conscience, including casualty, disaster or other events beyond the reasonable control” of the

distributee. In applying for a waiver of the 60-day rule, the distributee must use the procedures described in Revenue Procedure 2003-4 for applying for IRS letter rulings and submit the \$90 user fee set forth in Revenue Procedure 2003-8. Revenue Procedure 2003-16 also provides for an automatic waiver in situations where a financial institution receives the funds within the 60-day period and, solely due to an error on the part of the financial institution, the funds are not deposited into an eligible retirement plan within the 60-day period. The automatic approval is available only if the funds are deposited into an eligible retirement plan within one year from the beginning of the 60-day period and, if the financial institution had deposited the funds as instructed, it would have been a valid rollover. (Revenue Procedure 2003-16)

Automatic Rollovers Coming. One of the EGTRRA provisions, enacted in 2001, is a new rule requiring that small benefit cash-outs from qualified plans be rolled into an IRA by the plan administrator unless the participant has elected to take cash. This new provision will not be effective until after regulations are adopted. On January 6 the Department of Labor (DOL) issued a request for public comments on standards that might be adopted under regulations for these “automatic” rollovers. This is a fiduciary issue for plan administrators, who will have to deal with choosing an appropriate IRA custodian and investment vehicle.

We have faced similar issues for clients with terminating plans where some participants cannot be located. To complete plan terminations after exhausting efforts to find “lost” participants, one effective solution is to have the account balance transferred directly to an IRA established in the name of the participant. This has allowed the plan to

finish its distributions in cases where the joint and survivor rules do not apply.

It may take some time, but watch for the development of regulations that will make automatic rollovers a routine part of plan administration. Comments to the DOL are due by March 1.

2003 Procedures for Rulings. As a part of its regular annual update, the IRS issued new procedures on ruling and information letters (Revenue Procedure 2003-4), technical advice (Revenue Procedure 2003-5), employee plan determination letters (Revenue Procedure 2003-6), and user fees for employee plans and exempt organizations (Revenue Procedure 2003-8). No significant changes are noted. These new procedures will be used for submissions and requests to the IRS this year.

Cases

Summary Plan Description Should Explicitly Require Exhaustion of Remedies. In *Watts v. BellSouth Telecommunications Inc.*, 11th Cir. No. 02-13230 (1/3/03), the U.S. Court of Appeals for the Eleventh Circuit held an employee benefit plan participant did not need to exhaust administrative remedies provided under the plan before filing suit for a benefits claim. The court found the summary plan description (SPD) for the plan could reasonably be read to make exhaustion optional. The court noted ERISA requires plans to provide participants with a statement of rights and claim procedures but does not

impose an administrative exhaustion requirement. The exhaustion requirement is court-imposed. The court, however, made an exception to the exhaustion doctrine here because, based on the language of the SPD, it was reasonable for the participant to believe exhaustion was optional. The SPD stated participants “may use” the administrative appeals process if they wish to appeal a denied claim. On the next page, the SPD stated a participant may file a suit in court if the claim is denied. Nowhere in the SPD did it state that using the administrative appeal process was necessary before filing suit. Plans can remedy this problem by explicitly stating that proceeding through the administrative appeal process is a precondition to filing suit.

Corning, Inc. Pension Committee and Board Exonerated. The Federal District Court for the Western District of New York dismissed claims against Corning, Inc., its Pension Committee and Board of Directors made by 401(k) plan participants in *Crowley v Corning, Inc.*, W.D.N.Y. No. 02-CV-6172CJS (12/09/02). The participants sought to recover losses in the value of Corning stock held in their 401(k) accounts following Corning’s acquisition of Optical Technologies. The plaintiffs sought to hold the defendants responsible as plan fiduciaries. The court found the plan’s fiduciaries were not responsible for the losses where they did not know or have reason to know the acquisition and Corning’s stock value would fare so poorly.

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