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ERISA Group Benefits Alert

October 2010

2011 COLA LIMITS

The IRS has released the retirement plan limits for 2011. You will note that the retirement plan limits remain unchanged from 2010.

RETIREMENT PLAN LIMITS	2010	2011
Compensation Limit	$245,000	$245,000
401(k)/403(b) Elective Deferrals	$16,500	$16,500
401(k)/403(b) Catch-Up Contributions	$5,500	$5,500
457 Deferrals	$16,500	$16,500
457 Catch-Up Contributions	$5,500	$5,500
SIMPLE Plan Employee Deferrals	$11,500	$11,500
SIMPLE Plan Catch-Up Contributions	$2,500	$2,500
Annual Defined Contribution Limit	$49,000	$49,000
Annual Defined Benefit Limit	$195,000	$195,000
Highly Compensated Employee Threshold	$110,000	$110,000
Key Employee/Officer Threshold	$160,000	$160,000
Social Security Taxable Wage Base	$106,800	$106,800
SEP Minimum Compensation	$550	$550

Roth Provisions in the Small Business Jobs Act of 2010

The Small Business Jobs Act of 2010 (the "SBJA 2010") was recently passed by Congress and signed into law by the President on September 27, 2010. The SBJA 2010 includes a wide-assortment of tax changes generally affecting small business. Among others, it contains two provisions affecting Roth accounts within retirement plans. First, it permits Roth contributions to 457(b) plans sponsored by State or local governments. Second, the SBJA 2010 permits amounts from 401(k), 403(b) and governmental 457(b) plans to be rolled into Roth accounts

under the same plan, provided that the amounts are distributable and constitute an eligible rollover distribution.

This second provision, in essence, allows for in-plan conversion of pre-tax contributions to Roth as long as the plan permits regular Roth contributions. Absent this legislation, an individual would need to take a distribution and then roll that distribution into a Roth IRA in order to accomplish a conversion. In order to take advantage of this legislation and retain funds in the plan, a plan may adopt an amendment to permit in-service distributions prior to retirement age. In addition, the amendment may impose a condition on eligibility for in-service distributions, such as the participant's election to have the distribution directly rolled over to the designated Roth account within the plan.

The amount of the in-plan conversion of pre-tax contribution to Roth is included in gross income and subject to income taxation, but is not subject to the 10% early distribution penalty. If the conversion is made in 2010, any amount otherwise required to be included in gross income for the 2010 taxable year is not included in that taxable year but is instead included in gross income in equal amounts for the 2011 and 2012 taxable years, unless the participant elects to include the amount in gross income for the 2010 taxable year.

There are a number of issues regarding the in-plan conversion provisions of this legislation for which guidance from the Treasury or IRS is needed. Treasury officials have indicated that the Treasury is working on guidance. They have encouraged plan sponsors to wait on guidance before implementing in-plan Roth conversions.

Determining Hours of Service

Hours of Service may be used to determine eligibility for participation and plan contributions (or benefit accruals) as well as for vesting purposes. Generally, there are three methods of calculating service under a qualified retirement plan, (1) Actual Method, (2) Equivalency Method, and (3) Elapsed Time Method.

Actual Method. Under the Actual Method as determined from personnel records, an employee receives credit for an Hour of Service for each hour worked and for which the employer makes payment, each hour not worked and for which the employer makes payments (such as vacation, holiday, illness, incapacity, layoff, jury duty, military duty or leave of absence), and each hour of back pay.

Equivalency Method. When calculating the actual hours that an employee works is difficult, a plan may base a calculation of Hours of Service on

"equivalencies." Under an Equivalency Method, for each equivalency period for which the plan administrator would credit the employee with at least one Hour of Service, the plan administrator will credit the employee with: (a) 10 Hours of Service for a daily equivalency; (b) 45 Hours of Service for a weekly equivalency; (c) 95 Hours of Service for a semimonthly payroll period equivalency; and (d) 190 Hours of Service for a monthly equivalency. The equivalency will be applied if the participant works at least an hour during the period.

Elapsed Time Method. For employers that do not want to track the hours of service of individual employees, but that nevertheless want to require a minimum period of service prior to participation in the plan, an Elapsed Time Method may be appropriate. Under the Elapsed Time Method, an employee receives credit for service for the aggregate of all time periods (regardless of the employee's actual Hours of Service) commencing with the employee's employment commencement date and ending on the date a Break in Service begins. In applying the Elapsed Time Method, the plan administrator will focus on the number of one-year periods during which the employee is employed. Generally, a Break in Service occurs when an employee is not employed by the employer for at least a continuous period of 12 months.

Treasury regulations provide rules for special situations, such as intervening termination of employment, followed by reemployment.

Recently, we have received an influx of questions regarding the determination of hours of service in the event that actual hours are not tracked. If actual hours are not tracked and the plan applies hours of service requirements (as opposed to elapsed time), the equivalency method may be used. As noted above, the hours requirement may not be randomly chosen, as there are specific rules with respect to the number of hours that may be used to determine service under the Equivalency Method. Any changes between methods of determining service should be carefully reviewed prior to making such changes, as the rules are more complex. In addition, issues may arise during plan mergers when the two plans determine service using different methods. It is important to review your plan documents and administrative practices to be certain that service is being determined properly.

Participant Contributions

The Department of Labor ("DOL") rules require an employer to make participants 401(k) elective deferral contributions to the trust on the earliest date possible that

the employer may segregate the amounts from its general assets; however, in no event should the 401(k) elective deferral contributions be made to the trust later than the 15th business day of the month following the month in which they were withheld. The 15th business day is not a "safe harbor," but rather a maximum deadline for making contributions. On January 14, 2010, the DOL published a final rule that establishes a safe harbor period by which amounts that a small employer has received from participants as 401(k) elective deferral contributions must be deposited in an account of pension plans. Generally, the safe harbor rule provides that small employers (plans with less than 100 participants) would be considered to have satisfied the earliest date possible requirement, if contributions are deposited within 7 business days following the date on which such amount would otherwise be payable to the participant in cash. The safe harbor rule applies to multi-employer and multiple employer plans in the same manner as single employer plans. Unfortunately, there is no "safe harbor" for large employers (plans with 100 or more participants).

The DOL clarified that when an employer fails to deposit participant contributions in accordance with the law, losses and interest on the late contributions must be calculated from the date when such contributions should have been deposited rather than the end of the safe harbor period, if earlier.

Excise Tax Reporting on IRS Form 8928

On September 8, 2009, the Internal Revenue Service issued final regulations regarding new reporting requirements. Starting in 2010, employers (and certain third parties) must self-report and pay excise taxes for certain failures under COBRA, HIPAA portability and other group health mandates, health care reform, and HSA and Archer MSA comparability rules.

Failures such as the failure to provide appropriate or timely COBRA notice or the failure to properly calculate COBRA premiums may trigger the self reporting and excise tax requirements. In addition to COBRA failures, the failure to comply with certain health reform mandates may also trigger the self reporting and excise tax requirements.

Steps should be taken to develop and implement practices and procedures that will prevent such failures and identify failures that may have occurred.

Practice News

Alton C. Ward has been named the "Employee Benefits Lawyer of the Year in Tampa" for 2010 by *Best Lawyers in America*.

Bret Hamlin has been named the Chair of the American Bar Association Tax Section Sub-Committee on Defined Contribution Plans.

Recently, our practice was named #1 in Tampa and #1 in Florida by *Best Lawyers in America*.

Please note that this *Benefits Alert* only highlights the most significant changes in the law. The details of these changes are complex and beyond the scope of this Alert. We look forward to discussing these changes and how they may impact your plans with you. Please do not hesitate to contact any of the following members of our Employee Benefits and Executive Compensation Practice if you have any questions or if you would like additional information.


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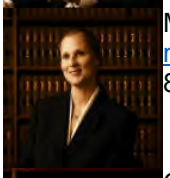
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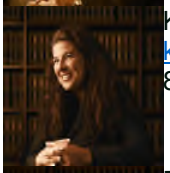
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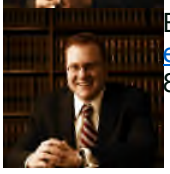
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