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EXECUTIVE BENEFIT PLANS, INC.
Employee Benefit & Pension Specialists

Plan Insight
A Qualified Plan Newsletter for Plan Sponsors

March 2010

In This Issue

DOL Finalizes 7 Business Day Safe Harbor Rule for Small Plans

New Department of Labor regulations on the timely deposit of employee contributions

Effective January 14, 2010 the DoL issued final regulations for retirement plans with fewer than 100 participants. Plan sponsors should review their process to ensure deferral contributions are segregated from the employer's assets timely, but no later than 7 business days following receipt, or following the date the amounts would otherwise have been paid to the employee as compensation.

The old regulation was often misinterpreted by plan sponsors. Initially, regulations were issued by the DoL in 1988 defining when employee contributions become plan assets for purposes of ERISA. In 1996, the regulations were amended for plan sponsors to deposit employee deferrals into plans as of the earliest date on which such contributions can reasonably be segregated from the employer's assets, but not later than the 15th business day of the month following the month in which the participants' contributions are withheld from the employees' compensation (29 CFR 2510.3-102).

While most plan sponsors currently remit employee elective deferral dollars on a 'payroll' basis, those who do not should consider changing their remittance process to qualify for this safe harbor. If this affects your company, please call our office for complete details and guidance.

What is a 401k Plan?

Employer-sponsored retirement plans are generally grouped into two major categories: defined benefit (DB) and defined contribution (DC). In a DB plan, the employer promises to pay a defined amount to retirees who meet certain eligibility criteria. In other words, the plan defines the benefit to be received. In its most typical form, a DB plan pays a lifetime monthly benefit to retirees who fulfill specific age and service requirements. Benefits are usually linked to the amount of service and based on final average salary. Employees can reasonably rely on a known and expected benefit level; although protection against post-separation inflation is usually limited and/or uncertain. The plan sponsor may also provide an alternative lump-sum "cash-out" of the benefit entitlement. Until relatively recent times, the DB was the dominant form of employer-sponsored retirement programs.

In DC plans, the plan defines the contributions that an employer can make, not the benefit that will be received at retirement. The terminating employee receives the proceeds in a current or deferred lump sum or annuity. Since the benefit is not defined, the retirement outcomes are not known in advance.

In 1978, section 401k of the Internal Revenue Code authorized the use of a new type of defined contribution plan that allows for the employee to make pre-tax contributions to the plan.

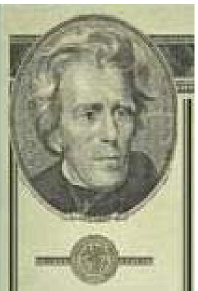
How It Works

Employee 401k contributions are automatically deducted from their paycheck each pay period. This money is taken out before the employee's paycheck is taxed. The contributions are invested at the employee's direction into one or more funds provided in the plan. Employers often "match" employee contributions, but are not required to do so. While the investments grow in the employee's 401k account, they do not pay any taxes on it.

Advantages and Benefits

401k plans offer many benefits including the following:

- Any business, whether a C Corporation, S Corporation, partnership, sole proprietorship, or self-employed can establish Plan.
- The company sets the eligibility requirements, within certain guidelines, at the time the plan is established.



401k Plans Cont'd. . .

- Employer can restrict individuals with less than 1 year of service, union members, non US citizens, part-time workers, etc., from being eligible for the plan.
- Contributions to plan can come from voluntary employee salary reduction, from employer, or both.
- Each individual employee can defer in 2010 up to $16,500 or 100% of compensation, whichever is less.
- Participants age 50 and over can make additional "catch-up" contributions of $5,500 in 2010.
- Employees are immediately 100% vested with their own salary reduction tax deferred contributions.
- Employee withdrawals before age 59 1/2 may be subject to 10% penalty.
- Employees, who retire any time during the calendar year in which they turn 55, or later, are not subject to the 10% penalty.
- Employers can establish a vesting schedule, within certain guidelines, for the contribution the company makes to the 401k.
- Employers are not required nor obligated to make any contribution to the 401k, although employer may have some obligation to contribute if plan is deemed top heavy.
- Turnkey and Internet based plans are available.
- Excellent range of investment options available for the plan sponsor to offer within the plan.
- The investment choices in most plans range from 8 to 20 options. The average plan has about 15.
- 401k plans may permit "self-directed investment accounts" and company stock purchase within the plan.
- Employee contributions to the plan are not subject to federal income taxes until a distribution from the plan is made. Any investment gains and earnings also enjoy tax deferral until distribution.
- This type of plan can permit loans and hardship withdrawals.
- Participants can start, stop contribution during course of year, as determined by the company.
- The employer can receive certain tax benefits for contributions.
- Plans are subject to top heavy and discrimination testing.
- Typically the amount the owners and highly compensated individuals can contribute to a 401k is a function of the contributions of the other employees.
- 401k plans can be subject to IRS 5500 filings.
- Generally, the vendor selected by the plan sponsor does all accounting, participant reporting, testing, and files 5500 reports with the IRS.

401k plans have proven to be popular with employees for several reasons. The tax deferral is obviously high on this list of reasons. Others include the increased portability of this plan, employer matching contributions, and the increased control associated with self-direction of investments. Every other type of pension or retirement plan requires the employer to make the contributions – to 'drive' the plan, while 401k plans are 'employee driven.'

DOL Audits of 401k Deposits

Editor's Note: *Please review the "safe harbor" exemption for small business located in the first article of this newsletter.*

Subject to the exception for certain types of assets under ERISA 403(b), The Employee Retirement Income Security Act of 1974 ("ERISA") requires that plan assets be held in trust. Once assets constitute plan assets, the failure to timely transmit them to trust will violate ERISA's trust requirement and thus, constitute a breach of fiduciary duty. In addition, the failure will be deemed to constitute a prohibited transaction.

Department of Labor ("DOL") regulations govern when participant before-tax contributions to an Internal Revenue Code (the "Code") section 401k plan constitute plan assets. Under regulations issued in 1988, such amounts were deemed to become plan assets as of the earliest date on which such contributions could reasonably be segregated from the

Deposit Audits Cont'd. . .

employer's general assets (the "general rule"), but in no event later than 90 days from the date on which such amounts are received by the employer or would otherwise have been payable to the participant, in the case of amounts withheld from the employee's wages (the "maximum period").

Concerned that plan sponsors were violating the regulation, in 1995 DOL began a project to investigate the misuse of employee contributions in general, and before-tax contributions to 401k plans in particular. As a result of its investigation, DOL concluded that the regulations needed to be revised.

In revising its regulations in 1996, DOL noted that many employers were then misinterpreting the rule as permitting all employers to delay the transmission of 401k before-tax contributions until 90 days after they were withheld. That is, many employers misinterpreted the maximum period as constituting a safe harbor. Notwithstanding this observation, when DOL revised its regulations, it decided not to make any changes in that portion of the regulation that was obviously most misunderstood, that is, the general rule. Rather, the only change was to shorten the fixed period to 15 days under the maximum period portion of the regulations.

Now, with the new revised ‘ 7 day’ safe harbor regulations in hand, several regional offices of DOL have begun actively investigating 401k plans and plan sponsors for compliance with these requirements as part of DOL's National Enforcement Project.

Pension Plan Limits For The Tax Year 2010

The Internal Revenue Service announced on October 15, 2009, the cost-of-living adjustments applicable to dollar limitations for pension plans and other items for Tax Year 2010.

Section 415 of the Internal Revenue Code provides for dollar limitations on benefits and contributions under qualified retirement plans. Section 415(d) requires that the Commissioner annually adjust these limits for cost-of-living increases. Other limitations applicable to deferred compensation plans are also affected by

Plan Limits Cont'd. . .

these adjustments under Section 415. Under Section 415(d), the adjustments are to be made pursuant to adjustment procedures which are similar to those used to adjust benefit amounts under Section 215(i)(2)(A) of the Social Security Act.

The limitations that are adjusted by reference to Section 415(d) will remain unchanged for 2010. This is because the cost-of-living index for the quarter ended September 30, 2009, is less than the cost-of-living index for the quarter ended September 30, 2008, and, following the procedures under the Social Security Act for adjusting benefit amounts, any decline in the applicable index cannot result in a reduced limitation. For example, the limitation under Section 402(g)(1) on the exclusion for elective deferrals described in Section 402(g)(3) will be $16,500 for 2010, which is the same amount as for 2009. This limitation affects elective deferrals to Section 401(k) plans and to the Federal Government's Thrift Savings Plan, among other plans.

401k Plan Limits for Plan Year	2010
401k Elective Deferrals	$16,500
Annual Defined Contribution Limit	$49,000
Annual Compensation Limit	$245,000
Catch-Up Contribution Limit	$5,500
Highly Compensated Employees	$110,000

NON 401K RELATED LIMITS	
403(b)/457 Elective Deferrals	$16,500
SIMPLE Employee Deferrals	$11,500
SIMPLE Catch-Up Deferral	$2,500
SEP Minimum Compensation	$550
SEP Annual Compensation Limit	$245,000
Social Security Wage Base	$106,800

Please contact us if you have any questions regarding 2010 plan limits and how they might affect your plan.

Blackout Period Notice Requirements

Most defined contribution plans allow participants to direct the investment of their accounts in the plan. Sometimes, a plan sponsor must temporarily suspend the ability of participants to change investment selections under the plan, or to take loans or distributions. These

Blackout Notice Cont'd. . .

periods, known as "blackout periods," can occur for a number of reasons, but the most common are when changes occur in the plan's third party administrator, investment fund provider or other service providers. Do you know the legal requirements regarding "blackout periods?"

DoL guidance addresses the required contents of the notice and timing, includes a model participant notice and is effective for all blackout periods beginning on or after January 26, 2003.

The guidance indicates that:

- The notice must describe participants' and beneficiaries' rights otherwise available under the plan during the blackout period and its projected duration, including the expected start and end dates.
- If notice of the blackout period is not issued at least 30 days before it begins, the notice must explain the delay. The notice may not be issued more than 60 days before the blackout, although supplemental communication may be provided to participants before then.
- The notice must provide the name, address and phone number of the plan administrator or other person responsible for answering participants' questions about the blackout.
- There are two circumstances under which the 30-day advance notice requirement does not apply: when deferring the blackout period for 30 days after giving the notice would violate ERISA's fiduciary standards (e.g., if the plan fiduciary immediately suspends investment in employer stock because the employer has filed for bankruptcy), and when the events prompting the blackout were unforeseeable or beyond the plan administrator's control.

Blackout Notice Cont'd. . .

Using the model amendment is not mandatory, but many employers will want to use it, especially the provision that satisfies the requirement to advise participants of the importance of reviewing their investments before the blackout, and a general statement that federal law requires furnishing the notice in advance of the blackout.

Executive Benefit Plans, Inc.

Compensation, of course, can take many forms. In addition to regular wages, employers often offer their employees compensation packages that may include a mixture of such benefits as health insurance, paid time off, tuition reimbursement and qualified plans that help to save for retirement.

In order to remain competitive, as well as attract and retain talented employees, employers are faced with the daunting task of creating a winning compensation strategy that will not only accomplish company objectives, but will also be balanced with business financial constraints.

It's a fact that employee compensation is much more than just a salary. It can encompass all the "perks," such as vacation and sick time, company vehicles, corporate memberships, and a variety of benefit options designed to provide employees and their families with, at a minimum, health insurance and retirement income.

While employers are often legally obligated to provide certain state and federally sponsored benefits, the majority of employers recognize that alone is not enough.

When it comes to qualified retirement plans, there are many types, but it is the plan design that will ensure both you and the beneficiaries of the program are completely satisfied. Designing a plan that makes sense for your company is what we do best!

Please contact us if we can assist you.

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