

Plan Administration Attorneys Give Tips on Year-End Compliance For Pension and Section 401(k) Plans

By Andrea L. Ben-Yosef

Pension plan sponsors need to worry about cutback provisions for this year regarding tax code Section 415 benefit limitations, a speaker said Nov. 15 at an audioconference sponsored by BNA Tax & Accounting on year-end issues for pension, tax code Section 401(k), and other defined contribution plans.

Speakers discussed plan amendments that have to be made before the end of the year, and other amendments that should be on plan sponsors' radar, but do not have to be done before 2008.

Key Issues

Elizabeth T. Dold, of Groom Law Group, Washington, D.C., went over key compliance issues, including permissible normal retirement age, Section 415 benefit limitation regulations, and new anti-cutback requirements.

Dold emphasized that normal retirement age must be typical for the industry in question, and cannot be based solely on years of service.

Regarding Section 415 benefit limitations, Dold said in an accompanying handout that comprehensive revision of Section 415 maximum benefit limitations will apply to calendar year limitation year plans effective Jan. 1, 2008. Therefore, most changes have to be made next year, but sponsors need to worry about cutback provisions for this year, she said. Plans should focus on the definition of compensation under Section 415, and whether an amendment is required regarding cutbacks on this issue, she said.

In addition, there are new anti-cutback regulations (152 PBD, 8/9/06; 32 BPR 1921, 8/15/06) regarding vesting that are based on the U.S. Supreme Court's ruling in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 32 EBC 2313 (2004), Dold said. If a plan's vesting provisions were amended in 2007, plan sponsors should think about adding anti-cutback language, she said. But sponsors have until the end of the tax year to amend this, she added.

Dold went on to discuss several items under the PPA that affect defined contributions plans and that may require a plan amendment at the end of the 2009 plan year, when the rules become effective. However, Dold suggested that plan sponsors wait for guidance on several of the items and make one big amendment. The items included:

- joint survivor distribution rules; rollover to nonspouse beneficiaries of an inherited individual retirement account;
- direct rollovers of Roth IRAs;
- automatic enrollment (applies to years after 12/31/07);

- Section 401k distributions to active military;
- diversification of employer stock; and
- faster vesting on all contributions in Section 401k plans.

David Levine of Groom Law Group said that for cash balance plans, the PPA gave some age discrimination protections, but there are lots of design questions. For example, plan sponsors are "very worried" about how to handle their interest credit rates, Levine said. As of 2008, cash balance plan accounts could have changed depending on the new PPA rates, and participants may claim cutbacks, Levine said. Sponsors need to focus on this issue, he cautioned. In addition, new PPA vesting rules go into effect next year, Levine said. Since many defined benefit plans are outsourced, sponsors need to be sure the outsourcer knows the new vesting rules under the PPA, Levine said.

New QDIA Rules

Jennifer E. Eller of Groom Law Group discussed the new regulations regarding qualified default investment alternatives. She said the Labor Department said it will try to issue Q&A guidance before Dec. 24, 2007, on QDIA issues.

Under these regulations, at 29 C.F.R. §2550.404c-5 (205 PBD, 10/24/07; 34 BPR 2558, 10/30/07), a plan sponsor has fiduciary relief from losses in QDIAs if a plan participant has notice and opportunity to invest his or her investments, but does not do so. The regulations become effective Dec. 24, 2007. Sponsors must notify participants at least 30 days before plan eligibility, so sponsors are asking whether they have to get notice out by Nov. 24, 2007, which is 30 days before the rule goes into effect, Eller said. In reality, "the consequences are not terribly severe," Eller said. If sponsors get out notices by Nov. 24, then they get relief as of the earliest possible date. But otherwise, they still get relief 30 days from whenever they issue the notice, she said.

Eller also said the Labor Department did not intend to distinguish between plan sponsors and in-house investment committees as getting fiduciary relief under the new regulations, but that the language of the regulations seem to only allow relief for plan sponsors. Hopefully there will be more guidance on this, she said.