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## IRS Issues Proposed Regulations on Permissible Normal Retirement Ages for Governmental Plans

The IRS has issued proposed regulations on the definition of “normal retirement age” for qualified governmental retirement plans. The new regulations, found at 81 FR 4599 (Jan. 27, 2016), in large part adopt many of the approaches that commenters for the public plan community have called for, most notably allowing normal retirement age to be based on years of service at any age, and so the regulations seem likely to be looked on by many public plans favorably.

Normal retirement age is a concept that, for public plans, is important for a number of purposes, including that in-service distributions are not permitted before normal retirement age, that vesting (under the pre-ERISA vesting rules that apply to public plans) is required on normal retirement age, and for the exclusion of health insurance premiums for eligible public safety officers of up to \$3000 a year under Section 402(l) that applies only after disability or normal retirement age. The IRS had issued proposed regulations in 2007 addressing normal retirement age in public plans, but these were delayed under various guidance, most recently Notice 2012-29, while comments were requested and the area studied.

That study has led to the new proposed regulations. Generally, the proposed regulations would provide as follows:

1. **In General.** A plan is not required to expressly define the normal retirement age. In the absence of such a statement, the plan must, however, specify the earliest age at which a participant has the right to retire without the consent of the employer and to receive benefits based upon the amount of the participant’s service on the date of retirement at the full rate set forth in the plan, without actuarial or similar reduction because of retirement before some later specified age. This will be considered the normal retirement age. (This is essentially the definition of normal retirement age that was long set out in the 457 regulations.)
2. **Reasonably Representative Requirement.** Plans are still required to have normal retirement ages that are not earlier than the earliest age that is reasonably representative of the typical retirement age of the industry in which the covered workforce is employed. However, there are several safe harbors:
  - a. **General Safe Harbor.** A governmental plan meets this safe harbor if the normal retirement age is age 62 or the later of age 62 or another specified date, such as 5 years of service.

- b. Other Safe Harbors - General Employees. Other safe harbors include:
  - i. Age 60 and 5 years of service.
  - ii. Age 55 and 10 years of service.
  - iii. A combination of the participant's age and years of service that equals 80 or more.
  - iv. Any age with 25 years of service. This must be combined with some other safe harbor with an age component, such as 25 years of service or age 60 and 5 years of service;. (Otherwise, the Service points out, a person hired at age 63 might not meet normal retirement age until age 88.)
  
- c. Safe Harbors for Qualified Public Safety Employees. For this purpose, a "Qualified Public Safety Employee" is as defined under Code section 72(t)(10), which is generally "any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision". Only such employees receive these safe harbors.
  - i. Age 50.
  - ii. A combination of the participant's age and service that equals 70 or more.
  - iii. Any age with 20 years of service.

A normal retirement age that is not within a safe harbor might still be permissible, but the plan sponsor would still have to make a good faith determination that the "reasonably representative" requirement is met. The proposed regulation would also permit different normal retirement ages for different classifications of employees.

The comment period for the regulations will be the 90 days following the date of publication in the Federal Register, which is April 26, 2016. A hearing may only be scheduled if timely requested with comments. The proposed regulations state that they will become effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017 or (2) the close of the first regular legislative session of the legislature with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the Federal Register. Thus, the effective date would recognize the issue that plans in some states have with applying any future reductions to the benefit formulas of existing hires.

As noted above, these safe harbors seem pretty reasonable, but governmental plans should review their terms for compliance with the new rules. If you have any questions, please contact one of the Groom lawyers listed.