For Your Benefit

A newsletter on current legal issues impacting employee benefits and executive compensation

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Missed a 60-Day Rollover? Try Self-Certification

By Susan Foreman Jordan

An individual who receives a distribution from a qualified 401(k), profit-sharing or pension plan or an Individual Retirement Account (IRA), can defer recognition of taxable income by transferring the distribution to another IRA or qualified plan within 60 days of receiving that distribution. Unfortunately, there are many situations in which timely deposit of the funds does not occur due to inadvertent errors or unexpected circumstances. If the participant fails to effectuate the rollover within the 60-day period, that individual not only is taxed on the full amount of the distribution, but he or she also may be subject to a 10 percent premature distribution penalty.

The Internal Revenue Code permits the IRS to waive the 60-day rule "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster or other events beyond the reasonable control of the individual subject to such requirement." In most cases, however, obtaining a waiver of the 60-day rollover requirement entails applying for a private letter ruling, which can be a costly endeavor, as it involves payment of an IRS user fee, currently set at $10,000.

In Revenue Procedure 2016-47, released on August 24, 2016, the IRS explains how a taxpayer now may *self-certify* the justification for a waiver of the 60-day requirement and then complete and report the rollover as if a waiver had been granted. A plan administrator or IRA custodian may rely on the self-certification to permit what otherwise would be a late rollover, but is not required to do so.

There are three conditions imposed for use of the self-certification procedure: (1) the IRS must not have previously denied a waiver request for rollover of all or part of the distribution; (2) the failure to satisfy the 60-day rule must have resulted from one or more of 11 specific circumstances; and (3) the rollover must be completed as soon as practicable after the applicable circumstances no longer prevent the taxpayer from making the deposit. Completing the rollover within 30 days thereafter is deemed to satisfy this requirement.

The enumerated circumstances justifying an automatic waiver eligible for self-certification are:

- An error was committed by the financial institution making the distribution or receiving the contribution;
- The distribution was in the form of a check, which was misplaced and never cashed;
- The distribution was deposited into, and remained in, an account that the taxpayer mistakenly thought was an eligible retirement plan;
- The taxpayer's principal residence was severely damaged;
- A member of the taxpayer's family died;
- The taxpayer or a member of the taxpayer's family was seriously ill;
- The taxpayer was incarcerated;
- Restrictions were imposed by a foreign country;
- A postal error occurred;
- The distribution was made on an account of an IRS levy and the proceeds of the levy have been returned to the taxpayer; or
- The party making the distribution to which the rollover relates delayed providing information that the receiving plan or IRA required to complete the rollover despite the taxpayer's reasonable efforts to obtain the information.

The plan administrator or IRA custodian may rely on this self-certification unless it has actual knowledge that is contrary to the self-certification. However, the plan administrator or IRA custodian may not rely on the self-certification for

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other purposes (such as waiving the one-rollover-per-year rule). Additionally, an IRA custodian that accepts a rollover contribution after the 60-day deadline must report that fact on Form 5498.

This new revenue procedure certainly provides welcome relief to many taxpayers, but it is no panacea. Plan administrators and IRA custodians are not required to accept the self-certification and we fully expect that many of the larger institutions will continue to insist upon a private letter ruling. In addition, the IRS itself has cautioned that self-certification is not the equivalent of a waiver of the 60-day requirement. If the IRS, in the course of an audit or other examination, determines that the requirements for a waiver were not satisfied, the rollover contribution will be invalidated and the taxpayer will become subject to taxation and penalties.

Each taxpayer in this situation must weigh the circumstances to determine whether to utilize the self-certification procedure or seek a private letter ruling. Among the factors that will be considered are the dollar amounts involved, the circumstances surrounding the failure to have completed the rollover within the 60-day period, the willingness of the plan administrator/IRA custodian to accept self-certification and the individual taxpayer's risk tolerance.

Author

Susan Foreman Jordan
412.394.5543
sjordan@foxrothschild.com

Section 457(f) Proposed Regulations Provide New Deferred Compensation Rules for Tax-Exempt Employers

By Brian G. Belisle

On June 22, 2016, the IRS issued proposed regulations under section 457(f) of the Internal Revenue Code, which applies to deferred compensation arrangements maintained by tax-exempt organizations for its key employees.

As previously announced by the IRS, the 457(f) proposed regulations largely follow the nonqualified deferred compensation rules under section 409A of the code. There are, however, some unexpected differences from the section 409A regulations. Tax-exempt employers must keep in mind that the section 457(f) rules are in addition to – and not in place of – the section 409A rules.

Effective Date

The 457 proposed regulations will not become effective until after they are issued in final form; however, taxpayers may rely on the proposed regulations prior to the issuance of final regulations.

Summary of Primary Changes in the Proposed 457(f) Regulations

Bona Fide Severance Pay Plan

The proposed 457 rules define a bona fide severance pay plan, which is not is not treated as deferred compensation under section 457:

- The severance must only be payable upon a participant's involuntary termination or under a voluntary early retirement incentive plan or window program;
- The amount of severance payable under the plan may not exceed two times the participant's annualized pay; and
- The severance must be paid in full within two years after the year the participant terminates.

As with the rules under section 409A, an involuntary termination includes certain terminations by an executive for "good reason" pursuant to written, pre-specified circumstances relating to material adverse employment actions taken by the employer.

Bona Fide Sick Leave and Vacation Leave Plans

The proposed 457 rules provide a list of factors that are to be considered in determining whether a vacation or sick leave plan is exempt from the definition of deferred compensation under section 457(f). The rules include limits on the ability to cash out any unused sick or vacation days.

Recurring Part-Year Compensation

The IRS previously addressed the situation, common with teachers, where services are provided over a period of less than 12 months, but pay is received over a longer period. The IRS has concluded that this is not deferred compensation. The proposed 457 rules modify the requirements for a recurring part-year compensation arrangement to be exempt from the deferred compensation rules.

Short-Term Deferral

The proposed 457 regulations adopt the short-term deferral exception that is included in the section 409A regulations; however, in applying the rule, a substantial risk of forfeiture is defined under section 457.

Substantial Risk of Forfeiture

Although the IRS had previously announced its intention to follow the section 409A rules in defining a substantial risk of forfeiture, the proposed regulations depart from those rules in a number of ways, including the following:

- *Initial Deferral of Current Compensation*: The proposed 457(f) regulations permit the initial deferral of current compensation as being subject to a substantial risk of forfeiture if the present value of the amount to be paid upon the lapse of the risk of forfeiture is more than 125 percent of the amount deferred. In addition, the risk of forfeiture must be limited to the future performance of substantial services of at least two years or an agreement not to compete, and the deferral must be made in writing prior to the calendar year the services are performed.

- *Rolling Risk of Forfeiture:* The proposed 457(f) rules permit the extension of a risk of forfeiture if, at least 90 days prior to the lapse of the forfeiture, the compensation is made subject to the future performance of substantial services of at least two years or an agreement not to compete and the present value of the amount to be paid upon the lapse of the risk of forfeiture is more than 125 percent of the amount of compensation that is being put at risk.
- *Noncompete Condition:* A noncompete condition may constitute a substantial risk of forfeiture under the proposed 457(f) regulations, provided several requirements are satisfied. The agreement must be in writing and enforceable under applicable law, the employer must make reasonable efforts to monitor compliance with the noncompete agreement and, at the time the agreement becomes binding, the facts and circumstances must show that the employer has a substantial and bona fide interest in preventing the employee from competing and the employee must have a bona fide interest in performing the prohibited services.

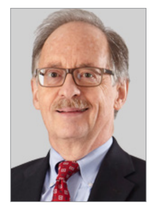
Beware of the Application of Section 409A

Tax-exempt employers need to be aware that compliance with the requirements of section 457(f) and the proposed regulations does not assure compliance with the requirements of section 409A and related regulations. As a practical matter, tax-exempt employers should design their 457(f) deferred compensation programs to minimize any discrepancies between the section 457(f) and section 409A requirements.

Next Steps

Tax-exempt employers should review their severance pay arrangements, sick leave plans and vacation plans to ensure that they comply with the proposed rules. In addition, any nonqualified deferred compensation arrangements with noncompete or rolling risk of forfeiture provisions should be reviewed to determine if they will continue to satisfy the rules in the proposed section 457(f) regulations.

Author



Brian G. Belisle
612.607.7271
bbelisle@foxrothschild.com

Leave Me Out of It!

By T.J. Lang

Can employers avoid state and local paid sick leave laws with an Employee Retirement Income Security Act (ERISA) plan?

In recent years there has been an increased focus on employer-provided, paid sick leave benefits. Certain politicians in this current election cycle have pointed out on numerous occasions that the United States is one of the few developed countries that lacks a national leave law requiring employers to provide paid sick leave to their employees. While President Obama has taken executive action to encourage paid sick leave benefits and has called on Congress to pass federal legislation, it is unclear whether Congress will pass federal sick leave legislation in the near future.

In the absence of federal action, five states, 27 cities and one county have passed local sick leave laws. The types of employees covered, waiting periods, maximum leave permitted and rate at which leave accrues differs greatly among the various laws. This patchwork of state and local leave laws creates challenges for employers whose employee populations span across these jurisdictions. With the potential for additional state and local paid sick leave laws, the challenge of complying with the multitude of laws is only going to get harder.

Employers interested in simplifying their obligation to provide sick leave benefits may wonder whether they can use an ERISA plan to preempt the state and local sick leave laws. While the idea of using ERISA to preempt state and local laws sounds promising, as discussed below, relying on ERISA for preemption will not guarantee that result.

Does ERISA preempt sick leave laws?

ERISA preempts any and all state laws that "relate to" any employee benefit plan, unless the plan is specifically exempted from ERISA. An "employee benefit plan" includes both welfare benefit plans and pension benefit plans. An employee welfare benefit plan includes any plan, fund or program established or maintained by an employer (or an employee organization or both) to provide benefits such as medical, dental, disability, vacation and sickness benefits. Thus, at a distance, the strategy of relying on ERISA preemption appears straightforward: plans sponsored by an employer to provide sickness benefits fall within ERISA and ERISA preempts state laws that relate to such plans. However, the analysis does not end here.

Is the sick leave program an ERISA plan or non-ERISA covered payroll practice?

A benefits program (including a sick leave plan) that pays an employee's normal compensation, or less, out of the employer's general assets while the employee is physically or mentally unable to perform his/her duties or is otherwise absent for medical reasons is not an employee welfare benefit plan for purposes of ERISA. Such a program is instead a "payroll practice," which is not subject to ERISA and cannot claim preemption of state or local laws.

What if the sick leave payments are paid from a separate trust fund?

Some courts have determined that a sick leave plan funded by a separate trust will not be an ERISA plan (and cannot take advantage of ERISA preemption) where the trust is not ultimately liable for the payment of the benefits.

In *Alaska Airlines v. Oregon Bureau of Labor*, a 1997 case out of the Ninth Circuit, an airline established a trust, separate from its general assets, in which it held the funds related to its sick leave benefits. When an employee took paid sick leave, the airline would pay the employee directly through its payroll and would obtain reimbursement from the trust. The Ninth Circuit ruled that Alaska Airlines' sick leave plan was not an ERISA plan (and did not qualify for ERISA preemption) because, under the arrangement between the company and the trust, the company was ultimately responsible to pay the sick leave benefits to the employees. While the trust held funds for the payment of the sick leave benefits, the court determined the trust itself was merely a pass through funding vehicle and had no obligation to pay the benefits to the employees.

Similarly, in *Airline Pilots Association International v. United Airlines*, a more recent case from 2014, United Airlines funded its sick leave benefits through a separate trust. However, United retained a reversionary interest in the trust's funds such that it was accessible by United's creditors. The court held that because the risk of employees receiving their sick leave benefits was tied to the financial health of United, and not the trust, the trust was not established in a manner consistent with ERISA and preemption of California's Kin Care Law was not available.

What if the sick leave benefits are funded by a separate, actuarially determined trust, which is liable for the payment of benefits?

Even if an employer implements a sick leave plan that is funded through a separate, actuarially determined trust, ERISA preemption may still not be available.

In *Shaw v. Delta Airlines*, a 1983 case, Delta adopted a disability benefits plan that provided benefits to its employees different from those required under a New York state disability benefits law. Delta asserted that New York's disability benefits law was preempted by ERISA and therefore Delta was not required to comply with it. The Supreme Court ruled that Congress did not intend to shield employers from all state-mandated benefits laws through the adoption of an ERISA plan. On the contrary, the court noted that states are free to give employers flexibility in providing state-mandated benefits as part of a multibenefit ERISA plan. Permitting employers to have that flexibility, however, does not mean that the state law is then made unenforceable by ERISA.

Similarly, in *Golden Gate Restaurant Association v. City and County of San Francisco*, in 2008 the Ninth Circuit ruled that a local ordinance establishing minimum health care spending requirements was not preempted by ERISA because it did not require employers to establish or modify an ERISA plan. The court found that employers had a meaningful alternative to establishing or modifying an ERISA plan; employers could make the required payments directly to the city and county.

Conclusion

Despite the challenges that employers face in complying with the patchwork of state and local sick leave plans, adoption of an ERISA plan to provide sick leave benefits does not provide a guaranteed method of preemption of state and local sick leave laws. Therefore, unless Congress takes action to pass federal sick leave legislation that specifically preempts state and local requirements, employers should ensure the sick leave benefits they are providing conform to the laws in which their employees are located.

Author

Terry A. Lang, Jr.
612.607.7205
tlang@foxrothschild.com

Tricks and Traps Involving Minimum Distributions

By Harvey M. Katz

Both pensions and IRAs are subject to required minimum distribution (RMD) rules. These rules are complex and constantly changing, and the complexity presents certain planning opportunities but also some traps for the unwary. Set forth below is a general primer on the RMD rules, as we regularly see issues (i.e., failures) relating to RMDs, which can have unexpected – and adverse – tax consequences.

General Rule

In most cases, individuals must commence required minimum distributions each year – commencing in the year in which they attain age 70½. In the first year in which the individual attains age 70½, the initial distribution may be delayed until April 1 of the year following attainment of age 70½ (the "required beginning date" or "RBD"). This rule applies to all traditional IRA owners and participants in company sponsored retirement plans who own more than 5 percent of the equity of the employer. Roth IRA owners are not required to take distributions during their lifetimes.

Calculating RMDs

Generally, an individual's RMD is determined by dividing the adjusted market value of their IRA or employer sponsored retirement account as of December 31 of the prior year by an applicable life expectancy factor taken from the Uniform Lifetime Table. There are special rules for participants in traditional retirement plans and those whose spouses are more than 10 years younger.

Additional Deferrals for Less than 5 Percent Owners

This rule, permitting a delay in the RBD, applies to RMDs from a qualified plan sponsored by an employer for whom an individual continues to perform services for as an employee. It is frequently advantageous to professionals such as lawyers, accountants, architects and others who are likely to reduce or eliminate their ownership interest in their employer as they approach retirement. It can be advantageous to reduce ownership in the employer prior to commencement of the distribution. As long as ownership is reduced to less than 5 percent prior to the date on which distributions are to commence, and the individual remains employed by the employer, distributions can be delayed until the individual terminates employment.

Treasury regulations impose no requirements on the number of hours that must be worked by the employee and the amount that must be paid. Nevertheless, the employment should be a bona fide employment relationship requiring that the employee render legitimate services in exchange for the compensation paid as W-2 income. Individuals who utilize this strategy must take care to properly determine their ownership share, as in situations where the employer is organized as a partnership or an LLC, ownership is determined by the greater of capital or profits interest and it is common for individuals to relinquish capital but still retain a profits interest in the partnership.

An enhancement on this technique involves rollover of IRA and other qualified plan accounts to the plan allowing the participant to delay RMDs, although engaging in such planning should only be done with the advice of professionals experienced in these matters.

Alternate Distribution Tables

While this is not the forum for marital advice, those with spouses who are more than 10 years younger may use a joint life expectancy table to calculate the amount of each distribution rather than using the Uniform Lifetime Table. This will allow the IRA owner or participant to "stretch" distributions over a longer period of time, thereby conserving the largest possible account balance. However, the individual's spouse must be the *sole* beneficiary of the account. In general, those designating multiple beneficiaries may not avail themselves of this alternative. One strategy, however, is to divide the IRA in multiple accounts, leaving one IRA with the individual's spouse as sole beneficiary. When creating multiple accounts, care must be exercised to avoid violating the one rollover per year rule imposed upon IRA accounts. While a full discussion of the rollover restrictions is beyond the scope of this article, it is a trap for the unwary and anyone engaged in a rollover transaction involving an IRA should be mindful of this requirement and, again, this strategy should only be pursued with the proper guidance from experienced professionals.

Distributions From Defined Benefit Plans

Traditional defined benefit plans and cash balance plans follow a different set of rules. Under the rules applicable to such plans, payments must commence *as if the individual retired and benefits commenced*. The first payment must begin before the employee's required beginning date. However, the individual may select any form and payment frequency of benefits that is permitted under the plan; once payments have commenced, in general, they must continue until the death of the participant.

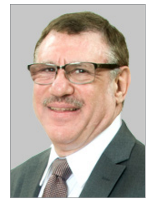
One technique to stretch payment is to select an alternate form of benefits such as a "joint and survivor annuity," which spreads payments over the life expectancy of the participant and his or her spouse. This technique reduces the amount of each monthly payment and keeps the participant's current taxable income to minimum.

Another technique, for plans permitting lump sum payments, is for the participant to select a lump sum payment of the commuted value of his or her pension. Most of this lump sum payment can be rolled over to a defined contribution plan sponsored by an employer in which the participant does not have a 5 percent ownership position. As a rollover account, the remaining amount is treated like a defined contribution plan and can be deferred until the participant ceases employment with the new employer. Once distributions commence, they are treated like any other defined contribution plan and distributions may be made under the defined contribution rules using the appropriate life expectancy table.

Conclusion

This article only scratches the surface regarding the RMD rules and related planning techniques. The distribution rules are highly complex and anyone with significant retirement plan or IRA assets should be thoroughly familiar with them or seek guidance before commencing any distributions.

Author



Harvey M. Katz
212.878.7976
hkatz@foxrothschild.com

IRS Determination Letter Program – It's a New Ballgame

By Susan Foreman Jordan

Last summer, the IRS announced that it intended to eliminate its determination letter program, citing budgetary constraints and unmanageable caseloads. Industry groups, plan sponsors and others protested and urged the agency to reconsider, but to no avail. On June 29, 2016, the IRS issued Revenue Procedure 2016-37, which substantially curtails the determination letter program for qualified retirement plans, most significantly with respect to individually designed plans.

Elimination of the Five-Year Remedial Amendment Cycle

To this point, individually designed plans have been subject to a five-year restatement cycle, with the specific cycle (A through E) generally determined by the last digit of the plan sponsor's employer identification number. Every five years, then, a plan sponsor would restate its plan to incorporate all prior amendments and conform to current law, in accordance with the applicable Cumulative List of Changes in Plan Qualification issued annually by the IRS. Application would be made to the IRS for a new determination letter and the plan sponsor was permitted to rely upon that determination letter until its expiration date, corresponding with the next remedial amendment cycle.

Effective January 1, 2017, this staggered five-year remedial amendment cycle for individually designed plans will be eliminated. (The current remedial amendment Cycle A, which began on February 1, 2016, and will end on January 31, 2017, will be the last such cycle). Instead, sponsors of individually designed plans will be permitted to submit determination letter applications only on initial adoption and on plan termination. Each year, the IRS will decide whether determination letter applications will be accepted under any other circumstances. Among the factors that may be taken into consideration in making that determination are significant changes in the law, new approaches to plan design, IRS caseloads and resources available to process applications.

Interim Amendments and Compliance

In the past, "interim" amendments were required from time to time between five-year restatement cycles to conform to changes in the law. While interim amendments, per se, no longer exist, the requirement for maintaining ongoing compliance by way of amendment has not been eliminated. To assist plan sponsors and those responsible for document compliance, the IRS now intends to issue two new pieces of guidance annually, beginning in 2017: (1) a Required Amendment List; and (2) an Operational Compliance List.

The **Required Amendment List** will be published during the fourth quarter of each year and will detail new requirements (which may necessitate plan amendment, depending upon the features included in a particular plan), as well as the effective dates of those requirements. Plan sponsors then will have until the end of the second calendar year following the calendar year in which the required modification first appears on the Required Amendment List to adopt any needed amendment. For example, if a change appears on the 2017 Remedial Amendment List, a plan sponsor will have until the end of 2019 within which to adopt any required amendment. In the interim, the plan must be operated in compliance with the amendment as of the specified effective date and the subsequent amendment must bring the plan document into conformity with plan operation. The IRS has stated that changes in the law generally will not appear on the Required Amendment List until any anticipated guidance relating to the change has been issued. This, at least, should minimize the number of amendments needed to conform to each change in the law.

The IRS also intends to issue an **Operational Compliance List** each year to identify changes in qualification requirements that are effective during that calendar year. This list is intended to assist plan sponsors with operational compliance during the period of time between the effective date of a change in the law and the date by which a conforming amendment must be adopted. The IRS has cautioned, however, that the Operational Compliance List may not be relied upon as being an exhaustive list of changes; plan sponsors are required to comply with all relevant qualification requirements, even if those items are not included on the list.

Reliance on Determination Letters

Revenue Procedure 2016-6 confirms, that, effective January 4, 2016, determination letters issued to individually designed plans no longer will specify expiration dates. Further, any expiration date included in a determination letter issued prior to January 4, 2016, no longer is operative. Once a determination letter has been issued (presumably, upon initial adoption) the plan sponsor is entitled to continued reliance on that letter, subject to required modifications on the Required Amendment List and subject to any discretionary amendments the plan sponsor voluntarily chooses to make.

Effect of Revenue Procedure 2016-37 on Preapproved Plans

The effects of the revenue procedure on preapproved (prototype and volume submitter) plans are much more limited. These plans remain on a six-year remedial amendment cycle and arguably remain subject to the interim amendment requirements. However, even if no interim amendment is needed, preapproved plans must be operated in compliance with changes noted on the Operational Compliance List, with the understanding that a retroactively effective plan modification will be incorporated in the next plan restatement.

Other Consequences and Considerations

Determination letters have played an important role over the years. They have provided assurance that plan documents satisfy regulatory and governmental standards and they have served to document qualified status for plan auditors, for individual participant rollovers and in corporate mergers and acquisitions. The curtailment of the determination letter program leaves a major void in these areas.

Given all of the new requirements and additional complexities, some might ask why an individually designed plan document should be maintained. Certainly, the IRS would prefer that more plan sponsors migrate toward the adoption of preapproved prototype and volume submitter plans. Yet, many plans, of necessity, include provisions that simply do not fit onto the preapproved documents. Some plans, for example, cover multiple divisions or subsidiaries with significantly different benefit features; others are obligated to maintain carryover features from plans of acquired entities; and many plans simply wish to preserve unique provisions that have been included historically. When this type of flexibility is needed and/or desired, a preapproved plan simply may be too restrictive. Nevertheless, the cost effectiveness and relative simplicity of preapproved plans offer great appeal, which must be weighed against the flexibility afforded by an individually designed approach to determine whether the costs and demands now involved in maintaining an individually designed plan are warranted.

Author

Susan Foreman Jordan
412.394.5543
sjordan@foxrothschild.com

PBGC Issues Proposed Regulation on Facilitated Mergers

By Michael McGovern

The Pension Benefit Guaranty Corporation (PBGC) recently issued a proposed rule clarifying the agency's authority to facilitate mergers of multiemployer pension plans. The proposed rule implements some of the statutory changes made by Section 121 of the Multiemployer Pension Reform Act of 2014 (MPRA) by granting the PBGC authority to facilitate mergers by providing training, technical assistance, mediation, communication with stakeholders and support with related requests to other government agencies or, if necessary, to help a plan in critical and declining status to avoid insolvency, financial assistance.

Because its ability to provide financial assistance is limited, the PBGC must determine three factors before providing financial assistance: (1) that the merger is necessary for at least one of the plans involved to avoid insolvency; (2) that the assistance will limit the PBGC's expected long-term loss; and (3) assistance will not affect the PBGC's ability meet existing obligations. Accordingly, the proposed regulation includes changes to the actuarial valuation rules and solvency test requirements for plan mergers.

Updated Solvency Test

Instead of the current requirement that assets of the merged plan equal or exceed five times the benefit payments for the last plan year ending before the proposed merger or transfer, the assets of the merged plan would now need to equal or exceed 10 times such payments. Likewise, the test projecting that assets, expected contributions and investment earnings will exceed expected expenses and benefit payments is also expanded to a 10-year test.

For plans that are "significantly affected," the requirement that expected contributions meet five years of future minimum funding is also extended to 10 years, as is the requirement that assets after the merger or transfer equal or exceed expected benefit payments. The proposed rule retains the requirement of contributions for the first post-transaction year to exceed expected benefit payments.

Finally, the current funding level requirement is modified from covering a minimum of normal cost and 25-year amortization of liabilities to normal cost and 15-year amortization of liabilities. The proposed regulation would modify the definition of "significantly affected plan" by adding plans that are either in endangered status or critical status and engage in a transfer. The definition of a significantly affected plan would continue to include transfers of 15 percent or more of assets and certain transfers or mergers after a mass withdrawal.

Facilitated Mergers Without Financial Assistance

To qualify for a facilitated merger, a plan sponsor must provide the following information to the PBGC not less than 270 days prior to the proposed effective date of the merger, in addition to meeting the criteria for a merger or transfer provided under ERISA Section 4231: (1) a notice of the merger or transfer; (2) a copy of the merger or transfer agreement; (3) a request for a compliance determination; and (4) a detailed narrative description with supporting documentation demonstrating that the proposed merger is in the interests of participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The plan sponsor must also notify the PBGC if any of the information provided changes before the completion of the merger.

Facilitated Merger With Financial Assistance

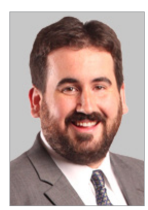
If the plan sponsor is also requesting financial assistance, it must submit additional documentation, including detailed actuarial and financial data such as rehabilitation or funding improvement plans, the most recent Form 5500 filing, plan census data and a list of all withdrawal liability payments recovered over the previous five years. Additionally, it must submit further information regarding the proposed structure of the merger, including the total amount of financial assistance requested for each year and a narrative description of the significant risks and assumptions relating to the proposed financial assistance merger and the projections provided and a demonstration that financial assistance is necessary to ensure that the merged plan stays solvent.

The PBGC notes that while it expects that in most cases the financial assistance it provides in a facilitated merger will be in the form of periodic payments, the structure of financial assistance will be decided on a case-by-case basis.

Takeaways

While it is expected that the proposed rule will help stabilize both multiemployer plans and the PBGC by increasing the base of contributing employers, reducing administrative costs and improving investment results, the requirements for a facilitated merger are extensive. Accordingly, the PBGC is encouraging plan sponsors to engage in informal consultations to better understand the complexities of the new rule prior to submitting a formal application.

Author



Michael M. McGovern
212.878.7975
mmcgovern@foxrothschild.com

Fox Rothschild LLP
ATTORNEYS AT LAW

For Your Benefit is available online at
www.foxrothschild.com.