

To: Our Clients and Friends

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## New IRS Guidance: Application to Retirement Plans

Last month, the IRS issued a series of Revenue Rulings and Notices to promote retirement plan savings. This Client Bulletin provides a brief description of this new guidance as well as its potential application to your retirement plans.

### **Notice 2009-68 – Safe Harbor Explanation – Eligible Rollover Distributions (“ERDs”)**

- This Notice contains two updated safe harbor models that a plan may provide to ERD recipients to satisfy Code § 402(f) notice requirements. Plans may use the first model notice for recipients of ERDs from non-designated Roth accounts and the second model notice for recipients of ERDs from designated Roth accounts.
- These updated model notices reflect changes in the law since the prior safe harbor model notices were issued in Notice 2002-3, and simplify the presentation and description of an ERD recipient's options. They also explain rules that apply in special situations such as when the distribution is to a surviving spouse or other beneficiary.
- Plans should tailor each model notice to their terms and administrative procedures.
- Plans may immediately use these model notices or continue to use the previously issued safe harbor notices contained in Notice 2002-3, as appropriately modified for law changes, through the end of 2009.
- Based on this guidance, plan administrators should review their Code § 402(f) notices for compliance by year end.

### **Notice 2009-65 – Adding Automatic Enrollment to 401(k) Plans**

- This Notice provides two sample amendments that plan sponsors may use (as modified to conform to their plans' terms and administrative procedures) to add automatic contribution features to their 401(k) plans. Sample amendment #1 is designed to add an automatic contribution arrangement (“ACA”), while sample amendment #2 may be used to add an eligible automatic contribution arrangement (“EACA”) (permitting 90-day withdrawals).

- Plan sponsors who want to add an ACA or EACA to their 401(k) plans must adopt the amendment by the later of: (1) the end of the plan year in which the amendment is effective; or (2) if applicable, the deadline under § 1107 of the Pension Protection Act of 2006 (“PPA”) for adopting an amendment made pursuant to the PPA (generally the last day of the first plan year beginning on or after January 1, 2009; however, a later deadline may apply to a governmental plan).
- The chosen amendment must be timely signed and dated by the plan sponsor (including an adopting employer of a pre-approved plan). However, regardless of when the amendment is adopted, the proper notice describing the features of the plan as amended must be provided to employees affected by the amendment within a reasonable period before the amendment is effective.

### **Notice 2009-66 – Automatic Enrollment in SIMPLE IRAs**

- This guidance confirms that SIMPLE IRA plans may include an ACA, and provides additional guidance, in the form of questions and answers, on including an ACA in a SIMPLE IRA plan. This guidance provides, among other things, that:
  - A plan may provide that default contributions will be made only for those employees who are first eligible under the SIMPLE IRA plan on or after the ACA’s effective date and who do not make an affirmative election (including an affirmative election of zero).
  - A plan may increase the default contribution percentages for an employee based on the number of years or portions of years for which default contributions have been made for the employee.
  - A plan sponsor of a SIMPLE IRA plan that includes an ACA must, in addition to satisfying the SIMPLE IRA plan notice requirements, provide certain additional information to an eligible employee.
- The Department of the Treasury and IRS have also requested comments regarding whether guidance should be issued with respect to SIMPLE IRA plans that include EACAs and, if so, what issues should be addressed in the guidance.

### **Notice 2009-67 – Adding Automatic Enrollment to SIMPLE IRAs**

- This Notice provides a sample amendment that sponsors of a SIMPLE IRA plan (using a designated financial institution) may use to add an ACA to their plans.
- Prototype sponsors of SIMPLE IRA plans may adopt the sample amendment contained in this Notice (tailored to their plan’s terms and procedures) to add an ACA to their plans. Plan sponsors must furnish a copy of the amended prototype SIMPLE IRA plan document to each adopting employer, regardless of whether the employer will use an ACA.
- An employer that wants to add an ACA to its prototype SIMPLE IRA plan (using a designated financial institution) must adopt the amendment, provided by the prototype sponsor, before the effective date of the automatic contribution arrangement.
- The timely adoption of the amendment must be evidenced by a written document that is signed and dated by the employer and the designated financial institution.

## **Rev. Rul. 2009-30 – Automatic Contribution Increases under Automatic Contribution Arrangements**

- This Ruling explains how 401(k) plans may permit automatic increases in an eligible employee's default contribution percentage based on future increases in the employee's base pay.
- It provides two rules regarding how a 401(k) plan can structure these increases:
  1. A plan may automatically increase an eligible employee's default contribution percentage in plan years after the first plan year of the eligible employee's participation based in part on an increase in the eligible employee's plan compensation without causing such default contributions to no longer be considered elective contributions.
  2. A plan may increase an eligible employee's default contribution percentage on a date other than the first day of a plan year without violating the qualified percentage requirements (including uniformity and minimum percentage requirements) for ACAs or the uniformity requirement for EACAs.

## **Rev. Rul. 2009-31 – Annual Paid Time Off (PTO) Contributions**

- This Ruling provides that qualified plans may be amended to require/permit certain annual contributions of the dollar equivalent of an employee's unused PTO, provided that the contributions satisfy the applicable requirements of §§ 401(a)(4) and 415(c) and, where applicable, §§ 401(k) and 401(a)(30). An employee is not required to recognize these contributions as gross income until distributed from the plan.
- Based on this guidance, plan sponsors may amend their plans to require or permit annual contribution of the dollar value of unused PTO (provided the applicable Code provisions are satisfied).

## **Rev. Rul. 2009-32 – PTO Contributions at Termination of Employment**

- This Ruling provides that qualified plans may require/permit employees, upon termination of employment, to contribute the dollar equivalent of unused PTO to the plan, provided that the contributions satisfy the applicable requirements of §§ 401(a)(4) and 415(c) and, where applicable, §§ 401(k) and 401(a)(30). An employee is not required to recognize these contributions as gross income until distributed from the plan.
- Based on this guidance, plan sponsors may amend their plans to require or permit contribution of the dollar value of unused PTO at the participant's termination of employment (provided the applicable Code provisions are satisfied).

Please feel free to contact any member of the Bryan Cave LLP Employee Benefits and Executive Compensation group listed below if you require assistance or have any questions regarding the information described in this Bulletin.

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