



## **SILENCE IS NOT ALWAYS GOLDEN: REQUIRED ADVANCE ERISA 204(h) NOTICE TO PENSION PLAN PARTICIPANTS**

There are a number of cases where a plan sponsor is required to provide advance notice to plan participants concerning plan changes. These include annual notices in 401(k) plans concerning the use of “safe harbor” employer contributions, automatic 401(k) enrollment, and automatic investment of certain assets in a qualified default investment alternative. Advance notices in pension plans (consisting of money purchase pension plans, target benefit plans, and defined benefit pension plans) are not as common. However, there is a requirement for an advance participant notice before the rate of future benefit accruals are significantly reduced or eliminated and failure to provide the notice can have hefty financial consequences. In addition, some situations that trigger a need for the notice are not necessarily intuitive.

### **Heavy Penalties Apply for Failures**

An employer who amends a pension plan to significantly reduce future benefits without timely providing the required notice is subject to a \$100 per participant excise tax for each day that the notice is late. The notice is due to be provided at least 45 days before the amendment effective date, or 15 days before the effective date for plans covering under 100 employees. This means, for example, that an advance notice to participants would be due on June 15, 2010 if a money purchase plan covering 25 participants is amended effective July 1, 2010 to change the employer contribution from 7.5% of compensation to 5%. If participants are not notified of the change until the July 1, 2010 effective date, the employer would be liable for a \$37,500 excise tax.

### **Rules Are Not Intuitive**

For example, terminating a money purchase or defined benefit plan that has been frozen for many years is deemed to be a “significant reduction in future benefit accruals” and requires the advance participant notice. Likewise, merging a money purchase plan into a profit sharing plan or converting a money purchase plan into a profit sharing plan also requires the notice. A defined benefit plan amendment reducing or eliminating a subsidized early retirement benefit also triggers the advance notice requirement. There is no exception for an owner-employee’s need to receive the notice.

The rules cut employers some slack, but not much. For example, it is okay for the employer to provide the participant notice before the amendment has been formally adopted, as long as the actual amendment follows the terms disclosed in the notice. Also, the law provides very limited exceptions for unexpected delivery delays, etc.

### **Employers must be on Guard**

Employers and their advisors are well advised to keep this requirement in mind if they have a pension plan where this plan may be amended to cut back benefits.

## **SOME REMINDERS FOR 2010**

The New Year is always a good time to pay attention to retirement plan maintenance items. For example, retirement plan participants should check to see if their current beneficiary designations are up to date. Divorce, deaths, and births represent events that often result in a beneficiary change. Keep in mind that many retirement plan documents (including the NRS document) automatically cancel a spouse designated as a beneficiary upon divorce, but a new beneficiary needs to be named.

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If no beneficiary is designated in an NRS plan, death benefits will be payable to children, parents, or the participant's estate, in that order. Other plans may have different defaults.

The required minimum distribution "holiday" established for defined contribution plans during 2009 does not apply in 2010, except for persons who turned age 70 ½ in 2009. Ordinarily, their Required Beginning Date would be April 1, 2010, but the law permits them to skip this otherwise required payment. Owners and former employees over 70 ½ who skipped their 2009 payment or opted to receive it voluntarily, are required to receive the usual annual distribution for the year 2010.

### **NRS DATA PORTAL TO OPEN IN 2010**

NRS is near completion of a new "portal" on its web site to facilitate the secure transmission of email and confidential data between clients and NRS staff. This development represents a further step in the process of providing plan sponsors with direct paperless access to pertinent documents, files, and correspondence through an electronic medium.

We will continue to keep you apprised of additional developments concerning the portal. On a related note, NRS clients should be sure that their NRS Account Manager has applicable email addresses for their key personnel.

### **EFAST-2 / ELECTRONIC FILING OF FORM 5500**

As we have previously noted, the Department of Labor has mandated the electronic filing of Form 5500 Series (Form 5500 and the Form 5500SF) for plan years beginning in 2009. Electronic filing through this EFAST-2 (electronic system) requires you to obtain signing credentials through the DOL's

website. Since this DOL website feature starts in January 2010, we will provide a "walk thru" of the necessary registration process in the form of step by step instructions, including actual "screen shots", as an easy reference tool.

**For more information or to request a proposal, please visit our website at [www.NRServices.com](http://www.NRServices.com), or for sales support, please contact:**

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