REPORTING TERMINATED VESTED PARTICIPANTS HAS A NEW TWIST

Ever since ERISA was passed more than 35 years ago, employers notified the Social Security Administration concerning terminated employees who had deferred benefits coming to them from the company retirement plan. This information was provided on an attachment to the plan's annual report. As most of you know, annual report Form 5500 is required to be filed electronically, except for plans that file Form 5500EZ. This electronic filing requirement started with the 2009 reports and the old attachment "SSA" that provided the terminated participant data is no longer part of that report. Our July 2011 Newsletter describes this new approach and describes extensions in the due dates for filing both the 2009 and 2010 "Form 8955-SSA". Both the 2009 and 2010 plan year reports are due no earlier than January 17, 2012, or later if the 2010 report is normally due after January 17, 2012.

Form 8955-SSA Content

Much like the previous Form 5500 attachment SSA, the new form requires the Plan Administrator (usually the employer) to report with respect to four groups of terminated vested participants:

- *Category A* – Participant who separates with deferred vested benefits
- *Category B* – Reserved for modifications (not updates) in previously reported participant data
- *Category C* – Participant previously reported as Category A by a different plan whose payment is now assumed by the reporting plan (usually due to a plan merger)
- *Category D* – Previously reported participant who is no longer entitled to a deferred plan benefit.

In addition, plan status changes, such as employer name changes or plan terminations must also be reported.

An SSA single employer plan report for a given year has always allowed Category A participants to consist of those participants who terminated in the year immediately preceding the reporting year, those who terminated during the reporting year, or both. In this way, if an employee terminates in one reporting year and is rehired in the immediately subsequent year, there is no need to report an unreported employee as a Category A participant. This rule does not extend to reporting for Categories C and D.

Transition Rules for 2009 Year Reporting

As reported in our July newsletter, Plan Administrators are permitted to combine 2009 and 2010 data on a 2009 reporting form; but are not required to do so. This issue took on new complexities when the IRS released a draft of the 2010 Form 8955-SSA in early October, 2011. The draft instructions provide that *once the 2010 Form is released in final form, a separate 2009 Form can no longer be filed with 2010 reportable information.* Since the final 2010 Form will presumably be released before the January 17, 2012 due date, this creates a time window lasting until the 2010 release date during which the 2009 Form 8955-SSA can be filed with 2010 participant information for all categories. However, once the window closes, any Category C or D participant who became reportable during 2010 must be reported on a 2010 Form. Note that as long as the plan is reporting only Category A participants, a 2010 Form can be filed that contains participants who terminated in both 2009 and 2010.

If the 2009 Form 5500 was the last report for the plan, the 2009 Form 8955-SSA must report all Category D participants that were not previously

Continued on the next page…

reported. Since the prior filing instructions did not require reporting Category D participants, and since terminating plans usually pay all deferred benefits, there is a good likelihood that a plan may have a significant number of former participants to report. Furthermore, since this requirement includes participants who may have received their benefits years ago, a good deal of administrative effort and expense may be required to properly prepare the final form 8955-SSA.

Needless to say, preparation of information for the SSA (Social Security Administration) has become particularly complex, especially for the 2009 and 2010 reporting years. This is a cause for concern because the IRS can assess significant financial penalties for failure to report this information. NRS will continue to monitor any new developments and will do everything reasonably possible to avoid filing difficulties or penalties for our clients.

REMINDER FOR 401(K) PLANS: PARTICIPANT NOTICES DUE

Employers who have calendar year 401(k) plans that feature safe harbor employer contributions, as well as many automatic enrollment plans, need to be sure to provide appropriate annual notices to participants. These notices relate to the upcoming 2012 year and must be provided no later than December 1, 2011, according to federal regulations. NRS automatically sends these to clients. However, an employer interested in adopting a safe harbor contribution for 2012 so that discrimination testing will be unnecessary must contact their Third Party Administrator. This action needs to be taken promptly in order to meet the December 1 notice requirement. Annual notices are also required for automatic enrollment plans established under Pension Protection Act of 2006 provisions ("Eligible Automatic Contribution Arrangements" and "Qualified Automatic Contribution Arrangements"). If an NRS client is in doubt about this, they should contact their NRS Account Manager.

FIFTH CIRCUIT APPEALS COURT: PRODUCE PLAN DOCUMENTS!

An opinion handed down in September by the Fifth Circuit underscores the importance of plan administrators providing plan participants with requested plan documents or other forms and materials needed to obtain benefits. The case was *Kujanek v. Houston Poly Bag I Ltd.* and involved former employee Kenneth Kujanek and his employer, Houston Poly. Kujanek resigned in September 2007. His retirement account was worth $490,000 as of December 31, 2007. The Houston Poly Plan requires a one year wait following termination before a participant can receive plan benefits. Kujanek sued Houston Poly in state court on an unrelated matter and as part of the discovery process asked for (a) the terms and conditions of the Houston Poly profit sharing plan, and (b) eligibility requirements for participants to receive plan benefits. Houston Poly failed to produce these documents.

A year later, Kujanek asked a broker to request a plan distribution for him. The plan trustee responded that Kujanek needed to request distribution directly, rather than through the broker. Kujanek did not approach the plan directly and sued for his benefits in February 2009. By December 31, 2008, his account had depreciated to $306,000. While the case was pending, Kujanek requested and received a $306,000 rollover distribution.

The court found that the plan administrator knew or should have known that Kujanek did not have the necessary information to obtain his benefit. It based its decision on the fact that the company does not give departing participants that information, company manuals do not include this information

Continued on the next page…

and there was no evidence that Kujanek ever received a Summary Plan Description before 2008. Houston Poly breached their fiduciary duty and was ordered to pay Kujanek $184,000 for the investment loss, plus over $60,000 in attorney fees.

Based on this opinion, plan administrators would be well advised to err on the side of providing forms and documents to former employees. Even if the participant does not use the materials, the plan administrator is protected from a charge of failure to properly discharge fiduciary responsibilities.

FOR MORE INFORMATION OR TO REQUEST A PROPOSAL, PLEASE VISIT OUR WEBSITE AT WWW.NRSERVICES.COM, OR FOR SALES SUPPORT, PLEASE CONTACT:

CENTRAL & EASTERN TIME

Jim Houpt
Executive Vice President
T| (800) 627-1610 x 2207
E| jim.houpt@NRServices.com

PACIFIC & MOUNTAIN TIME

Kevin Spaeth
Sales Representative
T| (800) 350-2172 x 260
E| kevin.spaeth@NRServices.com