

## Time to Amend Pre-62 Normal Retirement Age Plans

### June 30 plan years are the first to be affected

*Judy Miller, MSPA, ASPPA Chief of Actuarial Issues*

In August 2007, the IRS issued Notice 2007-69 providing relief for pension plans requiring an amendment to comply with the IRS' final normal retirement age regulations issued May 22, 2007 (see *asap* 07-15 and *asap* 07-20). Under Notice 2007-69, plans with normal retirement ages of at least 55, but less than 62, could delay adoption of an amendment to the normal retirement age until the later of the last day of the first plan year beginning after June 30, 2008, or the due date (including extensions) of the employer's tax return for the taxable year that includes the first day of the first plan year beginning after June 30, 2008. For plans that do not have a plan year beginning during the period July 1, 2008 through December 31, 2008 (including calendar year plan years), this amendment deadline coincides with the deadline for PPA amendments. However, for (twelve month) plan years beginning July 1, 2008, the amendment deadline is the later of June 30, 2009, and the employer's tax filing deadline for the taxable year including July 1, 2008.

#### **Example**

ABC Company Pension Plan's current (12-month) plan year began July 1, 2008.

- If ABC Company's taxable year is: July 1 through June 30,  
  
Then any required amendment to the normal retirement age must be adopted no later than the due date for the company's tax filing for the June 30, 2009 year.
- If ABC Company's taxable year is: the calendar year and the company's tax return due date was *not* extended,

Then any required amendment to the normal retirement age must be adopted by June 30, 2009.

- If ABC Company's taxable year is: the calendar year and the company's tax return due date was extended to August 15, 2009,

Then any required amendment to the normal retirement age must be adopted by August 15, 2009.

In all cases, the amendment should be effective retroactive to July 1, 2008.

Note that normal retirement ages of less than 55 are assumed to be unreasonable unless facts and circumstances can justify that the lower age is the "typical retirement age for the industry in which the workforce is employed." Plans with a normal retirement age of less than 55 should have filed a request for a private letter ruling regarding the normal retirement age by June 30, 2008.

#### **Which plans should be amended?**

Generally, any pension plan with a normal retirement age of 55 to 61 should be amended. According to the final regulations, whether or not a normal retirement age of 55 to 61 is "not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the workforce is employed" is a facts and circumstances determination. The preamble indicated that an employer's good faith determination of the typical retirement age "will be given deference, assuming that the determination is reasonable under the facts and circumstances." Comments by IRS representatives initially emphasized the "deference," but in practice many plans

are now being asked to provide independent data justifying the earlier retirement age. Recent conversations with the IRS confirm that deference is not absolute, and that some independent data justifying the earlier-than-62 retirement age must be provided upon request. The fact that data regarding a “typical retirement age” for employees of small business in a specific industry simply is not available has not changed their position. Because “deference” is not in fact the rule, and data to substantiate pre-62 normal retirement ages for small employers is not available, all plans with NRAs of 55 to 61 risk disqualification if amendments are not adopted by the deadline provided in the relief.

Notice 2007-69 does include a safety valve for plans where the sponsor determines “reasonably and in good faith” that no amendment is necessary, but during review of a determination letter application the Service finds otherwise. The guidance provides that in this “rare and unusual circumstance,” only a prospective amendment will be required. The implication is, however, that it will be “rare and unusual” that a sponsor who failed to amend did so “reasonably and in good faith.” The implication is *not* that it will be “rare and unusual” for the Service to disagree with a sponsor’s conclusion that no amendment was necessary.

### **Limited 411(d)(6) relief is available**

Changes in a pension plan’s normal retirement age made through an amendment adopted and effective within the Notice 2007-69 timeframe qualify for IRC §411(d)(6) relief with regard to the timing of distribution only. For example, a plan is timely amended to increase the normal retirement age from 55 to 62. On the date the amendment is adopted, a participant has accrued a benefit of \$1,000 per month payable at age of 55. If the participant subsequently terminates employment at age 55, the \$1,000 benefit must be payable at 55, even though any additional accruals may be deferred to or reduced for early payment from the later retirement age. The terms of the plan will determine whether or not the \$1,000 accrued benefit must be adjusted for late payment if termination of employment occurs after age 55.

ASPPA’s Government Affairs Committee has been meeting with Treasury and the IRS on this matter. Most recently, since the Service is not deferring to the employer’s determination, we requested a delay of the required

amendment date and the ability to amend the plan to delay distribution until the earlier of age 62 or termination of employment, instead of amending to a later normal retirement age. We will keep you informed if progress is made, but encourage practitioners to track their clients’ amendment deadlines carefully and, when necessary, proceed under current guidance.



4245 North Fairfax Drive, Suite 750  
Arlington, VA 22203  
P 703.516.9300 F 703.516.9308  
www.asppa.org

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