

# Client Alert

A report  
for clients  
and friends  
of the Firm     June 2007

## Treasury Department Finalizes Rules on Pension Distributions to Employees upon Attainment of Normal Retirement Age

On May 22, 2007 the Internal Revenue Service issued final regulations permitting a qualified pension plan to commence payment of benefits upon a participant's attainment of normal retirement age (as defined in the plan) while still employed by the plan sponsor. The final regulations also provide safe harbor rules to determine how low a normal retirement age can be under a plan. Special transitional relief is also provided so that a plan's normal retirement age may be raised to conform to the new rules without violating the anti-cutback provisions of Section 411(d)(6) of the Internal Revenue Code (the "Code").

### Background

In 2004, the Treasury Department issued proposed regulations that would have allowed a pension plan to make in-service distributions after normal retirement age to an employee who continued working on a reduced schedule. Code Section 401(a)(36) implemented by the Pension Protection Act of 2006 ("PPA") permits unrestricted pension distributions to employees who attain age 62 without requiring separation from service or any reduction in work schedule. The final regulations reflect Code Section 401(a)(36) and finalize only the portion of the proposed regulations relating to the definition of normal retirement age and in-service distributions upon attainment of normal retirement age.

The final regulations provide that a pension plan's normal retirement age must be "an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." The current Code Section 411(a)(8)(b) requirement that a qualified plan's normal retirement age may not be later than the later of the time that an employee attains age 65 or the fifth anniversary of the employee's commencement of plan participation remains in effect.

### Safe Harbor Normal Retirement Age

The final regulations provide that if the plan's normal retirement age is at least age 62 or is the later of age 62 and another specified date, such as the fifth anniversary of the commencement of plan participation, the normal retirement age is deemed to be not earlier than the typical retirement age for the industry in which the covered participant is employed and will satisfy the requirements for a safe harbor normal retirement age.

If a plan's normal retirement age is earlier than age 62, the determination of whether the age is earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed will be subject to a facts and circumstances test. If the plan's normal retirement age is between ages 55 and 62, a good faith determination by the employer, or the trustees in the case of a multiemployer plan, of the typical retirement age for the industry in which the covered workforce is employed will be given deference, assuming that it is reasonable.

If a plan's normal retirement age is younger than age 55, it will be presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry of the relevant covered workforce unless the facts and circumstances demonstrate otherwise.

A special safe harbor definition of normal retirement age of age 50 or later is provided for plans in which substantially all participants are “public safety employees” as defined by the PPA at Code Section 72(t)(10)(b).

### **Relief Under Section 411(d)(6) For Normal Retirement Age Amendments**

Code Section 411(d)(6) generally prohibits an employer from adopting a plan amendment that would reduce or eliminate an early retirement benefit or any optional form of benefit. Such an amendment is considered a prohibited reduction of a participant’s accrued benefit. This rule called the “anti-cutback rule” would prevent a plan from raising the normal retirement age at least with respect to benefits a participant had accrued under the plan prior to the amendment.

The final regulations amend the Code Section 411(d)(6) rules to allow a pension plan’s definition of normal retirement age to be amended during a transition period to conform to the final regulations. Such a plan amendment may increase a plan’s current normal retirement age and eliminate the right to an in-service distribution prior to the plan’s amended definition of normal retirement age, without running afoul of Code Section 411(d)(6).

### **Possible Plan Amendments**

The final regulations permit, but do not require, a qualified pension plan to provide benefits to participants upon attainment of normal retirement age. Plan sponsors who wish to permit such in-service distributions may amend their plans in accordance with the final regulations. If a plan is amended to permit in-service distributions to a participant at normal retirement age and the normal retirement age under the plan is earlier than the safe harbor age of 62, the plan sponsor will need to assess whether the plan should be amended under the special Code Section 411(d)(6) relief provision in the final regulations. In such case, the plan must be amended before the end of the “remedial amendment period,” which for calendar year employers, with calendar year plans, is the last day prescribed by law for filing the employer’s tax return for the 2007 tax year, including extensions.

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