Flashpoint: Extension of Restatement Deadlines for 403(b) and Defined Benefit Plans

And, of course, as we hit the "send" button on Friday to send out last week's FlashPoint on the CARES Act, the IRS announced that it is extending the remedial amendment periods for 403(b) and defined benefit pension plans.

The remedial amendment period for 403(b) plans was set to expire on March 31, 2020. The IRS announced that it is extended to June 30, 2020. The next cycle will begin July 1, 2020.

The remedial amendment period for the second six-year cycle for defined benefit plans, which was due to end on April 30, 2020, is extended to July 31, 2020. The third cycle – which we at FBLC are calling the "Tricycle" – will begin the next day, August 1, 2020.

More on Loan Delays

The actual language of CARES provides that the deadlines of Code section 72(p) are automatically delayed statutorily for a one-year period for eligible loans. Eligible loans include loans to people who have suffered financially due to layoffs, furloughs, reduced work hours, closing of businesses, etc.

If an employer has taken action which, by definition, causes the employee to be eligible for the loan delay, it should modify the loan procedure to permit it to suspend loan payments automatically while the crisis is at hand. This could be done with a quick modification that provides:

> In accordance with the provisions of Section 2202 of the CARES Act, loan repayments due during the period from March 27, 2020, to December 31, 2020, shall be automatically extended one year for any borrower who, in connection with the Coronavirus pandemic: (a) has been laid off; (b) has been furloughed; (c) has had his or her normal working hours reduced; (d) is unable to work due to an unavailability of child care; (e) owns or operates a business that has been closed or experienced reduced hours; or (f) informs the Plan Administrator that he or she (or his or her spouse or dependent) has been diagnosed with COVID-19 by a CDC-approved test. Any subsequent payments will be adjusted to reflect this delay and interest that accrues during the delay. The ultimate due date of such a loan shall be extended one year.

In addition to the above language, the employer also may want to allow participants to avoid default of the loan upon termination of employment (if so provided under the loan policy or plan document), so that the participant can take advantage of the one-year delay even if s/he is laid off. The following can accomplish that:

> In the event of a layoff or other termination of employment as a result of the Coronavirus pandemic, the employee's participant loan will not be considered to be in default (and, as a result, a deemed distribution or loan offset) until the earliest of: (a) one year after the failure to make a payment during the period between March 27, 2020, and December 31, 2020; (b) the date on which the employee receives a distribution (or is deemed to receive a distribution) of his or her vested interest; or (c) the date on which the employee advises the Plan Administrator that s/he wants the loan to be considered to be in default.

These loan procedure modifications may be made immediately or within the Act's remedial amendment period (last day of the 2022 plan year). If the modified language is provided to participants, it can advise them of how their loans will be/can be treated in this time of disarray. (It is also possible that your document provider will give you alternate language to use, and you may choose to wait for that.)

Of course, making this modification is not mandatory, and an employer may choose to default the loans as normal. However, in these difficult times, it makes sense to do what is needed to assist our employees as much as we can.

On the other hand, it is reasonable that a full offset of the loan will occur if the employee takes a complete distribution of his/her account.

Questions, Concerns?

FBLC lawyers are all working from home during this crisis, and our telephones will ring through from our office to our locations. Feel free to contact us using our normal office numbers. We are your ERISA solution!

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