



Klausner & Kaufman

PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

MEMORANDUM

TO: ALL CLIENTS

FROM: KLAUSNER & KAUFMAN, P.A.

**RE: IRS DEFERS NORMAL RETIREMENT AGE REGULATIONS UNTIL
JANUARY 1, 2011**

DATE: OCTOBER 13, 2008

Many of our clients have been monitoring the IRS' proposed rules on normal retirement age which were scheduled to apply to public pension funds beginning on or after January 1, 2009. The IRS rule would have required that governmental pension funds define normal retirement age so that it is not based wholly or partly on years of service. The regulations had indicated that for in-service distributions, age 62 was a clearly acceptable retirement age, ages 55 through 62 were presumed to be acceptable retirement ages, and that a retirement age lower than age 55 was presumed not to meet the new IRS proposed standards. For plans in which substantially all of the participants are public safety employees, a normal retirement age of age 50 or later would have met the IRS criteria.

The rule would have had a direct and negative impact on several aspects of retirement benefits currently enjoyed. Firstly, public safety officers retiring under age 50 would have been denied the \$3000.00 per year tax exemption for retiree health care. Secondly, the rules would have prohibited the rehiring of any public employee under the applicable age by the same employer unless the employee suspended receipt of retirement benefits. This would have resulted in disruption of many programs involving rehired retirees. Plans would have been in the difficult position of choosing between constitutionally-protected property rights of members under state law and loss of tax qualified status. The deferral of the rule allows for more careful study and analysis as to whether this rule is even reasonably applied to governmental plans.

The deferral of this rule is a direct outgrowth of strong advocacy by the public pension community, with the help of many concerned members of Congress. The issue was addressed directly at a recent workshop held by the House of Representatives, Ways and Means Committee on September 19th. Our office, through Bob Klausner, was privileged to play an important role in that process.

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As a result of the deferral, it is recommended that no action be taken at this time to amend plan documents to address this issue.

The IRS issued Notice 2008-98 on October 10, 2008 announcing that the effective date for the regulations has been deferred until January 1, 2011. The link to the IRS notice is: <http://www.irs.gov/pub/irs-drop/n-08-98.pdf>. In addition, a copy of the notice is attached to this communication.

We are also aware of continued concerns over the market rate of return issues which adversely affects DROP plans and cash balance plans as well as the IRS' announced increased scrutiny of governmental plans. Those issues were also explored at length at the September 19th Ways and Means Workshop. Additional responses for the IRS and Treasury are expected shortly.

Please contact our office with any questions that you may have.

Part III - Administrative, Procedural and Miscellaneous

Extension of Effective Date of Normal Retirement Age Regulations for Governmental Plans

Notice 2008-98

I. Purpose

The Service and Treasury intend to extend the date by which a governmental plan must comply with final regulations on distributions from a pension plan upon attainment of normal retirement age, which were published in the Federal Register as T.D. 9325 (72 FR 28604) on May 22, 2007 ("the 2007 final regulations"). Under the extension, the 2007 final regulations will be effective for a governmental plan (as defined in § 414(d) of the Internal Revenue Code) for plan years beginning on or after January 1, 2011. This notice does not change the effective date of the 2007 final regulations for a plan that is not a governmental plan or modify the relief previously provided in Notice 2007-69, 2007- 2 C.B. 468.

II. Background

Section 411(a)(8) provides that the term "normal retirement age" means the earlier of (A) the time a plan participant attains normal retirement age under the plan or (B) the later of age 65 or the fifth anniversary of the time a plan participant commenced participation in the plan. A plan's normal retirement age is relevant for a number of purposes, including for purposes of determining the date at which a participant is eligible to receive his or her normal retirement benefit and calculating the amount of the benefit received.

Prior to being amended by the 2007 final regulations, § 1.401(a)-1(b)(1)(i) of the Income Tax Regulations required a pension plan to be maintained primarily to provide systematically for the payment of definitely determinable benefits after retirement. The 2007 final regulations amended § 1.401(a)-1(b)(1)(i) to provide an exception to the rule that pension benefits be paid only after retirement by permitting a pension plan to commence payment of retirement benefits to a participant after the participant has attained normal retirement age even if the participant has not yet had a severance from employment with the employer maintaining the plan.

The 2007 final regulations require a pension plan's normal retirement age to 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 2007 final regulations provide that a normal retirement age of 62 or later (or age 50 or later, in the case of a plan in which substantially all of the participants are qualified public safety employees (within the meaning of § 72(t)(10)(B))) is deemed to satisfy this requirement, and a normal retirement age lower than 55 is presumed not to satisfy the requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. Whether a normal retirement age that is at least 55 but below 62 satisfies the requirement is based on facts and circumstances.

The 2007 final regulations are generally effective May 22, 2007, with a later effective date for governmental plans and certain collectively bargained plans. For governmental plans, the 2007 final regulations are effective for plan years beginning on or after January 1, 2009.

Notice 2007-69 provided temporary relief for certain plans that may have to change their definition of normal retirement age to satisfy the 2007 final regulations. The relief is available to certain plans that might otherwise be required to be amended to raise the plan's normal retirement age effective before the first day of the first plan year beginning after June 30, 2008. Because the 2007 final regulations are not effective for governmental plans until 2009, the relief in Notice 2007-69 does not apply to governmental plans.

Notice 2007-69 pointed out that the 2007 final regulations do not contain a safe harbor or other guidance with respect to a normal retirement age conditioned on the completion of a stated number of years of service, stating that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service typically will not satisfy the vesting or accrual rules of § 411. The notice asked for comments from sponsors of plans that are not subject to the requirements of § 411, such as governmental plans, on whether such a plan may define normal retirement age based on years of service. Specifically, comments were requested on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)-1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules.

III. Extension of Effective Date of 2007 Final Regulations for Governmental Plans

The Service and Treasury intend to amend the 2007 final regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2011. Governmental plan sponsors may rely on this notice with respect to the extension until such time as the 2007 final regulations are so amended.

DRAFTING INFORMATION

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact Mr. Flannery via e-mail at retirementplanquestions@irs.gov.