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EMPLOYEE BENEFITS ALERT
WHAT YOU NEED TO KNOW FOR 2009

With the new year, we want to bring to your attention certain changes in qualified plan limits, changes in the law that require qualified plan amendments and other items that may require your attention. This alert highlights 10 developments of which you should be aware:

- 2009 Retirement and Social Security Changes;
- IRS Determination Letter Requirements;
- No Required Minimum Distributions for 2009;
- New Regulations Requiring Plan Amendments;
- Rabbi Trust Funding Restrictions;
- Increased Fidelity Bond Amounts;
- New Plan Fee Disclosure Requirements;
- Reminder Regarding ERISA Fiduciary Duties;
- Incentive Stock Option ("ISO") Reporting Requirements; and
- Abatement of Alternative Minimum Tax on ISO Exercise.

(1) 2009 Retirement and Social Security Changes

Below are the annual limits and thresholds that plan administrators must adhere to that have changed for the 2009 calendar year.

Maximum 401(k) Deferrals	$ 16,500
Age 50 or Over Catch-up Contribution Limit	$ 5,500
Defined Contribution Maximum Annual Addition	$ 49,000
Highly Compensated Employee Threshold	$110,000
Key Employee Threshold	$160,000
Limit on Eligible Compensation	$245,000
Defined Benefit Maximum Annual Benefit	$195,000
Social Security Maximum Taxable Earnings	$106,800

(2) IRS Determination Letter Program

Under the IRS's determination letter program, individually designed plans, such as ESOPs and KSOPs, have staggered, five-year remedial amendment cycles. The period for submitting individually designed plans in the third remedial amendment cycle (Cycle C for employers with employer identification numbers that end in 3 or 8) began on February 1, 2008 and ends February 2, 2009. Thus, employers with individually designed plans in Cycle C should file their amendments with the IRS no later than February 2, 2009.

Employers with EINs that end in 4 or 9 that sponsor an individually designed plan can file a determination letter with the IRS beginning on February 1, 2009, but must file no later than January 31, 2010. Employers in Cycle D should amend or restate their plans, if necessary, and gather the other information required for filing with the IRS.

(3) No Required Minimum Distributions for 2009

The Worker, Retiree and Employer Recovery Act of 2008, suspends during 2009 the minimum distribution requirements applicable to employer sponsored retirement plans and IRAs. As a result of this change, participants over the age of 70½ who typically receive a required minimum distribution for 2009 are not required to take payment from their accounts during 2009. This new law does not affect the minimum required distribution for the 2008 calendar year, so a person who became 70½ during 2008 must take their first required distribution no later than April 1, 2009. Anyone who already receives required distributions had to take their 2008 distributions by December 31, 2008.

(4) New Regulations Requiring Plan Amendments

All qualified plans (such as 401(k) plans, ESOPs and defined benefit pension plans) must be amended to comply with Section 415 of the Internal Revenue Code ("Code") and new regulations. Generally, qualified plans will need to be amended to comply with the final regulations no later than the sponsoring employer's tax return due date (including extensions) for the year in which the new regulations became effective (e.g., for calendar year plans, September 15, 2009). However, individually designed plans that are "Cycle C" plans (described above in the IRS determination letter program) must be amended no later than February 2, 2009.

Under the new regulations, annual compensation generally does not include compensation paid after a participant's severance from employment unless it (i) is regular compensation earned during employment and paid within 2½ months following severance from employment, or the end of the limitation year in which the severance occurs, or (ii) falls within specified categories that plan amendments may implement. Many other types of compensation must now be either specifically included or excluded in the plan's definition of compensation, such as leave cash outs, military differential pay, payroll periods that extend beyond the end of the plan year and 409A deferred compensation.

(5) Rabbi Trust 409A Funding Restrictions

The stock market decline may affect more than an employer's funding level of its tax-qualified defined benefit pension plan ("Plan"). If a Plan sponsored by a publicly traded company is considered "at risk" (e.g., underfunded), amounts contributed to a rabbi trust in connection with a non-qualified deferred compensation plan, such as a SERP, during a "restricted period" may be taxable to certain employees as income and subject to a 20% penalty tax and interest under Code Section 409A.

A Plan is generally considered "at risk" if it is less than 65% funded for the 2008 plan year. This percentage increases to 80% in subsequent years. Employers should consult with the Plan's actuary to determine if the Plan was "at risk" for 2008.

A "restricted period" is: (a) any period during which a Plan is "at risk"; (b) any period when the employer is in bankruptcy; or (c) if the Plan is not adequately funded at the time of its termination, a 12-month period that starts six months before the effective date of the termination.

(6) Increased Fidelity Bond

In 2006 ERISA fidelity bonding maximum was increased from $500,000 to $1,000,000 for most plans with employer securities, such as ESOPs. All employers should review their ERISA fidelity bond coverage to determine whether changes in the fidelity bond are needed.

(7) Plan Fee Disclosures

The Employee Benefits Security Administration ("EBSA") issued proposed rules that would significantly affect ERISA fiduciary duties and disclosure of fees charged to ERISA plans by service providers. The rules propose major changes with respect to fee disclosures to: (1) the plan sponsor; (2) plan participants; and (3) the EBSA and IRS. The definition of "service provider" is also greatly expanded under the new rules. The purpose of the new rules is to create greater fee transparency by imposing stricter fiduciary responsibility on plan sponsors to take a more active oversight role with respect to fees charged to the plan. The proposed rules require a complete analysis of expenses, including a breakdown of "bundled" or "affiliated" products, determining expense ratios and benchmarking against other plans.

The final rules are expected to be issued in the near future, and after President Obama's moratorium on new regulations is lifted. One of the key provisions in the final rules will be their effective date, which likely will be delayed until January 1, 2010. Once the final rules are issued, employers will need to implement the changes by the effective date. We will prepare a client alert exclusively on the new rules, when they are finalized.

(8) ERISA Fiduciary Duties

As a reminder, ERISA imposes personal liability on individuals acting as plan fiduciaries. ERISA fiduciary liability insurance is available, but umbrella "directors and officers" liability coverage policies generally exclude ERISA fiduciary duty from the scope of the policy (unless a separate rider is offered and purchased). Often the plan documents merely state that "the employer" is the ERISA fiduciary. As a result, each member of a company's board of directors

is personally liable for the plan's ERISA compliance. Many individuals are unaware that they are ERISA fiduciaries. Due to increased EBSA audits involving financial institutions, we recommend that you review your retirement and welfare plan documents to determine who is the "named fiduciary" of each plan, and amend the plans to designate the correct individuals who serve as ERISA fiduciaries.

(9) ISO Reporting Requirements

Employers must furnish information statements by January 31, 2009 to employees who exercised incentive stock options ("ISOs") during the 2008 calendar year. Failure to timely furnish the information may result in penalties to the employer. The information statement must contain the following:

- The name, address and EIN number of the corporation transferring the stock;
- The name, address and identifying number of the person to whom shares were transferred;
- The name and address of the corporation the stock of which is the subject of the option;
- The date the option was granted;
- The date the shares were transferred to the person exercising the option;
- The fair market value of the stock at the time the option was exercised;
- The number of shares of stock transferred pursuant to the option;
- The type of option under which the transferred shares were acquired; and
- The exercise price per share of ISOs exercised during the year.

Beginning with ISO exercises occurring in 2009, the sponsoring employer must also report such exercises to the IRS on new IRS Form 3921 by January 31 of the next year. Thus, ISO exercises in 2009 must be reported by January 31, 2010 to both employees and the IRS.

(10) Abatement of Alternative Minimum Taxes ("AMT") on ISO Exercise

Generally, the owner of an ISO may be subject to AMT in the year the ISO is exercised, provided that the shares received upon such exercise are not sold in the same year as the exercise. The AMT calculation is made in the same tax year as the ordinary income tax calculation, and the employee is required to pay the greater amount of the AMT or the ordinary income tax. The AMT may be incurred when an employee exercises ISOs in the same year or if the employee also has other tax preference income or adjustment items from other sources in the same year.

The Emergency Economic Stabilization Act of 2008 added AMT-related provisions designed to reduce the AMT burden on middle class taxpayers. Starting with the 2008 tax return, a taxpayer can add to his or her AMT credits, any interest and penalties paid in the past due to being late on meeting an AMT bill. More remarkably, a "tax abatement" under the law now wipes out any AMT liability from ISO exercises before 2008 that were owed but never paid, along with any interest and penalties associated with the ISO-related AMT liability. This abatement is not available for 2008 AMT liability.

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