Retirement Plans of the Future
New Options for Employers

by GABRIELLE HANSEN of Barran Liebman LLP

For many employers, the law surrounding retirement plans has seemed out of date. Its archaic rules make it difficult for small plans to stay in compliance and it may fail to mirror the needs of today's employee. However, the times just might be starting to change. This article discusses two recent developments that employers should be aware of regarding this topic. The first is guidance provided in IRS Private Letter Ruling 201833012, issued on August 17, 2018. The second is President Trump's August 31, 2018, Executive Order: Strengthening Retirement Security for American Workers.

IRS Private Letter Ruling 201833012— Student Loan Repayment

Assisting employees with student loan repayment is a constant struggle for employers. Tax rules require that loan debt incurred prior to an employee's employment cannot be paid off by the employer on a pretax basis, forcing employers to saddle their side of employment taxes on amounts they do pay out to assist employees with existing debt. However, in a recent Private Letter Ruling (PLR), the IRS signaled its approval of a new approach.

As an initial matter, it is important to note that PLRs are not law. They are simply the IRS's interpretation of the appropriateness of a particular action by the plan sponsor making the request for the ruling. However, they clearly signal the IRS's position on the issues about which the ruling is requested.

In PLR 201833012, the plan sponsor sought approval for implementing a plan amendment adding a voluntary program under which the plan sponsor would make an employer non-elective contribution to the plan on behalf of its employees who made student loan repayments equal to two percent of the employee's compensation. Employees participating in the student loan feature of the plan would still be eligible to contribute an elective contribution to the plan; although this contribution would not be eligible for an additional five percent match. That is, the employer sought approval to match into the 401(k) plan certain amounts an employee paid to an external lender in student loan payments.

The most obvious issue for the plan amendment proposed by the plan sponsor is the contingent benefit rule, which prohibits an employer from conditioning any benefit on an employee's elective contributions. However, the IRS concluded that the facts of the presented plan did not violate the rule. Necessary to the IRS's conclusion, was the fact that the employer would not extend any student loans to employees eligible for the program and that the employer's student loan non-elective contribution was conditioned on whether an employee made a student loan payment during the pay period, not on whether the employee made an elective contribution. The fact that an employee who participates in the student loan feature of the plan is still permitted to make non-elective contributions to the plan was also important. The IRS emphasized that the PLR did not express whether such a plan remained qualified, so employers considering this feature should speak with their benefits attorney.

Executive Order: Strengthening Retirement Security for American Workers

On August 31, 2018, President Trump issued an executive order entitled Strengthening Retirement Security of American Workers (the "Executive Order"). While the order itself does not change the law, it directs the Secretary of Labor to consider certain regulations and suggests two large-scale changes to the rules governing retirement plans.

President Trump has asked the Secretary of Labor to consider whether to issue a notice of proposed rulemaking "that would clarify when a group or association of employers or other appropriate business or organization could be an 'employer' within the meaning of 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(5)." Further, the order directs the Secretary of the Treasury "to consider proposing amendments to regulations or other guidance" in regards to the circumstances under which a multiple employer plan may satisfy the tax qualifications to be so considered. What this means is that the Secretary of Labor has been directed to consider whether to allow expanded groups of employers to band together and offer a retirement plan as a group.

Second, the order considers the costs associated with the notices and disclosures required for administering retirement plans. These costs can be prohibitive for smaller employers. The order suggests that retirement plan disclosure requirements be made more useful and easier to understand and that the use of electronic delivery should be expanded for certain notices.

Finally, the order addresses the requirement under the current Required Minimum Distribution Rules that, absent certain exigent circumstances, individuals must take distributions from their employer sponsored retirement plans starting at 70½ years of age. The order proposes that as individuals live and work longer, this number should be increased so that individuals are better able to save for retirement.

Gabrielle Hansen is an attorney at Barran Liebman LLP, where she represents employers in a variety of ERISA and employment matters. For questions about structuring retirement plans or for assistance with any other benefits matters, contact Gabby at ghansen@barran.com or 503-276-2112