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Year-End Checklist for Benefit Plan Sponsors

1. Retirement Plans
2. 403(b) Plans
3. Deferred Compensation Plans
4. Health and Welfare Benefit Plans

'Tis the season for making a list and checking it twice. In that spirit, below is a checklist of compliance actions and design decisions that benefit plan sponsors should make before the end of the year.

1. RETIREMENT PLANS

- **Execute by 12/31/08** all required plan amendments and documents:
 - To reflect the IRS final regulations on annual additions and annual benefits under Internal Revenue Code Section 415 (assuming a calendar limitation year)
 - To memorialize any discretionary changes made during the year to the plan's design or operations
- **Distribute** required notices (as applicable):
 - For certain 401(k) plans, notices describing "safe harbor" status, eligible automatic contribution arrangements and/or qualified automatic contribution arrangements
 - For certain defined contribution plans, notices regarding QDIAs—qualified default investment alternatives
 - For defined contribution plans, individual participant statements (quarterly if participant-directed investments; otherwise, annually)
 - For defined benefit plans, individual benefit statements, or a notice of the availability of such a statement upon request
 - For defined benefit plans, funding notices depending on the plan's funding target attainment percentage—if less than 80%, notices are required to both plan participants and the PBGC
 - For defined benefit plans, an annual funding notice (due no later than 120 days after the end of the plan year)
- **Decide** on plan design choices for 2008 - 2009:
 - Whether to give service credit for benefit accruals for veteran death benefits that are payable if a participant dies while performing qualified military service, as permitted by the Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act")
 - Whether to permit qualified reservist distributions of elective deferrals, exempt from 10% early withdrawal penalty, for all individuals ordered or called to active duty, under the HEART Act
 - Whether the plan's definition of "spouse" should be changed in light of various state laws recognizing same-sex marriages
- **Implement** operational changes for 2008 - 2009:
 - Adjust benefit calculations and payroll practices to include military pay differentials provided to employees on active duty, which must be considered "compensation" under the HEART Act
 - Provide survivor death benefits for any participant who dies while performing qualified military service, pursuant to the HEART Act

- Permit active duty reservists who have been on duty for at least 30 days to receive a distribution of elective deferrals, provided that a 6-month suspension is imposed on employee contributions, pursuant to the HEART Act
- Update the tax notice provided to participants when they are eligible to receive a distribution, so that it includes a description of the consequences for failing to defer commencement of the distribution, and provides for 180 day notice and election period
- Allow participants to elect direct rollovers to Roth IRAs
- Allow non-spouse beneficiaries to rollover amounts to IRAs
- In plans that offer annuities, comply with the requirement to offer a qualified optional survivor annuity (generally, a joint & 75% survivor annuity option)
- Implement new mortality table and interest rates for lump sum and other calculations under defined benefit plans
- **Monitor** investment performance and make changes, as appropriate, in compliance with fiduciary duties
- **Evaluate** disclosure of plan fees, expenses and investment-related information for reasonableness, subject to coordination with plan administrator and service providers

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2. 403(b) PLANS

- **Execute by 12/31/08:**
 - A written plan document that meets the final 403(b) regulations and contains all material terms regarding eligibility, benefits, applicable limitations, contracts available under the plan, and the time and form of benefit distributions
 - Information sharing agreements with vendors not approved to accept new contributions
- **Evaluate:**
 - Vendors, and determine whether to offer a single vendor solution or multiple vendors; whether existing vendors will accept new contributions, etc.
 - Financial information that will need to be disclosed on Form 5500, because 403(b) plans subject to ERISA will now be subject to an independent plan audit
 - Disclosure of plan fees, expenses and investment-related information for reasonableness, subject to coordination with plan administrator, vendors, and service providers
 - Plan design and operational issues, as described above for other retirement plans

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3. DEFERRED COMPENSATION PLANS

- **Review and amend by 12/31/08** all plans, contracts or arrangements providing for any type of nonqualified deferred compensation, so that they meet the final rules under Internal Revenue Code Section 409A
 - These broad rules apply to all types of plans and policies maintained by for-profit and non-profit employers alike that provide for deferred compensation payable to any service provider, including arrangements that are "hidden" within other arrangements, such as employment contracts; severance policies and plans; change in control agreements; bonus and incentive plans; certain stock options or stock appreciation rights with deferral features (including below-market grants); voluntary or company-funded deferred compensation or supplemental retirement programs; certain in-kind benefits and reimbursement programs, etc.
- **Implement list of "specified employees"** (for public companies only), who will be subject to a 6-month delay before receiving benefits, in certain circumstances
- **Permit changes in distribution elections by 12/31/08** for prior elections made regarding the time and form of payment for amounts previously deferred (subject to certain limitations)
- **Establish a 409A compliance program**—policies, practices and procedures that are reasonably designed in order to ensure compliance with 409A, in order to preserve eligibility to participate in current and future corrections programs that may be established by the IRS to address inadvertent and operational errors

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4. HEALTH AND WELFARE BENEFIT PLANS

- **Distribute** notices (often fulfilled through open enrollment materials):
 - Women's Health & Cancer Rights Act
 - Newborns' & Mothers' Health Protection Act
 - HIPAA Privacy Notice
 - Medicare Part D Creditable Coverage Notice

- **Decide** (and implement, as necessary):
 - Whether to offer distributions of unused balances in health FSA accounts to military reservists ordered or called to active duty for at least 180 days, pursuant to the HEART Act; if so, amend plan documents
 - Whether plan's definition of "spouse" should be changed in light of various state laws recognizing same-sex marriages
 - Whether cafeteria plan documents should be modified to reflect certain features of the proposed IRS regulations that are expected to be finalized—e.g., how payment for certain services that are expected to span several plan years is treated, and the ability of health FSAs to adjust reimbursement provisions (within certain parameters) without violating the risk shifting requirement that the maximum reimbursement amount be available at all times during the year
 - Whether bicycle commuting reimbursements should be added to qualified transportation fringe benefit plans
 - For fully-insured plans, whether coverage for college students and young adults needs to be changed to conform to applicable state laws extending coverage to ages ranging from 25 to 30
 - Whether plan terms defining "dependent" need to be changed to adapt to changes made to Internal Revenue Code Section 152, providing that in order for a qualifying child to be a "dependent", he must be younger than the individual claiming him as a dependent and the child must not have filed a joint return with the child's spouse, and that a non-parent can claim a child as a dependent, as long as the child's parents do not do so and certain income-related conditions are satisfied, pursuant to the Fostering Connections to Successful and Increasing Adoptions Act of 2008
 - Whether the modified definition of "disability" in the ADA Amendments Act of 2008 will require changes to the eligibility or benefit terms of your group health and welfare plans

- **Coordinate** with insurer or third-party administrator:
 - Mandatory reporting in 2009 under Medicare secondary payer rules
 - Coverage during new military family leave and qualifying exigency leave under new proposed FMLA regulations
 - Implementation for the new mental health parity law (under the Paul Wellstone & Pete Domenici Mental Health Parity and Addition Equity Act of 2008); the genetic information nondiscrimination law (known as "GINA"); and "Michelle's Law" for coverage of dependent college students who take a medically necessary leave of absence for up to 1 year

- **Evaluate** disclosure of plan fees and expense information for reasonableness, subject to coordination with plan administrator and service providers

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Please contact any member of Venable's Employee Benefits and Executive Compensation Group if you have questions about how to meet your year-end compliance obligations and make decisions about how to design and operate your benefit plans in 2009.

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