

Executive Compensation, Benefits and Employment Law Focus

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New EU Directive Provides Equal Treatment to Agency Workers

"Today's vote is a major step forward for Social Europe guaranteeing protection for all agency workers in Europe." —Vladimír Špidla, EU Commissioner for Employment and Social Affairs.

After six years of legislative negotiations and several almost insurmountable stalemates, the European Parliament recently approved a new Directive extending several employment rights to so-called agency workers.

Who are they and what is their relevance?

Agency workers are individuals assigned from temporary work agencies, such as Adecco, Manpower or Randstad, to user companies in order to cover the short-term staffing needs of such companies. The work agencies act as intermediaries. Apart from some exceptional cases,¹ the agency worker remains an employee of the agency, while the user company enters into a commercial agreement with the agency to reimburse the employee's costs and pay an agreed fee.

US companies with operations in the EU tend to like this solution as they can avoid some of the existing restrictions attached to hiring fixed-term employees in EU Member States. In fact, because agency workers are not their employees, user companies do not have to offer them the same employment terms and conditions that their permanent employees enjoy. This makes them very attractive low-cost workers. This will, however, change with this new Directive.

Furthermore, when there is no such employment relationship, user companies are, in general, free to terminate the relationship whenever they see fit without having to give notice and/or severance/termination compensation to the agency worker (although they might have to give notice to the work agency and/or pay an early cancellation fee).

As a result, this atypical form of work has largely increased during the last decades. According to certain studies, during the nineties the number of agency workers multiplied by five in Denmark, Italy, Spain and Sweden,² and at least doubled in most other EU Member States.³

¹ In the UK, for example, an employment contract may be implied between an agency worker and the user company under certain circumstances. See *James v London Borough of Greenwich* [2008] EWCA Civ 35.

² Neugart & Storrie, *Temporary Work Agencies and Equilibrium Unemployment*, Program for the Study of Germany and Europe, Working Paper No. 02.6.

³ Their number also doubled in the US during this same period. For an interesting discussion about the possible causes of this increase in the US see David H. Autor, *Outsourcing At Will: Unjust Dismissal Doctrine and the Growth of Temporary Help Employment*, 7557 NBER Working Paper Series (2000).



The White & Case LLP EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS is prepared for the general information of our clients and other interested persons. This memorandum is not, and does not attempt to be, comprehensive in nature.

EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS authors:

Laura Chang
lachang@whitecase.com

Genevra Forwood
gforwood@whitecase.com

Manuel Martinez-Herrera
mmartinezherrera@whitecase.com

Andrew L. Oringer
andrew.oringer@whitecase.com

Kenneth A. Raskin
kraskin@whitecase.com

Jason Rothschild
jrothschild@whitecase.com

Laura Westfall
lwestfall@whitecase.com

White & Case
1155 Avenue of the Americas
New York, NY 10036
+ 1 212 819 8200

www.whitecase.com

Historical legislative efforts

As early as 1982, the European Commission submitted a proposal for a Directive on agency workers. This first Directive proposal was never passed. In 1995, the Commission launched a process of consultation with the European social partners—employers' and workers' representatives—leading to the start of negotiations between the two sides. While this process led to agreements (later formalized in EU Directives) on part-time work and fixed-term contracts, negotiations on the treatment of agency workers collapsed in May 2001.

Consequently, in March 2002 the Commission decided to break this stalemate by launching another proposal for a Directive on temporary agency work.

Since then, it has taken six years for the Directive to be approved. The main reason for this delay has been the fierce opposition by certain countries, especially the UK, but also Denmark, Germany and Ireland, due to the alleged potential negative effects for those businesses that rely, to a large extent, on this type of hiring. The UK is reported to be the EU country with the largest number of temporary agency workers, with sources estimating that there are between 1.1 and 1.4 million agency workers there.

What does the Directive do?

According to the Directive, Member States must ensure that temporary agency workers receive at least:

- The same basic working and employment conditions from the first day of their assignment as those that would apply if they had been recruited directly by the user company. Basic employment terms and conditions include:
 - Pay⁴
 - Holidays
 - Work time
 - Overtime
 - Night work
 - Breaks
 - Rest periods
 - Maternity leave
- Equal access to corporate facilities of user company, in particular to any canteens/cafeterias, child-care facilities and transport services
- Access to training both during and in-between assignments
- Information about permanent employment opportunities offered by their user companies

Member States shall impose “*effective, proportionate and dissuasive*” penalties in the event of noncompliance with these mandates by temporary work agencies or user companies.

The UK exception

According to the Directive, Member States may derogate from the general rule of “equal treatment from day one” when a national collective bargaining agreement provides otherwise. In those countries where universally applicable collective bargaining agreements cannot be declared, Member States may, after having consulted with the national social partners, establish their

⁴ Unless the Member State, after consulting the social partners, provides that an exemption be made for agency workers who have a permanent contract of employment with a temporary work agency and who continue to be paid in between assignments.

own arrangements on the basic working and employment conditions of agency workers. These arrangements may include a qualifying period before equal treatment applies to agency workers. In both these cases, however, there remains the general obligation to respect the overall protection of temporary agency workers.

This possible qualifying period was the key factor that led the UK government to accept the Directive after years of strong opposition. In fact, UK social partners agreed in May 2008 that UK-based agency workers will only be entitled to enjoy equal treatment after a period of 12 weeks (and not starting on day one).

Unions and employer organizations of other Member States may reach similar agreements, although the Directive makes clear that these practices should be the exception.

Implementation

EU Directives are not self-executing and need to be transposed nationally by each EU Member State by enacting laws that achieve the outcome pursued by the Directive.

The EU Member States will have three years as of the moment in which this Directive enters into force, which is expected to be in early 2009, to enact their implementing legislation. The beginning of 2012 is the likely deadline for this transposition process.

Conclusion

Many US companies have subsidiaries, branches or representative offices in EU Member States. Up until now, hiring agency workers has been an efficient and cost-effective solution to cover short-term employment needs. With the enactment of this Directive, some of the key features that made this option attractive for employers will disappear,

as these workers will become entitled to the same treatment given to their permanent colleagues.

Companies should keep in mind that some time will pass before the Directive is transposed in each Member State, and that even then agency workers will still offer several logistical advantages over permanent employees. This is especially true for US companies used to navigating in an at-will environment. For them, having to terminate the commercial relationship with a temporary work agency might be less troublesome than having to face unfamiliar national European laws on termination of employment.

It is important, however, to keep a close eye on the implementation process and review all applicable laws, as some EU jurisdictions already have specific regulations on agency workers, before deciding which type of hiring makes more sense for your company. White & Case can provide you with guidance in making agency worker employment decisions for your offices in EU jurisdictions.

Alert: Financial Crisis-Related Redemptions Could Result in Hedge Funds Unwittingly Violating the ERISA 25 Percent Plan Assets Exception

Background

In connection with the staggering investment losses suffered by hedge funds over the last several months, many hedge fund investors have already sought, or will soon seek, to redeem their hedge fund investments. Most hedge funds place restrictions on when investors may redeem their interests with many of such funds permitting redemptions only once per quarter. According to industry analysts, it is estimated that more than US\$40 billion was withdrawn from hedge funds in October alone. (See Matthew Scott, "Hedge Funds Take Beating for Fifth Month in a Row," *Financial Week*, November 20, 2008 <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081120/REG/811209979/1036>.) Some investors may not only pull money out of a poor performing hedge fund but, also, out of funds that have done well, in order to offset losses elsewhere. (See Louise Story, "Investors Flee as Hedge Fund Woes Deepen", *New York Times*, October 23, 2008 at A1.) It has been suggested that, given the prevalence of quarterly-redemption restrictions in a number of hedge funds, investors will redeem an estimated 30 percent of hedge fund industry-wide assets by the end of 2008. (See Suchita Nayar, "Funds of Hedge Funds are Facing a Bad Wake-up Call," *FT.com*, October 12, 2008 http://www.ft.com/cms/s/0/16ea79cc-96f7-11dd-8cc4000077b07658.html?nclick_check=1.)

Hedge funds often restrict their investors to wealthy individuals and institutional investors, who, in theory, have the resources to understand and absorb the risks involved in investing in such funds, in exchange for the ability to operate without many of the constraints of the regulatory and disclosure requirements imposed on other types of pooled investments (such as mutual funds). In recent years, there has been a trend for pension

plan fiduciaries, seeking greater diversification and significant growth potential, to invest pension plan assets in hedge funds and other so-called "alternative investments."

The 25 Percent Test

In general, under a look-through rule contained in the US Employee Retirement Income Security Act of 1974, as amended (ERISA), and the regulations promulgated thereunder (the "Plan Asset Regulation"), when a plan that is subject to ERISA (e.g., a US private pension plan) or Section 4975 of the US Internal Revenue Code of 1986, as amended (the "Code") (e.g., an individual retirement account (an "IRA")), acquires an equity interest in an entity, and that interest is neither a publicly-offered security nor a security issued by an investment company registered under the US Investment Company Act of 1940, the assets of the plan will include not only the equity interest in the entity, but also an undivided interest in each of the underlying assets of the entity, unless an exception under the Plan Asset Regulation and ERISA applies.

One such exception applies if the entity is an "operating company," within the meaning of the Plan Asset Regulation, which includes a "venture capital operating company" (a "VCOC"). Another exception applies if "benefit plan investors" (e.g., US private pension plans and IRAs) hold less than 25 percent of the value of each class of the equity interests in the entity, disregarding equity interests held by persons (other than benefit plan investors) who have discretionary authority or control over the assets of the entity or who provide investment advice for a fee with respect to those assets and "affiliates" of those persons. This rule is known as the "25 Percent Test."

For the most part, hedge funds seeking to avoid coverage by ERISA endeavor to comply with the 25 Percent Test. Unlike private equity funds, hedge funds generally will not seek to qualify as VCOCs, largely due to the fact that hedge funds typically will not obtain sufficient management rights in their investments (one of the key requirements for VCOC qualification).

While avoiding ERISA coverage is now easier after the enactment of the Pension Protection Act of 2006 (the "PPA"), which limited the types of plans taken into account under the 25 Percent Test, an increasing number of hedge funds accept coverage under ERISA, especially after the PPA's addition of the "service provider" prohibited transaction exception, which may facilitate ERISA compliance. More generally, market forces, particularly those causing a concentration of investment capital in pension plans, may cause hedge funds to become willing to be subject to ERISA.

For those hedge funds wishing to avoid ERISA coverage, complying with the 25 Percent Test entails a careful monitoring of each class of the equity interests in an investment fund held by "benefit plan investors." As a result, a hedge fund must initially determine the percentage of "benefit plan investors" holding equity interests in the hedge fund, either directly or indirectly. Thereafter, a hedge fund must monitor all new investors, transfers and redemptions of interests in the hedge fund to ensure that such new investors, transfers or redemptions will not cause the equity interests held by "benefit plan investors," either directly or indirectly, to equal or exceed 25 percent. If a hedge fund were to fail to meet the 25 Percent Test (and does not otherwise qualify as a VCOC or otherwise meet another exception under the Plan Asset Regulation), the unfortunate result would be that such hedge fund would be deemed to hold "plan assets" and would be subject to the panoply of ERISA rules and regulations. This result would in turn require, for example, that the manager or general partner of a fund act as a fiduciary of the investing pension plans and that consideration be given to whether the fund's transactions could constitute prohibited transactions under ERISA or Section 4975 of the Code.

Violations of the 25 Percent Test Could Occur

As hedge fund assets will begin to flow back to those investors who initiated redemptions over the last several months, the percentage of "benefit plan investors" that may remain in each hedge fund may change. It is possible that most redemptions motivated by the financial crisis will come from wealthy individual investors, rather than from institutional investors, such as pension plans, since individuals tend to generally have a lower tolerance for investment losses. (See L. Story, "Investors Flee as Hedge Fund Woes Deepen," cited above, at A1.) For some hedge funds, once redemptions have been made to withdrawing individuals, "benefit plan investors" may end up owning a larger percentage of the fund's assets and, in some instances, that percentage may exceed the 25 percent threshold.

What Can Be Done?

For hedge fund managers, now it is particularly important to monitor redemptions from their funds to ensure continued compliance with the 25 Percent Test. In the event that a distribution would cause a fund to violate the 25 Percent Test, action should be taken to prevent this from occurring, unless the fund is structured to be ERISA-compliant. The operating documents of hedge funds often contain provisions intended to assist managers from violating the 25 Percent Test. Such provisions can include, for example, (i) preventing non-benefit plan investors from receiving a distribution that would cause the fund to fail the 25 Percent Test and (ii) requiring benefit plan investors to take distributions from the fund if it is necessary for the fund to continue to pass the 25 Percent Test. Failure to take necessary action will, in addition to causing the fund to be subject to the panoply of ERISA rules and regulations, typically cause certain adverse provisions of the hedge fund's operating document to apply. Such provisions typically include certain cure requirements that, in some instances, could trigger mandatory distributions to certain investors.

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Given the number of redemptions that have occurred in the last several months and the possibility that market conditions will continue to sour, resulting in additional investors seeking redemptions, hedge fund managers should review their funds' operating documents to determine what steps (e.g., prohibiting redemptions or required distributions to certain investors, as described above) they can take to avoid violating the 25 Percent Test and to implement such steps as may become necessary.

For fiduciaries of pension plans who have invested plan assets in hedge funds, now may be a good time to contact each of their hedge fund managers to inquire about compliance with the 25% Test and, in the event of noncompliance, to take action (such as requesting a withdrawal or other action

as may be permitted in the fund's documentation) so as to avoid an investment in a fund that is deemed to have ERISA plan assets. It may also be appropriate to discuss the possibility of allowing the 25 percent level to be exceeded and thereby become an ERISA-compliant fund.

Conclusion

If you are a hedge fund manager or a pension plan fiduciary whose plan's assets are invested in hedge funds and you would like to discuss the recent market volatility and its possible ERISA-related implications, White & Case would be happy for you to contact us to review your options during this difficult time.

Group Health Plans Face New Medicare Secondary Payer Reporting Requirements

Effective January 1, 2009, the Medicare, Medicaid, and SCHIP Extension Act of 2007 (the "Act") will require both self-insured and fully-insured group health plans to collect certain participant data on a quarterly basis and to report such data on an ongoing basis to the Centers for Medicare and Medicaid Services (CMS). The purpose of the new reporting requirements is to help CMS, the federal agency responsible for overseeing Medicare, to enforce the Medicare secondary payer (MSP) rules. The MSP rules dictate the coordination of benefits between a group health plan and Medicare: with respect to certain individuals who are covered by both types of insurance, the MSP rules require the group health plan to be the primary payer and Medicare to be the secondary payer, meaning that Medicare is obligated to pay only if the primary payer has not paid or cannot reasonably be expected to pay. The penalty for noncompliance with the new MSP reporting requirements is US\$1,000 per day for each individual with respect to whom information should have been submitted.

Background

The Social Security Act, as amended in 1965 and 1972, established Medicare as the primary payer of covered health services for qualifying individuals who are age 65 or older, disabled, or have End Stage Renal Disease (ESRD). To alleviate the financial burden on Medicare, Congress passed subsequent laws, or the MSP rules, that require group health plans to be the primary payer, and Medicare to be the secondary payer, with respect to the following individuals:

- Those who are age 65 or older and are covered under an employer-sponsored and/or contributed to group health plan as a result of (i) their own current employment status with an employer that has

20 or more employees (or if it is a multiemployer plan, where at least one of the employers has 20 or more full- or part-time employees), or (ii) the current employment status of a spouse of any age with such an employer

- Those who are disabled and are covered under an employer-sponsored and/or contributed to group health plan as a result of (i) their own current employment status with an employer that has 100 or more full- or part-time employees (or if it is a multiemployer plan, where at least one of the employers has 100 or more full- or part-time employees), or (ii) the current employment status of a family member with such an employer
- Those who have ESRD and are covered by a group health plan on any basis (for these individuals, Medicare is the secondary payer during the first 30 months of eligibility).

On December 29, 2007, the Act was signed into law for the purpose of, among other things, identifying individuals with respect to whom Medicare is a secondary payer under the MSP rules. Section 111 of the Act requires an entity serving as an insurer or third party administrator for a group health plan, or a plan administrator or fiduciary in the case of a self-insured and self-administered group health plan, to (i) collect from the plan sponsor and plan participants such information as specified by the US Department of Health and Human Services (HHS) and (ii) to submit such information in the form and manner (including frequency) specified by HHS. On August 1, 2008, CMS, a division of HHS, issued a supporting statement for Section 111 of the Act (the "Statement"). The Statement specifies what information must be collected from plan sponsors and plan participants, and the form and manner in which such information must be reported to CMS.

What Information Must Be Collected and Reported

The Statement sets forth the following list of data elements that must be collected and reported with respect to individuals who are both participants of the reporting group health plan and beneficiaries of Medicare: (1) HIC number (HICN; Medicare ID Number), (2) beneficiary Social Security number (required if HICN not available), (3) beneficiary surname (first five letters required), (4) beneficiary first initial, (5) beneficiary date of birth, (6) beneficiary sex code, (7) document control number (assigned by the insurer), (8) transaction type (add, delete, or update), (9) type of insurance coverage, (10) effective date of current coverage, (11) termination date of current coverage, (12) relationship to policy holder, (13) policy holder's first name, (14) policy holder's last name, (15) policy holder's Social Security number, (16) employer size, (17) small employer MSP exception, (18) group policy number, (19) individual policy number, (20) employee coverage election (who the policy covers), (21) employee status (reason why the group health plan is primary), (22) employer EIN and business address and (23) insurer EIN and business address.

The Statement also includes the following list of optional data elements, the first four of which are needed for reporting prescription drug coverage: (1) Rx insured ID number, (2) Rx group number, (3) Rx PCN, (4) Rx BIN number, (5) Rx toll free number (to call with questions regarding Rx coverage) and (6) person code (assigned by insurer).

Form and Manner (Including Frequency) of Reporting

According to the Statement, the mandatory reporting will be a completely electronic process. The applicable reporting entity must first register online by logging on to a secure website, which is currently under development. Once an application is submitted, CMS will begin working with the entity to set up the data reporting and response process.

The Statement provides that the mandatory reporting shall be done on an ongoing, quarterly basis.

Non-Group Health Plans

Under the MSP rules, Medicare is also a secondary payer to liability insurance plans (including self-insurance plans), no-fault insurance plans and workers' compensation plans. The Act and the Statement set forth similar reporting requirements for these plans and a separate effective date of July 1, 2009.

As always, White & Case would be pleased to discuss any questions or concerns you may have regarding the new MSP reporting requirements.

New IRS Proposed Regulations Address Distribution Notices and Election Periods

The Internal Revenue Service recently issued Proposed Treasury Regulations that would provide guidance on the information that would be required to be provided to tax-qualified retirement plan participants, in connection with the distribution of their benefits from such plan, in order to satisfy the requirement that the participant be notified of the consequences of failing to defer (i.e., taking an immediate distribution). In addition, the Proposed Treasury Regulations would expand from 90 to 180 days: (a) the election period during which a qualified joint and survivor annuity may be waived and (b) the notice period for describing the terms and conditions of a qualified joint and survivor annuity.

Background

A. Notice of Consequences of Failing to Defer

Where a tax-qualified retirement plan participant's nonforfeitable accrued benefit exceeds US\$5,000, Section 411(a)(11) of the Internal Revenue Code (the "Code") provides that a qualified plan may not distribute that benefit to the participant prior to the later of age 62 or normal retirement age without the participant's consent. Section 411(a)(11) of the Code also requires the plan to provide a notice to such participant informing them of their right to defer receipt of such distribution.

The Pension Protection Act of 2006 (the "PPA") instructed the Department of the Treasury to modify the regulations under Code Section 411(a)(11) to provide that the applicable notice be expanded to include a description of the consequences of failing to defer receipt of the applicable distribution (i.e., the consequences of taking such an immediate distribution of the accrued benefit). The PPA also mandated that the changes to these notices apply to years beginning after December 31, 2006. Prior to the promulgation of regulations by the Treasury, IRS Notice 2007-7 provided guidance on how a plan sponsor could comply with the PPA's modifications

to Code Section 411(a)(11)'s notice requirements. Notice 2007-7 required the plan administrator to make a "reasonable attempt" to comply with the requirements and included a safe harbor that would be considered a reasonable attempt to comply. Such safe harbor would be satisfied if the notice included: (a) in the case of a defined benefit plan, a description of how much larger benefits will be if the commencement of distributions is deferred; (b) in the case of a defined contribution plan, a description indicating the investment options available under the plan (including fees) that will be available if distributions are deferred and (c) the portion of the plan's summary plan description that contains any special rules that might materially affect a participant's decision to defer (e.g., provisions which would limit retiree health benefits to participants who have an undistributed benefit under the employer's retirement plan).

B. Expansion of Applicable Election Period

Section 401(a)(11)(A) of the Code provides that, except as provided in Section 417 of the Code, a tax-qualified retirement plan must provide the accrued benefit payable to a vested participant who does not die prior to commencement of his or her benefit payments in the form of a qualified joint and survivor annuity (QJSA). Section 417 of the Code generally provides that a plan participant may elect at any time during the "applicable election period" to waive the QJSA form of benefit.

The PPA changed the "applicable election period" for electing a distribution subject to the QJSA rules of Sections 401(a)(11) and 417 of the Code in a form other than a QJSA from a 90-day period to a 180-day period. Under Section 417(a) of the Code, the participant must be given notice of their right to waive the QJSA form of benefit during the "applicable election period" no less than 30 days and no more than 90 days before the annuity starting date. (417(a)(1)(A)) The PPA provided that

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the Secretary of the Treasury amend the regulations relating to these Code Sections to substitute “180 days” for “90 days” each place it appears.

C. Expansion of Period for Notices

Section 417(a)(3)(A) of the Code provides that a tax-qualified retirement plan must provide to each participant, “within a reasonable period of time before the annuity starting date,” a written explanation of the terms and conditions of the QJSA and certain other information. Similarly, Section 402(f) of the Code provides that a plan administrator must, “within a reasonable period of time” before making an eligible rollover distribution, provide to recipients an explanation of certain tax consequences of the distribution. Regulations issued under such Code Sections provided that 90 days was a “reasonable period of time” for these purposes.

PPA provides that the Secretary of the Treasury shall modify the Treasury Regulations referenced above by substituting “180 days” for “90 days.”

IRS Proposed Regulations on Distribution Notices

A. Notice of Consequences of Failing to Defer

The Proposed Regulations would require that the notice required by Section 411(a)(11) of the Code provide guidance on the relevant information that must be provided to a participant in order to satisfy the requirement that the participant be notified of the consequences of failing to defer (i.e., the consequences of an election to take an immediate distribution). These consequences include the differences in timing of the taxation of an immediate distribution that is not (or cannot be) rolled over and a distribution deferred to the later of age 62 or normal retirement age, including the differences in the taxation of Roth deferrals (where applicable), application of the 10 percent additional tax on certain distributions before age 59½ and, in the case of a defined contribution plan, loss of the opportunity upon

immediate commencement for future tax-favored treatment of earnings if the distribution is not rolled over (or not eligible to be rolled over) to an eligible retirement plan.

The Proposed Regulations would require notices to participants in defined contribution plans to include a description of the loss of the opportunity for the participant’s account balance to accrue additional tax-favored treatment of earnings where the participant chooses an immediate distribution. Plan administrators would also have to include a statement that investment options available outside the plan may not be generally available on similar terms to those in the plan, as well as a statement that fees and expenses on investment options outside the plan may be different from the fees and expenses applicable to the participant’s account in the plan. The notice would also have to contain contact information so that the participant may obtain additional information from the plan on fees and expenses applicable to the participant’s account.

In the case where the distribution is made from a defined benefit plan, the Proposed Regulations would require the notice to contain a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and when the benefit is no longer immediately distributable (i.e., the later of age 62 or normal retirement age).

The Proposed Regulations would require the notice to contain an explanation of any plan provisions (including provisions of an accident or health plan maintained by the employer) that could reasonably affect the participant’s decision whether to take an immediate distribution of their benefit or defer it, such as plan terms under which the participant would lose eligibility for retiree medical benefits or an early retirement subsidy.

The information required by the Proposed Regulations must appear consecutively within the notice, but the notice may incorporate required information by reference, so long as the notice contains a statement of how the documents which provide information

on the consequences of choosing an immediate distribution may be obtained by the participant without charge and why the referenced information is relevant to a decision whether to defer.

B. Expansion of Applicable Election Period and Period for Notices

The Proposed Regulations would (1) expand the definition of “applicable election period” to up to 180 days and (2) expand the time period for notices issued under Code Sections 402(f), 411 and 417 to allow the notices to be issued up to 180 days prior to the annuity starting date.

Effective Date; Transition Period

The Proposed Regulations are proposed to become effective for notices provided (and election periods beginning) on or after the first day of the first plan year beginning on or after January 1, 2010, pending publication of Final Regulations in the Federal Register. However, as noted above, the PPA requirement to notify distributees of the consequences of failing to defer the receipt of distributions applies to years beginning after December 31, 2006. Therefore, prior to the effective date of the Final Regulations, with respect to the rules relating to the notice of

consequences of failing to defer the receipt of distributions, a tax-qualified retirement plan will be treated as complying if: (a) the plan complies with the Proposed Regulations or the requirements set forth in Notice 2007-7, or (b) the plan administrator makes a reasonable attempt to comply with the requirement to provide notice of a participant’s right to defer receipt of a distribution which also includes a description of the consequences of failing to defer. With respect to the rules relating to the expanded applicable election period and the expanded period for notices, a tax-qualified retirement plan may rely on the Proposed Regulations for notices provided (and election periods beginning) during the period beginning on the first day of the first plan year beginning on or after January 1, 2007 and ending on the effective date of the Final Treasury Regulations.

Conclusion

The Proposed Regulations will require changes to the distribution notices and election forms of tax-qualified retirement plans. White & Case would be pleased to review your current distribution notices and election forms for compliance with the PPA and/or to help modify such forms to comply with the Proposed Regulations.

White & Case

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Please contact Andrew L. Oringer, Sharon Parella, Kenneth A. Raskin or any member of White & Case's Executive Compensation, Benefits and Employment Law Practice Group if you have any questions or comments or you would like an additional copy of this or other issues. You may also call upon White & Case's Legislative Services in Washington, DC for information on pending bills, hearing dates, etc. For address changes or to receive this publication by e-mail, please send your information to ECBEL@whitecase.com.

Andrew L. Oringer, Esq.
New York
aoringe@whitecase.com

Sharon Parella, Esq.
New York
sparella@whitecase.com

Kenneth A. Raskin, Esq.
New York
kraskin@whitecase.com

Dan Woods, Esq.
Los Angeles
dwoods@whitecase.com

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