



401(K) Plan Design & Administration Questions Answered

This FYI provides information about a variety of 401(k) plan design and administration issues that I recently answered in my BenefitsLink 401(k) Q&A column.

Question 84: I understand that Code Section 402(g) limits elective deferrals based on the taxable year which for most individuals is the calendar year. Can you provide a cite?

Answer: Internal Revenue Code of 1986 ("Code") Section 402(g)(1) provides that the elective deferrals of any individual for any taxable year are included in the individual's income to the extent the deferrals exceed the applicable dollar limit. (The applicable dollar limit for 2009 is \$16,500. See Q&A 80.) The regulations are a little clearer about referring to the "individual's taxable year." See Treas. Reg. Section 1.402(g)-1(d) and (e)(2)(i). For Code Section 402(g) purposes, plan administrators should be aware that if they are applying the annual applicable limit (\$16,500 for 2009) to the individual's taxable year, the taxable year apparently normally is the calendar year, but might be a fiscal year. To get more details (and cites), go to: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=84.

Question 85: I am working with a 401(k) plan that was deemed top-heavy at 60.24%. Is there any reason why I cannot work with whole numbers and round down to 60% to avoid top-heavy status?

Answer: The language of the top-heavy statute is a reason not to round down. For a discussion, see: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=85.

Question 86: Our defined contribution plan is top-heavy for the year 2009. The percentage was 61.38%. Would any of these options help? (1) Have one of our highly compensated employees ("HCEs") roll over her money into an IRA? (2) Have a non-highly compensated employee ("NHCE") roll over her money out of our plan? (3) Have an NHCE roll over her money into our plan? If the NHCE rolled her money into the plan, the top-heavy ratio would be less than 60%.

Answer: As discussed in the answer, none of your options will help. To find out why, go to: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=86.

Question 87: The Pension Protection Act of 2006 allowed plans to provide for qualified reservist distributions for those called to active duty before December 31, 2007. Has this been extended?

Answer: Yes, the ability for plans to make qualified reservist distributions for those called or ordered to active duty has been amended to make the provision open-ended rather than ending at December 31, 2007. For more information, go to: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=87.

Question 88: Does adding a low wage hourly employee as a 401(k) plan participant help to alleviate a "top-heavy" problem?

Answer: It may help, but not necessarily. For example, generally, in order to help, there must be contributions on behalf of the employee that are included in the top-heavy calculation and the employee must not be a key employee. For a few of the issues that can arise, visit: http://benefitslink.com/modperl/qa.cgi?db=qa_401k&id=88.

You can find a more complete discussion of top-heavy testing in the outline, "Top Heavy Rules and Keogh Plans," at <http://www.boardmanlawfirm.com/readingroom/TopHeavy.pdf>.

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