

Part III - Administrative, Procedural and Miscellaneous

Automatic Enrollment in SIMPLE IRAs

Notice 2009-66

I. PURPOSE

This notice provides guidance to facilitate automatic enrollment in SIMPLE IRA plans, including questions and answers relating to the inclusion in a SIMPLE IRA plan of an automatic contribution arrangement. See also Notice 2009-67, IRB 2009-39, ____, which provides a sample amendment that may be used to add an automatic contribution arrangement to a SIMPLE IRA plan.

II. BACKGROUND

Section 408(p) provides rules for a SIMPLE IRA plan, which is a simplified tax-favored retirement plan for small employers. Notice 98-4, 1998-1 C.B. 269, provides guidance with respect to SIMPLE IRA plans.

Under a SIMPLE IRA plan, contributions are made to SIMPLE individual retirement accounts or annuities (referred to as "SIMPLE IRAs") established pursuant to the plan adopted by the employer. A SIMPLE IRA plan must be maintained on a calendar-year basis. A new SIMPLE IRA plan is generally permitted to be established as of any date between January 1 and October 1, or, in the case of an employer that comes into existence after October 1, a SIMPLE IRA plan is permitted to be established as soon as administratively feasible after the employer comes into existence. In addition, the SIMPLE IRA plan must be the only plan maintained by the employer, except for a plan in which only

employees covered by a collective bargaining agreement are eligible to participate.

Contributions under a SIMPLE IRA plan consist of salary reduction contributions, i.e., contributions made at the election of an employee eligible to participate in the plan (an “eligible employee”), as well as employer matching contributions required to be made with respect to each eligible employee’s salary reduction contributions. Subject to a notice requirement, an employer may elect to make nonelective contributions rather than matching contributions. These salary reduction contributions and employer matching or nonelective contributions must be the only contributions under the plan.

All contributions to an eligible employee’s SIMPLE IRA must be nonforfeitable. Employer contributions are not permitted to be conditioned on the retention of the contributions in an employee’s SIMPLE IRA, and the employer is not permitted to impose any restrictions on withdrawals from the SIMPLE IRA.

Salary reduction contributions to a SIMPLE IRA are subject to a dollar limit (the “SIMPLE IRA dollar limit,” \$11,500 for 2009) and are also taken into account in applying the dollar limit under § 402(g) on all elective contributions made by an individual to employer-sponsored retirement plans (the “aggregate dollar limit,” \$16,500 for 2009). In the case of an individual who is at least 50 years old, these dollar limits are increased by the amount of permissible catch-up contributions (\$2,500 for 2009 in the case of the SIMPLE IRA dollar limit and \$5,500 for 2009 in the case of the aggregate dollar limit).

Each eligible employee under a SIMPLE IRA plan must be permitted to elect, during the 60-day period immediately preceding the beginning of the calendar year, i.e., November 2 to December 31 (the “annual 60-day election period”), to make salary reduction contributions for the year or to change the amount of such contributions under a prior election, including changing the amount to \$0. For the first year an employee is eligible to make salary reduction contributions, including the first year a SIMPLE IRA plan is established, the employee must be given a 60-day election period (the “initial 60-day election period”) that includes either the date the employee becomes eligible or the day before that date. For example, if a newly hired employee becomes eligible to make salary reduction contributions on July 19, 2010, then the 60-day period can begin as early as May 20, 2010 (thus including July 18, 2010, the day before the employee’s eligibility date) or as late as July 19, 2010. A SIMPLE IRA plan may also permit an eligible employee to make or change a salary reduction contribution election during additional or longer election periods.

An employee must be permitted to terminate a salary reduction contribution election at any time during the year. If the employee does so outside of the election period or periods provided under the SIMPLE IRA plan for making or changing salary reduction contribution elections, then the SIMPLE IRA plan may provide that the employee is not permitted to resume salary reduction contributions until the next year.

Immediately before an eligible employee’s annual or initial 60-day election period, the employer must notify the employee of the opportunity to elect to make

salary reduction contributions (or to change a prior election) and must include a copy of a summary description of the SIMPLE IRA plan. The summary description used for this purpose must be provided to the employer by the SIMPLE IRA trustee and must describe the benefits provided under the SIMPLE IRA plan, the time and method of making elections under the plan, and the procedures for, and effects of, making withdrawals, including rollovers, from the SIMPLE IRA.

In general, a SIMPLE IRA plan must permit each eligible employee to select the financial institution to which SIMPLE IRA contributions are made on behalf of the employee. Alternatively, an employer is permitted to establish a SIMPLE IRA plan with a designated financial institution, so that all contributions under the plan are made to SIMPLE IRAs at the designated institution. In that case, an employee must be given a reasonable period of time each year in which to transfer his or her SIMPLE IRA balance without cost or penalty from the designated financial institution to a SIMPLE IRA at another financial institution selected by the employee. This requirement is deemed to be met if an employee has until the end of the employee's annual or initial 60-day election period to request to transfer, without cost or penalty, the balance attributable to contributions made for the next year (or for the remainder of the year in the case of an initial election period) and subsequent years to a SIMPLE IRA at another financial institution selected by the employee. The right to make such a transfer must be included in the notice provided to the employee immediately before the election period.

Distributions from a SIMPLE IRA are includible in gross income for the taxable year in which made unless rolled over to another SIMPLE IRA or tax-favored retirement plan. Distributions made during the 2-year period beginning when an employee first participates in any SIMPLE IRA plan of the employer (the employee's "initial two-year participation period") are permitted to be rolled over only to another SIMPLE IRA. Distributions made before age 59-1/2 are subject to the additional 10-percent tax on early withdrawals under § 72(t) unless the distribution is rolled over or an exception applies. However, in the case of a distribution from a SIMPLE IRA made during the employee's initial two-year participation period, the rate of the additional tax is 25 percent rather than 10 percent.

An automatic contribution arrangement is an arrangement under which, in the absence of an affirmative election by an employee, a default election applies whereby the employee is treated as having elected to have a portion of the employee's compensation contributed to a tax-favored retirement plan as default elective contributions rather than paid to the employee in cash.

III. QUESTIONS AND ANSWERS ON AUTOMATIC ENROLLMENT IN SIMPLE IRA PLANS

Q-1: May a SIMPLE IRA plan include an automatic contribution arrangement?

A-1: Yes. Section 408(p) requires that an employee eligible to participate in a SIMPLE IRA plan have an election between the employer paying cash to the employee or making a contribution to a SIMPLE IRA on behalf of the employee.

It does not, however, require that the employee receive an amount in cash in any

case in which the employee does not make an affirmative election to have that amount contributed to the SIMPLE IRA. Thus, for purposes of determining whether a contribution is a salary reduction contribution to a SIMPLE IRA, it is irrelevant whether the default that applies in the absence of an affirmative election is (1) for the employee to receive an amount in cash or (2) for the employer to contribute an amount to the SIMPLE IRA.

Q-2: May a SIMPLE IRA plan that includes an automatic contribution arrangement provide that default salary reduction contributions are made only for employees who are first eligible under the SIMPLE IRA plan on or after the effective date of the automatic contribution arrangement and who do not make an affirmative election (including an affirmative election of zero)?

A-2: Yes.

Q-3: May a SIMPLE IRA plan that includes an automatic contribution arrangement provide that the percentage of compensation at which default salary reduction contributions are made for an employee increases based on the number of years or portions of years for which default salary reduction contributions have been made for the employee?

A-3: Yes.

Q-4: What notice requirements apply to a SIMPLE IRA plan that includes an automatic contribution arrangement?

A-4: In addition to the information otherwise required to be included in a SIMPLE IRA notice, the notice must explain (1) the percentage of compensation at which default salary reduction contributions will be made on the employee's behalf if the

employee does not make an affirmative election, (2) the employee's right to elect not to have default salary reduction contributions made to the SIMPLE IRA or to have salary reduction contributions made at a different percentage of compensation or, if permitted under the SIMPLE IRA plan, in a different dollar amount, and (3) how default salary reduction contributions will be invested in the absence of any investment election by the employee. In the case of a SIMPLE IRA plan under which all contributions are made to a designated financial institution, the notice must also explain the additional period (as discussed in Q&A-5 of this notice) during which an employee may elect to transfer his or her balance without cost or penalty to another SIMPLE IRA.

Q-5: In the case of a SIMPLE IRA plan under which all contributions are made to a designated financial institution, how does an employee's right to transfer his or her balance without cost or penalty to another SIMPLE IRA apply if default salary reduction contributions are made for an employee under an automatic contribution arrangement?

A-5: As discussed in Section II of this notice, an employee must be permitted during his or her annual or initial 60-day election period to request to transfer, without cost or penalty, the balance attributable to contributions made for the next year (or for the remainder of the year in the case of an initial election period) and subsequent years to a SIMPLE IRA at another financial institution selected by the employee. If default salary reduction contributions for an employee are made to a designated financial institution, the employee must also be permitted, during the first 60 calendar days of the first year for which default salary

reduction contributions are made (or the remainder of the first year in the case of an initial election period), to elect to transfer, without cost or penalty, his or her balance attributable to contributions made for that year and subsequent years to a SIMPLE IRA at another financial institution selected by the employee.

Q-6: In the case of a SIMPLE IRA plan that is covered by the fiduciary duty requirements of § 404 of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), does fiduciary relief under § 404(c)(5) of ERISA apply with respect to the investment of SIMPLE IRA contributions, including default salary reduction contributions, in default investments (i.e., investments made in the absence of any investment direction by the employee)?

A-6: The Department of Labor has advised the Internal Revenue Service that the regulations under § 404(c)(5) of ERISA relating to qualified default investment alternatives (29 CFR 2550.404c-5) apply to the investment of contributions, including default salary reduction contributions, under a SIMPLE IRA plan.

Therefore, if the requirements of these regulations are met, fiduciary relief under § 404(c)(5) of ERISA applies with respect to the investment of such contributions in default investments.

IV. ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENTS UNDER § 414(w) AND REQUEST FOR COMMENTS

Section 902 of the Pension Protection Act of 2006, Public Law 109-280 (enacted August 17, 2006), added § 414(w) to the Code to facilitate automatic contribution arrangements in § 401(k) plans, § 403(b) plans, and governmental § 457(b) plans. Under § 414(w), an applicable employer plan that contains an

eligible automatic contribution arrangement is permitted to allow employees, within 90 days after the date of the first default elective contribution with respect to the employee under the arrangement, to elect to receive a distribution based on the default elective contributions and avoid the additional income tax on early withdrawals under § 72(t). Section 109(b)(5) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110-458 (enacted December 23, 2008), added SIMPLE IRA plans described in § 408(p) of the Code (and salary reduction simplified employee pensions described in § 408(k)(6)) to the list of employer plans that may include an eligible automatic contribution arrangement under § 414(w) of the Code. Final regulations under § 414(w) were published on February 24, 2009 in the *Federal Register* (74 F.R. 8200). The preamble to the regulations provides that they do not reflect guidance on SIMPLE IRA plans that include an eligible automatic contribution arrangement.

Comments are requested on whether the Department of the Treasury and the Service should issue guidance regarding SIMPLE IRA plans that include eligible automatic contribution arrangements under § 414(w) and, if so, what issues should be addressed in the guidance. For example, such issues might include:

- Application to SIMPLE IRA plans of the last sentence of § 414(w)(1) regarding the forfeiture, or other possible treatment, of employer matching contributions that relate to salary reduction contributions withdrawn in a permissible withdrawal under § 414(w);

- Application to SIMPLE IRA plans of the requirement in § 414(w)(3)(B) that default salary reduction contributions be a uniform percentage of compensation; and
- Administrative issues with respect to permissible withdrawals under § 414(w) and associated matching contributions, such as determining the proper amount of a permissible withdrawal, information sharing with respect to a permissible withdrawal, and reporting of a permissible withdrawal.

Comments are also requested on whether the Department of the Treasury and the Service should issue additional guidance regarding SIMPLE IRA plans that include automatic contribution arrangements that are not eligible automatic contribution arrangements under § 414(w) and, if so, what issues should be addressed in the additional guidance.

Written comments can be sent to CC:PA:LPD:DRU (Notice 2009-66), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, DC 20044. Also, comments may be hand delivered between the hours of 8 a.m. and 4 p.m., Monday through Friday, to CC:PA:LPD:DRU (Notice 2009-66), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the following e-mail address: notice.comments@irs.counsel.treas.gov (Notice 2009-66). All comments will be available for public inspection.

DRAFTING INFORMATION

The principal author of this notice is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via email to RetirementPlanQuestions@irs.gov.