

# employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service  
Tax Exempt and Government  
Entities Division

A Publication of Employee Plans

## IRS Continues to Oppose Deduction in ESOP Redemption Cases

Alan Tawshunsky, IRS Assistant Chief Counsel (Employee Benefits), speaking October 2<sup>nd</sup> in Boston before the American Bar Association's Section of Taxation, announced that the IRS will continue challenging deductions by corporate taxpayers under section 404(k) for redemptions of stock held by the company's employee stock ownership plan (ESOP). [Chief Counsel Notice 2004-38](#), issued October 1, 2004, provides guidance on the IRS position following the decision in [Boise Cascade Corp. v. United States](#), 329 F.3d 751 (9th Cir. 2003). In [Boise Cascade](#), the company redeemed ESOP stock in order to make cash distributions to ESOP participants upon their termination of employment. The 9<sup>th</sup> Circuit held that the company could deduct these amounts as dividend payments under section 404(k).

The Notice reiterates the IRS position, originally stated in [Rev. Rul. 2001-6](#), that these payments are not dividends and are therefore not deductible under section 404(k); even if the amounts are dividends, section 162(k) disallows the corporation's deduction; and treating the amounts as deductible is inappropriate because such treatment vitiates important protections for ESOP participants and duplicates an earlier deduction by the corporation for the same economic expense. The Notice instructs agents to continue disallowing claims for the deduction of these amounts under section 404(k) in cases outside the 9th Circuit. In cases within the 9th Circuit, agents will coordinate with the National Office before disallowing these deductions.

The Notice may be viewed at [www.irs.gov](http://www.irs.gov) under the FOIA section or at the [Retirement Plans web page](#) under the EP Examinations section. •

## Extended SEP and SIMPLE Contribution Deadline for Disaster Areas

The IRS has announced special tax relief for taxpayers in several Presidentially declared disaster areas. This tax relief affects a wide range of types of returns and taxes, including those relating to Simplified Employee Pensions (SEPs) and Savings Incentive Match Plans for Employees (SIMPLE IRA plans). If you are a taxpayer affected by the disasters, you may be eligible for tax relief impacting your SEP or SIMPLE IRA plan. It is important to determine whether you are an affected taxpayer before taking advantage of the tax relief provisions. Once you determine that you are an affected taxpayer, then you can identify the specific relief available to you.

The following questions and answers help identify some of the relief available to SEPs and SIMPLE IRA plans:

**Q:** My business is located within a Presidentially declared disaster area and I sponsor a SEP or a SIMPLE IRA plan. How does this affect my plan contributions?

**A:** Sponsors of affected SEPs or SIMPLE IRA plans may have an extension of the due date for making SEP or SIMPLE IRA plan contributions.

## Disaster Area Relief *continued from page 1*

**Q:** My business is physically located within one of the Presidentially declared disaster areas. Is my business's SEP or SIMPLE IRA plan affected by the President's declaration?

**A:** Yes, your SEP or SIMPLE IRA plan is affected and may be entitled to special relief.

**Q:** If my business is not located in a Presidentially declared disaster area but the SEP or SIMPLE IRA plan records are, is my SEP or SIMPLE IRA plan still affected?

**A:** Yes.

**Q:** What extension relief period will apply to my SEP or SIMPLE IRA plan?

**A:** The IRS determines the extension period for each individual disaster area. This information may be found at [www.irs.gov](http://www.irs.gov) and clicking on "Disaster Area Tax Relief".

For example, if you have been affected by Hurricane Ivan under IR-2004-118 and your original or extended due date for filing any returns related to your SEP or SIMPLE IRA plan falls between September 13, 2004 and December 30, 2004, then the following tax relief applies:

1. Returns related to your SEP or SIMPLE IRA plan (e.g., Form 1120, Form 1065, Form 1040, etc.) may be made through December 30, 2004.
2. SEP or SIMPLE IRA plan contributions that affect these returns may also be made through December 30, 2004.

(Note that the date is December 30, 2004, not December 31, 2004.)

Or, if you have been affected by Tropical Depression Ivan under NJ-2004-49 and your original or extended due date for filing any returns related to your SEP or SIMPLE IRA plan falls between September 18, 2004 and December 1, 2004, then the following tax relief applies:

1. Returns related to your SEP or SIMPLE IRA plan (e.g., Form 1120, Form 1065, Form 1040, etc.) may be made through December 1, 2004.
2. SEP or SIMPLE IRA plan contributions that affect these returns may also be made through December 1, 2004.

For all of the most recent disaster area tax relief, visit [www.irs.gov](http://www.irs.gov).

## Coming in the Winter 2004 Edition of *Employee Plans News*

Upcoming topics include:

- An interview with Steve Miller, new Commissioner of TEGE, discussing priorities, guidance, his thoughts on Employee Plans and more;
- COLA updates;
- New guidance;
- Articles from DOL/EBSA and PBGC;

... and much more. Look for us in your email inbox around December 20, 2004.

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