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SPECIAL BULLETIN

IRS Issues Guidance and Model Amendment for the 2009 Waiver of Required Minimum Distributions Under WRERA

On September 24, 2009, the IRS issued *Notice 2009-82* that provided guidance, transitional relief, sample plan amendments and answers to questions related to the waiver of 2009 required minimum distributions (RMDs) from defined contribution plans (such as 401(k) plans, 403(b) plans and certain 457(b) plans) and from individual retirement arrangements (IRAs). *Notice 2009-82* is available by "*clicking here*" or at *http://www.irs.gov/pub/irs-drop/n-09-82.pdf.*

On September 25, 2009, the IRS issued a *Special Edition* of its publication *Employee Plan News* to explain *Notice 2009-82.* The *Special Edition* is available by *"clicking here"* or at *http://www.irs.gov/pub/irs-tege/se092509.pdf*.

The *IRS' Special Edition* explained that *The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA*) waived RMDs for 2009 and generally allowed plan sponsors to make the required plan or contract amendments related to the 2009 RMD waiver up to the last day of the first plan year beginning in 2011 *as long as* the plan or contract operates as if the amendments were in effect from its effective date. Due to the waiver of 2009 RMDs, distributees may roll over any amount they received from a defined contribution plan that would have been an RMD for 2009 but for *WRERA* and that otherwise meets the definition of an eligible rollover distribution (ERD). However, the distribution is not treated as an ERD for purposes of requiring the plan to offer a direct rollover of that amount, mandatory 20% withholding or providing an ERD notice to the distributee. The passage of this change in *WRERA* caused uncertainty in how to administer the plan due to the short time between passage and the change. In response, the IRS issued *Notice 2009-82* and the *Special Edition.* See *Client Bulletin 2008-66* for the initial information we reported on *WRERA*.

Transitional Relief for Plan Sponsors

The *Special Edition* notes this concern and basically gives affected plans a "*get out of jail free*" card in the form of transitional relief. The *Special Edition* explains that the IRS recognizes that many plans, due to the enactment of *WRERA* shortly before

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the beginning of 2009, were unable to timely modify their administrative procedures to stop, or give participants and beneficiaries the choice to stop, 2009 RMDs. Therefore, the IRS will **NOT** consider a plan to have failed to operate in accordance with its terms merely because during the period beginning on January 1, 2009, and ending on November 30, 2009, the plan's operation conflicts with the sample amendment from *Notice 2009-82* the plan adopts.

This transitional relief is granted whether or not a plan:

- paid distributions that equal the 2009 RMDs or that are one or more payments in a series of substantially equal distributions (that include 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary or at least 10 years;

- gave participants and beneficiaries the option of stopping 2009 RMDs;

- gave participants and beneficiaries the option to continue 2009 RMDs; or

- gave participants the option to directly roll over certain RMD-related distributions described in the adopted sample amendment.

Plan Amendments

The *Special Edition* explained that *Notice 2009-82* provides <u>two sample plan amendments</u> that plan sponsors may use to amend their plans. Copies of the amendments in Word are available by "*clicking here*." The amendments permit participants to choose to receive or not receive 2009 RMDs, but only if the distribution(s) are:

- equal to the 2009 RMDs; or

- one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary or at least 10 years.

Depending on which sample amendment a plan chooses to adopt, the plan can either:

- cease making 2009 RMDs unless a participant or beneficiary elects otherwise; or

- continue making 2009 RMDs unless a participant or beneficiary elects otherwise.

Both sample amendments provide direct rollover options (in addition to those already offered by the plan) that plan sponsors can choose to offer.

The *Special Edition* noted that plan sponsors may need to tailor the sample amendment to their plan's particular terms and administrative procedures. **Plan Sponsors must adopt the amendment *no later than* the last day of the *first plan year beginning on or after* January 1, 2011**.

Because the sample amendments are set up for adoption agreements and individually designed plans, most multiemployer plans will need to tailor them. Plans that have already made decisions on how to approach this WRERA change may wish to adopt the amendment that is closest to their practice. However, the transitional relief states that the IRS will not consider it an operational failure if the plan was not operated in accordance with the amendment. Plans that have not made a decision on this WRERA change should discuss what approach they want to take.

Additional Guidance in Notice 2009-82 Explained

The *Special Edition* also explained other guidance in *Notice 2009-82* noting that *Notice 2009-82* also contains questions and answers addressing issues raised from the public regarding the 2009 RMD waiver. For example, this additional guidance provides that:

- The deadline for an employee or a beneficiary that had until the end of 2009 to choose between receiving distributions under the 5-year or the life expectancy rule is extended until the end of 2010.

- In plans that permit a nonspouse designated beneficiary to directly roll over a deceased participant's account balance, the special rule in Notice 2007-7 is modified so that, if the employee died in 2008, the nonspouse designated beneficiary has until the end of 2010 to make the direct rollover and use the life expectancy rule.

- Only for 2009, if an individual receives a plan distribution that includes a 2009 RMD, the portion of the distribution that represents the 2009 waived RMD is subject to the optional 10% withholding rules under §3405(b) and any remaining portion is subject to the 20% mandatory withholding rule of §3405(c) (assuming the distribution otherwise qualifies as an ERD). Any distributions made in 2009 are deemed to consist first of any undistributed RMDs from prior years followed by 2009 RMDs.

- The 2009 RMD waiver does not apply to payments that are part of a series of substantially equal periodic payments under the "RMD method" (a payment method that satisfies the §72(t)(2)(A)(iv) 10% early withdrawal tax exception).

Plan administrators would be well-advised to review at least the Q&As in the end of *Notice 2009-82*. The introduction is a bit dryer read but contains a nice explanation of the legal background under the Code about RMDs. A copy of just the Q&As from *Notice 2009-82* is available by "*clicking here*."

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