

November 30, 2009 Is Deadline for Plan Sponsors to Finalize 2009 Required Minimum Distribution Procedures

November 18, 2009

On September 24, the Internal Revenue Service (IRS) issued Notice 2009-82, which provides for a **November 30, 2009** deadline for defined contribution plan sponsors to finalize their required minimum distribution (RMD) waiver procedures for 2009. The notice provides for a later deadline of the **last day of the 2011 plan year** (or the 2012 plan year for governmental plans) for amendments reflecting plans' 2009 RMD waiver procedures. The notice provides further guidance on RMD waivers from defined contribution plans and individual retirement accounts (IRAs) for 2009.

The notice also provides that individuals who already received 2009 RMDs (and certain other amounts that include RMDs) and who wish to avoid income tax on the amounts received have until **November 30, 2009** to roll over the amounts to an eligible retirement plan (or 60 days after receipt of the RMD, if later).

Below is a list of action items for plan sponsors to consider. Following the action items is general background information about the 2009 RMD waiver.

Plan Sponsor Action Items for November 30, 2009 Deadline

- **Make Any Remaining Decisions Regarding RMD Procedures.** The following items highlight the options generally available to plan sponsors, although some options may not be available based on plan terms and limitations set by their plan recordkeepers. We recommend that plan sponsors discuss these options with their legal counsel and recordkeepers.
 - ◇ Whether to make 2009 RMDs to plan participants and beneficiaries
 - ◇ Whether to suspend 2009 RMDs to plan participants and beneficiaries
 - ◇ Whether to give participants and beneficiaries the choice of receiving 2009 RMDs and, whether the default option—if no election is made—should be to make the RMDs or to suspend the RMDs
 - ◇ Whether to permit participants or beneficiaries to elect a direct rollover of the RMDs (and/or certain other amounts that include RMDs) from the plan to another eligible retirement plan

- ◇ If RMDs have been made from the plan, whether to permit participants and beneficiaries to roll over the RMDs (and/or certain other amounts that include RMDs) back to the plan
- ◇ Whether to notify participants and beneficiaries of their right to roll over RMDs (and/or certain other amounts that include RMDs) to another eligible retirement plan
- **Review 2009 RMD Procedures for Compliance with IRS Guidance.** Plan sponsors should review their 2009 RMD procedures to make sure that they otherwise comply with the guidance provided in Notice 2009-82.
- **Plan Amendment Deadlines**
 - ◇ ***Employer-Sponsored Retirement Plans.*** Plan sponsors must adopt an amendment reflecting their 2009 RMD waiver procedures by **no later than the last day of the first plan year beginning on or after January 1, 2011** (December 31, 2011 for plans with calendar-year plan years). Governmental plans have until last day of the first plan year beginning on or after January 1, 2012 to adopt the amendments. The amendment adoption deadline also applies to plan sponsors of preapproved prototype or volume submitter plans. The notice indicates that timely adoption of the amendment must be evidenced by a written document that is signed and dated by the employer, with certain exceptions for preapproved prototype and volume submitter plans.
 - ◇ ***IRAs.*** Pending further guidance from the IRS, IRAs are not required to be amended at this time.

Background

The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) modified the RMD rules for 2009. Specifically, WRERA waived the requirement for participants who are age 70½ or older (and beneficiaries) to take RMDs from their defined contribution plans and IRAs for 2009. For these purposes, defined contribution plans include qualified profit-sharing and 401(k) plans, 403(a) annuity plans, 403(b) plans, and governmental 457(b) plans (except for 457(b) plans for executives of tax-exempt entities). Additionally, 2009 will not count toward the “five-year” period that certain beneficiaries have to withdraw funds, giving them a sixth year to do so. Although this waiver was effective January 1, 2009, it does not apply to any RMD that was due for 2008, including an RMD that was required to be made no later than April 1, 2009 because an individual reached age 70½ in 2008. The waiver does not apply to RMDs for years following 2009.

Under WRERA, if all or a portion of a distribution during 2009 is eligible for a rollover solely because it is no longer an RMD, that portion of the distribution is not treated as an eligible rollover distribution for purposes of the direct rollover rules, including the mandatory 20% income tax withholding and 402(f) notice requirements. However, if a defined contribution plan distributes an amount in 2009 that would have been an RMD in whole or in part but for WRERA, a plan may, but is not required to, offer the participant a direct rollover for the RMD portion.

If the plan does not offer a direct rollover of the RMD portion of a 2009 distribution, or if the plan does offer a direct rollover but the recipient receives it in cash, the plan administrator must apply 10% withholding to that portion of the distribution (and give the participant an option to elect no

withholding), rather than the mandatory 20% withholding. Additionally, the notice of an eligible rollover distribution does not need to be provided if the distribution is limited to the amount that would have been the 2009 RMD.

If you have any questions on any of the issues discussed in this LawFlash, or would like assistance in reviewing your RMD procedures, please contact any of the following Morgan Lewis attorneys:

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