

October 22, 2009

The Employee Benefits Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the employee benefits area.

If you have any questions about the issues addressed here, or any other matters involving employee benefits issues, please feel free to contact the following attorneys:

William J. Keenan, Jr.
860.240.6028
wkeenan@murthlaw.com

Lissa J. Paris
860.240.6032
lparis@murthlaw.com

Kenneth L. Levine
860.240.6121
klevine@murthlaw.com

Elizabeth Neuwirth
203.653.5411
eneuwirth@murthlaw.com

IRS ISSUES GUIDANCE REGARDING WAIVER OF 2009 REQUIRED MINIMUM DISTRIBUTIONS

Summary

The IRS has issued Notice 2009-82, providing additional guidance relating to the waiver of 2009 required minimum distributions from defined contribution retirement plans. The Notice provides two sample plan amendments to implement the waiver. It also provides transition relief through November 30, 2009 for compliance with Notice 2009-82.

The Notice clarifies that certain required minimum distributions for 2009 that are paid to participants and beneficiaries are eligible for rollover treatment and extends the normal 60-day period for making a rollover until November 30, 2009.

Although plan amendments are not required to be made this year, plan sponsors will need to promptly review the provisions of Notice 2009-82 and administer their plans in accordance with its provisions and the options provided under the Notice.

Background

Participants in qualified plans, Section 403(b) arrangements and Section 457(b) plans are generally required to begin receiving distributions (called “required minimum distributions” or “RMDs”) by April 1 of the calendar year following the later of the calendar year in which the participant attains age 70½ or retires. Earlier commencement is required for 5% owners of the plan sponsor. Similar RMD requirements apply to IRAs.

RMDs generally may not be rolled over to an IRA or other eligible retirement plan. In addition, RMDs are not subject to the 20% mandatory income tax withholding rules.

Legislative Change

The Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”) was signed into law by former President Bush on December 23, 2008, and waived the RMD requirements for calendar year 2009 for all defined contribution plans. Defined benefit plans are not affected. The

legislation was intended to prevent forced distribution from defined contribution plans when the value of the accounts had declined. As a result of the waiver:

1. If a participant's initial RMD is for the 2009 calendar year, the participant's initial RMD (normally required by April 1, 2010) does not have to be distributed; and
2. If a participant started receiving RMDs prior to 2009, the RMD for the 2009 calendar year that would normally be distributed to the participant by December 31, 2009, is not required to be distributed.

However, if the participant's initial RMD is for the 2008 year, it was required to be made by April 1, 2009 and is not affected by WRERA.

WRERA also modified the rollover rules to provide that the 2009 RMDs that are actually distributed will not be treated as eligible rollover distributions. Therefore, plans are not required to provide a direct rollover notice as to allow the participants to make direct rollovers with respect to distributions of 2009 RMDs, and the mandatory 20% income tax withholding for eligible rollover distributions does not apply to such distributions. These provisions led some to conclude that these distributions were ineligible for rollover treatment.

IRS Notice 2009-82

Notice 2009-82 provides significant guidance in the following areas:

1. **Installment Distributions are Covered by the 2009 RMD Waiver.** Notice 2009-82 provides that if a plan participant is receiving distributions in substantially equal periodic distributions payable at least annually over the participant's life expectancy (or the joint life expectancy of the participant and his beneficiary) or over a period of at least ten years, such distributions (referred to as "Extended RMDs") made for 2009 will be treated as 2009 RMDs that may be waived pursuant to the 2009 RMD waiver.
2. **Plan Amendments.** Plan sponsors are not required to implement the WRERA 2009 RMD waiver for the defined contribution plans, i.e., they can continue to distribute RMDs and Extended RMDs. In general, defined contribution plans may follow one of the following three courses of action:
 - a. Distribute 2009 RMDs and Extended RMDs without giving participants or beneficiaries the right to elect to leave their 2009 RMDs and Extended RMDs in the plan, and without regard to the 2009 RMD waiver provisions of WRERA;
 - b. Distribute 2009 RMDs or Extended RMDs unless the participant or beneficiary affirmatively elects not to receive the 2009 RMD;

- c. Cease distributions of 2009 RMDs or Extended RMDs unless the participant or beneficiary affirmatively elects to receive the 2009 RMD.

Plan documents must be amended to reflect the plan sponsor's decisions by the last day of the first plan year beginning on or after January 1, 2011 (or January 1, 2012 for governmental plans).

Notice 2009-82 contains two sample amendments that may be used by plan sponsors to amend their plans to allow participants and beneficiaries to decide whether to receive their 2009 RMDs and Extended RMDs or leave the amounts in the plan. Consistent with the options described above, the first sample amendment provides that participants and beneficiaries will receive distributions for 2009 unless the participant or beneficiary chooses not to receive them. The second sample amendment provides that participants and beneficiaries will not receive 2009 RMDs and Extended RMDs unless the participant or beneficiary affirmatively chooses to receive them. The IRS indicates that plan sponsors may have to modify the sample amendment chosen to conform to their plan's terms and administrative procedures.

3. **Direct Rollovers.** Although as noted earlier, WREERA modified the rollover requirements to prevent distributions of 2009 RMDs from being classified as eligible rollover distributions, Notice 2009-82 provides that a plan may nevertheless allow direct rollovers of such distributions into an IRA or other eligible retirement plan. The sample amendments include alternative provisions that either authorize or prohibit direct rollovers with respect to distributions of the 2009 RMDs and Extended RMDs. The default provision in both sample amendments is to offer a direct rollover alternative only with respect to amounts that would be eligible to be rolled over without regard to WREERA.
4. **Operational Relief.** Due to the enactment of WREERA in late 2008, many plans were unable to timely modify their procedures relating to 2009 RMDs to accommodate the new rules. The Notice provides that a plan will not be treated as failing to operate in accordance with its terms because, during the period from January 1, 2009 through November 30, 2009, the plan (a) either made or failed to make RMDs and Extended RMDs; (b) failed to give participants and beneficiaries the option to receive or not receive distributions that include 2009 RMDs; or (c) offered or failed to offer a direct rollover option for 2009 RMDs and Extended RMDs.
5. **Rollover Transition Relief.** To assist participants and beneficiaries who have previously received 2009 RMDs and Extended RMDs but did not know that these distributions could be rolled over into an IRA or other eligible retirement plan, Notice 2009-82 has extended the period following the distribution of 2009 RMDs and Extended RMDs during which such distribution may be rolled over into an IRA

or other eligible retirement plan. Generally, rollover contributions must be made within 60 days after receipt of the distribution of the amount being rolled over. However, Notice 2009-82 provides that distributions of 2009 RMDs and Extended RMDs may be rolled over to an IRA or other eligible retirement plan at any time on or before November 30, 2009 (or, if later, within 60 days after the 2009 RMD or Extended RMD is distributed from the plan). Plan sponsors may want to notify participants and beneficiaries who have previously received 2009 RMDs or Extended RMDs that these distributions may be rolled over by November 30, 2009.

Conclusion

Plan sponsors should review their procedures regarding the payment of 2009 RMDs and Extended RMDs in light of this guidance, and provide participants and beneficiaries notice of their options. Sponsors may also want to consider whether to notify participants and beneficiaries who have previously received 2009 RMDs and Extended RMDs of the extended rollover rights.

If you have any questions regarding any of the information discussed here, please contact Bill Keenan at (860) 240-6028 or wkeenan@murthalaw.com

BOSTON

HARTFORD

MADISON

NEW HAVEN

STAMFORD

WOBURN