

# Employer Compliance Alert

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## November 30 Deadline for Determining How to Handle 2009 Required Minimum Distributions

Under recent IRS guidance, sponsors of 401(k) and other defined contribution plans must decide, by November 30, 2009, how to handle required minimum distributions (“RMDs”) for the 2009 calendar year. Moreover, participants who have already received 2009 distributions that consisted of (or included) a 2009 RMD have until this same date to decide whether to roll that RMD into an IRA or eligible retirement plan in a tax-free rollover.

Late last year, Congress passed the Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”), which waived the 2009 RMD that must otherwise be paid to participants who have both retired and attained age 70½. The expressed goal was to allow participants to avoid having to liquidate a portion of their account balance while the bottom had fallen out of the market. This one-year waiver of the RMD applies only to 401(k) and other qualified defined contribution plans, Section 403(b) plans, and governmental Section 457(b) plans.

On September 24, 2009, the IRS released Notice 2009-82, which provides transition relief for both plan sponsors and plan participants. This transition relief applies to RMDs made between January 1, 2009, and November 30, 2009. According to Notice 2009-82, the IRS will not consider a plan to be disqualified – even if it was not operated in accordance with its written terms during that period – because:

1. It did or did not distribute 2009 RMDs;
2. It did not give participants the option of receiving or not receiving 2009 RMDs; or
3. It did or did not offer direct rollovers of 2009 RMDs.

Under the transition relief, participants who have received a 2009 RMD have until the later of November 30, 2009, or 60 days after receipt of the distribution to roll the RMD into an IRA or eligible retirement plan. This extended deadline applies to both single-sum RMD payments (i.e., a distribution that is limited to the 2009 RMD) and distributions (such as installments or annuity payments) where only a *portion* of the distribution is the 2009 RMD.

This transition relief is a boon for plan sponsors because they (and their service providers) have taken a variety of approaches to this waiver – some of them inconsistent with each other. However, the transition relief ends on November 30, 2009. All distributions made after that date *must* be made in accordance with the terms of the plan. Even though WRERA gives plan sponsors until the end of the 2011 plan year to adopt any amendments needed to comply with the RMD waiver, those amendments must reflect the actual operation of the plan for periods after November 30, 2009.

Plan sponsors must therefore decide – between now and November 30, 2009 – how to handle distributions of 2009 RMDs (and distributions that may *include* 2009 RMDs) for the remainder of the 2009 plan year. The permissible options include:

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1. Allowing participants to choose whether to receive any distribution that includes the 2009 RMD (with the default being *no* distribution if the participant fails to elect); or
2. Allowing participants to choose whether to receive any distribution that includes the 2009 RMD (with the default being to *make* the distribution); or
3. Automatically making all distributions required under the terms of the plan (i.e., as if there were no waiver of 2009 RMDs); or
4. Automatically stopping any distribution that consists solely of the 2009 RMD; or
5. Some combination of the above.

The IRS guidance anticipates that most plans will adopt one of the first two options (i.e., they will allow participants to choose whether to take, or not take, any distribution that includes the 2009 RMD). Notice 2009-82 even includes "model" amendments that plan sponsors may adopt for these two alternatives. Note that automatically "stopping" all distributions that include the 2009 RMD (without giving the participant any choice) may constitute an impermissible "cutback" of a protected distribution option, and is therefore not a recommended option.

Plan sponsors must also decide whether to give participants receiving 2009 RMDs the option of making a direct rollover of these amounts into an IRA or eligible retirement plan. WRERA does not require plan sponsors to offer a direct rollover option for 2009 RMDs (i.e., they can force participants to receive the distribution and then roll it over within 60 days). However, plan sponsors may allow participants to elect a direct rollover of either (i) any amount that is (or includes) a 2009 RMD, or (ii) only those amounts that would otherwise be "eligible rollover distributions" (such as lump sums or payments over a period of less than 10 years).

Plan sponsors should consult with their investment provider to make sure that the provider can operationally support the plan's decision on how to administer RMDs after November 30, 2009. Sponsors should also consult with their plan document provider to make sure that the provider will be able to provide a plan amendment that is consistent with the plan's actual administration of RMDs after November 30, 2009.

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