

Management Alert

Notices to Plan Participants Due by December 1 Plans Must Also Implement Waiver of 2009 Minimum Distributions

In recent years, Congress has created a slew of new notices that must be given to all participants in defined contribution plans at least 30 days before the beginning of each plan year. As December 1, 2009, approaches, each sponsor of a defined contribution plan that uses a calendar plan year should make sure that it is prepared to send participants each of the notices that applies to its particular type of plan. In addition, December 1 is the day by which defined contribution plans must adopt procedures to implement the waiver of the 2009 required minimum distributions for terminated employees over the age of 70½.

Required Annual Notices

The notices listed below must be given to all plan participants not later than 30 days prior to the beginning of each plan year, even though the notices are also given to individual participants when they are first hired. Most of the notices apply to 401(k) plans with automatic enrollment features, but some of the notice requirements apply more broadly.

Although each of the notices listed below satisfies a separate legal requirement, there is a large degree of overlap between the different notice requirements, and a plan that is subject to more than one notice requirement can usually use a single notice to satisfy each applicable requirement.

The plans that must provide participant notices by December 1, 2009, are:

- Any plan that provides for participant-directed investments and has a default investment option for participants who don't make an investment election must provide a qualified default investment alternative (QDIA) notice if the plan fiduciaries are to be protected by the QDIA safe harbor from lawsuits brought by plan participants who are defaulted into the QDIA option.
- Any 401(k) plan that uses one of the safe harbors to avoid annual ADP/ACP nondiscrimination testing must provide a safe harbor notice. This applies to plans that use one of the original safe harbor methods (which require either dollar-for-dollar matching on the first 3% of deferrals and 50% on the next 2% or else a 3% nonelective contribution), as well as to the new automatic enrollment (qualified automatic contribution arrangement, or QACA) safe harbor created by the Pension Protection Act.
- Any 401(k) plan that provides for immediate automatic enrollment but allows participants to opt out and withdraw their deferrals within the first 90 days after being enrolled (an eligible automatic contribution arrangement, or EACA) must provide a notice describing the terms of the EACA.

In addition to the notices described above, the Pension Protection Act amended ERISA to provide that plans with auto-enrollment are exempt from state payroll withholding laws, but the new rule also provides that such plans must give an annual notice to employees or else be subject to a penalty of up to \$1,000 per participant per day. However, the Department of Labor has announced that this notice requirement (and the state law preemption) applies only to plans that use the QDIA safe harbor described above, and that the QDIA notice will also satisfy this requirement.

Plan sponsors should also be aware that they must begin using the new form of tax explanation notice for distributions that are eligible for a rollover beginning January 1, 2010, regardless of whether they use a calendar plan year.

Compliance with Waiver of 2009 Minimum Required Distributions

The Worker, Retiree and Employer Recovery Act of 2008 (WRERA) provides that terminated employees over the age of 70½ are not required to take the minimum withdrawal from a defined contribution plan for 2009 that is otherwise required by the minimum distribution rules of Code §401(a)(9). Similar rules apply to minimum distributions from an IRA. Defined benefit plans are not affected.

Many plans are not drafted to accommodate this waiver, which may lead to an inadvertent violation of the terms of the plan. For example, if a plan requires the minimum distribution each year, and it doesn't say that the distribution is only mandatory to the extent required by §401(a)(9), allowing an employee to waive the minimum distribution would violate the terms of the plan. In addition, a plan may violate its own terms by not providing a direct rollover option for a 2009 minimum distribution that is not required due to the waiver included in WRERA.

Earlier this year, the IRS issued a notice providing that, through November 30, 2009, discrepancies between the terms of a plan and the way the plan handles 2009 minimum distributions will not cause the plan to have engaged in an operational failure that could threaten its qualified status. Beginning December 1, 2009, each plan must have implemented a policy of how it will handle the minimum distributions, although the actual plan amendments are not required until the end of the 2011 plan year.

Each plan must determine:

- Whether to permit participants to waive receipt of the 2009 minimum distribution. (This only applies to distributions equal to the 2009 minimum, or to payments in installments of ten years or more. If the participant receives his or her entire balance in a lump sum or in fewer than ten installments, the special rule doesn't apply.)
- If an election will be permitted, whether the default is to distribute the 2009 minimum or not distribute.
- Whether to permit participants a direct rollover of 2009 minimum distributions. (Direct rollovers may include minimum distributions that are part of a lump sum or installments over fewer than ten years.)

In addition, for participants who received a 2009 minimum distribution earlier in the year and were uncertain as to whether it was eligible for a rollover, the IRS has extended the 60 day rollover period so that it will expire no earlier than November 30, 2009.

If you have any questions about whether your plan is subject to one of the notice requirements described above, or how to implement the waiver of the 2009 minimum distribution rules, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our web site (www.seyfarth.com/employeebenefits).