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**EB/EC (Employee Benefits / Executive Compensation) Law Update**

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**PPA & WRERA QUALIFIED PLAN GUIDANCE – ACTION ITEMS FOR 2009**

**Action Items Required in 2009.** The IRS has issued a number of rulings, notices and regulations interpreting qualified plan provisions of the [Pension Protection Act of 2006](#) (PPA), as well as the 2009 required minimum distribution waiver by the [Worker, Retiree, and Employer Recovery Act of 2008](#) (WRERA). PPA changes generally require amendment of the plan document by the end of the 2009 plan year and certain notices 30 days prior to the end of the 2009 plan year, and the WRERA waiver requires operational compliance by November 30, 2009.

**Suspension of 2009 Required Minimum Distributions; Operational Compliance Required by December 1, 2009; Model Amendments in Notice 2009-82 Must be Adopted by End of 2011 Plan Year.** [Notice 2009-82](#), 2009-41 I.R.B. 491, provides guidance and sample amendments relating to the waiver of Code § 401(a)(9) required minimum distributions for 2009 for defined contribution plans and IRAs, as provided under § 201 of WRERA. There are a number of helpful provisions in the notice. For example:

- WRERA waives required minimum distributions for those whose required beginning date is in 2009 and those who are already receiving benefits.
- With respect to rollover distributions, Internal Revenue Code § 401(a)(9) required minimum distributions are not eligible rollover distributions. This rule would also apply to minimum distributions made in 2009 even though they are not required. However, a plan is permitted to provide that such 2009 non-required distributions are eligible rollover distributions. The model amendments provide a choice of the above. There is transition relief for rollovers in 2009, that since 2009 distributions can be rolled over if permitted by the plan, and participants may have been unsure of this at the time of

distribution, and therefore, the 60 day rollover period under § 402(c) is extended for any such distributions during 2009 so that it ends no earlier than November 30, 2009.

- The notice provides transition relief through November 30, 2009 for a plan that is not operated in accordance with its terms with respect to waived required minimum distributions. The plan amendment need only be enacted by the end of the plan year beginning in 2011, but the plan has to be operated in compliance from December 1, 2009.
- Notice 2009-82 has two model amendments, with the first model providing a default of continuing to make minimum distributions in 2009 unless otherwise elected by the participant, and the second model providing a default of not continuing to make the minimum distributions in 2009 unless otherwise elected by the participant. The models also have a choice as to whether minimum distributions made in 2009 will be treated as eligible rollover distributions.
- Note that IRS [§ 401\(a\)\(9\) FAQs](#) provide that the WRERA waiver applies to required minimum distributions that are first applicable in 2009, i.e., for those attaining age 70½ (required beginning date) in 2009. In such case distribution on account of 2009 due by April 1, 2010 is waived, provided that the election or terms of the plan so provide. The payment with respect to the 2009 amount for those who have already received required minimum distributions is also waived. The second distribution due by December 31, 2010 for the 2010 year is not waived. If the participant attained age 70½ in 2008, the required minimum distribution for 2008 due by April 1, 2009 is not waived.

**Revised Model Notices for Eligible Rollover Distributions - Notice 2009-68; Must be Put in Place by End of 2009 Plan Year.** In [Notice 2009-68](#), 2009-39 I.R.B. 423, the IRS provides a revised model safe harbor Code § 402(f) notice for distributions from qualified plans that are eligible for rollover. This notice must describe the direct rollover rules and the tax treatment and restrictions on distributions. A plan administrator is deemed to comply with the notice requirement if it uses the model notice. Treas. Reg. § 1.402(f) -1A Q&A 1(b). The Notice updates the prior model notice in Notice 2002-3 to make it more understandable, and to incorporate recent law changes, such as: (i) tax treatment of rollovers to Roth IRAs or to Roth 401(k) accounts, as allowed by Code § 408A pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and PPA; (ii) the requirement that for mandatory distributions of more than \$1000 (if allowed under the plan) an automatic rollover to an IRA must be provided by the plan as required by Code § 401(a)(31)(B), as amended by EGTRRA 2001; (iii) the exemption from Code § 72(t) early distribution tax for eligible automatic contribution accounts (EACAs) withdrawn within 90 days, as permitted by Code § 414(w), per PPA; etc. The Notice also contains a separate model notice for distributions from Roth accounts.

Note that:

- The plan notices should be updated by the end of the plan year beginning in 2009;
- The notices must be amended for any law changes after September 28, 2009 with respect to items covered in the notice;
- The safe harbor notice language is generally followed (with minor variations where needed);
- PPA provides that notice required under § 402(f) may be provided as much as 180 days before the annuity starting date.

**Sample Amendments to Add Automatic Enrollment to Plans – Amendment Required by End of 2009 Plan Year.** [Notice 2009-65](#), 2009–39 I.R.B. 413, contains two sample amendments for adding an automatic enrollment feature to a 401(k) plan. Plan sponsors may use the first sample amendment to add a basic automatic contribution arrangement (ACA) and the second sample amendment to add an eligible automatic contribution arrangement (EACA) to their plans. (An EACA is an ACA that has “uniform” contribution percentages and 30 days notice is given under Code § 414(w).) Sponsors may modify these amendments to conform to their specific plan terms and administrative procedures. Note that:

- These sample automatic contribution amendments must be adopted by the later of the end of the plan year in which the amendment is effective or the last day of the first plan year beginning in 2009.
- Escalating automatic contribution arrangements are permitted. [Revenue Ruling 2009-30](#), 2009-39 I.R.B. 391, provides that generally a plan can state that automatic contribution arrangements in 401(k) plans (as a percentage of salary) can increase over time, even if not coinciding with the end of the plan year. Thus, an ACA with escalating features can be provided for as set forth in the revenue ruling.
- [Notice 2009-67](#), 2009–39 I.R.B. 420, adds a sample amendment for automatic enrollment to SIMPLE IRA plans. ([Notice 2009-66](#), 2009-39 I.R.B. 418, provides guidance and Q&As regarding automatic enrollment in SIMPLE IRAs.)

**Notices Required 30 Days in Advance of Plan Year.** The following notices must be provided at least 30 days in advance of the plan year under PPA: (i) qualified automatic contribution arrangement (QACA) safe harbor notice (similar to regular safe harbor 401(k) notice), and eligible automatic contribution arrangement (EACA) notice; and (ii) qualified default investment alternative notice under ERISA § 404(c)(5).

**PPA Amendments Required by End of 2009 Plan Year; Some Examples.** Amendments for other PPA changes are also required by the end of the plan year beginning in 2009. See PPA § 1107. One cannot wait until submitting the plan to the IRS for a determination letter to make the amendments.

The PPA changes are included among the changes outlined in the IRS Cumulative List of Changes in Plan Qualification Requirements, [Notice 2008-108](#). (In the 2007 Cumulative List [Notice 2007-94](#) the PPA requirements are set forth separately as 28 items in § VI.) Some of the more significant PPA changes, in addition to the ones above, include:

- **Code § 436 Limitation for Benefits if Adjusted Funding Target Attainment Percentage Falls Below Certain Level; Must be Stated in the Plan.** Code § 436 limitation for benefit payments and benefit accrual if the plan's adjusted funding target attainment percentage falls below 80% or below 60%, as provided in PPA. The rule must be included in the plan.
- **Distribution During Working Retirement at 62.** PPA added Code § 401(a)(36) allowing distributions from pension plans (defined benefit or money purchase pension plans) at age 62 even prior to normal retirement age and prior to termination of employment, in order to facilitate phased retirements.
- **Diversification.** Code § 401(a)(35) added by PPA requires that defined contribution plans provide employees with the freedom to divest employer securities
- **Hardship.** PPA modified the 401(k) hardship distribution rules to permit the plan to treat a participant's beneficiary under the plan the same as the participant's spouse or dependent.
- **Rollover Rules.** PPA amended Code § 402(c)(2)(A) to permit distributions from a qualified plan to be directly rolled over to a § 403(b) plan if separate accounting requirements are met. PPA added Code § 402(c)(11) to allow nonspouse beneficiaries to directly roll over distributions from a qualified plan to an IRA. PPA also added § 408A(e) which permits rollovers to Roth IRAs from qualified plans, 403(b) plans, and 457 plans.
- **Vesting.** PPA amended Code § 411(a)(2)(B) to provide that the accelerated vesting of 3 year cliff or 2-6 year graded vesting that previously applied only to matching contributions under EGTRRA now applies to all employer contributions to defined contribution plans.
- **Notice.** PPA amended Code § 417(a)(6)(A) to provide that the requirement for qualified joint and survivor annuity notice and consent that was 30 to 90 days prior to annuity starting date is changed to 30 to 180 days prior to annuity starting date. PPA also

provided that notice required under § 411(a)(11) may be provided as much as 180 days before the annuity starting date, and that this notice must include a description of the consequences of failing to defer receipt of a distribution.

- Lum Sum and Mortality Assumptions. For determining actuarial value of lump-sum distributions from defined benefit plans under Code § 417(e)(3), PPA provides that plans must use the same three interest rates (short term, mid term and long term) used for funding purposes, except that it is not averaged over 24 months, and must also use the same mortality table as for funding purposes
- Qualified Optional Survivor Annuity. PPA amends Code §§ 417(a)(1)(A)(ii) & 417(g) to provide that an additional optional survivor annuity must be offered that at the direction of the participant would allow a “qualified optional survivor benefit,” which is 75% of the participant’s annuity where the QJSA is less than 75%, and which is 50% where the QJSA is 75% or more.

#### **Other Recent Qualified Plan Guidance From IRS**

- Rollovers From Employer Plan to Roth IRA; No Income Limit in 2010. [Notice 2009-75](#), 2009-39 I.R.B. 436, provides that if a rollover is made from an employer plan regular account or a regular IRA to a Roth IRA, the amount rolled over, less after-tax contributions, is taxable. Before 2010, non-Roth to Roth transfers have been permitted only if adjusted gross income for married filers is \$100,000 or less. Beginning in 2010, however, the transfer to a Roth IRA will not be subject to the \$100,000 income limit.  
Note:
  - This conversion to a Roth IRA in 2010 can in many cases be a significant tax benefit, particularly if the participant can pay taxes from outside the plan.
- Contribution of Paid Time Off at End of Plan Year or on Termination of Employment – Revenue Rulings 2009-31 & 2009-32. [Revenue Ruling 2009-31](#), 2009-39 I.R.B. 395, provides that a qualified retirement plan (such as a 401(k) plan) can be amended to allow annual contributions of the value of the employee’s unused paid time off (e.g., for sick leave or vacation) at the end of the plan year. Likewise, [Revenue Ruling 2009-32](#), 2009-39 I.R.B. 399, provides that employees upon termination of employment can contribute the dollar equivalent of unused paid time off to the plan. Both rulings state that the contributions, taking into account any other contributions, prior deferrals and prior annual additions, cannot violate the qualified plan nondiscrimination rules, annual addition limits or annual elective deferral limits. These contributions are not includible in the participant’s gross income until distributed from the plan.

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