

Employee Benefit News

July 31, 2009

MINIMUM DISTRIBUTION NOT REQUIRED FOR 2009

In general, participants in qualified plans and IRAs must begin to take required minimum distributions ("RMDs") after attainment of age 70½. On December 23, 2008, President Bush signed into law the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"). One of the relief provisions is to allow the suspension of RMDs for 401(k) plans, 403(b) plans, other defined contribution plans, and IRAs for the 2009 calendar year. That means there is no RMD as of April 1, 2010 for participants who reach age 70½ during 2009, and there is no RMD for participants who have a required minimum distribution as of December 31, 2009. The relief also applies to beneficiaries. WRERA provides employers with the following options for the 2009 calendar year:

- the RMD is not required and participants may only elect distribution if permitted under other in-service provisions of the plan;
- the RMD is not required, but the participant may elect distribution even if in-service withdrawals are not permitted under other provisions of the plan;
- the RMD is required and no waiver is permitted; and
- the RMD is required, but the participant may waive distribution.

If the amount that would have been the RMD distribution is taken in cash for 2009, the 20% mandatory withholding will not apply.

The WRERA amendment for RMDs is required by the last day of the 2010 plan year. We are going to fold the RMD amendment into the Pension Protection Act amendments required for all plans in 2009. **Our standard approach will be to use the first option – the RMD is not required, and participants may only elect distribution if permitted under other provisions of the plan. If you would like one of the other options, please contact us.**

ADDITIONAL WITHHOLDING FOR PENSION PAYMENTS

In our April 30, 2009 newsletter we discussed the impact of reduced withholding which was effective April 1, 2009 under the Making Work Pay tax credit. In May, the IRS released additional withholding amounts that plan sponsors may adopt to help retirees avoid potential under-withholding. You can find a link to the withholding tables found in Notice 1036-P at <http://www.irs.gov/pub/irs-pdf/n1036p.pdf>.

WHAT HAPPENS WHEN BENEFICIARY DESIGNATION FORM NAMES EX-SPOUSE?

Kennedy v. Plan Administrator for Dupont Savings and Investment Plan, 129 S.Ct. 865 (2009), allowed the Supreme Court to address a frequently repeated set of facts. The facts are:

- while married, a husband designated in writing his wife as beneficiary of his retirement plan benefits;
- the couple divorced and during the divorce proceedings the wife waived any interest in her husband's retirement plan benefit; and
- the husband did not change his written beneficiary designation before his death.

The Dupont plan provides that benefits are paid to the designated beneficiary and if there is no surviving spouse or designated beneficiary at the time of death, then the benefits are paid as directed by the estate's executor. The Supreme Court held that the appropriate action is to follow the terms of the plan document. As a result, in this case, since the plan provided that benefits are paid to the designated beneficiary, the benefits were payable to the ex-wife even though she waived her rights to benefits during the divorce. If the plan document had provided that a beneficiary designation naming the spouse is void upon divorce, the benefits would not have been payable to the ex-wife.

In response to IRS requirements several years ago, we wrote our plans to provide that designation of a spouse as beneficiary continued in effect after a divorce unless the participant changed the beneficiary designation. That approach is still permissible, but we think the better course of action is to treat a beneficiary election of a spouse as null and void after divorce unless a qualified domestic relations order entitles the former spouse to all or a portion of a participant's benefit at his death. We will include this change with the Pension Protection Act amendments which we will send to you this fall.





STATUS OF 2008 FORM 5500'S

Form 5500 is due the last day of the seventh month following the plan year end. That means the due date for the 2008 5500 for calendar year plans is July 31, 2009. An automatic 2½ month extension is available. Many of the 5500's that we prepare for calendar year plans had to be extended. The two primary reasons for extension were the final contribution had not been made or the audit was not yet prepared. We will complete the 5500's as soon as the audit or contribution information is provided. The extended due date for 2008 calendar year plans is October 15, 2009.

PARTIAL PLAN TERMINATION

If the number of active participants in your plan drops more than 20%, you could have a partial plan termination issue. The consequence of a partial plan termination is that the plan will have to vest participants who had an employer-initiated severance from employment.

An employer-initiated severance includes any severance from employment other than for reasons of death, disability, retirement, or a severance that the employer can demonstrate was purely voluntary.

In a defined benefit plan, a drop of more than 20% of the active participants in one year (or a drop of 25% over a 2-year period) may also result in a PBGC reportable event if the plan is not well-funded. The closing of a location may result in additional reporting to the PBGC. In any event, please talk to us if you know there will be a plant shutdown, layoff, or any other event resulting in a significant percentage of terminations.

WE NEED YOUR SIGNED PLAN DOCUMENTS!

The Internal Revenue Service scrutinizes adoption dates of plan restatements and amendments for timeliness. When we send plan documents for your review and adoption, we indicate the date by which the amendment or restatement must be signed. It is important that you return a copy of the signed documents to us. If an amendment has not been signed in a timely manner, then the plan has to go through a correction procedure with the IRS. It is important that you retain copies of all plan documents (including amendments and IRS letters) from the plan's original effective date to insure that you can provide them should the IRS ask to see them.

ELIMINATING SAFE HARBOR 401(K) CONTRIBUTION DOES NOT ELIMINATE TOP-HEAVY CONTRIBUTION

In our April 30, 2009 newsletter, we discussed amending a safe harbor 401(k) plan during the year to eliminate or modify a safe harbor matching contribution. In May, the IRS issued proposed regulations allowing employers who incur a **substantial business hardship** to reduce or suspend a required safe harbor nonelective contribution. Qualifying as a "substantial business hardship" is not easy. If you would like to explore the possibility of suspending your safe harbor nonelective contribution mid-year, we suggest that you contact your attorney to see if your company's economic challenges satisfy the requirements for a hardship.

To reduce or eliminate a safe harbor nonelective contribution, once the employer qualifies as having a substantial business hardship, the following requirements must be satisfied:

- the plan must be amended prior to the end of the plan year;
- the ADP test (and ACP test if applicable) must be satisfied for the entire plan year;
- participants must be given notice of the amendment and an opportunity to change their salary deferral elections; and
- the limit on compensation (\$245,000 for 2009) must be pro-rated up to the effective date of the amendment.

Here is an example of pro-rating the compensation limit: Assume the plan has a 3% nonelective contribution which is suspended beginning August 1, 2009 and a participant has earned \$200,000 of compensation through July 31. The pro-rated compensation limit is \$142,916.67 (\$245,000 x 7/12). If the employer has made a 3% contribution each payroll period, the participant would have received a contribution as of July 31, 2009 of \$6,000. However, the maximum contribution, based on the pro-rated compensation limit, is \$4,287.50. The result is that there is an excess contribution. The plan would follow the IRS' self-correction procedures to correct the excess.

Another important consideration is that a plan that reduces or suspends its safe harbor nonelective contribution is subject to the top-heavy rules, and if the plan is top-heavy, the 3% minimum top-heavy contribution continues to apply to compensation earned after the date the safe harbor contribution is frozen. As a result, if more than 60% of the assets in a safe harbor plan are allocated to key employees, suspending the safe harbor contribution will most likely not reduce the contribution the employer is required to make for non-key employees.

The May 2009 "Employee Plans News" published by the IRS contains a helpful summary of the proposed regulations. <http://www.irs.gov/pub/irs-tege/se0509.pdf>.

If you have questions or would like additional information about the items presented in this newsletter, call your McCready and Keene consultant.

Employee Benefit News is not intended as legal advice. Readers should seek legal advice before acting on any of these subjects.

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