Snell & Wilmer L.L.P.

EMPLOYEE BENEFITS UPDATE

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Required Minimum Distributions From Defined Contributions Plans Waived for 2009

In response to recent financial turmoil, President Bush signed the Worker, Retiree, and Employer Recovery Act of 2008 (the "Act") on December 23, 2008. Under the Act, participants and their beneficiaries do not have to take a required minimum distribution ("RMD")[1] for 2009 from defined contribution plans described in Section 401(a), such as Section 401(k) plans, Section 403(b) plans, or Section 457(b) plans. The Act also waives any RMD for 2009 from Individual Retirement Arrangements ("IRAs"). The waiver does not apply to defined benefit plans.

The Act does not waive any RMDs for 2008, even for individuals who were eligible and chose to delay taking their 2008 RMD until April 1, 2009 (generally retired employees

1 Section 401(a)(9) of the Internal Revenue Code (the "Code") requires individuals to begin taking RMDs by April 1 of the calendar year following the year in which they attain age 70 ½, although most plans do not require age 70 ½ participants to take RMDs until after they have terminated employment. A 50% excise tax is imposed on individuals who fail to take an RMD.

and IRA owners who turned 70 ½ in 2008). *These individuals must still take their full RMD for 2008 by April 1, 2009.*

The 2009 RMD waiver under the Act does apply to individuals who may be eligible to postpone taking their 2009 RMD until April 1, 2010 (generally retired employees and IRA owners who attain age 70 ½ in 2009). However, the Act does not waive any RMDs for 2010. Accordingly, an individual who attains age 70 ½ in 2009 would still have to take an RMD for 2010 by December 31, 2010.

If a beneficiary is receiving distributions over a five-year period, he or she can now waive the RMD for 2009, effectively taking distributions over a six-year period rather than a five-year period.

The Act also allows participants to rollover amounts that would have been RMDs, but for the Act, to another eligible retirement plan, such as a qualified plan or IRA. Although these amounts are eligible for rollover in 2009, certain eligible rollover distribution rules do not apply to these amounts. Accordingly, the requirement to provide notice and a written explanation of the direct rollover, and the mandatory 20% withholding requirement, do not apply to these amounts.

The waiver of RMDs for 2009 currently appears to be a mandatory change. However, some plan sponsors might want to continue making RMDs for 2009 due to the administrative costs and burdens involved with modifying their systems in order to waive payments in 2009. Other plan sponsors may want to waive all RMDs in 2009 or may want to allow participants to elect whether or not they want to waive their RMD in 2009. The IRS has been asked to clarify whether plan sponsors may choose not to allow RMD waivers for 2009.

Plans must adopt conforming amendments by the last day of the first plan year beginning on or after January 1, 2011 (i.e., December 31, 2011 for calendar year plans) to reflect the waiver of 2009 RMDs. In the meantime, plans must be administered consistent with the new rules.

Action Items

To comply with these recent changes in the law, defined contribution plan sponsors should consider taking the following actions:

- ❑ Notify participants who turned 70½ in 2008, who are required to take an RMD for 2008 but have not yet done so, that the waiver does not apply for 2008 RMDs, and that they must take their 2008 RMD before April 1, 2009 to avoid a 50% excise tax.

- ❑ Implement systems to comply with the new Act. If allowing waivers of 2009 RMDs presents administrative difficulties, monitor future guidance on whether RMD waivers for 2009 are, in fact, mandatory.
- ❑ Adopt conforming plan amendments. Plans must be amended by the last day of the first plan year beginning on or after January 1, 2011 (i.e. December 31, 2011 for calendar year plans).

If you have any questions regarding this article, feel free to contact Nancy Campbell at 602.382.6374 or Eva Kerr at 602.382.6245.

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