



whether PTO contributions would be subject to FICA taxes. Employer non-elective contributions are exempt from FICA taxes, but cash in lieu of vacation pay is not. The Rulings also do not state whether such contributions can be made to a 403(b) tax-deferred annuity plan. Further, the Rulings only address federal income tax laws and do not provide any guidance with respect to state payment of wage laws. Plan sponsors should review these state laws and consider the impact of nondiscrimination testing prior to determining whether participants can contribute unused PTO to a retirement plan.

### Model 402(f) Tax Notices

The IRS issued two new safe harbor tax notices that plan sponsors may provide to participants to explain their rollover options and tax treatment when receiving a distribution of plan benefits. The new notices satisfy the requirements of Internal Revenue Code Section 402(f) for notifying plan participants of rollover options and tax treatment for such benefits and have been expanded to reflect changes in the law, including rollovers to Roth IRAs, rollovers by non-spouse beneficiaries to inherited IRAs, and the waiver of the 10% early distribution penalty for qualified reservists distributions. One safe harbor notice applies to eligible rollover distributions from a designated Roth account and the other safe harbor explanation applies to distributions of traditional (non Roth) contributions.

Although these new model 402(f) notices are deemed to satisfy the Section 402(f) requirements, plan administrators may customize the safe harbor explanation by omitting certain information that does not apply to the plan. Plans may immediately use the new model notices or may continue to use the prior model notice through December 31, 2009. Beginning January 1, 2010, only the new model notices will satisfy Section 402(f).

### Waiver of 2009 Required Minimum Distribution

Generally, participants in qualified retirement plans, Section 403(b) tax-deferred annuity plans and governmental Section 457(b) plans are required to begin receiving annual required minimum distributions (“RMD”) of their plan benefits when they reach age 70-1/2 or retire, if later. RMDs may not be rolled over, in a direct or indirect rollover, to an IRA or other eligible retirement plan and are not subject to the mandatory 20% withholding rules.

To address participant concerns that the required minimum distributions would force older participants to withdraw funds from their defined contribution account in a declining market, the Worker, Retiree and Employer Recovery Act of 2008 (“WRERA”), which was signed by President Bush in December 2008, waived the 2009 RMD requirements for all defined contribution plans. In this regard, RMDs for the 2009 calendar year that would normally be distributed to participants by December 31, 2009 are not required to be distributed. Likewise, if a participant’s initial RMD is for the 2009 calendar year, the distribution that would normally be distributed by April 1, 2010 is not required to be distributed. However, initial RMDs for the 2008 calendar year, which were required to be distributed by April 1, 2009 are not waived and must be distributed by April 1, 2009.

In addition, WRERA permits plans to allow participants and beneficiaries to make direct rollovers of 2009 RMDs to IRAs or other eligible retirement plans. These amounts are not subject to the Section 402(f) notice requirements and are not subject to the mandatory 20% withholding rules. If a plan does not permit participants or beneficiaries to make a direct rollover of 2009 RMDs, such individuals will be able to indirectly roll over the portion that would have been considered a 2009 RMD within 60 days after receipt of the payment.

Notice 2009-82, recently issued by the IRS, provides the following guidance:

- Plan sponsors must decide by November 30, 2009 how to treat 2009 RMDs by choosing among the following three options:
  - ◆ Cease 2009 RMDs unless the participant or beneficiary affirmatively elects to receive the 2009 RMD;
  - ◆ Distribute 2009 RMDs unless the participant or beneficiary affirmatively elects not to receive the 2009 RMD; or
  - ◆ Distribute 2009 RMDs without regard to the WRERA waiver and without giving participants or beneficiaries the election to receive or not receive the 2009 RMD.
- Plan sponsors must decide by November 30, 2009 whether or not to allow direct rollovers of 2009 RMDs.
- Plan documents must be amended to reflect the plan sponsor’s decisions by the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 for governmental plans). The Notice includes two sample plan amendments that may be used by plan sponsors to amend their plans. Plans that incorporate Section 401(a)(9) provisions by reference may automatically provide for the 2009 waiver and will need to be amended depending on the plan sponsor’s decisions.
- To assist participants and beneficiaries who have already received 2009 RMDs but did not know that these distributions could be rolled over into an IRA or other eligible retirement plan, the Notice extends 60-day rollover period until November 30, 2009. The Notice provides that the 2009 RMD may be rolled back into the original distributing plan if permitted by such plan. Although not required by WRERA or the Notice, plan spon-

sors may wish to notify participants and beneficiaries who previously received 2009 RMDs that these distributions may be rolled over by November 30, 2009.

Plan sponsors need to act promptly to determine how the 2009 RMDs will be treated and to provide participants and beneficiaries with their options regarding 2009 RMDs. Any 2009 RMD that is not waived must be made by December 31, 2009.

The EAPD Benefits and Compensation attorneys can assist plan sponsors and administrators on how the recent IRS guidance may apply to their plans, advise sponsors and administrators on what choices are best for their plans and prepare the appropriate plan amendments and participant communications to document such decisions.

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