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**RETIREMENT**

# Complicated Situations Can Arise Involving 401(k)s When Working After Age 72

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Picture this: [You are age 72 or older and you are still working and participating in your company's 401\(k\) plan.](#) Did you know that you may be able to delay required minimum distributions (RMDs) until you retire, even though you are over 72?

The rules are set out in [Internal Revenue Code Section 401\(a\)\(9\)\(C\)](#). The 401(k) must be your current employer's plan, not a former employer's plan; you cannot own more than 5% of your current employer; and the plan has to allow the delay. (As [IRS Publication 575, "Pension and Annuity Income,"](#) points out, "your plan may require you to begin to receive distributions by April 1 of the year that follows the year in which you reach age 72 even if you haven't retired.")

This "still-working" exception for 401(k)s does not apply to IRAs.

Since each person's tax situation is unique, you'll need to consult with your tax adviser for answers that apply to you.

These reader situations can help illustrate how the rules work. I reached out to Alex Kotwal, a CPA and tax manager for Marcum LLP, a national accounting and advisory firm, for some general insights.

In one case, 75-year-old “Wayne” hasn’t retired yet; in fact, he is still contributing to his 401(k) at work. Even though he is over age 72, Wayne is not taking RMDs from the 401(k) – he doesn’t need to under the still-working exception to RMDs.

Wayne wants to know if he can do an in-service rollover from his 401(k) to an IRA, which is permitted by his plan. He wants to time the rollover before the end of the year, while he is still working. Wayne’s question: Will the rollover to the IRA trigger an RMD for 2022?

The answer is no, according to Kotwal. But be careful. Always review your situation with your tax adviser, especially when an RMD is involved. [Penalties for failure to do an RMD are severe \(excise taxes\)](#).

According to Kotwal, here’s the general rule: “An IRA’s RMD is based on the value of the account on Dec. 31<sup>st</sup> of the previous year. Since the IRA didn’t exist as of 12/31/2021, there would not be an RMD requirement for 2022. The first RMD would begin in 2023.”

## **What Happens To Your 401(k) When Your Company Is Sold?**

In another situation, “John” is over age 75. The company where he was working, and where he had a substantial 401(k), was purchased by another company. All of the employees of the old company were terminated after the sale.

However, John was hired by the new company, and he is still working. The new company has its own 401(k), to which John can contribute.

However, John is looking to minimize any new RMDs. His existing 401(k) account is with a multinational financial services company, which informed him that he has options due to the company being sold: He can cash out his 401(k), roll it into an IRA, roll it over into his new employer's 401(k), or leave it with the financial services company.

John would like to leave the 401(k) with the financial services company because he likes the conservative option. If he does that, he is wondering if and when he will need to take an RMD.

## **When Does The RMD Begin?**

Kotwal points out that if John leaves the 401(k) with the financial services company, then he would be required to take RMDs from the account, as “the still-working exception only applies to the plan of the company which he is currently working for.” The required beginning date (RBD) for 401(k) RMDs is April 1 of the year after John's employment ended with the previous employer — in this case, 2023.

The solution for John is to roll over the old 401(k) into the new company's 401(k). That is, as Kotwal noted, John “could continue to utilize the still-working exception by rolling over the 401(k) into the new employer's plan.”

## **Caution**

For situations like these, it is important to know the rules related to your 401(k) plan. Ask your plan sponsor or human resources department for details

if you do not have them. And, one more time, seek the advice of your own CPA.

## **Can The 5% Ownership Rule For RMDs Be Reversed?**

Another reader presented this situation: A 401(k) participant owned 100% of his company until 2021, when he sold all of his stock. He continued working for the buyer. He had been taking RMDs since age 70 1/2 because he did not qualify for the still-employed exemption (due to his ownership).

Now that he is working for the new company but is no longer a shareholder, can he take advantage of the still-working exemption? Or does he have a 2022 RMD?

Sorry, once a shareholder hits his RBD, there is no turning back. Experts at Fidelity Investments explained it this way: “A 5% owner is determined in the year in which the participant would have reached his/her required beginning date, either age 70 1/2 (if he/she had attained age 70 1/2 before Jan. 1, 2020) or 72 (if he/she had not attained age 70 1/2 until after Dec. 31, 2019). If the participant is a 5% owner in the year of his/her required beginning date, then he/she will always be considered a 5% owner even if he/she thereafter sells his/her ownership in the company and will be required to continue receiving at least annual required minimum distributions.” Fidelity stresses, as I do, that the participant needs to confirm this answer with his or her tax adviser.