

Employee Benefit ■ Plan Review

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Heroes Act Requires Changes to Employee Benefit Plans

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The Heroes Earnings Assistance and Relief Tax Act of 2008 (Heroes Act), which became effective June 17, 2008, contains several measures designed to enhance employer-provided benefits to military personnel and their families.

REQUIRED AND OPTIONAL CHANGES MUST BE MADE

The changes to employee benefit plans, some required and others optional, generally expand the availability of benefits under retirement and cafeteria plans to employees who have been called to military service. All employers should review the Heroes Act to determine the provisions that apply to their benefit plans, and the applicable effective dates. A summary of the employee benefit provisions of the Heroes Act, and a chart outlining the provisions and their respective effective dates, are provided below.

DEATH BENEFITS MUST BE PAID TO SURVIVORS OF PARTICIPANTS IN QUALIFIED MILITARY SERVICE

All qualified retirement plans, 403(b) plans, and 457 plans must be amended to provide that if a participant dies while performing qualified military service, the participant's survivors are entitled to any additional benefits (other than benefit accruals during the time of military service) provided under the plan as if the participant had resumed employment, then terminated due to death. "Qualified military service" is active military service while the participant is entitled to reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Benefits must be paid with respect to deaths occurring on or after January 1, 2007.

BENEFITS MAY BE ACCRUED FOR QUALIFIED MILITARY SERVICE OF PARTICIPANT WHO DIES OR BECOMES DISABLED

For benefit accrual purposes, a qualified retirement plan, 403(b) plan, or 457 plan may treat a participant who dies or becomes disabled during qualified military service as if the participant had resumed employment on the day before death or disability, then terminated employment on the date of death or disability. If this benefit is adopted by a plan, it is treated as if compliance were required by USERRA. The benefit must apply to all individuals performing qualified military service for all employers in the employer's controlled group on reasonably equivalent terms. The amount of elective deferrals or employee contributions must be based on the participant's average actual deferrals or contributions for the 12-month period of service immediately prior to the military service, or the actual period of service, if less than 12 months. Benefits may apply to deaths and disabilities occurring on or after January 1, 2007.

DIFFERENTIAL MILITARY PAY MUST BE TREATED AS COMPENSATION UNDER PLAN

Effective January 1, 2009, qualified retirement plans, 403(b) plans, and 457 plans must treat differential wage payments as compensation under USERRA. "Differential wage payments" are payments to employees for periods during which they are on active military duty for a period of more than 30 days, which represent all or part of the wages they would have received from the employer if they had been performing services for the employer. A plan will be treated as nondiscriminatory under USERRA only if employees of all employers in the controlled group are

EXHIBIT 1.

Type of Plan	Change	Required or Optional	Administrative Effective Date	Plan Amendment Deadline (Calendar Year Plans)
401(a), 403(b), 457	If a participant dies in qualified military service, survivors are entitled to death benefits.	Required	January 1, 2007	December 31, 2010
401(a), 403(b), 457	If a participant dies or becomes disabled in qualified military service, the plan may treat the participant as reemployed for benefit accrual purposes.	Optional	January 1, 2007	December 31, 2010
401(a), 403(b), 457	Differential pay must be treated as compensation.	Required	January 1, 2009	December 31, 2010
401(k), 403(b), 457	Participant performing military service is treated as severed from employment for purposes of making withdrawals from elective deferrals.	Required	January 1, 2009	December 31, 2010
401(a), 403(b)	Exception from Code Section 72(t) tax for distributions to qualified reservists made permanent.	Required	December 31, 2007	N/A
125	Plan may permit distributions to qualified reservists until end of reimbursement period in which participant is called to active duty.	Optional	June 17, 2008	Not Specified

entitled to differential wage payments on reasonably equivalent terms.

DIFFERENTIAL WAGE PAYMENTS SOON TO BE SUBJECT TO FEDERAL INCOME TAX WITHHOLDING

Differential wage payments will become subject to federal income tax withholding effective January 1, 2009.

ELECTIVE DEFERRALS MAY BE WITHDRAWN BY PARTICIPANT IN ACTIVE SERVICE

Effective January 1, 2009, a participant on active military duty for a period of more than 30 days must be permitted by a 401(k),

403(b), or 457 plan to request a distribution of his or her elective deferrals as if the participant had severed from employment. The plan must be amended to provide that the participant may not make elective deferrals or employee contributions during the six-month period following the date of distribution.

EXCEPTION FOR DISTRIBUTIONS TO QUALIFIED RESERVISTS FROM 72(T) TAX MADE PERMANENT

The Heroes Act makes permanent the exception from the 10 percent excise tax under Internal Revenue Code Section 72(t) for withdrawals of elective deferrals

by reservists called to active duty. Reservists must be called to duty for a period of at least 180 days or for an indefinite period. When the participant returns to employment with his or her employer, the participant may repay all or any part of the distribution within the two-year period after the end of active duty. Repaid contributions are not deductible.

SECTION 125 PLANS MAY PERMIT DISTRIBUTIONS TO RESERVISTS DURING ACTIVE DUTY

Effective June 17, 2008, a cafeteria plan may make distributions to reservists called to active duty during the period beginning on the date of

the participant's order or call and ending on the last date that reimbursements can be made for the plan year which includes the date of the participant's order or call. Reservists must be called to duty for a period of at least 180 days or for an indefinite period.

AMENDMENT DEADLINE

Plans must be administered in compliance with the requirements

of the Heroes Act beginning on the effective dates provided in the Act. Amendments to comply with the Heroes Act must be retroactively adopted by the last day of the first plan year beginning on or after January 1, 2010 (December 31, 2010, for calendar year plans).

CONCLUSION

The changes made by the Heroes Act to qualified retirement and

cafeteria plans, along with their respective effective dates, are outlined in Exhibit 1. ☺

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