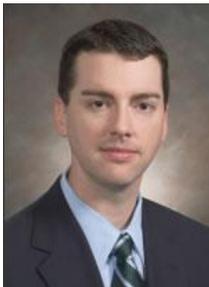


Benefit Protection Expanded for Employees Called to Active Duty

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On June 17, 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act"), which expands the benefits provided to employees qualifying under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). More specifically, the HEART Act provides additional benefits to employees called to qualifying active duty with respect to retirement plans, education savings accounts, cafeteria plans and health flexible spending accounts.

In general, for purposes of benefit accrual, the HEART Act permits an employer sponsoring a retirement to treat an individual who dies or becomes disabled (as defined under the terms of the plan) while performing qualified military service with respect to the employer maintaining the plan as if the individual has resumed employment on the day preceding death or disability and terminated employment on the actual date of death or disability.¹ In other words, the HEART Act details that an individual who dies or becomes disabled during qualifying military service may be treated as having been actively employed on the date of death or disability. These provisions take effect for deaths and disabilities occurring on or after January 1, 2007.²

The HEART Act further details that, for retirement plan purposes, any differential wage payment shall be treated as a payment of wages by the employer to the employee. Differential wage payments include any payment made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days, as well as all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.³ The differential wage payment provision applies to remuneration paid after December 31, 2008.⁴

Additionally, employees called to active duty on or after December 31, 2007 shall be entitled to receive distributions from their retirement plans without incurring penalties.⁵ Small employers may also be eligible for a wage payment credit equal to 20% of the differential wage payments issued to employees who are on active duty. Eligibility is based upon whether the employer averaged less than 50 employees on business days during the taxable year.⁶ Further, employers may also provide additional contributions to retirement, such as a Roth IRA, as well as education savings accounts for employees who die during military service.⁷

¹ H.R. 6081, Section 104(b)

² *Id.* at Section 105(a)

³ *Id.* at Section 105(b)

⁴ *Id.* at Section 105(a)

⁵ *Id.* at Section 107

⁶ *Id.* at Section 111

⁷ *Id.* at Section 109

Employees called to active duty may also be able to now receive cash distributions from the unused benefits in their cafeteria plan or health flexible spending account. In general, all or a portion of such plans may be distributed if the employee was ordered or called to active duty for a period in excess of 179 days or for an indefinite period. This provision of the HEART Act applies to distributions made after the date on or after June 17, 2008.⁸

In conclusion, amendments must be made to benefits plans no later than January 1, 2010.⁹ Benefit plan sponsors should begin to review the plans to ensure the necessary amendments are included to permit the aforementioned distributions and general compliance with the provisions of the HEART Act. Likewise, plan participants should be notified of the plan changes. Mr. Baker may be contacted with questions or concerns regarding compliance with this issue and he is available to assist in benefit plan revision.

⁸ Id. at Section 114

⁹ Id. at Section 104(d)