Course 55437 – EP CPE Winter FY14

Post PPA Pension Legislation

By:
Christine Chaille, Cindy Ellsworth, and Marjorie Waldman

Reviewers:
Ryan McDonald, Marilyn Ross, and Al Reich

INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES

Overview

Purpose

The purpose of this chapter is to explain the provisions of any post Pension Protection Act (PPA) pension legislation. In this chapter we will discuss: the HEROES Earnings and Assistance Relief Tax Act of 2008 (HEART); the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA); Pension Relief Act of 2010 (PRA); Small Business Job Act of 2010 (SBJA 2010) and the Moving Ahead for Progress in the 21st Century Act (MAP 21).

Objectives of Chapter

At the end of this chapter you will be able to:

- Identify which provisions of HEART are required and which are optional
- Determine the revisions HEART made to USERRA and PPA provisions
- Describe the new rules regarding Qualified Reservist Distributions
- Determine when and what plans were eligible to waive the required minimum distributions
- Describe the technical corrections WRERA made to certain PPA provisions

Continued on next page

Overview, Continued

Objectives of chapter (continued)

- Determine when a plan was required to be amended by WRERA
- Identify the provisions of PRA
- Identify the provisions of the SBJA 2010
- Identify the provisions of MAP 21

Continued on next page

Overview, Continued

Reference Material

- Pub. L. No. 110-245
- Pub .L. No. 110-458
- Pub. L. No. 103-353
- Pub. L. No. 109-280
- Notice 2009-42
- Notice 2009-82
- Notice 2010-15
- Notice 2010-84
- Notice 2012-61
- Federal Tax Code and Regulations
- 2009 Cumulative List

Table of Contents

OVERVIEW ---------- 1

HEART AND USERRA ---------- 5

SECTION 401(A)(37)--SECTION 104(A) OF HEART ---------- 8

IRC §414(U)(9)-DEATH OR DISABILITY WHILE PERFORMING QUALIFIED MILITARY SERVICE---------- 11

SECTION 414(U)(12)(A), DIFFERENTIAL WAGE PAYMENTS (SECTION 105 OF HEART)---------- 15

SECTION 414(U)(12)(B) AND DISTRIBUTIONS ---------- 18

IRC SECTION 72(T)(2)(G) (SECTION 107 OF HEART) ---------- 22

OTHER SECTIONS OF THE HEART ACT ---------- 25

AUDIT STEPS---------- 29

WRERA---------- 30

WAIVER OF REQUIRED MINIMUM DISTRIBUTIONS ---------- 31

WRERA TECHNICAL CORRECTIONS TO PPA ---------- 35

WRERA CHANGES TO FUNDING AND OTHER REQUIREMENTS UNDER PPA ---------- 43

MULTIEMPLOYER PLANS---------- 47

PENSION RELIEF ACT OF 2010 ---------- 53

SMALL BUSINESS JOBS ACT OF 2010---------- 57

MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT---------- 60

HEART AND USERRA

Overview

The Uniformed Services Employment and Reemployment Act of 1994 ("USERRA"), allowed an employee who took qualified military leave to be reemployed if he or she returned to employment within a specified time period.

In addition to reemployment rights, a returning veteran is also entitled to the restoration of certain retirement benefits that would have accrued had the employee not been absent due to the qualified military service.

The protections provided under USERRA did not apply unless the veteran was reemployed by the veteran's civilian employer, leaving a gap for individuals who could not return to employment after military leave because of a disabling injury or death.

In 2008, President Bush signed the HEROES Earnings and Assistance Relief Tax Act (HEART), which addresses some gaps in prior law, and provides additional benefits to the service members and their beneficiaries in the event of debilitating injury or death. Some of these benefits must be made available, while other benefits are optional.

Mandatory and optional provisions

It is important for the Agent to know which provisions are mandatory and which are optional since a missing mandatory provision is a qualification issue. Likewise, a qualification issue may be present if an optional provision is used but the optional amendment wasn't adopted or the terms of the optional amendment that is adopted are not being followed operationally.

Background

USERRA allows an employee who leaves a civilian job for qualified military service to be reemployed by the pre-service civilian employer if the individual returns to employment within a specified period and meets other eligibility criteria under USERRA.

USERRA also provides that an individual, upon reemployment, is entitled to receive certain pension, profit-sharing, and similar benefits that would have been received but for the employee's absence during military leave.

IRC Section 414(u) provides rules regarding the interaction of USERRA with the rules governing tax-qualified retirement plan expanded by HEART.

Continued on next page

IRC Section 414(u)(5)

Section 414(u)(5) defines qualified military service with respect to an individual as any service in the uniformed services by an individual entitled to reemployment rights under USERRA

IRC Section 414(u)(8)

Specifically, Section 414(u)(8) provides the USERRA requirements for qualified plans. An employer maintaining a plan is treated as meeting the requirements of USERRA if an employee reemployed under USERRA is:

- treated as not having incurred a break in service because of the period of military service;
- the employee's military service is treated as service with the employer for vesting and accrual purposes;
- the employee is permitted to make additional elective deferrals and employee contributions in an amount not exceeding the maximum amount the employee would have been permitted or required to contribute during the period of military service if the employee actually had been employed by the employer during that period;
- the employee is entitled to any accrued benefits that are contingent on employee contributions or elective deferrals to the extent the employees pay the contributions or elective deferrals to the plan.

Reemployment Rights under USERRA

An individual who left his civilian job to perform service in the uniformed service has the right to be reemployed if:

- He ensures that his employer receives advance written notice or verbal notice of his service;
- He has five (5) years or less of cumulative service in the uniformed services while with that particular employer;
- He returns to work or applies for reemployment in a timely manner after conclusion of service; and

Continued on next page

Re-employment rights under USERRA (continued)

- He has not separated from service with a disqualifying discharge or under other than honorable conditions.

The individual must be reemployed, restored to the job and benefits he would have attained had he not been absent due to military service or, in some cases, a comparable job.

Audit tips-in general

In general, the Service began ruling on section 414(u)(9) regarding how a plan may pay benefit accruals for a person who dies or becomes disabled while providing qualified military service with respect to the 2010 Cumulative List.

The 2010 Cumulative List also includes section 414(u)(12), which provides for differential wage payments during the period that a person on active duty who is performing service in the uniformed services.

For determination letters issued prior to 2011, the agent has no reliance on any determination letters provided by the employer during the course of the examination to support form qualification. Therefore, the agent must analyze each mandatory and optional provision of HEART thoroughly.

Section 401(a)(37)--section 104(a) of HEART

Section 104(a) of the HEART Act

Section 104(a) of the HEART Act added Section 401(a)(37) to the Code regarding qualified retirement plans. Section 104(c) of the Act makes this new requirement apply to tax-deferred annuities under Section 403(b) of the Code and to governmental eligible deferred compensation plans under Section 457(b).

IRC 401(a)(37)

Section 401(a)(37) provides death benefits under USERRA-qualified active military service. A trust shall not constitute a qualified trust unless the plan provides that, in the case of a participant who **dies** while performing qualified military service (as defined in section 414(u)):

The survivors of the participant are entitled to any additional benefits that would have been provided if the participant resumed and then terminated employment on account of death. These additional benefits include:

- accelerated **vesting**;
- ancillary life insurance benefits; or,
- other survivor benefits that are contingent on the participant's death while employed.

Q&A 2, Notice 2010-15

IRC §401(a)(37) **specifically excepts benefit accruals** for the period of qualified military service from the additional benefits to which survivors must be entitled in the case of a participant who dies while performing qualified military service. Accordingly, even if death benefits provided under the plan are based on the amount of the deceased participant's accrued benefit, IRC §401(a)(37) does not require that benefit accruals (whether benefit accruals under a defined benefit plan or contributions under a defined contribution plan) be imputed for the period of qualified military service for purposes of determining these death benefits.

Continued on next page

Section 401(a)(37)--section 104(a) of HEART, Continued

Q&A 3, Notice 2010-15

Section 401(a)(37) requires that survivors of a participant be entitled to any additional benefits (other than benefit accruals) provided under the plan had the participant resumed employment and then terminated employment on account of death.

IRC Section 414(u)(8) provides that each period of an individual's qualified military service is, upon reemployment, deemed to constitute service with the employer for vesting and accrual purposes. Although §401(a)(37) provides an exception for benefit accruals for the period of qualified military service, there is no exception for vesting service.

Reemployment rights

IRC §401(a)(37) does not apply to a plan participant who dies while performing qualified military service, but who *was not* entitled to reemployment rights with respect to the employer maintaining the plan.

Plan language for clarification

"In the case of a death occurring on or after January 1, 2007, if a Participant dies while performing qualified military service (as defined in Code §414(u)), the Participant's Beneficiary is entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Plan as if the Participant had resumed employment and then terminated employment on account of death. Moreover, the Plan will credit the Participant's qualified military service as service for vesting purposes, as though the Participant had resumed employment under USERRA immediately prior to the Participant's death."

Effective date of changes for Section 104(a) of the HEART Act

- This is a required amendment
- The amendments made by section 104 of the HEART Act apply with respect to death and disabilities occurring during military service on or after January 1, 2007.
- A plan subject to these new provisions is treated as being operated in accordance with the terms of the plan if a plan amendment is made to comply with the requirements of §401(a)(37) of the Code and is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans).

Continued on next page

Section 401(a)(37)--section 104(a) of HEART, Continued

Audit Steps-determine if HEART applies to any employee-section 401(a)(37)

Determine if the HEART provisions would apply to any employee. This could be done during the initial interview through a series of questions:

1. Were any employees on active military duty (see above with respect to section 414(u)(5))?

2. If yes, did any of those employees die while serving?

3. If yes, were any of those entitled to reemployment rights under USERRA (see above with respect to provisions on section 414(u), especially section 414(u)(8))

4. If yes, determine if additional benefits apply (additional vesting, life insurance, other survivor benefits). These provisions (additional benefits) should be documented on the work paper pertaining to the plan provisions.

Compare operation with plan document

If the HEART provisions apply, then**,** check to see that operationally the plan complied with plan document terms.

A qualification issue is present if plan operations differ from the written terms of the document.

IRC §414(u)(9)-death or disability while performing qualified military service

Section 104(b) of the HEART Act (IRC 414(u)(9)(A))

Section 104(b) of the HEART Act added Code Section 414(u)(9) to the Internal Revenue Code.

For **benefit accrual purposes**, retirement plan sponsors *may* treat someone who dies or becomes disabled while performing qualified military service as if he or she:

- resumed employment in accordance with her reemployment rights under USERRA on the day before her death or disability (as the case may be), and
- terminated employment on the actual date of her death or disability.

Non-discrimination requirement IRC §414(u)(9)(B)

This provision only applies if the employer must treat all those individuals similarly situated (i.e., all individuals performing qualified military service who die or become disabled as a result of performing this service prior to reemployment) on *reasonably equivalent terms.* *IRC §414(u)(9)(B)*

Deemed deferrals and/or employee contributions

Section 414(u)(9) does not provide for actual employee contributions or elective deferrals. Instead, under 414(u)(9)(c), an individual who dies or becomes disabled while performing qualified military service is deemed to have made employee contributions or elective deferrals for the purpose of determining benefits under Section 414(u)(8)(C) that are contingent on employee contributions or elective deferrals.

Continued on next page

IRC §414(u)(9)-death or disability while performing qualified military service, Continued

Benefits under IRC §414(u)(8)(c)

An individual reemployed is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes payment to the plan with respect to such contributions or deferrals.

No such payment may exceed the amount the individual would have been permitted or required to contribute had the individual remained continuously employed by the employer throughout the period of qualified military service.

Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is 3 times the period of the qualified military service (but not greater than 5 years).

Sample plan language for clarification

"If the Employer so elects, then effective January 1, 2007, for benefit accrual purposes, the Plan treats 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 as if the individual had resumed employment in accordance with the individual's reemployment rights under USERRA, on the day preceding death or disability (as the case may be) and terminated employment on the actual date of death or disability."

Effective date

- This amendment is optional.
- Section 104(b of the HEART Act, Section 414(u)(9) of the Code applies to deaths and disabilities occurring on or after January 1, 2007.
- However, because the provisions of Section 414(u)(9) are permissive rather than mandatory, they may be applied beginning as of any date on or after January 1, 2007.
- The employer must adopt the amendment by the end of the 2010 plan year; by the end of the 2012 plan year for governmental plans.

Continued on next page

IRC §414(u)(9)-death or disability while performing qualified military service, Continued

Question 1: If, for benefit accrual purposes, a plan provides for treatment of an individual who *dies* while performing qualified military service as if the individual had resumed employment, must the plan also provide vesting credit for that service under IRC§414(u)(9)(A)?

Answer: **Yes**. Under Sections 401(a)(37) and 414(u)(8), vesting credit must be provided for the period of the deceased individual's period of qualified military service. This vesting credit it taken into account for purposes of determining a participant's vested percentage in accruals earned both during qualified military service and during other periods.

Question 2: If, for benefit accrual purposes, a plan provides for treatment of an individual who become *disabled* while performing qualified military service as if the individual had resumed employment, must the plan also provide vesting credit for that service under IRC§414(u)(9)(A)?

Answer: **No.** Section 414(u)(9) applies only for benefit accrual purposes and neither that section nor any other Code section requires that a plan provide vesting credit to a *disabled* individual who became so while performing qualified military service.

Audit tip This was previously stated on page 7

Continued on next page

IRC §414(u)(9)-death or disability while performing qualified military service, Continued

Audit steps-414(u)(9)(A)

1. Craft initial interview questions so that any individual(s) who die or become disabled while performing qualified military service (as defined in 414(u)(5) are revealed, see above, audit tips, section 401(a)(37).

2. Review the plan document and determine if 414(u)(9)(A) was adopted.

3. If adopted, document the effective date, the adoption date and the provisions of the amendment in the workpapers. Since this is an optional amendment, it may be applied beginning as of any date on or after January 1, 2007. However, the deadline for its adoption can be no later than the end of the 2010 plan year (2012 for a governmental plan).

4. If the amendment was adopted and the employer had affected individuals, then determine what additional benefits the beneficiaries are entitled to based on date of reemployment (the day preceding death or disability) and date of termination (date of death or disability). The agent needs to compute service using the USERRA rules under IRC section 414(u)(8); time served in the military will be considered as time worked for the employer.

Optional provision

Note: This is an optional provision under HEART. USERRA already permitted the reemployed military personnel to make deferrals and employee contributions under IRC Section 414(u)(8).) (see above).

Audit steps-section 414(u)(9)(B)--mandatory if 414(u)(9)(A) is adopted by the plan

1. During the initial interview ask applicable questions (see Audit Steps for IRC 401(a)(37)). Additionally, ask if any employee became **disabled.**

2. If it is determined that the employer had individuals that died or became disabled as a result of their qualified military service, then determine if service and benefits were credited on a reasonably equivalent basis.

Reminder: This amendment is required only if the optional amendments under IRC 414(u)(9)(A) were adopted.

Section 414(u)(12)(A), differential wage payments (section 105 of HEART)

Introduction

In the case of employees who are called to active duty, some employers have paid some or all of the compensation that a service member would have received from the employer during the service member's period of active duty had the employee not been called to active duty.

Prior to the enactment of HEART, these payments commonly referred to as "differential wage payments," were not treated as wages for Federal employment tax purposes.

Employers are not required to make these wage payments, but for those that do, the HEART Act changed their tax treatment.

Definition of "differential wage payment"

The term "differential wage payment" is defined in Section 3401(h) as any payment which:

- is 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; and

- represents all or a portion of the wages the individual was performing service for the employer.

Basically, differential wage payments are typically the difference between the individual's normal pay from the employer and his military pay.

Continued on next page

Section 414(u)(12)(A), differential wage payments (section 105 of HEART), Continued

IRC § 414(u)(12)(A)

Section 105(b)(1)(A) of the HEART Act added IRC Sections 414(u)(12)(A) and (B). Section 414(u)(12)(A) provides that, for purposes of applying the Code to retirement plans subject to Section 414(u), the following applies:

- An individual receiving a differential wage payment is treated as an employee of the employer making the payment;
- the differential wage payment is treated as compensation, and
- the plan is not treated as failing to meet the requirements of any provisions described in §414(u)(1)(c) by reason of any contributions or benefit which is based on the differential wage payment.

Treatment of differential wage payments as compensation

The HEART Act states that differential wage payments made after December 31, 2008, are considered W-2 wages.

Differential wage payments are treated as compensation for purposes of applying the Code. Accordingly, these payments must be treated as compensation under §415(c)(3) and §1.415-2(d).

Differential wage payments do not have to be considered as compensation for purposes of determining contributions and benefits under a plan. A plan's definition of compensation will not fail to satisfy §414(s) because differential wage payments are excluded from the plan's definition of compensation for this purpose.

Also, Section 105(b)(2) of the Act amends Section 219(f)(1) of the Code to provide that, for purposes of determining the limitations on contributions to an IRA, the term "compensation" includes differential wage payments.

Continued on next page

Section 414(u)(12)(A), differential wage payments (section 105 of HEART), Continued

414(u)(12)(A)-Audit steps

1. If the initial interview reveals that the employer has any individual(s) performing service in the uniformed services as described in section 3401(h)(2)(A), the Agent should inquire whether differential wage payments are being made to those individuals.

2. If the employer does make differential wage payments, review the amendment/plan document and note the details in the workpapers (along with definition(s) of compensation).

3. Determine whether differential wage payments were properly considered compensation by the Employer.

    - Review payroll records including W-2s and other federal and state payroll returns.

    - Reconcile compensation payments to employee to employer workpapers/schedules and payroll returns.

Section 414(u)(12)(B) and distributions

IRC § 414(u)(12)B)-special rules for distributions

Section 105(b)(1)(A) of HEART also adds § 414(u)(12)(B) to the Code. This provision applies to all individuals on active duty for a period of more than 30 days.

Generally, an individual shall be treated as having been severed from employment during any period of active duty service that exceeds 30 days (i.e., "deemed severance"), regardless of whether he is receiving differential wage payments. Thus for purposes of applying rules that permit distributions upon severance from employment under §§401(k), 403(b), and 457(d), an individual is treated has having been severed from employment during any period the individual is performing service in the uniformed services while on active duty for a period of more than 30 days.

A plan may, but is not required to, provide for distributions upon a deemed severance under Section 414(u)(12)(B). For example, a plan that provides for distributions upon severance from employment may, but is not required to, also provide for distributions upon a deemed severance from employment under § 414(u)(12)(B).

Suspension of deferrals

If the individual elects to receive a distribution by reason of this deemed severance from employment, then the plan shall provide that the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution. Section 414(u)(12)(B)(ii).

For purposes of the 6-month restrictions, the definition of "elective deferral" under 414(u)(2)(C) applies, which includes any deferral of compensation under IRC §§ 401(k), 403(b)(7) and 403(b)(11), and 457(d).

The 6-month restriction does not apply to a qualified reservist distribution.

Continued on next page

Section 414(u)(12)(B) and distributions, Continued

Sample Plan Language for clarification

"If a Participant performs service in the uniformed services on active duty for a period of more than 30 days, the Participant will be deemed to have a severance from employment solely for purposes of eligibility for distribution of amounts not subject to Code §412. However, the Plan will not distribute such a Participant's account on account of this deemed severance unless the Participant specifically elects to receive a benefit distribution hereunder.

If a Participant elects to receive a distribution on account of this deemed severance, then the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

If a Participant would be entitled to a distribution on account of a deemed severance, and a distribution on account of another Plan provision, then the other Plan provision will control and the 6-month suspension will not apply."

Q&A 13, Notice 2010-15

The deemed severance rule of §414(u)(12)(B) applies only for purposes of the provisions of §§ 401(k), 403(b), and 457(d) that permit distributions on severance from employment.

For example, in the event an individual is treated as severed from employment under§ 401(k)(2)(B)(i)(1), the individual may receive a distribution otherwise subject to the distribution restrictions of § 401(k)(2)(B).

On the other hand, merely because an individual is treated as severed from employment under §414(u)(12)(B) does not cause such individual to be treated as severed from employment under sections of the Code *other than* §§401(k), 403(b) and 457(d)(1)(A)(ii).

Actual severance from service (vs. deemed)

Section 414(u)(12)(B) does not affect the status of an individual who is on active duty for a period of more than 30 days and who has, in fact, had an actual severance from employment.

Example: A plan participant receives a distribution from his retirement plan under § 401(k)(2)(B)(i)(l) and returns to employment within six (6) months, § 414(u)(12)B)(ii) would not prevent the participant from making elective deferrals or employee contributions to the plan before the end of the 6-month period.

Continued on next page

Section 414(u)(12)(B) and distributions, Continued

In service distributions

Section 414(u)(12)(B) does not affect a plan's ability to make other in-service distributions to the extent permitted under other applicable rules and plan terms.

Example: A plan participant may receive a distribution of elective deferrals from his employer's 401(k) plan when he attains age 59 ½ (or under other circumstances listed in §401(k)(2)B), and the distribution would not be subject to the 6-month suspension restriction on elective deferrals under § 414(u)(12)(B) (although a 6-month restriction may apply to a hardship distribution).

Effective date

- This is an optional provision
- Code Section 414(u)(12) is effective for plan years beginning on or after January 1, 2009.
- Employers must adopt this amendment by the end of the 2010 plan year.

Audit tips

The 2010 Cumulative List includes section 414(u)(12), which provides for differential wage payments during the period that a person on active duty who is performing service in the uniformed services.

As stated above for 414(u)(9), for determination letters issued prior to 2011, the agent has no reliance on any determination letters provided by the employer during the course of the examination to support form qualification for the HEART provisions. Therefore, the agent must analyze each mandatory and optional provision of HEART thoroughly.

A participant that had a deemed severance from employment and received a distribution can return to employment and begin making deferrals (thus the 6-month wait period is negated).

Continued on next page

Section 414(u)(12)(B) and distributions, Continued

Audit steps-414(u)(12)(B)

1. While reviewing the plan document for form qualification, the agent should be documenting the major plan provisions, which would include the distribution provisions. If the plan contains a CODA or is a 403(b) or 457(d) plan, remember to document the distributions provisions unique to deferrals (they may differ from other distributions provisions).

   This is the point during the examination when the Agent would determine if the optional provision was adopted.

2. If the Employer adopted the optional provision, ensure that the individual was in fact on active duty for 30 days or more before the distribution occurred. Additionally, verify that no deferrals were permitted during the 6-month period following the distribution.

3. Section 414(u)(12) is effective for plan years beginning on or after January 1, 2009. Employers must adopt this amendment by the end of the 2010 plan year.

IRC section 72(t)(2)(g) (section 107 of HEART)

Section 107 of the HEART Act

Under current tax law, a taxpayer who receives a distribution from a qualified retirement plan prior to age 59-1/2 or prior to death or disability is generally subject to a ten-percent (10%) additional income tax under IRC Section 72(t), unless there is an exception.

The Pension Protection Act of 2006 (PPA '06) amended the Code to provide that the 10% additional income tax does not apply to a Qualified Reservist Distribution (QRD). Originally PPA '06 provided a timeframe for the exception (for QRD for individuals ordered or called to active duty after 9/11/01 but before 12/31/07).

Section 107 of HEART amends IRC §72(t)(2)(G) to delete the reference to 12/31/07 so that these special rules for QRD do not expire.

"Qualified Reservist Distributions"

A "qualified reservist distribution" ("QRD") is a distribution:

- from an IRA, or
- of elective deferral contributions made from a 401(k) plan or 403(b) arrangement;
- made to an individual who was ordered or called to active duty in the Reserves or National Guard for a period exceeding 179 days, or indefinitely; and
- made during the period beginning on the date of the call-up order and ending at the close of the active duty period.

Special rules regarding QRDs

A QRD can be made without regard to the otherwise applicable restrictions on Section 401(k) and Section 403(b) elective deferrals in-service distributions.

An individual who receives a QRD may re-contribute all or part of his QRD to an IRA at any time during the two-year period beginning on the day after the end of his active duty period. Section 72(t)(2)(G)(iii).

Continued on next page

IRC section 72(t)(2)(g) (section 107 of HEART), Continued

Question 3: Jim is employed by ABC Corporation. ABC Corp sponsors ABC 401(k) Profit Sharing Plan which has a 6-year graded vesting schedule. Jim has been a participant in the Plan for 3 years. The Plan has been written to provide distributions from the plan for an actual severance from employment, however the employer has elected to exclude distributions for a deemed severance.

Jim has been called to active duty and has currently served 9 months. His employer is not providing differential wage payments. His family is having financial difficulty, so Jim has requested a distribution from the plan. Is he entitled to receive the distribution?

Answer: **Yes**. Although Jim has not had an actual severance from employment he has had a deemed severance. Unfortunately, the plan was not written to allow distributions upon deemed severance, so he cannot receive a distribution under Section 414(u)(12)(B). However, because he is still on active duty and his service has exceeded 179 days, he is entitled to receive a qualified reservist distribution.

Remember, a plan participant does not have to receive differential wage payments in order to get a QRD. Furthermore, Jim is able to receive this distribution without incurring any of the penalties under 72(t) or without regard to the otherwise applicable restrictions on Section 401(k) and Section 403(b) elective deferrals in-service distributions.

Effective date

- Optional provision
- For plans that choose to implement this change, amendment are due on the later of:
  - i. The last day of the plan year in which the amendment is effective, or
  - ii. December 31, 2011.

Continued on next page

IRC section 72(t)(2)(g) (section 107 of HEART), Continued

Audit tip

Most likely, the distribution issues under 72(t)(2)(G) would not translate to a plan qualification issue. The issues would appear on examination during a discrepancy adjustment case on a Reservist. However, since QRD are optional, the employer must decide whether the plan permits QRD. Thus, as previously stated, qualification issues present themselves when operations do not mirror plan terms.

Audit steps

1. During the initial interview, determine if the employer employed any members of the Reserves or National Guards, as defined in Code section 72(t)(2)(G)(iii)(II).

2. If so, determine if they served for more than 179 days.

3. If so, did any receive a QRD (see above for definition).

4. Verify that the amendment was adopted timely. This would be the later of the last day of the plan year in which the amendment is effective, or December 31, 2011.

Audit reminder

Repayment of QRD can occur during the 2-year period beginning on the day after the end of the active duty period.

Other sections of the HEART Act

Section 114 of the HEART Act

Section 114 of HEART amended IRC Section 125 to provide a special rule allowing distributions of unused amounts in a health Flexible Spending Account (health FSA) to reservists ordered or called to active duty. Section 114 of the Act applies to distributions made on or after June 18, 2008 and enable employers to modify their health FSA plan to assist employee who are also active military reservists. Qualified reservists can make a request to cash out any remaining funds in their FSA as of June 18, 2008. While the cash disbursements will be taxed as income, the accountholders will be able to use the monies for whatever expenses and purposes they choose.

Notice 2008-82

This notice provided guidance on this amendment. This applies to any qualified reservists (as defined above) whose unit has been called up to active duty for a period of 180 days or longer. The Act stipulates a 180 day call up to qualify, the reservist does not need to serve the entire time to receive payment.

Conversely, if an order or call up is for less than six months and the reservist actually serves the 180 days or more, that employee is also qualified to request the cash payment. In all cases, each request must be made after the order has been given and before the end of the plan year, which includes the end of the grace period for plans that utilize them.

Plan Amendment

Employers must first amend their plan to accommodate cash disbursement requests. Employers can amend the plan to disburse cash in one of three ways:

1. Make all funds elected available, minus any reimbursement claims submitted as of the request date;
2. Make only the employee's to date contributions available, minus claims submitted; or
3. Choose a percentage of the remaining funds (minus reimbursements).

In the case of (2) and (3) above, the employer can also decide if they want to terminate the plan after the disbursement of funds. However, the employer chooses to amend the plan, all payments must be made within 60 days of each request.

Continued on next page

Other sections of the HEART Act, Continued

Section 109 of the HEART Act

Section 109 of the HEART Act added IRC §408A(e)(2) to the Code to include a military death gratuity or Service members' Group Life Insurance (SGLI) payment contribution to a Roth IRA a qualified rollover contribution.

Military death gratuity and SGLI

10 U.S.C. 1477 provides for payment of a military death gratuity to an eligible survivor of a service member.

Also, certain members of the uniformed services are automatically insured against death under the Service members' Group Life Insurance (SGLI) program. 38 U.S.C. 1967.

PPA '06 and Roth IRA qualified rollover contributions

Before 2008, a Roth IRA could only accept rollovers from another Roth IRA, a non-Roth IRA (subject to income limits), or from a designated Roth account under an employer sponsored plan described in Section 402A. These rollover contributions to Roth IRAs are called "qualified rollover contributions."

PPA '06 amended the definition of a qualified rollover contribution in Section 408A(e) of the Code to allow any rollovers to Roth IRAs from certain employer sponsored plans, even if the rollover is not from a designate Roth account, effective for distributions made after 12/31/07.

HEART Act expanding Roth IRA qualified rollover contribution

Section 109 of HEART further amendment IRC §408A(e) to include as a qualified rollover contribution the contribution to a Roth IRA of a military death gratuity or SGLI payment if the contribution is made before the end of the 1-year period beginning on the date on which the IRA beneficiary receives the military death gratuity or SGLI payment, to the extent such contribution does not exceed:

i. the total amount of the military death gratuity and SGLI payment received, *minus*

ii. the amounts so received which were contributions to a Coverdell education savings account under section 530(d)(9) (See Notice 2010-15) or another Roth IRA.

Continued on next page

Other sections of the HEART Act, Continued

Effective date	The amendments made by §109 of the Act generally apply with respect to deaths from injuries occurring on or after June 17, 2008. In addition, §109 of the Act permits a contribution to a Roth IRA (or a Coverdell ESA) of a military death gratuity or an SGLI payment received with respect to a death from injuries occurring before June 17, 2008 (and on or after October 7, 2001), if the contribution is made no later than June 17, 2009.
Section 111 of the HEART Act	Section 111 of the HEART Act adds IRC § 45P to the Code
IRC § 45P	Section 45P provides a credit to eligible small business employers that make eligible differential wage payments to qualified employees who are on active duty in the uniformed services for more than 30 days.
Tax credit	An eligible small business may take a credit against its income tax liability in an amount equal to 20 percent of the sum of the eligible differential wage payments made to qualified employees during the taxable year.
Differential wage payments for purposes of §45P	The definition of differential wage payments for purposes of §45P credit is the same definition enacted in new §3401 discussed before. The amount of eligible differential wage payments that may be taken into account for the taxable year is limited to $20,000 per qualified employee, resulting in a maximum credit for a taxable year of $4,000 per qualified employee.
Qualified employee	An employee is a qualified employee if he or she has been an employee of the taxpayer for the 91-day period immediately preceding the period for which differential wage payments are made.

Continued on next page

Other sections of the HEART Act, Continued

Eligible small business employer

An employer is an eligible small business employer if it employed an average of fewer than 50 employees on business days during the taxable year and provides differential wage payments under a written plan to every qualified employee.

For purposes of determining an employer's eligibility, the rules of § 414(b), (c), (m) and (o) apply, under which the members of a controlled group and other related entities are treated as a single employer.

Coordinating §45P with other tax credits

Section 45P (c) provides a rule to coordinate the § 45P credit with other credits under Chapter 1 of the Code that are calculated taking into account employee compensation. Under this rule, the amount of any such other credit determined with respect to compensation of an employee must be reduced by the amount of the §45P credit determined with respect to that employee.

Example

The amount of credit under Chapter 1 of the Code determined with respect to compensation of an employee must be reduced by the amount of the §45P credit determined with respect to that employee if: (1) compensation paid in the current taxable year is an expense used directly in determining the amount of credit; (2) military differential wage payments are a type of compensation that can be taken into account in determining the amount of the other credit; and (3) the military differential wage payments taken into account in determining the employer's § 45P credit are also taken into account in determining the other credit.

Audit steps

Verify plan provisions

The following steps should be taken when verifying USERRA provisions:

1. Verify that the Plan contains USERRA (exception for 403(b) and 457 plans) as it relates to the addition of Code section 414(u). .

2. Verify HEART amendments were made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012, for governmental plans).

3. Verify the plan was amended for the following mandatory provisions and changes of HEART:

   - Code section 401(a)(37)-(see above),

   - Code section 414(u)(9)(B) (only required if the Employer adopts the **optional provisions** of 414(u)(9)(A), (see above) and

   - Code section 72(t)(2)(G). This is an amendment to the statute which deletes the previous expiration date of December 31, 2007, for the waiver of the 10% additional tax for "qualified reservist distributions". There is no expiration date on the waiver of the 10% additional tax. Although deleting the expiration date is mandatory, the qualified reservist distribution requirements are optional.

WRERA

Background

On December 23, 2008 President Bush signed into law the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) P.L. 110-458. Due to the economic downturn which resulted in large investment losses effecting pension assets and other retirement accounts Congress decided to enact WRERA to provide some temporary relief from certain requirements that might be difficult for pension plans to meet.

In addition WRERA provides several technical corrections to the Pension Protection Act of 2006 (PPA) P.L. 109-280. This chapter will provide an overview of some of the key provisions of WRERA, including provisions relating to the funding of single and multiemployer plans, the temporary relief of required minimum distributions for 2009, as well as technical corrections.

Waiver of required minimum distributions

Background

Under section 401(a)(9) of the Internal Revenue Code, employer-sponsored retirement plans, such as 401(k), 403(b) and 457 plans, and individual retirement accounts and annuities ("IRAs") must make certain annual required minimum distributions (RMDs) in order to maintain their "qualified" status. RMDs to participants must start no later than April 1 of the year after the year in which the participant either attains age 70 ½, or retires, whichever is later.

For traditional IRAs, required minimum distributions must commence by April 1 following the year the IRA owner reaches age 70 ½. Alternative minimum distribution requirements apply to beneficiaries in the event that the participant dies before the entire amount in the participant's account is distributed. Failure to make a required distribution results in an excise tax equal to 50 percent of the required minimum distribution amount that was not distributed for the year, which is imposed on the participant or beneficiary.

WRERA addresses concerns

Following the decline in the stock market, there was concern about individuals taking these required distributions, since their accounts had suffered substantial losses.

Suspending minimum required distributions

Therefore, Section 201(a) of WRERA added § 401(a)(9)(H) to the Code which suspends the minimum distribution requirements, both initial and annual required distributions, for defined contribution arrangements, including IRAs, for calendar year 2009. Thus, plan participants and beneficiaries are allowed, but are not required, to take required minimum distributions for 2009. However, it should be noted that this relief does not suspend 2009 RMDs from defined benefit plans and it does not apply to nongovernmental 457(b) plans.

Continued on next page

Waiver of required minimum distributions, Continued

Minimum distribution requirement still required for 2010	WRERA allows a suspension of the RMD for 2009. Therefore, an individual who reaches age 70½ in 2009 who would normally be required to take their first RMD on or before April 1, 2010 would not be required to take this distribution. However, the individual will still be responsible for taking an RMD for the 2010 calendar year on or by December 31, 2010. Also, individuals with an RMD of April 1, 2009 for their 2008 RMD will still need to take their 2008 RMD. (Note: Employees who continue to work beyond age 70½ are not required to take RMDs until they separate from service, unless they are 5 percent owners of the employer.)
5 year rule for 2009	The 2009 RMD relief also applies to the 5-year rule applicable to beneficiaries when a participant dies before his required beginning date and the death occurred before January 1, 2009. Beneficiaries will receive an extra year to receive total payouts of their account balances if the payment deadline was December 31, 2009, or later. The 5-year rule requires that the death benefit be completely distributed no later than 12/31 of the 5th calendar year following the participant's death.
Example	For an account of an individual who died in 2008, the 5 year period ends in 2014 instead of 2013.
Question	Mike turned 70 on March 7, 2009 and retired from XYZ Company on May 1, 2009. Would Mike be required to take a RMD by April 1, 2010?
Answer	No, he would not be required to take the RMD.
Question	Would he be required to take a RMD by December 31, 2010?
Answer	Yes, he would be required to take his 2010 year RMD by 12/31/10.

Continued on next page

Waiver of required minimum distributions, Continued

Question

Same Facts as example above but Mike continued to work until March 1, 2010. Would he have to take the RMD by April 1, 2010?

Answer

No, unless he was a 5% owner in XYZ Company.

Distributions not treated as eligible rollover distributions

Distributions made during 2009 that would have been considered RMDs but for this waiver will not be treated as eligible rollover distributions for purposes of an employer's requirement to offer a direct rollover (and related notification obligations) and mandatory withholding requirements for non-direct rollovers. Therefore employers may, but do not have to, offer a direct rollover and provide related documentation, and the distribution isn't subject to the mandatory 20 percent withholding. Even if an employer does not offer a direct rollover, employees may roll over the distribution into another eligible plan within 60 days.

In essence, the participant can take his normal RMD, receive the full amount (no withholding requirements) and use the money for 60 days and then roll it into an IRA/other plan and not have to come up with the additional amount (the amount normally withheld).

Notice 2009-82

Notice 2009-82 provides guidance on the waiver of the 2009 RMDs. The notice:

- provides transition relief through November 30, 2009 for a plan that is not operated in accordance with its terms with respect to waived required minimum distributions and certain related payments;
- sets out rollover relief with respect to waived required minimum distributions and certain related payments, including an extension of the 60-day rollover period to November 30, 2009 for certain of the distributions; and
- answers questions that have been raised regarding the waiver of 2009 required minimum distributions under WRERA.

Continued on next page

Waiver of required minimum distributions, Continued

Sample plan amendments

In the Appendix, the notice also provides two sample plan amendments that give recipients a choice as to whether to receive waived required minimum distributions and certain related payments and that specify the application of the direct rollover rules to the distributions. The sample amendments can be used by plan sponsors that are uncertain as to the treatment under plan terms of waived required minimum distributions and certain related payments or that otherwise desire to give recipients a choice as to whether to receive such distributions.

Audit step

Obtain amendment and make sure that it was adopted on or before the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of a governmental plan. Note that the sample amendments do not cover all of the provisions required by WRERA, but only covers the RMD waiver. The remaining WRERA provisions relate to technical corrections of PPA.

WRERA technical corrections to PPA

WRERA Clarifications

WRERA provides the following technical corrections to PPA with retroactive effective dates as if they had been included in PPA, unless otherwise noted.

Non-spouse beneficiary direct rollovers

PPA amended IRC section 402(c)(11) to allow non-spouse beneficiaries to make direct rollovers of death benefit payments from a qualified plan (including governmental 457 plans and 403(b) plans) to an inherited IRA. These direct rollovers were available for distributions made after December 31, 2006. Notice 2007-7 provided guidance that plans were permitted, but not required, to offer these direct rollovers to non-spouse beneficiaries.

However, section 108(f) of WRERA provides that, effective for plan years beginning after December 31, 2009, plans must provide a direct rollover option for non-spouse beneficiaries. Plans must also provide appropriate notice to nonspouse beneficiaries.

Audit tip

While reviewing distributions, verify distribution paperwork contains the new required language (see section V of Notice 2007-7 for specifics).

GAP Period Income

Gap Period Income is the earnings on contributions from the last day of the plan year up through the date of distribution. Prior to the enactment of PPA, gap period income was to be distributed on any refunds due to failure of compliance with IRC 401(k), IRC 401(m), and/or IRC 402(g).

Effective for plan years beginning on or after January 1, 2008, PPA eliminated gap period income distributions required to be paid on corrective distributions made to highly compensated employees to correct failing the actual deferral percentage test or the actual contribution percentage tests. But, gap period income remained applicable to corrective distributions of excess deferrals that inadvertently exceeded the dollar limits under 402(g) of the Code.

However, section 109(b)(3) of WRERA corrected the oversight by providing that gap period income also does not apply to excess deferral distributions for plan years beginning on or after January 1, 2008.

Continued on next page

WRERA technical corrections to PPA, Continued

Audit tip

When reviewing distributions in general or in connection with a review of the ADP or ACP test or compliance with 402(g), verify that only the amount needed to bring the plan into compliance within the specified limits was distributed to the participant (income should no longer be calculated).

Eligible Automatic Contribution Arrangements ("EACA")

PPA created and required EACA's to designate a qualified default investment alternative ("QDIA") to invest automatically withheld contributions for participants that did not make an affirmative election themselves. Additionally, participants may be allowed to take a "permissible withdrawal" within 90 days of being automatically enrolled in a plan if they change their mind and/or elect not to participate in the plan.

Sections 109(b)(4), (5) & (6) of WRERA technically corrects PPA by no longer requiring plans with an EACA to designate a QDIA beginning on or after January 1, 2008. Although a QDIA is not required for an EACA, Plan Sponsors may still want the default investment to be a QDIA to help relieve plan fiduciaries from liability for any losses to the participant's account that may result.

Also, permissible withdrawals are now disregarded in applying the annual IRC 402(g) calendar year deferral limit. Thus, when determining whether the section 402(g) limits have been exceeded, the permissible withdrawal amounts that are distributed within 90 days of the participant being automatically enrolled in the plan are not counted as part of the elective deferrals.

Audit tip

While reviewing participant deferrals under 402(g), be sure to exclude any amount deferred and distributed to the participant which resulted from the return of amounts automatically deferred. If distributions of this nature are found, make sure that the participant did not subsequently enter into a deferral arrangement. If they did, verify that the amounts distributed were deferrals made prior to the execution of the deferral arrangement form.

Continued on next page

WRERA technical corrections to PPA, Continued

Direct Rollovers to Roth IRAs

Section 108(f)(2) of WRERA made a clarification regarding direct rollovers to Roth IRAs. PPA allows for direct rollovers from qualified retirement plans, 403(b) plans, and governmental 457 plans, to Roth IRAs, subject to the limitations that generally apply to rollovers from traditional IRAs to Roth IRAs, specifically an adjusted gross income limit. However, PPA did not indicate if a direct rollover from a Roth 401(k) or Roth 403(b) account to a Roth IRA would also be subject to an adjusted gross income limitation.

WRERA clarifies that a rollover from a Roth 401(k) or Roth 403(b) account to a Roth IRA is not subject to the adjusted gross income limitation.

Calculation of Limitations on Lump Sum Distributions

Section 415(b) limits the benefits that a defined benefit plan may pay to any participant. The limitations are defined in terms of a life annuity beginning at any age between 62 and 65. When benefits are paid in a different form, the limitation must be converted to that form using prescribed actuarial assumptions. PPA provided that the mortality assumptions used in IRC §415(b) calculations would be based on the Commissioners' standard table for determining reserves under group annuity contracts (IRC §807(d)(5)(A)).

WRERA substitutes the table used for converting benefit accruals to lump sums under IRC §417(e). This change is mandatory beginning in 2009 and may be adopted voluntarily before then.

Audit tip

Request the employer provide you with a work paper detailing how the lump sum distribution was calculated along with the applicable mortality table and applicable interest rate used. Also request an explanation of how the table and interest rate were derived. Then, provide the information to your local actuary to determine if the lump sum distribution was correctly calculated.

Cash balance plans

PPA addressed a number of issues related to cash balance plans, including age discrimination, conversions of traditional defined benefit plans to cash balance plans, and the so-called "whipsaw" effect, under which, in certain circumstances, a plan could be required to distribute more than the hypothetical balance in the participant's account.

Continued on next page

WRERA technical corrections to PPA, Continued

WRERA changes to cash balance plans

Section 107(b) of WRERA makes a few revisions to the rules related to cash balance and other hybrid plans. WRERA clarifies that:

- The new vesting requirements applicable to cash balance plans (generally requiring 100% vesting after three years of service) do not apply to a participant who does not have an hour of service after the effective date of the new rules. The effective date generally is for plan years ending on or after June 29, 2005. However, for plans in existence on June 29, 2005 the requirements apply to plan years beginning after December 31, 2007, unless the plan sponsor decides to apply them sooner. Also, a special effective date applies to plans subject to a collective bargaining agreement that was ratified on or before August 17, 2006.

- In determining whether a participant is subject to a mandatory cashout, the "whipsaw" rules do not apply. Instead, a participant will be subject to a mandatory cashout based on the balance in his hypothetical cash balance account.

Cash balance plans maintained by government employers are allowed to use any desired interest crediting rate. Other plans are limited to a reasonable market rate of return (which, under certain circumstances, can be a negative rate of return).

Continued on next page

WRERA technical corrections to PPA, Continued

Combined plan deduction limit

A special combined plan contribution deduction limit applies when an employer sponsors both a defined contribution plan and a defined benefit plan covering one or more of the same employees.

This limit is the greater of:

- 25% of compensation paid or accrued during the plan years to participants in the combined plans; or
- The contribution needed to meet the minimum funding requirements, but not less than the amount of the defined benefit plan's unfunded current liability.

Effective for contributions made for tax years beginning on or after January 1, 2006, PPA provided that this combined plan limit does not apply if the defined contribution plan contributions do not exceed 6% of compensation for beneficiaries under the plans. However, even if defined contribution plan contributions do not exceed 6% of compensation, the combined plan limit would still apply to the defined benefit plan.

WRERA clarification

WRERA clarifies that if contributions to a defined contribution plan are less than 6% of compensation, the defined benefit plan is not subject to the combined plan deduction limit. If contributions to a defined contribution plan exceed 6% of compensation, only contributions exceeding 6% of compensation are counted toward the combined limit.

This provision is effective retroactively to contributions made for tax years beginning after December 31, 2005.

Audit tip

When an Employer sponsors a DB and a DC plan, request the employer submit a work paper reflecting DC contributions as a percentage of compensation (as defined for deduction purposes). If the percentage exceeds 6%, then more documentation would need to be obtained and actuarial involvement might be warranted to determine the DB plan's minimum funding requirement and the plan's unfunded current liability.

Continued on next page

WRERA technical corrections to PPA, Continued

Extension of Pension Funding Equity Act amendment deadline

For plan years beginning in 2004 and 2005, the Pension Funding Equity Act (PFEA) replaced the Code section 417(e)(3) rate to be used for determining maximum annual benefits with a rate of 5.5%. PFEA also required plan sponsors to amend their plans by the end of the 2006 plan year to reflect this requirement. PPA then required that distributions made in years beginning after December 31, 2005, use an interest rate assumption for adjusting a lump sum payment to comply with the benefit limitation rules, which is not less than the greater of:

- 5.5%;
- The rate that produces a benefit of not more than 105% of the benefit calculated using the minimum value lump sum interest rate; or
- The interest rate specified in the plan.

PPA extended the PFEA amendment deadline to the last day of the 2008 plan year.

Section 103(a) of WRERA further extended the required amendment deadline to the last day of the 2009 plan year. In addition, plans with fewer than 100 participants in the preceding year are not subject to the 105% component of the benefit limit calculation.

Audit tip

When checking plan qualification and the timely adoption of amendments, be mindful of the extended due date by WRERA.

Continued on next page

WRERA technical corrections to PPA, Continued

Mortality tables for lump sum payments

PPA amended the interest rates and mortality tables used in calculating the minimum value of certain optional forms of benefit, such as lump sum payments. These are referred to as the "applicable interest rate" and the "applicable mortality table."

Section 103(b)(2)(B)(i) of WRERA clarifies that the applicable mortality table that must be used to calculate the minimum value must also be used to adjust benefits to comply with the maximum annual benefit limits. This clarification is effective for plan years beginning after December 31, 2008. However, a plan may use the new mortality table for years or portions of years beginning after December 31, 2007, and before January 1, 2009.

See the calculation of limitation on lump sum distributions above for further information.

DB(k) plans

Effective for plan years beginning in 2010, PPA added Code section 414(x) which allows certain employers to establish "eligible combined plans," more commonly known as "DB(k) plans." This plan design will only be available to employers with fewer than 500 employees when the plan is established and will provide both a defined benefit portion and a 401(k) automatic enrollment portion. The plan will be funded through a single trust with a single plan document and will file only one Form 5500. However, the rules of ERISA must be applied to the defined benefit component and the 401(k) component as if each component were a free-standing plan.

WRERA clarifies that in the case of a termination of a DB(k) plan, the 401(k) component and the defined benefit component must be terminated separately. As a result, the defined benefit component will need to comply with PBGC plan termination requirements.

Continued on next page

WRERA technical corrections to PPA, Continued

Missing Participants

An employer that terminates a fully funded defined benefit plan must comply with certain requirements with regard to missing participants or beneficiaries whom the plan administrator cannot locate after a diligent search. A plan administrator may either purchase an annuity from an insurer or transfer the missing participant's benefits to the PBGC. Prior to PPA, the missing participant requirements only applied to single-employer plans. PPA amended these requirements to apply to multiemployer plans, defined contribution plans, and other plans that do not have termination insurance through the PBGC.

Section 104(e) of WRERA specifies that the missing participant requirements apply to plans that at no time provided for employer contributions. WRERA also narrows the missing participant requirements to defined contribution plans (and other pension plans not covered by PBGC's termination insurance) that are qualified plans. This provision is effective retroactively to contributions made for tax years beginning after December 31, 2005.

Disclosure Requirements

Under ERISA, pension plans must meet extensive notice and reporting requirements that disclose information about the plan to participants and beneficiaries as well as government agencies. Among these disclosures is a requirement that a terminating single-employer defined benefit plan provide "affected parties" with certain information required to be submitted to the Pension Benefit Guaranty Corporation (PBGC).

Section 105 of WRERA clarifies that in order for a plan to terminate in a distress termination, a plan administrator must not only provide affected parties with information that the administrator had to disclose to the PBGC along with the written notice of intent to terminate, but also certain information that was provided to the PBGC after the notice was given. This information may include a certification by an enrolled actuary regarding the amount of the current value of the assets of the plan, the actuarial present value of the benefit liabilities under the plan, and whether the plan's assets are sufficient to pay benefit liabilities.

Further, in an involuntary termination, certain confidentiality provisions exist that prevent the plan administrator or sponsor from providing information about the termination in a form which includes any information that may be associated with, or identify affected parties. Section 105 of WRERA extends this confidentiality protection disclosure of this information by the PBGC.

WRERA changes to funding and other requirements under PPA

Code § 436 Background

PPA established stricter funding standards for single employer defined benefit plans by amending the Internal Revenue Code (Code) to add section 436. Effective for plan years beginning after December 31, 2007, PPA provided that single-employer and multiple employer plans that do not meet specific funding percentage levels are subject to certain benefit restrictions. These benefit restrictions are tied to the plan's adjusted funding target attainment percentage (AFTAP).

PPA sets a plan's funding target at 100% of the present value of all benefit liabilities accrued to date. The 100% target is phased in over four years (92% in 2008, 94% in 2009, 96% in 2010, and 98% in 2011 with 100% thereafter).

In general, single-employer and multiple employer plans that do not meet specific funding levels are subject to certain benefit restrictions, such as:

- The payment of unpredictable contingent event benefits (e.g., plant shutdown benefits);
- The adoption of plan amendments that increase or improve benefits;
- The payment of prohibited payments; and
- Ongoing benefit accruals.

Benefit restrictions apply if the AFTAP is less than 80% with more restrictions applying if the AFTAP is less than 60%.

Continued on next page

WRERA changes to funding and other requirements under PPA, Continued

Determination of Normal Target Cost

PPA changed the way in which minimum funding requirements for defined benefit plans are calculated. The old funding requirements were replaced by a method that focuses on plan solvency: Contributions each year must at least equal the cost of benefits accruing during that year (the "target normal cost") plus the amount necessary to amortize any beginning-of-year funding shortfall over a period of roughly seven years. Underfunded plans that meet "at-risk" criteria are subject to accelerated funding requirements.

PPA amended the Code to define the minimum required contribution for a single-employer plan that is not in at-risk status as the sum of the plan's target normal cost and the shortfall and waiver amortization charges for the plan year. PPA defined "*target normal cost*" as the present value of all benefit liabilities expected to accrue during the plan year, including increases in past service benefits attributable to current year increases in compensation.

WRERA changes

WRERA now clarifies that a plan's target normal cost is:

- Increased by the amount of plan-related expenses to be paid from plan assets during the plan year; and
- Decreased by the amount of mandatory employee contributions to be made over the plan year.

This change applies to plan years beginning after December 31, 2008. However, plan sponsors may elect to apply this provision to plan years beginning in 2008.

Continued on next page

WRERA changes to funding and other requirements under PPA, Continued

Funding Target Transition Relief	PPA provides that a plan's funding target is phased-in over three years. Plans with a funding target at or below the set phase-in level for the year (e.g., 92% for 2008, 94% for 2009 and 96% for 2010) only need to fund up to that percentage. If the plan does not meet those phased-in funding target percentages, the plan would no longer be eligible for the phase-in period, and the employer must fund the plan based on the 100% funding target. The transition rule does not apply to a plan that was: not in effect for 2007; or subject to certain deficit reduction contribution rules.
WRERA changes	WRERA provides funding relief and revises the phase-in rules to permit plans that miss the phase-in funding target for a specific year to continue to fund up to the specified funding target for the remainder of the three phase-in years, rather than 100%. This may reduce the required contributions for some plans. This provision is effective retroactively to 2008.
Temporary Relief of Frozen Benefit Accruals	For plan years beginning after December 31, 2007, PPA imposed benefit restrictions on certain underfunded plans. For example, a plan sponsor must freeze all future benefit accruals under any plan that is less than 60% funded for the current plan year.
WRERA changes	WRERA temporarily allows underfunded plans to look back to the plan's funding status during the previous plan year to determine whether the plan was at least 60% funded solely for the purpose of determining whether benefit accruals must be frozen. However, all other benefit restrictions continue to apply to the plan. This provision applies to plan years beginning during the period beginning on October 1, 2008, and ending on September 30, 2009.

Continued on next page

WRERA changes to funding and other requirements under PPA, Continued

Valuation of Plan Assets

Under PPA, effective for plan years beginning after December 31, 2007, a plan may determine the value of plan assets on a valuation date as the sum of the average of the fair market value on the valuation date and the adjusted fair market value of assets determined on an earlier date. However, the averaging period cannot be longer than 24 months and the resulting average value must be between 90 and 110 percent of the fair market value of plan assets.

WRERA changes

WRERA provides that the averaging method is adjusted for expected earnings, which results in "asset smoothing." Expected earnings are determined by the plan's actuary on the basis of an assumed earnings rate for the plan. However, the assumed earnings rate cannot exceed the applicable third segment rate, which is the rate applied to benefits reasonably determined to be payable after the end of an initial 20-year period. Asset smoothing may be helpful to plan sponsors by resulting in smaller required contributions. This provision applies retroactively to plan years beginning after December 31, 2007.

Prohibited Payment

The most common example of a prohibited payment is a lump sum payment. Proposed regulations did not provide guidance on the treatment of mandatory cash-out payments (e.g., payments with a present value of less than $5,000 or $1,000 if the plan lowered the threshold) when lump sums are restricted.

However, WRERA provides that mandatory cash-out payments are not prohibited payments and may be distributed immediately from an underfunded plan. This change applies retroactively to plan years beginning after December 31, 2007.

Determination of "at risk" Status

Under PPA, a plan is "at-risk" if the funding target percentage for the preceding plan year is less than: 80%; and 70%, determined by applying the specified at-risk actuarial assumptions.

The 80% funding is phased-in, with 65% for 2008, 70% for 2009, 75% for 2010 and 80% thereafter. WRERA clarifies that the phase-in period also applies to the 70% funding target.

Multiemployer Plans

Background-endangered status

PPA created Code section 432 which states that multiemployer plans failing to meet certain funding levels may be subject to certain additional funding obligations and benefit restrictions. A plan's enrolled actuary must certify annually the plan's funding status within a specific time frame.

These additional requirements depend on whether the plan is in "endangered" or "critical" status.

A multiemployer plan is considered to be endangered if it is less than 80 percent funded or if the plan has an accumulated funding deficiency for the plan year, or is projected to have a deficiency within the next six years. A plan that is less than 80 percent funded and is projected to have an accumulated funding deficiency is considered to be "seriously endangered."

Funding improvement plan

Endangered plans must adopt a funding improvement plan (FIP), which contains options for a plan to attain a certain increase in the plan's funding percentage, while avoiding accumulated funding deficiencies.

Critical status

A multiemployer plan is considered to be in critical status if, for example, the plan is less than 65 percent funded and the sum of the fair market value of plan assets, plus the present value of reasonably anticipated employer and employee contributions for the current plan year and each of the next six plan years is less than the present value of all benefits projected to be payable under the plan during the current plan year and each of the next six years (plus administrative expenses).

Rehabilitation plan

Plans in critical status must develop a rehabilitation plan containing options to enable the plan to cease being in critical status by the end of the rehabilitation period, generally 10 years. The rehabilitation plan may include reductions in plan expenditures and future benefit accruals. Employers may also have to pay a surcharge in addition to other plan contributions.

Continued on next page

Temporary Delay of Endangered or Critical Status for Multiemployer Plans

WRERA allows affected plans to elect to treat the plan's funding status for the prior plan year as its status for the applicable plan year. The applicable plan year is the first plan year beginning between October 1, 2008 and September 30, 2009. Therefore, if the plan is not in endangered, seriously endangered or critical status for 2008, they may elect to retain this status for the 2009 plan year. If the plan was in endangered, seriously endangered or critical status for 2008, they may elect to retain this status for 2009, and they will not be required to update their FIP or rehabilitation plan until the following plan year.

Extending the funding improvement period

Section 205 of WRERA provides that a plan sponsor of a plan in endangered or critical status may elect, for a plan year beginning in 2008 or 2009, to extend the funding improvement period or the rehabilitation period by three years, to 13 years instead of 10 years.

Plans in seriously endangered status have a funding improvement period of 18 years, rather than 15 years. The provision gives plans more time to meet their funding obligations. An election must be made by the plan in order to take advantage of this relaxed funding requirement.

Effect of Election

If a plan elects to retain its prior year funding status, it must operate in accordance with that election, regardless of the funding status certified by the actuary for that year. Therefore, if the plan's prior year status was endangered, and their current year's status is now critical they could not assess employer surcharges, reduce adjustable benefits or restrict lump sum benefits. If the plan adopted a FIP they would continue to operate according to the FIP, rather than adopt a rehabilitation plan. Also the FIP would not need to be updated. However, if the plan had not adopted a FIP for its endangered status the prior year, then it would need to adopt a FIP in the election year. No excise tax would apply for the election year for any accumulated funding deficiencies.

Continued on next page

Deadline to Elect

Initially the deadline to elect was April 30, 2009. The IRS issued Notice 2009-42 which extended the deadline to June 30, 2009. A plan sponsor must make an election to freeze the prior year funding status by the later of:

- June 30, 2009; or
- The date that is 30 days after the due date of the annual certification.

Notice of Election

If a plan sponsor is electing to freeze the plan's funding status as neither endangered or critical, then they must provide a special notice. This notice must be provided to participants, beneficiaries, collective bargaining parties, Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor (DOL). The notice must be provided no later than 30 days after the later of:

- The actuarial certification; or
- Date of election.

The notice can be provided in paper format or electronically. The notice must be submitted to the PBGC and DOL.

Content of notice

The notice must be written in a manner to be understood by the average employee to whom it applies and must contain information such as:

- The name of the plan, the Employer Identification Number (EIN) of the plan sponsor and plan, and the plan number.
- That an election has been made to treat the plan as neither in endangered or critical status for the plan year.
- The plan's endangered or critical status for the election year as certified by the plan's actuary as if no election had been made.
- An explanation that (i) the election applies only for the current plan year; and (ii) if the plan is certified to be in endangered or critical status for the year following the election year, the plan sponsor will provide notice of the plan's status (i.e., endangered or critical) for that following year and steps will have to be taken to improve the plan's funded situation, which steps may include increases in contributions and reductions in future benefit accruals.

Continued on next page

Content of notice (continued)

- An explanation that, if the plan is certified to be in critical status for the year following the election year, the steps that will have to be taken to improve the plan's funded situation will include a surcharge on employer contributions and the suspension of the payment of lump sums and similar accelerated distributions for individuals who commence receiving benefits after notice is provided of the plan's critical status, and may include amendments to reduce early retirement benefits or other adjustable benefits for such individuals.

- Information on how to obtain information about the election from the plan administrator, including a telephone number, address, and email address (if appropriate).

Election must be submitted to the IRS

The sponsor must submit all WRERA elections to the IRS. If the election is made on or before the date of the annual actuarial certification, the notice must be submitted to the IRS with the certification. However, if the election is made after the annual actuarial certification is filed with the IRS, the notice must be submitted no later than 30 days after the date of the election.

Signing the election and content of election

An election must be signed by an authorized trustee who is a current member of the plan sponsor board of trustees. In addition, the election must contain information such as:

- Name, address, telephone number and the plan sponsor EIN;

- Name, plan EIN (if different from plan sponsor), and plan number for the plan that is making the election;

Continued on next page

Signing the election and content of election (continued)

- The plan year for which the election is made;
- A statement that the election is to freeze the plan's prior year funding status and/or extend the plan's applicable FIP or rehabilitation plan; and
- Information pertaining to the funding status of the plan.

Plan sponsors are cautioned to consider the interaction between electing to: retain its prior year funding status; and extend the applicable FIP or rehabilitation plan by three years in deciding whether to take advantage of the temporary relief provided under the Notice.

Example

For the plan year beginning in 2009, a plan sponsor may choose to freeze the plan's prior year funding status as neither endangered nor critical. However, if the plan is later certified in the plan year beginning in 2010 to be in endangered or critical status, then the election to extend the FIP or rehabilitation plan would no longer be available because the initial year for which the plan is certified to be in endangered or critical status is 2010. In 2010, the election to extend the FIP or rehabilitation plan is no longer available.

Notice 2009-42

In addition to extending the election deadline, IRS Notice 2009-42 also allows plan sponsors to make contingent elections that may be revoked if specific requirements are met. Either type of WRERA election may be revoked if:

- As of the election deadline, the plan sponsor is unable to reach an agreement as to whether to make an election and the decision must be resolved through an arbitration process;
- The plan sponsor makes an election by the applicable deadline that is contingent on the resolution of the arbitration; and
- The resolution is to not make an election.

In this situation, the IRS will automatically approve a request to revoke the election. The Notice does not provide any guidance regarding deadlines for making requests to revoke a WRERA election or the procedures for doing so.

Continued on next page

Deadline to Adopt WRERA Amendment	A plan must adopt a WRERA amendment on or before the last day of the 1st plan year beginning on or after January 1, 2011 (January 1, 2012 for governmental plans).

Pension Relief Act of 2010

Background

On June 25, 2010, President Obama signed into law the Pension Relief Act of 2010 (PRA), which contains provisions designed to ease the funding burden for defined benefit plans. Additionally PRA provides: (1) a notice requirement for plan sponsors that elect funding relief; (2) temporary relief through 2010 that allows participants in plans whose funding percentage is less than 60% to continue to accrue benefits; and (3) temporary relief that allows for the payment of social security leveling income benefits to be paid without restriction.

Pension Funding Relief

Under PPA, if a plan has a funding shortfall, the shortfall must be amortized in level annual installments over a 7-year period beginning with that plan year.

PRA provides relief by allowing 2 alternatives to extent the 7-year period for an eligible plan year. An eligible plan year is a plan year beginning in 2009, 2010 or 2011 (and a plan year beginning in 2008, if after October 10, 2008). Plan sponsors may elect funding relief for two eligible plan years. Eligible plan years do not need to be consecutive, but plan sponsors must use the same funding relief for each eligible plan year.

Plan sponsors must also notify participants, beneficiaries and the Pension Benefit Guaranty Corporation (PBGC) that they have elected funding relief. The election cannot be revoked without the consent of the Secretary of the Treasury, with an opportunity for comment by the PBGC. Also, this relief applies to plans with frozen benefits.

Continued on next page

2 Alternatives

Option 1: 2 + 7-year rule

Under this option the 7-year amortization period is delayed by 2 years. During the 2-year delay, the employer only pays interest on the funding shortfall.

Example: The funding shortfall for 2009 is amortized over a 7-year period beginning in 2011. However, for 2009 & 2010, the employer must pay the interest on the funding shortfall.

Option 2: 15-year rule

Under this option, the shortfall is amortized in level annual installments over 15-years.

Installment Acceleration Amount

If an amortization extension is elected an additional contribution referred to as an "installment acceleration amount" may be required during the "restricted period." An installment acceleration amount is the sum of:

- The aggregate amount of all employee's excess compensation for the plan year, plus
- The aggregate amount of extraordinary dividends and stock redemptions for the plan year.

The restricted period is:

- 3 years if the 2 + 7-year rule is elected; or
- 5 years if the 15-year rule is elected.

The restriction period begins on the 1st day of the later of the: (i) the plan year for with relief is elected; or (ii) 1st plan year beginning after December 31, 2009.

Continued on next page

Excess Employee Compensation

Excess employee compensation is all taxable compensation paid to any employee in excess of $1 million during a calendar year in which the plan year begins (regardless of when services are performed), such as regular pay, bonuses, etc. Beginning in 2011, the $1 million threshold will be adjusted for inflation. Self- employed individuals are treated as employees for purposes of determining excess employee compensation.

Income for this purpose includes deposits into a nonqualified deferred compensation arrangement, as defined under IRC section 409A, regardless of whether such amount is otherwise includable in income.

The following exceptions apply for determining the excess employee compensation, income does not include:

- Compensation for services performed before March 1, 2010;
- Nonqualified deferred compensation, restricted stock, stock options or stock appreciation rights that are paid or granted under a binding written contract that was in effect on March 1, 2010 and which was not materially modified;
- Commissions on income generated directly by the employee's performance; and
- Restricted stock that is granted after February 28, 2010 and that is subject to a substantial risk of forfeiture for at least five years from the date of the grant.

Extraordinary dividends and stock redemptions

Extraordinary dividends and redemptions are defined as the total of:

- Dividends declared during the plan year by the plan sponsor; plus
- The total amount paid for redemptions of the plan sponsor's stock redeemed during the plan year minus the greater of the: plan sponsor's adjusted net income for the preceding plan year; or historical dividend amount.

Continued on next page

Pension Relief Act of 2010, Continued

Dividends and redemptions to not include

For this purpose dividends and redemptions do not include:

- Dividends declared and redemptions occurring before March 1, 2010;
- Dividends paid within a controlled group;
- Redemptions made on account of the death, disability or termination of employment of a shareholder or employee; and
- Certain dividends and redemptions with respect to preferred stock issued before March 1, 2010 or which is still held by the plan.

Benefit Restrictions

PRA provides limited relief for certain benefit restrictions under IRC section 436. PPA provided that plans with an AFTAP of 60% or less must freeze benefit accruals for the current plan year. As we discussed earlier, WRERA allowed these underfunded plans to look back to the plan's funding status during the previous plan year to determine whether the plan was at least 60% funded. This provision applied to plan years beginning during the period beginning on October 1, 2008 and ending on September 30, 2009. PRA further extends this relief for an additional year to September 30, 2010.

Social Security Leveling Option

Under PPA, certain underfunded plans are restricted from making "prohibited payments." A social security leveling option is considered a prohibited payment. A social security leveling option is a payment that increases payments under the plan before a participant starts receiving social security benefits and reduces payments after a participant starts receiving social security benefits in order to provide a level stream of income.

PRA provides that a plan may apply its 2008 funded status for the 2009 and 2010 plan years for the purpose of applying the restriction attributable to social security leveling options.

Amendment Deadline

An amendment for PRA is required by the last day of the first plan year beginning or or after January 1, 2011 (for a calendar year plan, December 31, 2011).

Small Business Jobs Act of 2010

Background

On September 27, 2010, President Obama signed into law the Small Business Job Act of 2010 (SBJA 2010). SBJA 2010 expands Roth contributions and conversions. Previously only 401(k) and 403(b) plans could provide Roth contributions. SBJA 2010 allows for taxable years beginning after 2010, section 457(b) governmental plans to add a designated Roth feature.

Generally under a Roth feature, participants may make elective contributions to the plan that are taxed immediately. Then when "qualified" distributions of those contributions are made, the amount including earnings are not subject to federal income tax, if certain conditions are met. To be a "qualified" distributions it must be made: (1) after a 5-year period of Roth participation and (2) after either the participant's attainment of age 59 ½ or the participant's death or disability.

In Plan Conversion

SBJA 2010 allows employers to amend their plan to provide for Roth conversions within 401(k), 403(b) and governmental 457(b) plans. Effective on or after September 28, 2010 certain participants can convert their vested accounts to Roth accounts. The conversion maybe made via a direct or indirect rollover.

The plan must have a designated Roth feature in place whereby participants can make Roth contributions. Roth accounts can't be set-up solely for the conversions.

Only eligible rollovers may be converted. To be eligible they must meet the terms of the plan and the Internal Revenue Code.

- Pre-tax elective deferrals can only be rollovered if the participant is age 59 ½ or older; is disabled; has terminated employement; or is eligible for a qualified reservist distribution.
- The plan's distribution and withdraw provisions must permit the participant to take a distribution or withdrawal. However, the plan can offer an in-plan conversion feature without allownig the participant to actually take a distribution from the plan.

Note: required minimum distributions, hardship distributions, corrective distributions of excess deferrals, deemed distributions and employer securities dividends cannot be converted.

Continued on next page

Special Tax Rule for 2010

Generally the conversion will be subject to tax in the year of conversion. However, a special tax rule allows participants to defer the tax due for amounts converted in 2010, and split the tax due between 2011 and 2012.

Not Treated as a Distribution

The in-plan conversion will not be treated as a distribution, so it is not subject to:

- Spousal consent rules
- Loans will not be treated as new loans and repayment schedules will remain the same
- Notice of right to defer receipt

However, the 402(f) special tax notice must be provided.

Deadline to amend for 401(k) plans

Generally discretionary amendments must be made by the end of the plan year in which the change is effective. However, an extension of time has been granted for amending the plan to comply with SBJA 2010.

Non-safe Harbor 401(k) plans must amend by the later of:

(i) the last day of the plan year in which the conversion feature was added or

(ii) December 31, 2011.

A safe harbor 401(k) plan must generally be amended by the later of (i) the first day of the plan year in which the conversion feature was added or (ii) December 31, 2011.

Continued on next page

Deadline to amend-403(b) plan

For a 403(b) plan, Announcement 2009-89, 2009-52 I.R.B. 1009, provides that if an employer adopts, on or before December 31, 2009 (or, if later, the date the plan is established) a written § 403(b) plan intended to satisfy the requirements of § 403(b) and the regulations, the employer will have a remedial amendment period in which to amend the plan to correct any form defects retroactive to January 1, 2010 (or the date the plan is established), provided that the employer subsequently adopts a pre-approved plan that has received a favorable opinion letter from the Service or applies for an individual determination letter, under forthcoming procedures.

In this case, the employer will have reliance that the form of its written plan satisfies the requirements of § 403(b) and the regulations, provided that, during the remedial amendment period, the plan is amended to correct any defects retroactive to January 1, 2010 (or the date the plan is established).

In the case of a § 403(b) plan that has a remedial amendment period pursuant to Announcement 2009-89, a plan amendment providing for in-plan Roth rollovers is not required to be adopted before the later of the end of that remedial amendment period or the last day of the first plan year in which the amendment is effective, provided the amendment is effective as of the date the plan first operates in accordance with the amendment.

Note: the IRS opened the 403(b) pre-approved program on June 28, 2013. See Revenue Procedure 2013-22. The IRS does not currently issue determination letters for individually designed 403(b) plans.

Deadline to Amend-governmental plans

Governmental 457(b) plans have until the end of the plan year in which the change is effective, unless further guidance is issued.

Notice 2010-84

This notice provides guidance under § 402A(c)(4) of the Internal Revenue Code, relating to rollovers from § 401(k) plans to designated Roth accounts in the same plan ("in-plan Roth rollovers"), as added by § 2112 of the Small Business Jobs Act of 2010 ("SBJA"), P.L. 111-240. The guidance in this notice also generally applies to rollovers from § 403(b) plans to designated Roth accounts in the same plan.

Moving ahead for Progress in the 21st Century Act

Overview

The Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, was enacted July 6, 2012. Although the Act is primarily known for authorizing funding for the nation's highways and for extending low interest rates for federal student loans, it contains a number of pension provisions.

Specifically, MAP-21 provides rules relating to pension funding stabilization for single-employer defined benefit pension plans under amendments to the Internal Revenue Code and ERISA. The purpose of this section is to briefly familiarize you with this new law.

Background

Traditional defined benefit plans are generally subject to minimum funding rules designed to make sure that plans have enough money in them to fund promised benefits. If a plan faces a funding deficiency, which means the value of the plan's assets are lower than the plan's funding target, then employers must make contributions to increase the plan's assets and cover the deficiency. Contribution amounts are based on complicated formulas that take into account current and projected interest rates.

Today's excessively low interest rates have meant that employers have had to put in more money than expected into their pension plans. This is because when interest rates are low, pension plan liabilities are estimated to be higher, and employers must contribute more money to meet their obligations.

Conversely, when interest rates are high, pension liabilities are valued to be smaller and employers are required to contribute less money.

Continued on next page

Moving ahead for Progress in the 21st Century Act, Continued

Changes made by MAP 21

The Act changes the mechanism for determining interests rates to be used for funding pension plans by using an average of interest rates going back 25 years, resulting in employers being able to contribute less money into their pension plans today.

This new interest rate structure can only be used to calculate minimum required funding contributions. It will not affect calculations for determining the amount of lump sums or for determining variable rate premiums.

This provision was included in the highway bill, because Congress needed money to fill a shortfall between current gas taxes and projected highway spending. Because contributions employers make to their pension plans are not taxed by the federal government until the benefits are paid to workers, allowing companies to contribute less to their plans raises revenue for the federal government.

The pension funding provision is estimated to raise about $9.4 billion over 10 years.

IRC §430-interest rates

Section 430 specifies minimum funding requirements that generally apply to single employer defined benefit pension plans pursuant to IRC § 412. Section 430(h)(2) specifies interest rates that are used for purposes of calculating the minimum required contribution. The interest rates that are used for this purpose are a set of three segment rates described in § 430(h)(2)(D)(ii).

Continued on next page

Interest rates used for a number of purposes

These rates are used for a number of purposes including:

- The calculation of target normal cost and funding target under §§ 430(b) and 430(d), in accordance with the rules of § 1.430(d)-1 of the Income Tax Regulations;
- The calculation of the present value of remaining shortfall and waiver amortization installments for purposes of determining any shortfall amortization base established in the current plan year under § 430(c)(3);
- The determination of amortization installments with respect to a shortfall or waiver amortization base under § 430(c)(2) or § 430(e)(2); and
- The limitation on the assumed rate of return when determining the average value of assets under § 430(g)(3)(B).

Other purposes

The segment rates under § 430(h)(2)(C) have other purposes, as well.

Sections 104 and 105 of PPA ’06 provide that the effective dates for the minimum funding rules under § 430 and funding based benefit restrictions under § 436 are delayed for certain plans. Sections 104 and 105 provide that in applying Section 412(b)(5)(B) (as in effect prior to amendment by PPA ’06) for plan years beginning after December 31, 2007, and before the first plan year to which Sections 430 and 436 apply, the third segment rate determined under Section 430(h)(2)(C)(iii) is to be used in lieu of the interest rate otherwise used to determine current liability.

The third segment interest rate under Section 430 (h)(2)(C)(iii) is also specified as an interest crediting rate not in excess of a market rate of return for a statutory hybrid benefit formula under Section 1.411(b)(5)-1(d)(3).

In addition, Section 1.411(b)(5)-1(d)(4) provides that the first and second segment rates under Sections 430(h)(2)(C)(i) and (ii) are deemed not to exceed a market rate of return.

Continued on next page

IRC §430(h)(2)(C)(iv)

Section 40211(a) of MAP-21 adds this new section which is generally effective for plan years beginning on or after January 1, 2012. Section 430(h)(2)(C)(iv) provides that each of the three segment rates described in §430(h)(2)(C)(i), (ii), and (iii) for a plan year is adjusted as necessary to fall within a specified range that is undermined based on an average of the corresponding segment rates for the 25-year period ending on September 30 of the calendar year preceding the first day of that plan year.

For plan years beginning in 2012, each segment rate is adjusted so that it is not less than 90% and no more than 110% of the corresponding 25-year segment rate.

For later plan years, this range is gradually increased, so that the segment rates for plan years beginning after 2015 are no less than 70% and no more than 130% of the corresponding 25-year average segment rates.

You can find the initial set of MAP-21 segment rates under Section 430(h)(2)(c)(iv)(II) for plan years that began in 2012 in Notice 2012-55, 2012-36-I.R.B. 332.

When MAP-21 rates do not apply

Sections 40211(a)(2) and 40211(b)(3) of MAP-21 amend the Code and ERISA to provide that the adjustments based on the 25-year average segment rates under Section 430(h)(2)(C)(iv) do not apply for certain purposes involving:

- Section 404(o) relating to the determination of the maximum deductible limit under Section 404;
- Section 417(e)(3) relating to the calculation of the minimum present value requirement for distributions;
- Section 420 relating to the determination of the amount of excess assets that can be transferred to retiree health and retiree group life insurance accounts;

Continued on next page

When MAP-21 rates do not apply (continued)

- Section 4006 of ERISA relating to the calculation of PBGC variable rate premiums; and

Section 4010 of ERISA relating to the requirement to report additional information to the PBGC that applies to contributing sponsors of certain underfunded plans.

Section 101 of ERISA

Section 40211(b)(2)(A) of MAP-21 amends section 101(f) of ERISA to require additional disclosures for certain plans as part of the annual funding notice to participants. These additional disclosures relate to the effect of the application of the 25-year average segment rates.

Effective dates of amendment

Section 40211(c)(1) of MAP-21 provides that the amendments to the Code and ERISA made by section 40211 of MAP-21 are generally effective for plan years beginning after December 31, 2011.

However, a plan sponsor may elect not to have these amendments apply to any plan year beginning before January 1, 2013, either:

- For all purposes, or
- Solely for purposes of determining the adjusted funding target attainment percentage (AFTAP) under Setion 436.

The Act also provides that a plan shall not be treated as failing to meet the requirements of Section 411(d)(6) and section 204(g) of ERISA solely by reason of such an election.

Right to revoke election

Section 40211(c)(2)(B) of MAP-21 provides that if, as of the date of enactment of MAP-21, July 6, 2012, an election is in effect with respect to a plan to use the full yield curve as provided under Section 430(h)(2)(D)(ii), a plan sponsor may revoke that election without the consent of the Secretary of the Treasury.

This revocation may be made any time before the date that is one year after the date of enactment of MAP-21, and is effective for the first plan year to which the MAP-21 amendments apply.

Continued on next page

Notice 2012-61	Provides guidance relative to the application of MAP-21 segment rates in a very helpful Q&A format. Please refer to this Notice for further guidance and information related to the changes discussed above.