



4245 North Fairfax Drive, Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

November 24, 2008

W. Thomas Reeder
Benefits Tax Counsel
Treasury Department
1500 Pennsylvania Ave., NW
Room 3054
Washington, D.C. 20220

Re: Request for Clarification on Pension Provisions of the HEART Act

Dear Mr. Reeder:

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates the opportunity to request clarification on several of the pension provisions of the Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act").

ASPPA is a national organization of more than 6,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Summary of Recommendations

These key clarifications involve the treatment of (1) differential pay as plan compensation, (2) the special withdrawal right for military employees, (3) life insurance held under a qualified plan, and (4) the timing of plan amendments.

Although clarification on these issues is needed, we are also concerned that our members will not have sufficient time to act once guidance has been issued. Therefore, to the extent that any of the pension provisions of the HEART Act are deemed mandatory, we request a good faith compliance standard be granted through 2009 to enable employers and third party administrators sufficient time to incorporate these provisions into their systems.

Discussion of Issues

A. Treatment of Differential Pay as Plan Compensation

Section 105(b)(1)(A) of the HEART Act provides for the treatment of differential pay as plan compensation. Some employers, however, may be reluctant to provide differential pay if the result of doing so would increase costs related to their retirement plan. Employers typically have flexibility on items of compensation that may be included in compensation for plan benefit purposes, subject to nondiscrimination requirements (e.g., IRC §414(s)).

ASPPA recommends that the IRS provide guidance clarifying that, subject to nondiscrimination rules, employers may exclude differential pay from their plans' definition of compensation. Further, the IRS should provide guidance clarifying whether those participants receiving differential pay be treated as active employees [for purposes of coverage and nondiscrimination testing].

ASPPA also recommends that any amendment to reflect this provision (either adding or removing differential pay to a plan's definition of compensation) be subject to the amendment period set forth in Section 104(d)(2) of the HEART Act and that Treasury provide relief from the anti-cutback provisions of IRC §411(d)(6) for such amendment.

B. Distribution Provisions

Section 105(b)(1)(B) of the HEART Act provides that an individual performing service in the uniformed services is treated as having severed employment for purposes of the distribution provisions of IRC §§401(k), 403(b), and 457(d). The HEART Act provides that any participant receiving a distribution pursuant to such provision is prohibited from making elective deferrals for a six-month period.

Many existing plans provide for distributions on severance of employment. It is not clear whether such plans will now automatically be required to provide for distributions pursuant to the changes made by Section 105(b)(1)(B) of the HEART Act. Subjecting these plans to the six-month suspension period (which could apply to individuals with differential pay or any employee who returns from active military service) would be onerous, particularly this late in the year. Moreover, additional guidance is required on how the suspension period works. For example, would the suspension period work in the same manner as the suspension period for safe harbor hardship distributions (e.g., the employee is still treated as eligible to defer for coverage and ADP test safe harbor provisions)? Lastly, to the extent plan sponsors offer this provision, we need to understand the interplay between this provision and the "qualified reservist distribution" provision added under the Pension Protection Act of 2006 ("PPA"). Specifically, which rule applies if an individual is eligible for both distributions (assuming the plan provides for both distributions).

ASPPA recommends that Section 105(b)(1)(A) of the HEART Act be viewed as a new optional provision rather than merely a refinement of the definition of “severance of employment.” This would permit plans that currently permit distributions on severance of employment to decide whether to add this new distribution option without running afoul of the IRC §411(d)(6) anti-cutback rules. ASPPA also requests that the IRS clarify that if a distribution is made pursuant to this provision, then the six-month suspension will be treated in the same manner as the six-month suspension period that applies for purposes of hardship distributions made pursuant to the safe harbor hardship standards found in the IRC §401(k) regulations. Lastly, ASPPA recommends that clarification be provided on the interplay of this new provision with a "qualified reservist distribution" under the PPA.

C. Payments made to Expatriates

Section 301 of the HEART Act appears to trump the standard Form 1099-R and pension withholding provisions under IRC §3405. However, clarification would be appreciated.

ASPPA recommends that the instructions to Form 1099-R/1042-S (as appropriate) be amended to reflect any new requirements of the HEART Act, and that such requirements be made optional for 2009 in order to allow time for system changes to be made.

D. Maintenance of Life Insurance

The HEART Act requires that a plan provide death benefits to an individual on military leave (that is subject to the law) as though the individual were still employed. It is not clear how this provision applies with respect to plans providing for death benefits through the purchase of life insurance (e.g., the interaction of the minimum incidental death benefit rules and the HEART Act).

ASPPA recommends the IRS clarify that, to the extent an individual is on duty subject to the HEART Act, (1) life insurance is not required to be maintained on the individual even though it is maintained for active participants, and (2) to the extent a plan purchases life insurance on behalf of such individual, the benefit from such life insurance is limited to the amount payable under the insurance (e.g., the individual is not entitled to an amount equal to the face value of the insurance if no benefit is provided under the policy due to death while in combat).

E. Plan Amendments

Clarification and relief is needed with respect to the timing of plan amendments to comply with the HEART Act provisions. As indicated in A and B above, there are voluntary aspects of the HEART Act which, under the general amendment timing rules would need to be adopted no later than the last day of the plan year to which they apply. Furthermore, the HEART Act includes provisions for delayed amendment deadlines (generally up to the last day of the 2010 plan year). However, this delay does not cover all aspects of the HEART Act, such as Sections 104(b) and 107 of the HEART Act.

ASPPA recommends that the IRS provide that no amendments be required pursuant to the HEART Act prior to the last day of the plan year beginning on or after January 1, 2010. Furthermore, guidance should clarify that such deadline applies to both required changes as well as to changes that are integral to the changes made by the HEART Act. This would permit the extended deadline to apply to both mandatory and voluntary amendments. Furthermore, to the extent possible, the Treasury should provide relief from the anti-cutback rules of IRC §411(d)(6) in order to permit all employers to be able to use the extended deadline on a uniform basis.



These comments were prepared by ASPPA's IRS Subcommittee of the Government Affairs Committee, Elizabeth Dold, Esq., APM, Chair and primary author. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Teresa T. Bloom, Esq., APM
Chief of Government Affairs

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
David M. Lipkin, MSPA, Co-chair
Gov't Affairs Committee

/s/
Robert M. Richter, Esq., APM, Co-chair
Gov't Affairs Committee

/s/
James Paul, Esq., APM, Co-chair
Administrative Relations Committee
Gov't Affairs Committee