Military Pay Under USERRA: Compliance Requirements for Qualified Retirement Plans

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ASPPA
Making Retirement Plans Work
Part of the American Retirement Association
Agenda

• Basic USERRA rights
• General compliance requirements for qualified retirement plans
• Plans subject to the requirements
• Employer contributions
• Employee contributions, including 401(k) deferrals
• Plan loans
• Reporting issues
• Plan distributions
• Plan provisions and elections
Basic USERRA Rights

- USERRA – Uniformed Services Employment and Reemployment Rights Act
  - Amended by Heroes Earnings Assistance and Relief Tax (HEART) Act
  - Veterans and Sailors Civil Relief Act of 1940 also impacts military benefits
- USERRA grants certain reemployment and benefits rights to an employee who is absent from his/her job due to duty in uniformed service
- Applicable to public and private employers, regardless of size
- Posting of Notice - “Your Rights under USERRA”
Basic USERRA Rights

- Eligibility for USERRA rights
  - Uniformed services include Army, Navy, Air Force, Marines, Coast Guard, Army and Air National Guards, the commissioned corps of the Public Health Service, and others designated
  - USERRA protects full-time, temporary, part-time, seasonal and probationary employees
  - USERRA applies to all employees, including executives, managers, and professional employees
Basic USERRA Rights

- Employee notice requirements
  - Employee must provide advance notice to employer
  - No formal notice process
  - Employer permission is not required
  - Employee does not need to decide whether he/she intends to seek reemployment
Basic USERRA Rights

- USERRA Reemployment Rights – DOL Notice
  You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and
  - You ensure that your employer receives advance written or verbal notice of your service
  - You have five years or less of cumulative service in the uniformed services while with that particular employer
  - You return to work or apply for reemployment in a timely manner after conclusion of service
  - You have not been separated from service with a disqualifying discharge or under other than honorable conditions

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.
General Plan Compliance Requirements

• If an employee is reemployed after military service, the plan must:
  – Grant vesting and benefit credit for the period of absence
  – Credit the participant with any allocations of employer contributions to which the participant would have been entitled to if not for the absence (except for earnings and forfeitures)
  – Allow the make-up of employee contributions or deferrals after the return to work
  – Provide for a suspension of loan repayments until military leave is complete
  – Limit plan loan interest to six percent

• Qualification rules under Code §414(u) and Code §401(a)(37)
Plans Subject to the Requirements

• USERRA applies to all employers (regardless of number of employees)
  – Private
  – Government
  – Church

• USERRA applies to most retirement plan types
  – Qualified plans under Code §401(a)
    • Defined contribution and defined benefit plans
  – 403(b) plans
    • Annuity contracts, custodial accounts and retirement income accounts
  – Governmental 457(b) plans
Employer Contributions

• Basic rule
  – Employers must fund retirement plan benefits that a reemployed participant did not receive due to qualifying military service

• Rule for profit sharing and money purchase plans
  – Employers must make the non-elective employer contributions that would have been made during the military service period

• Employees on active duty are NOT considered to have a break-in-service for plan purposes
Employer Contributions

- Compensation calculation
  - To calculate the amount of the makeup contributions and allocations, assume the rehired employee earned compensation at the same rate he/she would have received during the military service period.
  - If not reasonably certain, use the employee's average compensation during the 12-month period immediately preceding the qualified military service.
Employer Contributions

• How long does an employer have to make these makeup contributions?
  – The employer does not have to begin the makeup contributions until after the veteran returns to civilian employment with the same employer
  – The employer's makeup contribution period is equal to three times the period of qualified military service - not to exceed five years
  – If the employer contributions were contingent on the employee making elective contributions and the employee makes up the missed contributions, the employer must make up its contributions over the same period the veteran uses to pay the makeup deferrals
Employer Contributions

• Are there special rules for forfeitures or lost earnings?
  – A rehired employee is not entitled to additional benefits for allocations resulting from any forfeitures that occurred during the military service period, nor lost earnings on makeup contributions
Employee Contributions

• Contributory defined benefit plans
  – A rehired veteran must be permitted to make up missed contributions required to earn a benefit accrual for the military service period

• Make up of elective contributions (including 401(k) deferrals)
  – A rehired veteran has up to three times the period of service - not to exceed five years - to make up missed employee contributions
  – The amount of makeup contributions is subject to the limits that would have applied during the military service period
  – If an employee is gone for more than one year, the employee designates the specific year or years his/her contributions cover
Employee Contributions

• In a 401(k) plan, who decides whether the returned employee's 401(k) contribution is a makeup contribution or a current deferral?
  – The employee designates what period the contributions cover

• What is the impact on a veteran covered by both an employer plan and governmental plan under Code section 402(g)?
  – The law provides that the employee may make up elective deferrals to the extent that the employee could have made them
  – The deferrals are adjusted for any elective deferrals actually made during the period of qualified military service
Participant Loans

• A plan may allow for a suspension of plan loan repayments when the participant is performing military service

• What happens to the loan when the veteran is rehired?
  – The participant must resume loan repayments when the military service ends with the payment frequency and amount at least equal to the pre-military schedule
  – The rehired veteran must repay the full loan amount (including interest accrued during the military service period) by the end of the maximum term for the original loan plus the military service period
Participant Loans

• Cap on the interest rate used during the military service period
  – Participant loan interest accrued during the military service period is generally limited to no more than six percent
  – The participant must supply a copy of the military orders to the plan sponsor and must ask that the six percent interest rate limit be applied
Reporting Issues

• Assume an employee elects to do employee makeup contributions to his 401(k) and the contributions span a few years. Such makeup contributions exceed the current year 402(g) limit. How should these contributions be recorded on the W-2 without appearing to exceed the current year limit?
  – Report the prior year contributions separately in Box 12 as a "Code D." Beginning with the earliest year, enter the code, the year, and the amount. For example, elective deferrals of $2,250 for 2015; $1,250 for 2016, and $7,000 for 2017 would be entered in Box 12 as follows:
    • D 15 2,250.00
    • D 16 1,250.00
    • D 7,000.00 (no year designated)
Survivor Benefits

• Survivors of a participant who dies while performing qualified military service are entitled to additional benefits that would be provided under the plan as if the participant had resumed employment and then terminated employment on account of death [Code §401(a)(37)]

• Does not include benefit accruals for the period of qualified military service

• Additional benefits – vesting, ancillary life insurance benefits, and other survivor benefits under the plan
Plan Distributions

• Special rule regarding deemed severance from employment for military service
  – For purposes of plan distributions, a participant may be treated as having a deemed severance from employment during any period the participant is performing service in the uniformed services
  – A participant who elects to receive such a distribution may not make an elective deferral or an after-tax employee contribution during the six-month period beginning on the date of the distribution
Plan Distributions

• Penalty-free withdrawals for individuals called to active duty
  – If a participant takes a qualified reservist distribution (if permitted under the plan), such distributions will not be subject to the ten-percent penalty tax under Code §72(t)
  – A qualified reservist distribution means any distribution to an individual if:
    • Such distribution is from amounts attributable to elective deferrals
    • Such individual was (by reason of being a member of a reserve component) ordered or called to active duty for a period in excess of 179 days or for an indefinite period
    • Such distribution is made during the period beginning on the date of such order or call and ending at the close of the active-duty period
Other Rules

• Differential pay
  – Employers may, but are not required to, provide differential pay to employees on leave to perform military service
  – Employer may continue to contribute to the employer’s retirement plan while the employee is on active duty based on the differential pay
  – Employees on active duty may contribute to the plan based on the differential pay
**Plan Provisions**

**Military Service.** To the extent required under Code §414(u), an Employee who returns to employment with the Employer following a period of qualified military service will receive any contributions, benefits and service credit required under Code §414(u), provided the Employee satisfies all applicable requirements under the Code and regulations. In determining the amount of contributions under Code §414(u), Plan Compensation will be deemed to be the compensation the Employee would have received during the period while in military service based on the rate of pay the Employee would have received from the Employer but for the absence due to military leave. If the compensation the Employee would have received during the leave is not reasonably certain, Plan Compensation will be equal to the Employee’s average compensation from the Employer during the twelve (12) month period immediately preceding the military leave or, if shorter, the Employee’s actual period of employment with the Employer.
Plan Provisions

(a) Death benefits under qualified military service. In the case of a Participant who dies while performing qualified military service (as defined in Code §414(u)), the survivors of the Participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the Plan as though the Participant resumed and then terminated employment on account of death.
(b) Benefit accruals. If elected under AA, for benefit accrual purposes, the Plan will treat an individual who dies or becomes disabled (as defined under the terms of the Plan) while performing qualified military service (as defined in Code §414(u)) with respect to the Employer, as if the individual has resumed employment in accordance with the individual’s reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) on the day preceding death or disability (as the case may be) and terminated employment on the actual date of death or disability.
(c) Plan distributions. Notwithstanding the provisions of Section XXX regarding the treatment of Differential Pay, an individual shall be treated as having been severed from employment during any period the individual is performing service in the Uniformed Services for purposes of receiving a Plan distribution under Code §401(k)(2)(B)(i)(I). If an individual elects to receive a distribution while on military leave, the individual may not make Salary Deferrals or Employee After-Tax Employee Contributions under the Plan during the six-month period beginning on the date of the distribution.
(d) **Make-Up Contributions.** A Participant who is reemployed following a qualified military leave shall have the right to make up any Salary Deferrals or After-Tax Employee Contributions to which he/she would have been entitled but for the fact the Participant was on qualified military leave. The Employer will also make any Employer Contributions and Matching Contributions the Participant would have earned during the period of qualified military leave had the Participant remained employed during such period. The Employer will only be required to make Matching Contributions if the reemployed Participant makes up the underlying contributions that were eligible for the Matching Contributions.
Plan Provisions

Adoption agreement provisions

PLAN COMPENSATION: Plan Compensation is Total Compensation with the following exclusions:

Deferral  ER  Match

...........

☐  ☐  ☐  Differential Pay
Plan Provisions

Adoption agreement provisions

**AVAILABILITY OF IN-SERVICE DISTRIBUTIONS. .......**

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<th>Deferral</th>
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☐ N/A N/A As a Qualified Reserve Distribution
Plan Provisions

Adoption Agreement provisions

- **HEART ACT PROVISIONS -- BENEFIT ACCRUALS.** The benefit accrual provisions under Section 15.06 of the Plan do not apply. To apply the benefit accrual provisions under Section 15.06, check the box below.

  - Eligibility for Plan benefits. Check this box if the Plan will provide the benefits described in Section 15.06 of the Plan. If this box is checked, an individual who dies or becomes disabled in qualified military service will be treated as reemployed for purposes of determining entitlement to benefits under the Plan.
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