

Employer Compliance Alert



“Meeting employee needs
is a challenge.
Meeting the government’s
is critical.”



▶ DEADLINE APPROACHES FOR HEART ACT AMENDMENTS

As we reported in our [August 2008 article](#), most tax-favored retirement plans must be amended by the end of the 2010 plan year to reflect the mandatory provisions of the Heroes Earnings Assistance and Relief Tax Act (the “HEART Act”). **A plan amendment is required for each of the following mandatory changes.**

- **Enhanced Survivor Benefit.** The Act created a new survivor benefit for reservists who die during qualified military service on or after January 1, 2007. This change requires tax-favored retirement plans (401(a), 403(b), and governmental 457(b)) to provide a reservist’s beneficiaries with the same death benefit they would have received had the reservist returned to employment and then died.

Such death benefits must include any *ancillary* benefits (such as accelerated vesting and life insurance proceeds) that would be payable to an employee who died while actively employed. They need *not*, however, include *benefit accruals* for the period of qualified military service.

- **New Rules for Military Differential Pay.** Many employers continue to pay some or all of a reservist’s wages when the reservist is called to active duty. The Act comprehensively changed the treatment of such “military differential pay,” for both retirement-plan and payroll purposes.

SECOND ROUND OF AMENDMENTS MAY BE NECESSARY

As we reported in our [March 2010 article](#), guidance on the Act issued by the IRS this January contained a number of surprises. As a result, plan sponsors who have *already* amended their plans for the HEART Act should consider whether further changes are needed in each of the following areas:

- **Vesting Credit for Qualified Military Service.** Under the new IRS guidance, if a reservist dies while on active duty, his or her period of qualified military service must be counted as vesting service. In other words, if a participant enters qualified military service while *nonvested*, then dies on or after the date he or she would have become vested had he or she remained an active employee, the plan must vest the reservist. Under this rule, a reservist who dies during qualified military service can vest in his or her benefit even if the plan does *not* automatically vest active employees on death.

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Employers whose plans do not vest active employees on death may have determined that their plans were not affected by the HEART Act's survivor benefit provision. Such plans must now be amended to reflect the new IRS guidance. Even plans that have *already* been amended to reflect the Act's survivor benefit may need an update to reflect this new rule.

- **Military Differential Pay.** Many plans have already been amended to reflect the Act's requirement that differential wage payments be included in the plan's definition of "compensation." According to the IRS, however, this change is mandatory only for purposes of applying the Tax Code's annual limit on *benefit payments* (from defined benefit plans) and *contributions* (to defined contribution plans). It need *not* be made to the definition of compensation used to calculate benefit accruals or contributions under the plan.

Plans that have been amended to include differential wages in the benefit-accrual definition of compensation may now be amended to exclude such wages from that definition. Such amendments may need to be purely prospective, however, to avoid anti-cutback concerns.

Spencer Fane's Employee Benefits Group would be pleased to help employers review their retirement plan documents for compliance with the HEART Act's mandatory provisions and to prepare any required amendments. Just contact any member of our Employee Benefits Group to arrange for such a review.

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