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ERISA Group Benefits Alert

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Has the Plan Sponsor (or its EIN) of your Plan changed recently?

Please notify us if the Plan Sponsor of your qualified retirement plan or the Plan Sponsor's federal Employer Identification Number (EIN) changes. A change in Plan Sponsor may be due to an organizational restructuring; an acquisition, merger or disposition of a company, or a change in the members of a controlled group of companies. A change in the EIN may result if the type of entity changes.

A change in the Plan Sponsor or the Plan Sponsor's EIN could change the cycle in which your qualified retirement plan must be amended and restated. The IRS requires custom-drafted retirement plans to be completely amended and restated, and filed with the IRS (if a determination letter is desired) once every five years. The IRS assigns a plan one of five one-year cycles (Cycle A through E) based on the EIN of the Plan Sponsor.

If your custom-drafted retirement plan is not amended and restated in the correct cycle, the plan would not be in compliance with the tax code and may lose its qualified status. In addition, if the plan is not filed with the IRS in the correct cycle, the receipt of the determination letter is significantly delayed.

Working with USERRA and HEART Act Provisions in Your Plan Document

As members of the military leave and return back to the workforce, plan sponsors and employers should review their retirement plan documents and be aware of the legal requirements imposed by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Heroes Earnings Assistance and Relief Tax Act of 2008 (the HEART Act).

For the most these requirements have already been incorporated into employee benefit plans, though some governmental plans and non-calendar year plans may not have completed their required amendments. We note that while the document may contain all of the required amendments, most employers still wrestle with understanding the distinction between and the application of

USERRA and the HEART Act provisions that are in those documents. This article will provide an overview of the significant differences of these two laws.

USERRA

USERRA establishes certain reemployment and benefit rights for employees who have served in the uniformed services. With respect to an eligible retirement plan, such as a 401(k) plan, these rights include: (i) reinstatement in the employer's retirement plan upon reemployment, (ii) service credit for purposes of eligibility and vesting, and (iii) benefit accruals for the period of absence due to the employee's uniformed service.

In particular, employees participating in an employee benefit plan are not treated as having incurred a break-in-service while serving in the uniformed service. Thus, a returning employee must be credited with eligibility service and vesting service for the period of absence due to the uniformed service. In addition, upon reemployment, the employee must be provided with the opportunity to make up any missing elective deferrals and after-tax contributions for the period of absence due to the uniformed service. If the employer would have made a matching contribution on behalf of the employee but for the employee's absence from work due to the uniformed service, the employer is required to make the matching contributions as soon as the returning employee makes the make-up elective deferrals or after-tax contributions. Similarly, the employer is also required to make profit-sharing contributions on behalf of the returning employee if such contributions would have been made but for the employee's absence from work due to the uniformed service.

HEART Act

The HEART Act applies to qualified retirement plans (such as 401(k) plans), 403(b) plans, and 457(b) plans. The HEART Act comes in to play if a participant of the plan dies or becomes disabled (as opposed to returning back to the workforce) during the uniformed service.

If a participant dies during the uniformed service, then his or her survivors are entitled to receive any additional benefits (other than benefit accruals relating to the period while he or she is in the uniformed service) provided under the plan as if the participant resumed employment the day before his or her death. With respect to a 401(k) plan, it generally means that an employer must credit vesting service for the participant for the period of absence due to the uniformed service.

With respect to benefit accruals, unlike USERRA, which requires plans to credit service for contribution purposes, the HEART Act permits, but does not require an employer to credit service for the period while the participant is in the uniformed service. Thus, only those employers who have adopted this feature in the HEART Act amendment to the plan should properly credit service to the participants who die or become disabled in the uniformed service. With respect to a 401(k) plan, it generally means that the participant is deemed to have made the employee contributions or elective deferrals for the period of absence due to the uniformed service, and the employer will make matching contributions and/or profit-sharing contributions on behalf of the participant.

Another feature that employers might have adopted as permitted by the HEART Act is distributions of elective deferrals to participants who are in the uniformed service for more than 30 days (the HEART Act Military Distribution). If an employer has adopted this feature as part of the HEART Act amendment to its plan, then the employer must ensure that the participants who take these distributions may not make any elective deferrals or after-tax contributions to the plan within 6 months following the distribution. In addition, this distribution is subject to the 10% early withdrawal penalty.

Some of the retirement plans also permit a participant to withdraw his or her elective deferrals if the participant is ordered or called to active duty for at least 179 days or for an indefinite period (the Qualified Reservist Distribution). The Qualified Reservist Distribution is not subject to the 10% early distribution penalty. Nor is it subject to the 6 months deferral suspension rule as it applies to the HEART Act Military Distributions.

Last, and certainly not the least important item addressed in the HEART Act is that if an employer makes military differential payments to its employees in the uniformed service, then the HEART Act requires that such military differential payments be taxable to the employees. Thus, they must be reported on the employees' Form W-2s.

Please note that this *Benefits Alert* only highlights the most significant changes in the law. The details of these changes are complex and beyond the scope of this Alert. We look forward to discussing these changes and how they may impact your plans with you. Please do not hesitate to contact any of the following members of our Employee Benefits and Executive Compensation Practice if you have any questions or if you would like additional information.

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