

REPTTECH

Customized Employee Benefits Administration

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MILITARY LEAVE AND VETERAN'S REEMPLOYMENT RIGHTS

Many employees are now leaving their jobs to serve in the armed forces. The Uniformed Services Employment and Reemployment Rights Act ("USERRA") provides extensive employment and benefits protections, including guaranteed reinstatement, to employees who leave their jobs to join the uniformed services. In order to assist employers in complying with this law as it applies to their retirement plans, we offer the following summary:

Overview. USERRA requires employers to grant leave to employees to serve, on a voluntary or involuntary basis, in the U.S. Armed Forces, the Reserves, the Coast Guard,

the Public Health Service or the National Guard. Upon completion of such military service, employees are entitled to be restored to their former jobs or, in some circumstances, to a similar position offering the same pay and rank, with full seniority. Returning service personnel are also entitled to any pay increases they would have received had their employment not been interrupted by military duty. In addition, USERRA participation in pension and health care plans and prohibits discrimination in hiring and other employment practices because of an individual's desire or obligation to perform military service.

Retirement Plans. USERRA applies specific rules to retirement plans, including defined benefit plans and defined contribution plans (such as profit sharing plans and 401(k) plans). Generally, USERRA requires that employers that maintain retirement plans treat an employee returning to work after a qualified military leave as though no break in service had occurred. Employers may, however, require that employees who are absent for more than 90 days provide appropriate documentation before the period of the leave will be treated as an authorized break in service. Employers

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FORM 5500 REVISED TO DISCLOSE LATE DEPOSIT OF 401(K) DEFERRALS

For employers maintaining 401(k) plans, the Department of Labor ("DOL") has made a significant modification in the Form 5500. The modification relates to question 4a on Schedules H and I.

Question 4a. Question 4a inquires as to whether the

employer has deposited the employees' elective deferrals within the regulatory time period. The regulations require an employer to deposit the elective deferrals on the earlier of (1) the earliest date the employer reasonably could have segregated the elective deferrals

from its own funds, or (2) the 15th business day of the month following the month the employer withheld the deferrals.

In prior versions of Schedules H and I (1999-2001), the wording of question 4a (referencing the

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IRS AUTHORIZES 401(K) DEFERRALS FROM PARTNER DRAWS

A partnership maintains a 401(k) Plan. The partnership pays its partners regular "draws" throughout the year, and allows them to have 401(k) deferrals withdrawn from those draws. A recent IRS private letter ruling (PLR 200247052) authorizes this practice based on the following:

- Current regulations provide that an elective contribution must: (a) not be currently available to the employee; and (b) be made under a cash or deferred election.

- They also state that a partner's compensation is deemed available on the last day of the partnership's taxable year. Hence, elections made prior to the end of the year satisfy the current availability test.

- Furthermore, regulations provide that a cash or deferred election is an election by an employee either to receive cash or another taxable benefit or to have a contribution to the plan. A partner's draw, deferred

into the plan, would have been receivable in cash, satisfying this requirement.

Since the partner made the election before the end of the year, and the partner elected to have the partnership deposit the deferral rather than pay the amount to him in cash, the IRS concluded that the deferral qualifies as an elective contribution under the 401(k) rules.

This ruling confirms our expectations. However, employers should exercise care

when making midyear elective contributions for partners and other self-employed owners, particularly when the plan has limits on the percentage of compensation an employee can contribute, or business income fluctuates radically from year to year. It is possible that at the end of the year the owner's deferrals may exceed the plan limit. Worse still, if business is particularly bad at year end, it is possible that total deferrals may exceed the owner's earned income.

MILITARY LEAVE

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should consider the period of the military leave as service with the employer for purposes of eligibility, vesting, and benefits accrual under the plan. For example, if an employee who had not completed an eligibility service period prior to the military leave would have become eligible during the leave period, upon returning the employee should be considered eligible based on the date that he or she would have become eligible.

Employee and Matching Contributions. If an employee returns from a qualified military leave and is otherwise eligible under a plan, the employer is required to make any retirement contributions that would have been made if the employee had not been out on military leave. This contribution excludes earnings and for-

feitures that occurred during the employee's absence. Also, if there is an employee contribution portion to the plan, the employee is entitled to make up such contributions upon return from service. The employee has up to three times the duration of the military service, but no longer than five years, to make up such contributions. These contributions should be calculated using the rate of pay the employee would have received but for the military leave. If this amount is not reasonably certain, the contribution should be based on the employee's average compensation from the employer during the 12 months immediately preceding the military leave. Furthermore, if these contributions are made up and would have been matched

by the employer had they been made previously, such matching contributions must also be made on behalf of the employee. Although these make-up contributions do not count toward limitation amounts for the current year of employment, they may not exceed the contribution limits that would have applied if the employee had been continuously employed during the military leave.

Plan Loans. USERRA permits, but does not require, plan sponsors to include provisions in a plan that suspend the obligation to repay loans made to an employee while on qualified military leave. If a plan includes such a loan suspension provision, those loan amounts are not treated as a distribution from the plan, nor do such loans disqualify a plan from tax-exempt status.



RECURRING DEADLINES FOR 401(K) PLANS

Deadline Calendar Year Plan	Action/Form Name	Form Number	When Due	Who is Responsible	Delivered to
1/31	Distribution Reporting to Participant	Form 1099-R (copy B)	1/31	Payer	Recipient
1/31/ or 2/10	Annual Return of Withheld Federal Income Tax	Form 945	1/31/or 2/10 if taxes timely paid	Employer	IRS
3/15	Corrective Distribution for Failed ADP/ACP Without 10% Excise Tax		If fail, correction by 2 1/2 months from plan year end	Employer/Trustee	Participant
3/15	Filing of Corporate Tax Return and Contribution Deadline for Deductibility (without extension—see below)	Form 1120	2 1/2 months after fiscal year end	Corporate Employer	IRS
3/15	Request for Automatic Extension—Corporate Tax Returns (to 9/15)	Form 7004	File on or before 2 1/2 months after fiscal year end	Corporate Employer	IRS
3/31	Excise Taxes (on correction of ADP/ACP testing after 2 1/2 months after plan year end)	Form 5330	Last day of the 15th month after the plan year end to which the excess contributions or excess aggregate contributions relate	Plan Sponsor	IRS
4/15	Corrective Distribution of excess deferrals		4/15	Plan Administrator/ Trustee	Participant
7/31	Annual Report of Plan	5500 series filing	Last day of 7th month beginning after end of plan year (or as extended)	Plan Sponsor	EBSA of DOL
7/31	Request for Extension to File 5500 series	Form 5558	Due date for Form 5500	Plan Sponsor	IRS
9/15	Extended Deadline for Corporate Tax Returns (and extended contribution deductibility deadline)	Form 1120	6 months after original filing deadline	Plan Sponsor	IRS
9/30	Summary Annual Report		Last day of 9th month beginning after end of plan year (or as extended)	Plan Administrator	Participants, Beneficiaries
10/1— 11/30 (Calendar year plans)	Safe Harbor Plan Notice		30-90 days prior to start of plan year using Safe Harbor Design	Plan Administrator or Plan Sponsor	Participants
10/15	Extended Form 5500 Filing Deadline	Form 5500	2 1/2 months after original filing deadline	Plan Sponsor	IRS
Each Pay Period	401(k) Deferral Deposit		Earliest date that they can be segregated from employer funds. We recommend two days.	Employer	Trust/Custodian, Recordkeeper

REPTECH

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LATE DEPOSIT OF 401(K) DEFERRALS (CONTINUED FROM PAGE 1)

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maximum time period under the regulations) suggested to some that an employer could indicate that it was not "late" in depositing (at least for purposes of answering the question), provided the employer deposited the deferrals no later than the 15th business day of the next month. In fact, many Form 5500 return preparers have applied the "15th business day" standard in answering question 4a.

DOL's interpretation. It has been clear from DOL plan audits occurring during recent years, that the DOL has applied its own interpretation to the wording of the question. Specifically, the question intends to determine if the employer has deposited deferrals no later than the earliest reasonable segregation date, and this "earliest date" may never be later than the 15th business day of the next month. For example, if the employer could have segregated the deferrals within 5 days of withholding, the maximum time period would be 5 days.

To eliminate any further misunderstanding regarding the question, the DOL removed the word "maximum" in the 2002 Form 5500. The DOL's modification of question 4a further signals the

DOL's emphasis on the issue and disagreement with the way many preparers have interpreted the question. Employers no longer can rely on the 15th business day of the following month standard in answering question 4a. We have repeatedly urged our clients to deposit elective deferrals (and loan payments) within two business days.

Consequences. An employer who answers question 4a with a "yes" acknowledges they have breached their fiduciary duty and committed a prohibited transaction. The employer must correct the breach of fiduciary duty by making up the deferrals and also lost earnings on the late deposit of deferrals. Under the DOL's Voluntary Fiduciary Correction Program (VFCP), an employer makes a contribution for the lost earnings in an amount equal to the greater of (1) the plan's rate of earnings (or the employer's profit on the use of the deferrals if greater), or (2) the interest rate under Code §6621(a)(2) (currently the interest rate is 6%). To correct the prohibited transaction, the employer will also need to file a Form 5330 and pay a 15% excise tax on the value of the use of the money (i.e., on the interest, as if the

plan loaned the deferrals to the employer).

If the employer checks "yes" on question 4a, the employer could receive a letter from the DOL and possibly be subject to a DOL audit. The DOL letter will typically invite the employer to file under VFCP or ask the employer to explain if they have corrected the matter and why they have not filed under VFCP. Although an employer may elect to file under VFCP, an employer can generally resolve the matter less expensively by self-correcting using the VFCP methodology. The employer should footnote the Schedule H or I indicating that the matter has been corrected in accordance with the VFCP method. This footnote most likely will satisfy the DOL and avoid any examination or DOL correspondence.

Conclusion. The DOL's change in the wording of question 4a sends a clear signal that they are serious about enforcing the deferral deposit timing rule. Employers should re-evaluate their payroll procedures in order to avoid the consequences associated with the late deposit of deferrals.

PWBA RENAMED EBSA Without much fanfare, the Pension and Welfare Benefits Administration (PWBA) became the Employee Benefits Security Administration (EBSA) effective February 3, 2003. The EBSA can be reached by using the existing telephone numbers and Web addresses. Actions that should be taken include using EBSA (rather than PWBA) in the address for mailing Form 5500 to Lawrence, Kansas. Also, be sure to modify the text in the Summary Annual Report to reflect the new name. The change is likely to be reflected in the 2002 Form 5500 booklets that the IRS has available
