

Employee Plans CPE Technical Topics for 1999

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

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PUBLISHED GUIDANCE

Rev. Proc. 96-49

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Introduction

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Pub. L. 103-353, grants certain reemployment rights and pension benefits rights to an employee who is absent from his job due to his duty in the uniformed military service. The Small Business Job Protection Act of 1996 ("SBJPA"), Pub. L. No. 104-188, added ' 414(u) to the Internal Revenue Code which delineates the requirements that qualified plans must satisfy in order to fulfill the USERRA requirements.

USERRA and 414(u) Requirements

A) USERRA Qualification Requirements

A qualified plan under ' 401(a) of the Code and a plan under ' 457 of the Code will not be treated as satisfying USERRA unless they meet the following three requirements provided under section 414(u)(8).

- 1) A former employee, who is reemployed under USERRA, must be treated by the plan as not having incurred a break in service with the employer maintaining the plan by reason of the employee's period of qualified military service.
- 2) The employer must treat the period of qualified military service as service with the employer for purposes of determining:
 - the employee's accrued benefit and
 - the nonforfeitability such benefit.
- 3) An individual reemployed under USERRA is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes a payment to the plan with respect to such contributions or deferrals.
 - Such payment may not exceed the amount the individual would have been permitted or required to contribute had the individual remained continuously employed by the employer throughout the period of qualified military service.

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--Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the qualified military service (but not greater than 5 years).

In general, an individual has rights under USERRA and 414(u) if his military service is qualified military service. Section 414(u)(5) defines qualified military service as service in the uniformed services (as defined in USERRA) by any individual if such individual is entitled to reemployment rights under USERRA with respect to such service. USERRA also defines qualified military service.

B) Elective Deferrals

An employee who is entitled to benefits under USERRA and who is a participant in a plan which provides for elective deferrals must be permitted to make-up elective deferrals he/she would have made during the period in which he/she performed qualified military service.

Section 414(u)(2) provides that an employer sponsoring a plan which permits elective deferrals will satisfy USERRA only if such an employee is permitted to make additional elective deferrals to make up elective deferrals not made while on military duty. Section 414(u)(2) also requires the employer to make matching contributions relating to make-up elective deferrals that would have been required had the make-up contributions actually been made during the period of qualified military service.

For the purpose of this requirement, elective deferrals are treated as including after-tax employee contributions. The term elective deferrals has the same meaning as defined under ' 402(g)(3), except it includes deferrals under an eligible deferred compensation plan under ' 457.

The amount of make-up contribution that employees can make is equal to the maximum amount of elective deferrals that they would have been permitted to make under the plan (taking into account all of the applicable Code limitations on contributions) during the period of qualified military service if the employee had continued to be employed by the employer during such period and received compensation.

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The amount of the make-up contribution is reduced for any elective deferrals that the employee actually made during the period of qualified military service.

In order to satisfy 414(u)(2), an employee must be permitted to make-up elective deferrals during a specific period, which is three times the amount of time that he was away performing military duty, up to five years, to make-up missed elective deferrals. The period begins on the date of the employee's reemployment with the employer.

C) Compensation during a period of Qualified Military Service

When computing compensation for an employee who is in qualified military service, for the purposes of ' 403(b)(3), ' 415(c)(3), and ' 457(e)(5) of the Code, the employer must increase the amount of compensation by the amount that the employee would have received during such period if he/she were not in qualified military service.

WHAT IS NOT REQUIRED BY USERRA

An employer is **not** required to:

- 1) credit earnings to an employee with respect to a contribution before it is actually made, and
- 2) allocate any forfeiture to an employee with respect to the period of qualified military service.

See section 414(u)(3) of the Code.

USERRA PROCEDURAL MATTERS

A) Effective Date

Section 8 of USERRA provides that it is effective with respect to reemployment initiated 60 days after the date of enactment (i.e. reemployment initiated on or after December 12, 1994). Section 414(u) of the Code, which was added by SBJPA, is also effective as of December 12, 1994.

B) Plan amendments and the Remedial amendment period

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In section 6.04 of Rev. Proc. 97-41, 1997-33 I.R.B. 51, the remedial amendment period for SBJPA is extended to the last day of the first plan year beginning on or after January 1, 1999 ("SBJPA remedial amendment period"). Therefore, plans do not have to be amended to conform to USERRA and ' 414(u) until this date.

Pursuant to Rev. Proc. 98-14, 1998-4 I.R.B. 22, the SBJPA remedial amendment period for governmental plans is extended to the later of (i) the last day of the last plan year beginning before January 1, 2001, or (ii) the last day of the first plan year beginning on or after the "1999 legislative date."

C) Model Amendments

Rev. Proc. 96-49, 1996-2 C.B. 369, provides two model amendments that give plan sponsors a streamlined way to amend their plans to comply with the USERRA requirements. They are:

- 1) "Notwithstanding any provision of this plan to the contrary, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with ' 414(u) of the Internal Revenue Code."
- 2) The second model amendment is available for sponsors who choose to suspend loan repayments during a participant's period of military service. It reads as follows: "Loan repayments will be suspended under this plan as permitted under ' 414(u)(4) of the Internal Revenue Code."

The model language is available to sponsors of:

M&P,

regional prototype,

volume submitter specimen, and

individually designed (including volume submitter and SEP) plans

that, as of the date of the adoption of the model amendment, have reliance on a favorable opinion, notification, advisory, ruling, or determination letter that takes into account the requirements of TRA 86.

If a sponsor adopts the model amendments, neither application to the Service nor a user fee is required. Section 3 of Rev. Proc. 96-49 points out

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that the Service will not issue new opinion, notification, advisory, ruling, or determination letters for plans that are amended solely to add the model language.

D) Operational compliance with USERRA

Pursuant to ' 1465 of SBJPA, a plan amendment applying the changes made by SBJPA shall not be required to be made before the first day of the first plan year beginning on or after January 1, 1998, if:

- (1) during the period after the amendment takes effect and before such first plan year, the plan is operated in accordance with the requirements of such changes and
- (2) the amendment applies retroactively to the period.

The same rule applies to governmental plans, as defined in ' 414(d) of the Code, except that the year 2000 is substituted for the year 1998.

Even though plan amendments are not required for the changes by USERRA pursuant to the SBJPA remedial amendment period until the last day of the first plan year beginning on or after January 1, 1999, section 1465 of SBJPA requires plans to operate in compliance with any SBJPA provision that is effective before the first day of the first plan year beginning on or after January 1, 1998 as of such provision's effective date.

Therefore, plans must operate in compliance with USERRA and 414(u) as of the effective day of the laws, December 12, 1994.

Thus, a plan can only be retroactively amended to reflect USERRA and ' 414(u) to the date that **it first operated in accordance with them.**

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Part III - Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.

Rev. Proc. 96-49

SECTION 1. PURPOSE

This revenue procedure provides a model amendment that will give plan sponsors a streamlined way to amend their plans to comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353 ("USERRA"), and ' 414(u) of the Internal Revenue Code. The revenue procedure also provides that plan amendments to reflect the provisions of USERRA and ' 414(u) generally will not be required to be made before 1998.

Section 414(u) was added by ' 1704(n) of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188 ("SBJPA"). The model amendment is available for use by sponsors of master or prototype ("M&P"), regional prototype, volume submitter specimen, individually designed, and simplified employee pension ("SEP") plans that have received favorable opinion, notification, advisory, ruling, or determination letters that take into account the requirements of the Tax Reform Act of 1986, Pub. L. No. 99-514 ("TRA '86").

SECTION 2. BACKGROUND AND GENERAL INFORMATION

.01 USERRA, codified at 38 U.S.C. ' 4301-4333, revised and restated the federal law protecting veterans' reemployment rights. Under USERRA, which is interpreted and enforced by the Veterans' Employment and Training Service of the U.S. Department of Labor, an employee who is absent from a position with an employer because of military service generally is entitled to reemployment with that employer, subject to certain limits and exceptions.

USERRA also requires certain other rights and benefits to be provided or made available, including, in certain circumstances, coverage under the employer's health plan.

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In addition, on reemployment, an employee is entitled to receive certain pension, profit-sharing and similar benefits (under defined benefit or defined contribution plans) that would have been received but for the employee's absence during military service. USERRA sets forth various rules relating to the employee's reemployment and other rights and benefits, including--

- ! the types of military service covered,
- ! advance notice of military service to be given to an employer,
- ! documentation of reemployment eligibility,
- ! exceptions for dishonorable discharge and employer hardship,
- ! the position in which an individual must be reemployed, and
- ! enforcement procedures.

.02 Section 414(u) generally provides that a contribution that is made by an employer or employee to an individual account plan or by an employee to a contributory defined benefit plan, and that is required under USERRA, is taken into account for purposes of the limitations of ' 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415 or 457 in the year to which the contribution relates, not the year in which the contribution is made.

In addition, ' 414(u) provides that a plan is not treated as failing to meet the requirements of ' 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416 because of the contribution (or the right to make the contribution).

.03 Section 414(u) generally provides that an employer maintaining a plan shall be treated as meeting the requirements of USERRA only if

an employee reemployed under USERRA is treated as not having incurred a break in service because of the period of military service,

the employee's military service is treated as service with the employer for vesting and benefit accrual purposes,
the employee is permitted to make additional elective deferrals and employee contributions in an amount not exceeding the maximum amount the employee would have been permitted or required to contribute during the period of military service if the employee had actually been employed by the employer during that period ("make-up contributions"), and

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the employee is entitled to any accrued benefits that are contingent on employee contributions or elective deferrals to the extent the employee pays the contributions or elective deferrals to the plan. Make-up contributions must be permitted during the period that begins on the date of reemployment and continues for five years or, if less, three times the period of military service. With respect to make-up contributions, the employer must make matching contributions that would have been required if the make-up contributions had actually been made during the period of military service.

.04 Section 414(u) provides that an employee is treated as receiving compensation from the employer during the period of military service equal to the compensation the employee otherwise would have received from the employer during that period, or, if the compensation the employee otherwise would have received is not reasonably certain, the employee's average compensation from the employer during the period immediately preceding the period of military service.

For purposes of ' 414(u), USERRA is not treated as requiring the crediting of earnings to an employee with respect to any contribution before the contribution is actually made or requiring any allocation of forfeitures to the employee for the period of military service.

Section 414(u) also provides that, if a plan provides for the suspension of an employee's obligation to repay a loan for any part of any period of military service, the suspension is not taken into account for purposes of ' 72(p), 401(a) or 4975(d)(1).

.05 USERRA provides generally that it is effective with respect to reemployments initiated 60 days or more after the October 13, 1994, enactment date of USERRA, that is, reemployments initiated on or after December 12, 1994.

USERRA provides that an employee pension benefit plan has two years from the date of enactment, that is, until October 13, 1996, to come into compliance.

Section 1704(n)(3) of SBJPA provides that ' 414(u) is effective as of December 12, 1994. The relief provided by ' 414(u) extends to plans that are not operated in compliance with the requirements of USERRA specified in ' 414(u) until after October 12, 1996, as well as to plans that were operated in compliance with those requirements before October 13, 1996.

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.06 Provisions of SBJPA that are unrelated to USERRA changed various qualification requirements for plans. Section 1465 of SBJPA provides that, if a plan amendment is required by certain changes under SBJPA ("SBJPA change"), the amendment is not required to be made before the first day of the first plan year beginning on or after January 1, 1998 (January 1, 2000, for a governmental plan as defined in ' 414(d) of the Code), if the plan is operated in accordance with the SBJPA change during the period from the effective date of the SBJPA change to the time the plan amendment is required and if the plan amendment reflecting the SBJPA change applies retroactively to that period.

.07 Plan amendments to reflect the provisions of USERRA and ' 414(u) will not be required to be made before the date plan amendments will be required to be made under ' 1465 of SBJPA.

SECTION 3. MODEL AMENDMENT

.01 All plans--Sponsors described in subsection .02 may amend their plans by adopting, word-for-word, the model language in the appendix to this revenue procedure in accordance with the instructions in this revenue procedure. If a sponsor to whom the model language is available pursuant to subsection .02 adopts the model language, neither application to the Service nor a user fee is required. The Service will not issue new opinion, notification, advisory, ruling, or determination letters for plans that are amended solely to add the model language described in this section.

.02 The model language is available only to sponsors of M&P, regional prototype, volume submitter specimen, and individually designed (including volume submitter and SEP) plans that, as of the date of the adoption of the model amendment, have reliance on a favorable opinion, notification, advisory, ruling, or determination letter that takes into account the requirements of TRA '86 under Rev. Proc. 87-50, 1987-2 C.B. 647, as modified; Rev. Proc. 89-9, 1989-1 C.B. 780, as modified; Rev. Proc. 89-13, 1989-1 C.B. 801, as modified; Rev. Proc. 90-20, 1990-1 C.B. 495; Rev. Proc. 91-41, 1991-2 C.B. 697; Rev. Proc. 91-66, 1991-2 C.B. 870; Rev. Proc. 93-39, 1993-2 C.B. 513; or Rev. Proc. 96-6, 1996-1 I.R.B. 151.

.03 M&P, Regional Prototype and Volume Submitter Plans--M&P, regional prototype and volume submitter plan sponsors that use the model language must file Form 8837, Notice of Adoption of Revenue Procedure Model Amendments.

SECTION 4. RELIANCE

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An employer entitled to rely on an opinion, notification, ruling, or determination letter will not lose reliance on the letter merely because of this amendment. Plan amendments made in accordance with section 2.07 and section 3 of this revenue procedure will not cause the plan to lose its otherwise applicable extended reliance period under Rev. Procs. 89-9 and 89-13, as modified by Rev. Proc. 93-9, 1993-1 C.B. 474, or section 13 of Rev. Proc. 93-39.

DRAFTING INFORMATION

The principal author of this revenue procedure is Richard Wright of the Employee Plans Division. For further information regarding this revenue procedure, contact the Employee Plans Division's telephone assistance service between 1:30 and 4:00 p.m., Eastern Time, Monday through Thursday at (202) 622-6074/6075 or Mr. Wright at (202) 622-6214. (These telephone numbers are not toll-free numbers.)

For further information regarding USERRA, contact the local office of the Veterans' Employment and Training Service ("VETS") of the U.S. Department of Labor or contact the VETS National Office at 1-202-219-8611.

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APPENDIX

MODEL AMENDMENTS

AMENDMENT 1

(Note to Sponsor: The following model amendment may be used to amend plans to provide for the requirements of USERRA and ' 414(u) of the Code.)

"Notwithstanding any provision of this plan to the contrary, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with ' 414(u) of the Internal Revenue Code."

AMENDMENT 2

(Note to Sponsor: The following model amendment may be used to amend plans that provide for loans to participants, if the sponsor chooses to suspend loan repayments during participants' periods of military service.)

"Loan repayments will be suspended under this plan as permitted under ' 414(u)(4) of the Internal Revenue Code."