

# Employee Benefit News

September 30, 2008

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## CELEBRATING 75 YEARS OF BUSINESS

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McCready and Keene is proud to have administered retirement plans for over 75 years. We enjoy working with our clients and know that our success is based on pleasing them.



*"Staff stability is a key to company success. We take great pride in the years of experience our associates have, with 38 of our 94 associates having over 15 years of experience with our company. We know our overall success is determined by the relationships our associates have with our clients."*

**Sherry Myers, GBA, CEBS**  
*Vice President, Employee Relations Manager*

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## PARTICIPANTS ON MILITARY LEAVE

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On June 17, 2008, the President signed the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act") to provide additional benefits to military personnel. It contains some mandatory and some optional changes. Some of the changes are retroactively effective, and some are not effective until January 1, 2009. The changes apply to defined contribution plans, defined benefit plans, 403(b) plans, and 457(b) plans.

Effective for deaths or disabilities occurring on or after January 1, 2007:

- **Required change.** Death benefits (other than benefit accruals relating to the period of military service) that would have been payable if the participant had been reemployed prior to his or her death will be paid on behalf of a participant who dies while on military leave. For example, if a participant on military leave is 20% vested, the plan provides for 100% vesting at death, and the participant dies while performing military service, then the beneficiaries are entitled to 100% of the participant's benefit. Another example—if a defined benefit plan provides for a 50% joint and survivor annuity death benefit for a married participant who dies while employed, the same death benefit will be paid on behalf of a married participant who dies while on military leave.

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## PARTICIPANTS ON MILITARY LEAVE (CONT.)

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- **Optional change.** The employer may count the retroactive benefit accruals for the period of military service as part of the death benefit or disability benefit for a participant who dies or becomes disabled while on military leave. For example, if a participant's account balance was \$10,000 without the benefit that accrued during military leave, \$12,000 with the benefit that accrued during military leave, and the plan provides for 100% vesting at death, the plan is required to provide a death benefit of \$10,000 and may be written to provide a death benefit of \$12,000.

Effective January 1, 2008:

- **Required change.** The Pension Protection Act of 2006 added an exception to the 10% premature distribution penalty (distributions prior to age 59½) for certain distributions to qualified reservists called to active duty after September 11, 2001, and before December 31, 2007. The HEART Act makes this provision permanent by extending the exception to individuals ordered or called to active duty on or after December 31, 2007.

Effective January 1, 2009:

- **Required change.** "Differential pay" is the voluntary pay from an employer to an individual serving in the military. Differential pay may not exceed the amount of compensation the service member would have received if he or she had been actively employed by the employer. The HEART Act provides that 1) individuals receiving differential pay are treated as employed by that employer, 2) differential pay is subject to withholding tax, and 3) retirement plans are required to treat differential pay as compensation under the plan. If an employer provides differential pay, that pay must be provided on a non-discriminatory basis.

- **Required change.** A participant who is on active duty for more than 30 days is treated as having severed employment for purposes of receiving a distribution of salary deferrals from a 401(k) plan, 403(b) plan or 457(b) plan. A participant who receives a distribution of salary deferrals must be suspended from making elective deferrals or employee contributions during the 6-month period beginning on the date of distribution.

Plan amendments to reflect the HEART Act are not required until the end of the 2010 plan year (2012 plan year for government plans). If you provide differential pay to service members, that pay will need to be reported as compensation beginning in 2009. If you have a participant who dies or becomes disabled in the military, please contact us and we can discuss your options regarding death or disability payments.





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## PLAN ADMINISTRATION CHECKLIST

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Benjamin Franklin's advice that an ounce of prevention is worth a pound of cure definitely applies to retirement plans! Correction of operational failures and failing to adopt or file the proper documentation can be very expensive and time consuming. The IRS has issued an updated revenue procedure on how to correct operational and document failures. The better course is to avoid the problems. Here are some checkpoints to help keep your plan healthy:

### *Defined Benefit Plans and Defined Contribution Plans*

- ✓ Has your plan document been updated to reflect required changes?

If we are responsible for drafting your plan, we will alert you when your plan needs to be amended. When we send you the amendment, we will let you know the time frame for adopting the amendment or restatement. Timely adoption is extremely important. At a recent conference, it was reported that the IRS assessed an employer a penalty of over \$9,000 for failure to timely adopt an amendment when the IRS discovered the oversight during an audit.

- ✓ Have you maintained the filings and documents required for your plan?

You must maintain the original plan document and all subsequent amendments or restatements, all Board resolutions and minutes related to the plan, along with any determination or opinion letter issued by the IRS. In addition, any reports filed with the government (such as 5500's and requests for determination letters), along with supporting records must be maintained for 6 years after the filing or receipt date.

- ✓ Are an appropriate number of employees covered under the plan? (This requirement does not apply to government or church plans.)

We perform the coverage test for your plan each year. However, it is only as accurate as the data you provide to us. Each year we send a questionnaire asking for the number of total employees and if any other employers are in a controlled group or affiliated service group with your company. If your company buys or sells divisions or other companies, it will affect your coverage test. It is important that you inform us of corporate changes that affect your demographics.

- ✓ Is the correct definition of compensation used to calculate benefits under the plan?

This can be one of the most difficult areas of plan administration, because of the complexity of payroll codes and payroll reporting systems. We suggest that you review the definition of "compensation" in your plan with the person who responds to our census requests each year to insure that the correct compensation amounts are reported to us.

- ✓ Do you respond in a timely and accurate manner to our request for census data?

The census requests include information about hours credited, compensation earned, dates of birth, dates of severance from employment, dates of hire, dates of rehire, officer status, change of status (such as military leave, other leave, change from union to non-union status). This information is necessary for us to monitor qualification requirements, such as compliance with contribution/benefit limits, non-discrimination tests, minimum required distribution rules for participants who are age 70½, top-heavy rules, etc.

- ✓ Do you have procedures for reviewing, tracking, and processing domestic relations orders? (This requirement may not apply to some government plans.)

We can review the domestic relations orders for you. We can also provide a sample order for you to provide to participants and attorneys. We recommend that you have a sample available for participants. It will increase the efficiency of the review process.



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## PLAN ADMINISTRATION CHECKLIST (CONT.)

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- ✓ Have you made beneficiary designation forms available to your employees and reminded them of the need to have a current beneficiary designation form in place?

Challenges by family members over payment of death benefits can be expensive and time consuming. You will want to be sure that you have clearly communicated to participants the need to have a current beneficiary designation on file. If there is a dispute over who the beneficiary is, the plan will want to delay distribution until the dispute has been resolved.

- ✓ Has Form 5500 been filed in a timely manner and have you distributed a Summary Annual Report to all plan participants each year? (This requirement does not apply to government or church plans.)

The due date for filing Form 5500's is the last day of the 7<sup>th</sup> month following the end of the plan year. By filing for an extension, the due date can be extended 2½ months. Summary Annual Reports must be distributed to participants within 2 months after the filing date of Form 5500.

- ✓ Has a Summary Plan Description ("SPD") and any Summary of Material Modifications ("SMM") been distributed to participants in a timely manner? (This requirement does not apply to government or church plans.)

An SPD must be given to each new participant within 90 days of becoming a participant. SPDs must be updated every 5 years if there has been an amendment to the plan that affects the SPD. An SPD has to be updated every 10<sup>th</sup> year even if there has not been an amendment to the plan that affects the SPD. An SMM must be provided if an amendment to the plan is material or affects the content of the SPD. SPDs and SMMs must be distributed no later than 210 days after the close of the plan year in which an amendment was adopted.

### *Defined Contribution Plans*

- ✓ In a 401(k) plan, 403(b) plan, or 457(b) plan, have all eligible employees been identified and given the opportunity to make an elective deferral election and have their elections been properly implemented?

This is one of the most common operational errors in a salary deferral plan. Correction can involve a plan amendment, submission to the IRS or additional contributions by the employer. We suggest that you review the requirements for deferral elections under your plan and the procedures for making those elections available to everyone who is eligible. You will want to pay particular attention to the requirements and procedures for rehires.

- ✓ Are employee contributions and loan repayments timely deposited to the trust?

The requirement is that deposits be made as soon as possible. For small employers (under 100 participants), the Department of Labor has proposed a safe harbor that gives employers 7 business days to make deposits. If an employer fails to deposit employee deferrals in a timely manner, the employer will be required to make up lost earnings to participants and pay an excise tax to the Department of Labor.

- ✓ If an employer contribution is made to the plan, has it been allocated to all appropriate employees under the terms of the plan?

We suggest that you review the terms of the plan and your procedures for determining the employer contribution (if you determine and allocate your employer contribution) or the census data submitted to us (if we determine and allocate your employer contribution). If your plan provides different levels of contributions based on various groupings of participants, it is important to let us know when a participant changes from one group to another.



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## PLAN ADMINISTRATION CHECKLIST (CONT.)

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- ✓ If your plan permits loans, have participants completed the required forms and received a truth in lending statement, if applicable? Have loans been monitored to make sure the loan limit is not exceeded and if payments are late, have the appropriate steps been followed?

If your plan has loans, you should have a loan package that contains loan rules and necessary forms. You will want to be sure you have procedures in place to implement the loan rules.

### *Defined Benefit Plans*

- ✓ If your plan's adjusted funding target attainment percentage is less than 80%, have participants been notified of the restrictions that apply to benefit payments? (This requirement does not apply to government or church plans.)

We will determine the funding target attainment percentage and prepare a notice for you to distribute to your participants if the percentage is less than 80% and your plan does not meet one of the exemptions. It is important that you respond to our census request as soon as possible so we can complete your certification in a timely manner.

- ✓ If quarterly contributions are required, do you have a system in place for making the required quarterly contributions and the final contribution in a timely manner? (This requirement does not apply to government or church plans.)

Failure to make quarterly contributions in a timely manner affects funding and may result in a notice to participants and a notice to the PBGC. An excise tax is imposed if the final contribution is not made by 8½ months after the end of the plan year. Also, beginning in 2008, if you want to use your credit balance to avoid making quarterly contributions, you must make a written election.

- ✓ When participants terminate before retirement do you provide them with a calculation of their vested termination benefit, ask them to keep the employer informed of any address changes, and remind them to contact the employer for commencement of their benefit? (For terminated participants, our plans are written that benefits must commence no later than normal retirement age and may commence anytime after satisfaction of early retirement requirements.)

The method for correcting the failure to commence benefits at normal retirement age will depend on whether your plan has been amended for retroactive annuity provisions. (All non-government defined benefit plans that we draft have this provision.)

- ✓ Have you timely paid the PBGC premiums? (This requirement does not apply to government or church plans.)

The due dates can be very complicated and they have been modified beginning with the 2008 premium payment year. The payment date is based on the participant count as of *the last day of the year prior to the year for which the premiums are being paid*. In general, plans with less than 100 participants must pay flat rate and variable rate premiums by the last day of the 4<sup>th</sup> month following the end of the plan year. For example, 2008 premiums for a plan with a calendar year plan year and less than 100 participants as of December 31, 2007, are due by April 30, 2009. If the prior year's participant count is 100 or more but less than 500, flat rate and variable rate premiums are due by the 15<sup>th</sup> day of the 10<sup>th</sup> full calendar month in the plan year. For example, 2008 premiums for a plan with a calendar year plan year and more than 100 and less than 500 participants as of December 31, 2007, are due by October 15, 2008. If the prior year's participant count is 500 or more, flat rate premiums are due by the end of the second month of the plan year and variable rate premiums are due by the 15<sup>th</sup> day of the 10<sup>th</sup> month. For example, 2008 flat rate premiums for a plan with 500 or more participants as of December 31, 2007, and a calendar year plan year were due by February 28, 2008. 2008 variable rate premiums are due by October 15, 2008.

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If you have questions or would like additional information about the items presented in this newsletter, call your McCready and Keene consultant.

***Employee Benefit News is not intended as legal advice. Readers should seek legal advice before acting on any of these subjects.***

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