

Military Service - Treatment of Benefits Earned During

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A. Background

This PBGC internal guidance statement provides rules for PBGC's treatment of benefits earned by participants during certain periods of military service.

Federal law protects returning military veterans against employment discrimination, provides them with certain reemployment rights, and provides various protections regarding their pension benefits.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994, strengthens and clarifies pension rights that, generally, were established in predecessor statutes and pre-USERRA case law. USERRA provides that, upon reemployment with the pre-service employer after absence due to military service, an employee must be treated as not having a break in service with the employer maintaining the pension plan for purposes of participation, vesting, accrual, and eligibility for benefits. DOL regulations relating to the USERRA requirements are prescribed in 20 CFR Part 1002.

The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) expanded entitlement to pension benefits for employees and their survivors if the employee dies or becomes disabled on or after January 1, 2007, while serving in the military. Under HEART, plans are required to provide that if a participant dies while performing qualified military service, survivors of the participant are entitled to any additional benefits (other than benefit accruals) that would have been provided under the plan had the participant resumed employment the day before the date of death, and then terminated employment on account of death. Such additional benefits include vesting service, accelerated vesting, and survivor benefits contingent on termination of employment due to death.

HEART permits plans, but does not require them, to provide service for benefit accruals if a participant dies while performing qualified military service, or to provide service for vesting or accrual purposes if a participant becomes disabled while performing qualified military service.

This edition of the guidance addresses PBGC's treatment of benefits attributable to deemed reemployment under HEART, clarifies the determination of a participant's reemployment position and its implications for service and compensation used in benefit calculations, and clarifies the effect of differential wage payments during military service on a participant's pension benefits.

B. Scope and Effective Date

This PBGC internal guidance is effective August 30, 2011 and applies to participants in trustee plans whose benefits are affected by the laws described above.

The rules in this internal guidance apply for payment purposes. See the Actuarial Services Division for guidance on valuing benefits derived from service attributable to periods of uniformed service when death, disability or reemployment occurs after DOPT.

C. Definitions

1. **Uniformed service** means the performance of duty – on a voluntary or involuntary basis – in a uniformed service, including:
 - Active duty;
 - Active duty for training;
 - Initial active duty for training;
 - Inactive duty training;
 - Full-time National Guard duty under Federal authority;
 - Absence from work for an examination to determine a person's fitness for any of the above types of duty;
 - Funeral honors duty performed by National Guard or reserve members; and
 - Duty performed by intermittent disaster response personnel for the Public Health Service, and approved training to prepare for such service.
2. **The uniformed services** consist of the following:
 - Army, Navy, Marine Corps, Air Force, or Coast Guard;
 - Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve;
 - Army National Guard or Air National Guard;
 - Commissioned Corps of the Public Health Service; or
 - Any other category of persons so designated by the President in time of war or emergency.
3. **Qualified military service** means uniformed service by an individual entitled to reemployment rights under USERRA. (See section C.7 Reemployment under USERRA below for the criteria for determining if a participant is entitled to reemployment rights under USERRA.)
4. **Pension service** means service counted for participation, vesting, eligibility and accrual of benefits under a pension plan.
5. **PPA 2006 bankruptcy plan** means a PBGC-trusted pension plan that terminates while bankruptcy proceedings are pending with respect to at least one of the plan's contributing sponsors, if the bankruptcy proceedings were initiated on or after September 16, 2006.
6. **Pre-service employer** means the employer that employed the individual prior to his or her uniformed service or any employer that is a successor in interest to the former employer. The determination of whether an employer is a successor in interest is made on a case-by-case basis considering the following factors:
 - a. Whether there has been a substantial continuity of business operations from the former employer to the current employer;
 - b. Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;
 - c. Whether there has been a substantial continuity of employees;
 - d. Whether there is a similarity of jobs and working conditions;

- e. Whether there is a similarity of supervisors or managers; and,
 - f. Whether there is a similarity of products or services.
- 7. Reemployment under USERRA** means reemployment with the pre-service employer on or after December 12, 1994, where:
- a. the employee is honorably discharged from the uniformed service;
 - b. the cumulative period of uniformed service covered under USERRA does not exceed five years; and
 - c. the employee applies for reemployment within the time period required under USERRA (generally no more than 90 days after the completion of the uniformed service).
- Extensions to the time limits in (b) and (c) are available in limited circumstances -- e.g., where the employee was ordered to remain on active duty or was hospitalized. Request guidance by emailing PSDGuidance@pbgc.gov in such cases.
- If a participant is reemployed in a position that is in a furlough, layoff, or other similar status, the participant is still considered to be reemployed under USERRA. See section D.6 for more details regarding reemployment positions.
- 8. Deemed reemployment under HEART** means that, when a participant dies while in active military service and eligible for reemployment under USERRA (or becomes disabled during that period, if such an event is covered under the terms of the plan), he or she is considered to be reemployed with the pre-service employer on the day before the death or disability occurs. This applies to deaths and disabilities occurring after January 1, 2007.
- 9. Differential wage payments** are payments made by the employer to the participant with respect to a period of qualified military service of at least 30 days' duration that represent all or a portion of the wages the participant would have received if the participant had continued to perform service for the employer during the period of military service.

D. PBGC Internal Guidance

1. General Rule.

- a. PBGC calculates and pays pension benefits to participants in PBGC-trusteed pension plans in accordance with USERRA and HEART as summarized in this guidance. PBGC will disregard any plan provision that fails to comply with the minimum requirements of USERRA or HEART for providing benefits based on pension service derived from a participant's period of qualified military service. Thus, if a plan does not explicitly provide:
 - i. pension service for periods of qualified military service for participants who are reemployed under USERRA; or
 - ii. with respect to survivor benefits, vesting service (or any additional benefits except for benefit accruals) for periods of qualified military service for participants who are deemed reemployed under HEART;

then PBGC will read such requirements into the plan and, to the extent that the participant would have earned such service if he or she had remained employed in the

position, PBGC will determine benefits under the escalator principle (as described in section D.6).

Likewise, if a plan does not provide, with respect to periods of qualified military service after December 31, 2008, during which a participant receives differential wage payments, that the participant will be treated under the plan as if he or she remained employed with the employer as described in section D.7 Differential Wage Payments, PBGC will read such a provision into the plan.

PBGC will recognize plan provisions that provide benefits exceeding the requirements of USERRA (such as those granting service during all or part of a period of uniformed service without regard to the participant's reemployment), provided that the conditions of eligibility for such benefits were met on or before DOPT. PBGC will also recognize plan provisions that provide benefits permitted but not required under HEART (such as providing service for vesting or accruals to participants disabled while in qualified military service).

- b. If a participant is reemployed under USERRA or is deemed reemployed under HEART after DOPT, PBGC will recognize the pension service attributable to the qualified military service up to DOPT, as explained below in further detail.

2. Guaranteed Benefits.

- a. **Reemployment under USERRA.** Subject to the limitations of Title IV of ERISA, PBGC will guarantee those benefits derived from pension service attributable to the participant's qualified military service up to DOPT (or the bankruptcy petition date (BPD) in a PPA 2006 bankruptcy plan), if the participant is reemployed under USERRA, even if such reemployment occurs after DOPT (or BPD in a PPA 2006 bankruptcy plan).
- b. **Deemed Reemployment under HEART.** Subject to the limitations of Title IV of ERISA, if the participant is deemed reemployed under HEART due to death, PBGC will guarantee those benefits derived from pension service (except for benefit accruals, unless they are explicitly provided by the plan) attributable to the participant's qualified military service up to the day before the date of death, or up to DOPT (or BPD) if the death occurs after such date.

In the case of a participant deemed reemployed under HEART due to disability, PBGC will guarantee benefits derived from pension service attributable to the participant's qualified military service up to the day before the date of disability, or up to DOPT (or BPD) if the disability occurs after such date, but only to the extent the plan provides for such service.

3. Priority Category 3.

- a. **Reemployment under USERRA.** If a participant is reemployed under USERRA, PBGC will include, in its determination of the participant's benefit entitlement in priority category 3, any pension service attributable to periods of qualified military service on or before DOPT-3 (or BPD-3 in a PPA 2006 bankruptcy plan), even if the reemployment occurs after DOPT-3 (or BPD-3).
- b. **Deemed Reemployment under HEART.** If a participant is deemed reemployed under HEART due to death, PBGC will include, in its determination of the participant's benefit

entitlement in priority category 3, any pension service (except for benefit accruals, unless they are explicitly provided by the plan) attributable to periods of qualified military service up to the day before the date of death, or up to DOPT-3 (or BPD-3) if the death occurs after such date.

If a participant is deemed reemployed under HEART due to disability, PBGC will include, in its determination of the participant's benefit entitlement in priority category 3, any pension service attributable to periods of qualified military service up to the day before the date of disability, or up to DOPT-3 (or BPD-3) if the disability occurs after such date, but only to the extent the plan provides for such service.

Example: The ABC Company Pension Plan has a BPD of January 1, 2009, and a DOPT of March 1, 2009. A participant leaves the employment of the plan sponsor for service in the military on July 1, 2005 and is reemployed under USERRA on June 1, 2009. PBGC will include the pension service attributable to qualified military service from July 1, 2005 through January 1, 2006 (BPD-3) when determining the participant's benefit entitlement in priority category 3.

4. Benefits from Employee Contributions.

- a. **Reemployment under USERRA.** A participant who is reemployed under USERRA is entitled to accrued benefits attributable to employee contributions for the period of qualified military service only to the extent that he or she makes the required employee contributions to the plan. USERRA generally provides that an employee returning to work has up to three times the period of qualified military service but no longer than five years to make up any missed contributions. Request guidance by emailing PSDGuidance@pbgc.gov if a participant in a trustee plan was reemployed under USERRA by the plan sponsor but had not fully made up missed employee contributions attributable to the period of qualified military service.
- b. **Deemed Reemployment under HEART.** If a plan provides for benefit accruals for participants deemed reemployed under HEART, such a participant is also deemed to have made employee contributions equal to the participant's average contributions made during the 12-month period prior to military service (or the entire period of employment if less than 12 months). However, HEART allows a plan to require that disabled participants deemed reemployed under HEART must make employee contributions with respect to periods of qualified military service in order to receive employer-sponsored contributions or benefits based upon employee contributions. In such a case, PBGC will determine the participant's benefits based on the actual employee contributions made.

5. Priority Category 5. Nonforfeitable benefits related to pension service earned during a period of qualified military service that are not in priority category 4 or higher priority categories are in priority category 5 (PC5). For example, if a participant in a PPA 2006 bankruptcy plan returns to work after the bankruptcy petition date, any nonforfeitable benefits derived from pension service accrued during a period of qualified military service after BPD and on or before DOPT will be assigned to PC5.

- 6. Compensation and Reemployment Position.** USERRA provides that returning service members are reemployed in the position that they would have attained had they not been absent for qualified military service. This is referred to as the escalator principle. If a participant's retirement benefit depends on his or her compensation from the employer, the compensation used for the period of leave for qualified military service will be calculated using the rate of pay the participant would have received in the positions determined under the escalator principle. Where this rate of pay cannot reasonably be determined, the participant's average rate of pay during the 12-month period of employment (or the entire period of employment if less than 12 months) that immediately preceded the qualified military service should be used.

The reemployment positions determined under the escalator principle may include positions that were placed in a status of unpaid furlough, layoff, or other similar status. Pension service attributable to periods of qualified military service during which the participant's reemployment position was in a status of furlough, layoff, or other similar status will be determined according to the plan's provisions regarding service while employed under such status.

- 7. Differential Wage Payments.** For periods of qualified military service after December 31, 2008, during which a participant receives differential wage payments from the employer, the participant will be considered employed in the position determined under the escalator principle (as described in section D.6), without regard to any subsequent reemployment, death or disability.