

Employee Benefit Plan Review

Ask the Experts

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SUSPENSION OF BENEFITS UNDER PENSION PLAN

Q One of our company's former employees was recently rehired by our company. When he first left the company, he elected to begin his pension under our company's pension plan and has been receiving pension benefits for the past two years. Our plan administrator has informed us that the rehired employee must stop receiving pension benefits now that he has rejoined our company. Is this correct?

A This may be correct. Your company's pension plan may suspend pension benefits to rehired participants, provided that certain requirements are met. Internal Revenue Code (Code) Section IRC 411(a) generally requires that participants benefits be non-forfeitable upon reaching normal retirement age. Code Section 401(a)(14) generally requires that pension plans begin distributing benefits after a certain period of time past normal retirement age. Plans are, however, permitted to suspend pension benefits to rehired participants who have previously commenced receiving pension benefits and/or to participants who have reached normal retirement age. These suspension of benefit provisions are optional. If your company's pension plan does require suspension of benefits for rehired participants, the suspension of benefits must be set forth in the plan document and described in the plan's summary plan description (SPD).

Under the suspension of benefits rules, a pension plan may suspend benefits to a rehired participant up to a certain amount for each calendar month (or each four or five week payroll period ending in the calendar

month) during which the rehired participant performs service. The period of service is defined in Code Section 411(a)(3)(B) (generally is 40 hours per month).

Before suspending benefits to a rehired participant, the plan administrator should provide a suspension of benefits notice to the rehired participant which contains or references the following information:

- The specific reasons why the pension payments are being suspended;
- A general description of the plan's suspension of benefits provisions;
- A copy of the specific plan suspension of benefit provisions;
- A statement explaining that the participant may find additional information regarding suspension of benefits in the applicable Department of Labor (DOL) regulations in Section 2530.203-3 of the Code of Federal Regulations;
- A description of the appeals process for the suspension and for resumption of benefits, if applicable; and
- Information about any offsets of suspendible amounts that are paid during employment.

The suspension notice may incorporate by reference information set forth in the plan's SPD, provided that the suspension notice references the specific pages on which the SPD's suspension of benefits information may be found. If the notice does cross-reference the SPD, the suspension notice must explain that the participant may obtain a copy of the SPD

and that the SPD must be provided within 30 days of request.

The suspension of benefits notice to rehired participants must be provided in the first month in which the pension benefits are suspended.

If a rehired participant's pension is suspended before his or her required beginning date (currently, April 1 following the year in which the participant reaches age 70 1/2), no adjustment is required for periods up to required beginning date. If a rehired participant works past his or her required beginning date, his or her benefit will be required to actuarially adjusted.

DEDUCTION FOR BONUS PAYMENTS

Q Our company pays annual bonuses each year to our workforce. We have received confusing guidance from our accountants as to when the company can deduct those employee bonuses from its income. Can you provide some clarity?

A The deduction rules for bonuses differ depending on whether your company is a cash-basis or accrual-basis taxpayer. If your company is a cash-basis taxpayer, then your company deducts the bonuses in the year in which they are paid to the employees. However, if your company is an accrual-basis taxpayer, then your company may be able to deduct the bonuses in the prior year in which the bonuses are earned rather than in the subsequent year in which they are paid. For example, if your employees earn bonuses in 2019 that are paid in early-2020, then your company may be able to deduct those bonuses in 2019 instead of 2020.

To take advantage of this rule, there are some conditions that need to be satisfied. One requirement is that the bonuses need to satisfy the "all events test" under Code Section 461(a). The "all events test" has three parts:

- (1) All events to establish the liability for the bonuses must have occurred by the end of the applicable year (2019 in the example above);
- (2) The amount of the company's bonus liability must be determinable with reasonable accuracy by the end of the applicable year; and
- (3) Performance has occurred with respect to the economic liability (e.g., the employees completed their work needed to earn or calculate the bonus).

Be careful with respect to item (1). Many bonus arrangements require employees to be employed on the date that the bonus is paid. If that is the case, then item (1) is not satisfied until the bonus is actually paid to the employee (because the employer does not become legally obligated to pay the bonus to the employee until that later date). Therefore, the bonus will not be deductible for the prior year, even if the bonus is intended to reward performance for that prior year. However, if the employee need only be employed through December 31 of the prior year, then that may be sufficient to satisfy item (1). There is an exception to this rule if your company has a bonus pool for the year that gets fixed in amount by the end of the year, even if the specific bonus recipients from that pool are not determined until after the year. In that case, your company may still be able to deduct the bonuses in the prior year even if the employees need to be employed on the date of bonus payment.

Another requirement is that the bonuses must be paid to the employees during a "brief period of time" after the close of the prior year in order to avoid having the bonuses be classified as deferred compensation. Under Section 404 of the Internal Revenue Code, deferred compensation may not be deducted by a company until the bonus amounts are paid to the employees.

To avoid having the bonuses classified as deferred compensation, there is a rebuttable presumption under the Internal Revenue Service regulations that bonuses paid by the 15th day of the third month following the close of the tax year (generally, March 15th) are not deferred compensation.

Please note that this explanation covers just the general rules – there are almost always exceptions. And this explanation covers just federal tax rules. State tax rules may differ. Lastly, or maybe what you and your company should do first, is consult with an experienced and trusted tax advisor before submitting your company's tax returns.

SEP ELIGIBILITY REQUIREMENTS

Q Last year, my company set up a simplified employee plan (SEP), which covers all employees at the company. We will be hiring two new employees this fall. Do we have to cover the new employee's right away or can we require them to wait until January 1, 2020?

A It depends upon the terms in your SEP document. To qualify as a SEP, your plan must generally cover all employees (including self-employed employees) who have (1) attained age 21, (2) worked for your company in at least three of the last five years, and (3) received at least \$600 in compensation from your company during the plan year (for 2018 and 2019). Your SEP may exclude employees who are covered by a collective bargaining agreements whose retirement benefits were bargained for in good faith and non-resident aliens with no U.S. source income.

Your SEP may impose less restrictive eligibility requirements but may not impose more restrictive eligibility requirements. For example, your SEP could require that all employees be eligible to participate in the SEP immediately,

regardless of a minimum age or service requirement.

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