

June 3, 2008

## MEMORANDUM TO CLIENTS

**Re: HEART Act Provides Benefits for Those in Military Service**

The House of Representatives and the Senate passed the Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008 (H.R. 6081) on May 20, 2008 and May 22, 2008, respectively. The bill has been cleared for the White House for the President's signature, and the President is expected to sign the bill into law soon. The HEART Act amends the Internal Revenue Code (the "Code") and the Social Security Act to provide certain tax benefits and incentives to military personnel.

### **QUALIFIED RESERVIST DISTRIBUTIONS FROM CAFETERIA PLANS.**

The HEART Act allows distributions of unused amounts in health flexible spending arrangements ("health FSAs") to reservists called to active duty. "Qualified reservist distributions" can be made from a health FSA without subjecting all other amounts in the health FSA to immediate taxation. These distributions will be taxable to the individual. This provision will allow those who are called into military service and who may not be able to fully use amounts credited in his or her cafeteria plan or health FSA to cash out the unused benefits and not forfeit them under the "use it or lose it" rule that applies to cafeteria plans.

A qualified reservist distribution is a distribution of all or a portion of unused amounts in health FSAs belonging to reservists ordered or called to active duty, provided:

- (a) the order or call to active duty is for a period of over 179 days or for an indefinite period and
- (b) the distribution is made between the date of the order or call and the last date that reimbursements from the health FSA could otherwise be made for the plan year that includes the date of the order or call to active duty.

This provision will apply to distributions made after the date that the HEART Act is enacted.

Plan sponsors wishing to allow qualified reservist distributions will need to amend their plan documents accordingly and issue summaries of material modification (SMMs) describing these distributions to all cafeteria plan participants. We note, however, that qualified reservist distributions raise additional issues, such the effect (if any) on a plan's obligations to provide continuation coverage under USERRA and COBRA, but we expect this will be addressed in later guidance from the Internal Revenue Service.

## **RETIREMENT PLAN REVISIONS**

The HEART Act also includes other provisions applicable to employee benefit plans.

- Tax-qualified pension plans (§401(a), §403(b) and §457 plans) are required to provide survivors of plan participants who die while performing qualified military service any additional benefits, such as accelerated vesting or incidental death benefits, that are provided under such plans for active participants die while employed. This is accomplished by treating the deceased as returning to employment with the employer and then dying and determining benefits under that scenario. Under certain rules, additional benefit service may be accrued under a retirement plan for those participants who die or become disabled while in military service before returning to the employer. These provisions are effective for deaths and disabilities occurring after January 1, 2007.
- The exemption from the 10% penalty for premature withdrawals from retirement plans and the ability to repay such distribution for 2-years after the end of active duty that expired December 31, 2007 is now made permanent. This provision applies to any individual called or ordered to active military duty on or after December 31, 2007.
- A tax-free rollover of any military death benefit payment can be made to a survivor's Roth individual retirement account (Roth IRA) or to an education savings account, regardless of the limits on contributions to such accounts. This is generally effective for payments made with respect to deaths occurring on or after the date of enactment or for contributions made within 1 year of enactment on account of deaths occurring on or after October 7, 2001.

## **MENTAL HEALTH PARITY**

The HEART Act also amends the Code, ERISA, and the Public Health Service Act to extend the mental health parity requirements applicable to group health plans through 2008.

\* \* \*

Authors: Bill Sweetnam and Debbie Leung

If you have any questions, please contact your regular Groom contact or any of the Health and Welfare practice group attorneys listed below:

Jon W. Breyfogle	jwb@groom.com	(202) 861-6641
Gina M. Boscarino	gmb@groom.com	(202) 861-6645

Jenifer A. Cromwell	jac@groom.com	(202) 861-6329
Thomas F. Fitzgerald	tff@groom.com	(202) 861-6621
Christine L. Keller	clk@groom.com	(202) 861-9371
Debbie G. Leung	dgl@groom.com	(202) 861-2601
Heather E. Meade	hem@groom.com	(202) 861-0179
William F. Sweetnam	wfs@groom.com	(202) 861-5427
Christy A. Tinnes	cat@groom.com	(202) 861-6603
Donald G. Willis	dgw@groom.com	(202) 861-6332
Brigen L. Winters	blw@goom.com	(202) 861-6618