

## LIMITATIONS ON NEBRASKA EMPLOYERS USE OF EMPLOYEE SOCIAL SECURITY NUMBERS

Effective September 1, 2008, Nebraska law will restrict how an employer may use its employees' social security numbers ("SSNs"). An employer cannot publicly post, display, communicate or otherwise make available more than the last four digits of employees' SSNs. Employers also cannot require more than the last four digits of employees' SSNs to be transmitted over the Internet, unless the connection is secure or the information is encrypted; to access an Internet website, unless a password, unique PIN or other authentication devise is also required for access; or to be used as an employee number for any type of employment-related activities. Despite these broad prohibitions, employers can continue to use employees' entire SSNs to comply with state or federal laws, rules or regulations; in commercial transactions between the employer and the employee; and for internal administrative purposes, such as providing full SSNs to third parties for administration of benefit or employment screening. However, the exception for internal administrative purposes does not permit an employer to use employees' whole SSNs as identification numbers for occupational licensing, drug-testing purposes (except when required by state or federal law), or company meetings; in files with unrestricted access; in files accessible by a temporary employee, unless the temporary employee is bonded or insured; or for the posting of any type of company information. Any employer violating these restrictions will be guilty of a Class V misdemeanor and such conviction will be admissible evidence of employer negligence. Please contact a member of Koley Jessen's Employment, Labor and Benefits Group if you have any questions about this Nebraska law or conforming your employment practices for compliance.

## MILITARY SERVICE BENEFITS AT THE "HEART" OF NEW ACT

On June 17, 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act"). This article will address certain mandatory and optional provisions under the HEART Act which impact retirement plan benefits as well as health flexible spending accounts ("FSAs") for individuals engaged in military service. If you have personnel who are or may be on active military leave, the HEART Act may impact you.

## MANDATORY RETIREMENT PLAN CHANGES REQUIRED BY THE HEART ACT

**Differential Pay Treated as Plan "Compensation" and Wages for Withholding.** When an employee is called to military duty, the employee begins to receive military pay and typically stops receiving some or all of his or her regular pay. Since military pay is often less than civilian pay, employers often elect to pay the employee all or a portion of the employee's regular pay. Prior to the HEART Act, if an employer elected to pay its employees this additional income, it had to be reported on a Form 1099 versus a W-2, and the employee was responsible for income taxes. This additional pay was not considered wages for purposes of retirement plan contributions. Under the HEART Act, when an employer continues to pay an employee who is on active duty for more than 30 days, these "differential wage payments" should now be reported on Form W-2 and included in the compensation of the active-duty employee when calculating contributions for the employee to the employer sponsored qualified plans. Whether an employer makes any "differential wage payments" is optional, so if an employer does not make such payments, the HEART Act will not affect a plan's definition of compensation.

Employers making "differential wage payments" should work with their payroll departments/vendors to ensure "differential wage payments" are included in W-2 wages and subject to mandatory income tax withholding. The HEART Act only applies to "differential wage payments" for withholding purposes after December 31, 2008 and for plan purposes to plan years beginning after December 31, 2008. Formal plan amendments are not required until the 2010 plan year and 2012 for governmental plans.

**New Survivor Benefits Requirement.** Under the HEART Act, qualified plans must treat a participant who dies while performing "qualified military service" (as defined in the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")) as if he/she had been re-employed on the day before death for purposes of survivor benefits. The participant's beneficiary is entitled to survivor benefits (*other than benefit accruals for the period of military service*) that would have been provided to the participant if the participant resumed employment and was terminated on account of

death. For example, if your qualified plan provides for accelerated vesting for participants who die while actively employed, such benefits must also be provided to participants who die while on active duty.

Although plan amendments are not required until 2010 (or 2012 for governmental plans), this provision applies to all deaths occurring on or after January 1, 2007. Therefore, plans must be operationally compliant as of January 1, 2007 and employers should review the records of all participants who died while on active duty since January 1, 2007 to determine if crediting of additional benefits is necessary.

**Waiver of 10% Tax Penalty for Early Withdrawals.** The waiver of the 10% premature withdrawal penalty that was established under the Pension Protection Act of 2006 for reservists called to active duty and taking distributions from his/her retirement plan account is made permanent under the HEART Act. To be eligible for the waiver, the participant must be called to duty for at least 180 days. Participants who return to work following military service may re-contribute the amounts withdrawn (on an after-tax basis) any time within the 2 years following the end of active duty. No plan amendment is required, but this provision applies to all employees called to active duty on or after December 31, 2007.

### **OPTIONAL PROVISIONS EMPLOYERS MAY ELECT TO INCORPORATE INTO THEIR PLANS**

**Accrual of Additional Benefits.** Under the HEART Act, a qualified plan *may* treat participants who die or become disabled while engaged in military service as if the participant became re-employed the day before death or disability for purposes of accruing additional benefits. This allows employers to credit participants who die or become disabled during military service with benefits which would have accrued upon the participants' reemployment with the employer under USERRA. For example, the employer would then be allowed to make contributions on behalf of that individual as if he or she had returned to employment. If adopted, this provision must be made available to employees on reasonably equivalent terms. Plans wishing to adopt this provision must do so by 2010 (2012 for governmental plans).

**Unused Health FSA Benefits.** Under the HEART Act, a cafeteria plan or health FSA is allowed to make a "qualified reservist distribution" of all or a portion of the balance of an individual's FSA account and will not jeopardize a plan's status as a cafeteria plan or health FSA. This is an exception from the "use-or-lose" requirement that all amounts contributed to a health FSA must be used for qualified medical expenses or the amounts will be forfeited at the end of the year. To be considered a qualified reservist distribution, the participant must be called to active duty for a period of at least 180 days and the distribution must be made during the period beginning with the call to active duty and ending on the last date reimbursements could otherwise be made for the plan year that includes the date of the call to active duty. If an employer elects to adopt this provision, it must be effective for distributions after June 17, 2008.

If you have any questions or would like further information about how the HEART Act impacts you or your business, please contact a member of Koley Jessen's Employment, Labor and Benefits Group.

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