

Federal Legislative & Regulatory Report

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Inside this issue

- Washington Update..... Below
Status of Proposed Roth 457 [Page 2](#)
- IRS Invites Comment on Mandatory 3% Withholding Requirement..... [Page 4](#)
Nationwide Comment..... [Page 5](#)
- Disability Savings Account Legislation Introduced [Page 6](#)
- Employee Benefits and Compensation Cost Surveys Released..... [Page 7](#)
TABLE: Employer Compensation Costs Per Hour Worked – December 2007 [Page 8](#)
Nationwide Comment..... [Page 8](#)
- Plan Cannot Base Benefit Entitlements Based on Oral Representations..... [Page 9](#)
Nationwide Comment..... [Page 10](#)

I. Washington Update

As the 2008 campaign season continues, Presidential candidates are releasing information about proposals they support regarding retirement-related policy issues. Senators Hillary Clinton (D-NY) and Barack Obama (D-IL) have identified measures they propose to expand the retirement savings of American workers. Senator John McCain (R-AZ), the presumptive Republican nominee, has not yet announced specific retirement proposals but has indicated his position on the Social Security program.

The following identifies some of the retirement-related positions of the candidates that may be of interest to state and local government employers.

Hillary Clinton supports:

- Establishing American Retirement Accounts (ARAs) similar to IRAs but with new features including permitting distributions during periods of long-term unemployment and the ability to borrow from these accounts.

- Establishing tax credit incentives for small employers to encourage automatically enrolling employees in payroll deduct ARAs; the default investment for the ARA would be a passively managed lifecycle-type option.
- Adopting a savings incentive of up to 100% government match on the first \$1000 of savings in the new ARA or employer-sponsored retirement savings plan for low and middle income earners.
- Preserving Social Security by pursuing changes to address the program's solvency on a bipartisan basis but opposes creating individual accounts within the system and raising the Social Security retirement age.

Barack Obama supports:

- Requiring employers to offer payroll deduct IRAs if they do not currently have a retirement plan and providing temporary tax credits to offset employers' cost to establish this program.
- Automatically enrolling employees in payroll deduct IRAs if this is their only retirement plan; IRAs would offer low cost investments comparable to the Federal Thrift Savings Plan and accounts would be automatically rolled over to another retirement account when employees change jobs.
- Expanding the current Saver's Credit to provide a refundable tax credit for low to middle income workers with automatic deposit of the Credit into retirement accounts.
- Improving disclosures to IRA participants about fees and investments as well as expanding disclosures to defined benefit plan participants regarding the plans' investments and investment strategies.
- Pursuing bipartisan solutions to address the Social Security program's solvency. He proposes increasing the Social Security taxable wage base but opposes creating individual accounts within the system and raising the Social Security retirement age.

John McCain supports:

- Preserving the Social Security program and pursuing bipartisan changes to accomplish this end.
- Creating personal retirement accounts within Social Security, but opposes raising Social Security taxes.

Retirement Plan Fee Disclosure Legislation Update

The House Education and Labor Committee is expected to mark up a revised version of the [401\(k\) Fair Disclosure for Retirement Security Act of 2007](#) on April 16. This legislation was originally introduced in 2007 by Representative George Miller (D-CA), chair of this committee.

Read the Bills Online

To read the actual language of any bill proposed in Congress, go to www.thomas.loc.gov. Enter the bill number in the Search box.

The 401(k) Fair Disclosure Act is H.R. 3185; the Farm Bill Extension Act is H.R. 2419.

Farm Bill Extension Act of 2007 Still Awaiting Action

As of the publication date of this report, the [Farm Bill Extension Act of 2007](#) has not been resolved, leaving in limbo the issue of Roth 457 accounts. As noted in previous issues of this report, the Senate version of the Farm Bill Extension Act passed last year included a provision to permit Roth 457 accounts in eligible Section 457 plans. The conference committee, established to reconcile differences between the Senate and House versions of this bill, has not yet been able to reach agreement on this legislative proposal.

Department of Labor Files Amicus Brief in Appeal of Fiduciary Lawsuit

On March 20, 2008, the Department of Labor (DoL) filed a [friend of the court brief](#) asking the 7th U.S. Circuit Court of Appeals to throw out a ruling made last year that dismissed a case pertaining to a fiduciary breach of duty under ERISA (Hecker v. Deere & Co., 7th Cir., No. 07-3605). In this case, 401(k) participants alleged their employer – Deere & Co. – along with Fidelity Management Trust Company, and Fidelity Management and Research Company breached their fiduciary duty by:

- Offering investment options with “excessive and unreasonable fees” that were charged to plan participants, and
- Failing to disclose to participants revenue-sharing arrangements between Deere and Fidelity.

In June 2007, U.S. District Judge John Shabaz, Western District of Wisconsin, dismissed this suit concluding that current laws and regulations governing the disclosure of plan fees and costs had been followed. Although the DoL brief did not suggest a specific outcome in regard to the fiduciary breach, it was argued that the decision to dismiss the case disregarded the application of the ERISA 404(c) safe harbor provision.

The brief also suggests that fiduciary duties of prudence and loyalty can encompass a duty to disclose information that goes beyond what is specifically mandated by laws and regulations and must be dependent on the specific facts and circumstances of the case.

Note

You can download the Department of Labor’s friend of the court brief at www.plansponsor.com/uploadfiles/deerehecker7thcirc.pdf.

You can download the initial court ruling from www.plansponsor.com/uploadfiles/dereshabaz.pdf.

[\(back to beginning of this section\)](#)

[\(back to the Table of Contents\)](#)

II. IRS Invites Comment on Mandatory 3% Withholding Requirement

In [IRS Notice 2008-38](#) invites public comment that will be used to assist the Treasury and IRS in drafting guidance on the non-wage withholding and reporting requirements of IRC section 3402(t), which was added to the Code by the [Tax Increase Prevention and Reconciliation Act of 2005](#).

[Section 3402\(t\)](#) requires government entities, beginning in 2011, to withhold three percent (3%) of all payments for services or property. This mandatory withholding requirement applies regardless of how the payment is made and includes any payment made in connection with a government voucher or certificate program which functions as a payment for property of services on payments. Certain small state entities and any of their political subdivisions or instrumentalities making less than \$100,000,000 in annual payments for property or services are exempt from this requirement. There is no statutory exception for *de minimis* payments for property or services made by a Government entity (or any instrumentality thereof) that is not exempt from this withholding requirement.

Payments exempt from the 3% withholding requirement are those made:

- Through a Federal, State or local government public assistance or public welfare program such as food vouchers or medical assistance for low income individuals whose eligibility is determined by a needs or income test. However, payments under government programs to provide health care or other non needs or income based payments are subject to withholding including programs where eligibility is based on the age of the beneficiary.
- For wages, or any other payment that is currently subject to mandatory (e.g. U.S.-source income for foreign taxpayers) or voluntary withholding. Payments that are being withheld under back-up withholding are also exempt. However, payments that are potentially subject to backup withholding are not exempt.
- For interest or real property;
- To tax-exempt entities or foreign governments or other intra-government entities;
- Pursuant to a classified or confidential contract; and
- To government employees which are not otherwise excludable under the new withholding provisions of IRC 3402(t) for services performed as employees.

This withholding requirement will apply regardless of whether the government making the payments is the recipient of the property or services. For example payments to a commodity producer under a government commodity support program will be subject to the withholding requirement.

Specific comments being sought

The Treasury and IRS are requesting comments from the public on guidance that Government entities and their paying agents will need to implement this new withholding requirement, especially comments addressing:

- How to apply the withholding requirements to purchases made with credit cards or other form of payment cards;

- How to apply withholding requirements if the payee is not subject to U.S. tax;
- How to apply the withholding requirements to partnerships and other pass through entities when the government entity is a partner or owner of the partnership or pass through arrangement;
- How to apply withholding requirements to governmental contractors and Subcontractors;
- The application of withholding requirements to so-called Government Sponsored Entities;
- The application of withholding requirements to de minimus payments for property or services made by affected Government entities and
- When and how to transmit withheld amounts to the IRS.

Comments in writing should be sent to:

CC:PA: LPD:RR (Notice 2008-38)
 Room 5203
 Internal Revenue Service
 P. O. Box 7604 Ben Franklin Station
 Washington DC 20044

Comments delivered electronically (online) should be sent to:

Notice.Comments@irs.counsel.treas.gov

Include Notice 2008-38 in the subject line. If you're reading this report online or electronically (rather than a printed copy), click on the underlined link above, and your e-mail software should launch and automatically insert the appropriate Subject line.

Nationwide Comment: These non-wage withholding requirements will affect most all government entities. This requirement could make the cost of doing business with government entities more expensive than providing the same services to private industry which is not subject to this withholding requirement.

[\(back to beginning of this section\)](#)

[\(back to the Table of Contents\)](#)

III. Disability Savings Account Legislation Introduced

Senator Christopher Dodd (D-CT) recently introduced [The Disability Savings Act of 2008](#) (S. 2741) that would create Disability Savings Accounts (DSA). These accounts are intended to be easier to set up and manage for disabled individuals than current savings mechanisms, which often require the services of an attorney.

If the bill is enacted, DSAs would:

- Encourage individuals with disabilities (beneficiaries) and their families to save private funds for disability-related expenses to supplement, not supplant, benefits provided by other sources including Medicaid and private insurance;
- Earn tax-free interest income on account balances of \$250,000 or less;
- Provide tax-free withdrawals for expenditures used for education, medical services, employment training and support, transportation and other related services for disabled beneficiaries;
- Permit funds from college savings plans and special needs trusts for the same disabled beneficiary to be rolled into the DSA with penalty;
- Offer a refundable tax credit up to \$1,000 for low-income savers, who make contributions to the DSA.

Read the Bills Online

To read the actual language of any bill proposed in Congress, go to www.thomas.loc.gov. Enter the bill number in the Search box.

The Disability Savings Act is S. 2741.

To be eligible for a DSA, the bill requires a disabled beneficiary to be under age 65, and determined to be blind or disabled by the Social Security Administration or the Disability Determination Service of a State. DSAs can be held through a financial institution and managed by the disabled beneficiary, their spouse, family member, or a legal guardian.

This bill has been referred to the Senate Committee on Finance for review.

[\(back to the Table of Contents\)](#)

IV. Employee Benefits and Compensation Cost Surveys Released

The Department of Labor's Bureau of Labor Statistics recently released two of National Compensation Surveys. The first survey, [Employee Benefits in State and Local Government: September, 2007](#), lists the types and costs of benefits provided to state and local government workers by worker classifications: management, professional protected services, administrative support, union and non union, full and part-time. The survey also provides detailed establishment characteristics, such as education and health care services, public administration, and state and local government segments.

A brief sampling from the survey notes that:

- 89% of all state and local government workers had access to employer- sponsored retirement benefits. 83% had access to defined benefit plans and 96% of those with access participated in defined benefit plans.
- 29% of state and local government workers had access to defined contribution plan, but only 63% of those with access to a defined contribution plan chose to enroll in them. By comparison, only 61% of private industry employees had access to retirement benefits of at least one type.
- 87% of state and local government workers had access to medical care plans, 55% had access to dental care and 38% had access to vision care.
- State and local governments pay on average 90% of employee medical costs for single coverage and almost 75% of the cost for family coverage.

The survey concludes that the major factor affecting benefit availability for state and local government workers was employment status as full- or part-time. Access to most benefits was much higher for full- rather than part-time employees. State government workers had greater access to most benefit programs such as medical care than did local government workers.

The Bureau also released the [Employer Costs for Employee Compensation, December, 2007](#) survey which compares compensation costs in private industry and State and Local government. The following [table](#), summarized from the survey and [found on page 8](#), provides both the percentage and dollar costs to employers for employee compensation for every hour worked.

Sample of Employer Compensation Costs Per Hour Worked – December 2007

(Not inclusive of all costs...columns not intended to add up to a specific total)

Compensation Component	State and Local Government (Percent of Compensation and Dollar Cost Amount Per Hour Worked)	Private Industry (Percent of Compensation and Dollar Cost Amount Per Hour Worked)
Wages and salaries	66.4% / \$25.04	70.7% / \$18.67
Benefits	33.6% / \$12.69	29.3% / \$7.75
Paid Leave	7.9% / \$2.97	6.8% / \$1.79
Supplemental Pay	0.9% / \$ 0.34	3.0% / \$.79
Insurance (life, health, disability)	11.3% / \$4.25	7.6% / \$2.01
Health Insurance Benefits	10.9% / \$ 4.11	7.1% / \$1.87
Retirement & Savings	7.6% / \$2.86	3.6% / \$0.95
Defined Benefit	6.7% / \$2.54	1.6% / \$0.43
Defined Contribution	0.9 % / \$0.32	2.0% / \$0.52
Legally Required Benefit: Employer-paid social security, Medicare taxes, workers' compensation, and federal and state unemployment taxes	6.0% / \$2.27	8.4% / \$2.22
Note The employer compensation cost survey also includes detailed statistics categorized by occupational and industry groups. You can download the Bureau of Labor Statistics' Employee Benefits survey at www.bls.gov/ncs/ebs/sp/ebsm0007.pdf. You can download the Employer Costs for Employee Compensation survey from www.bls.gov/news.release/pdf/ecec.pdf.		

Nationwide Comment: The BLS surveys provide an extensive trove of interesting information and confirm that State and local government workers generally have higher compensation and more extensive benefits than their private sector counterparts.

[\(back to beginning of this section\)](#)

[\(back to the Table of Contents\)](#)

V. Plan Cannot Base Benefit Entitlements Based on Oral Representations

In [Robinson v. New Orleans Employer ILA AFL-CIO Pension Welfare Vacation and Holiday Funds](#), the United States Court of Appeals for the Fifth Circuit upheld a lower court's ruling that the Funds' plan administrator did not abuse his discretion when denying a widow's claim for benefits.

Background

Marian Robinson is the widow of George Robinson who worked as a longshoreman in Louisiana and earned benefits in the ILA Pension Fund until he retired in 1983 and applied for his pension benefits.

The Pension Fund provides a 50% Qualified Joint and Surviving Spouse benefit after an employee's death. However, to qualify for this benefit the employee must, at the time of making the application for the qualified surviving spouse benefit, be married to a qualified spouse for at least 12 months immediately preceding the approved retirement date. George began receiving his early retirement benefit from the Fund on January 1, 1984.

George and Marian dated for many years and subsequently lived together but were not formally married in Louisiana until 1996, long after George retired. Sometime in May 1996, George and Marian attended a meeting that was held with representatives from the Pension Fund. Marian alleges that the Fund representatives said that if George signed a "Designation of Beneficiary" naming her as the sole beneficiary of his pension benefit, the Pension Fund would consider her to be a qualified spouse. After George died in 2004, Marian applied for her surviving spouse benefit. The plan administrator denied her request because she and George were not legally married on his retirement date.

Marian brought suit in the United States District Court for the Eastern District of Louisiana claiming that she was a qualified spouse under the Pension Fund and entitled to benefits under ERISA. The Pension Fund argued Marian was not a qualified spouse under the terms of the plan because she and George were not legally married in 1984 when George retired.

Marian contended that:

1. The Pension Fund's administrator abused his discretion in deciding she was not a qualified spouse under the terms of plan because she and George lived as if they were husband and wife from 1978 until 1996,
2. The information she received orally at the longshoreman's meeting when George signed the "Designation of Beneficiary" demonstrates that she is George's qualified spouse and entitled to benefits, and
3. Her relationship with George was a "common law" marriage.

The Appellate Court agreed with the district court and affirmed that:

- It was unreasonable for Marian to rely on any oral claim that would modify the plan's definition of qualified spouse under the terms of the plan. ERISA requires every employee benefit plan to be established and maintain pursuant to a written instrument.

- Marian did not provide any authority stating that Louisiana recognizes common law marriages. In fact, the Louisiana Supreme Court has previously ruled that common law marriages are not valid marriages under Louisiana law, a fact that struck the fatal blow to her claim for benefits.

Nationwide Comment: This decision again proves that a little piece of paper – in this case a certificate of legal marriage – does matter for a lot of reasons, including claiming spousal benefits. It also demonstrates you cannot believe everything some one tells you unless you can verify it in writing. Better legal advice based on a more comprehensive understanding of ERISA and the marriage laws of Louisiana could have saved Marian the time and expense of bringing a fruitless legal action.

Note

You can download the United States Court of Appeals for the Fifth Circuit opinion at www.ca5.uscourts.gov/opinions/unpub/07/07-30433.0.wpd.pdf.

[\(back to beginning of this section\)](#)

[\(back to the Table of Contents\)](#)

VI. Keeping watch

You can find the most recent information on issues affecting governmental defined contribution plans, plan sponsors and plan participants on the Employer page of our plan Web site, NRSforu.com. In addition, we report guidance on legislative and regulatory activity relevant to government sector defined contribution plans through:

- *Plan Sponsor Voice* newsletter, available online on the Hot Topics / News page of NRSforu.com.
- *Federal Legislative and Regulatory Report* — distributed monthly and posted on the Legislative / Regulatory tab on the Employer section of NRSforu.com. It's available online and for download.
- *Plan Sponsor Alerts* — published as needed to announce breaking news, and distributed by e-mail and posted in the Plan Sponsor Corner of NRSforu.com.

About this report

JOANN ALBRECHT, CPC, QPA, Plan Technical Consultant, our resident expert on legislative and regulatory issues, prepares this report. As a leading member of the Nationwide Legislative Task Force, she identifies how federal actions may affect your plan and its participants.

Albrecht is a member of American Society of Pension Professionals and Actuaries (ASPPA), currently serving on its Government Affairs Committee, is immediate past chair of the ASPPA Tax Exempt and Government Plans Subcommittee and is a member of the ASPPA Education and Examinations Committee. She is a member of the National Association of Governmental Defined Contribution Administrators. Albrecht was a contributor to the Aspen Publisher's 2007 edition of the "457 Answer Book."

BOB BEASLEY, CRC, CIC, Communications Consultant, edits it. Beasley brings 18 years of financial services communications experience to your plan. He helped prepare the *457 Guidebook* and *Fiduciary Fundamentals*, edited countless newsletters and plan sponsor communications, and in 2001 authored "What you should know about the Economic Growth and Tax Relief Reconciliation Act of 2001."

Beasley serves on the Education and Communication Committee for the Profit Sharing / 401k Council of America and is a member of the National Association of Governmental Defined Contribution Administrators.

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