



Electronic Dispatch

# Employee Benefits Law Action Memo

March 2008

[Go to BS&K Employee Benefits Home Page](#)

## SUPREME COURT DECISION EFFECTIVELY VALIDATES EEOC RULE THAT ALLOWS COORDINATION OF RETIREE HEALTH BENEFITS WITH MEDICARE

On March 24, 2008, the United States Supreme Court declined to review an earlier federal appeals court ruling in which the appeals court upheld an Equal Employment Opportunity Commission ("EEOC") regulation that allows an employer to reduce or eliminate employer-provided retiree health benefits for retirees who attain age 65 and qualify for Medicare. The EEOC regulation exempts such coordination with Medicare from the prohibition on age discrimination in the Age Discrimination in Employment Act ("ADEA").

The EEOC regulation had been challenged by the American Association of Retired Persons (and others) on the basis that ADEA prohibits an employer from spending less on retiree health benefits for older retirees than it does for similarly-situated younger retirees. Although the federal appeals court had initially agreed, and ruled that the EEOC regulation was contrary to ADEA, the court reversed its position last summer and held that the EEOC regulation was a reasonable exception to ADEA's prohibition on age discrimination in employment. The United States Supreme Court declined to review that determination, effectively validating the EEOC regulation.

The Supreme Court's decision should put an end to a number of years of uncertainty over an employer's right to coordinate retiree health benefits with Medicare. However, a decision to coordinate retiree health benefits with Medicare, or to modify retiree health benefits in any other fashion, should not be made without first evaluating whether the employer may have contractually obligated itself to continue to provide retiree health benefits at a certain level pursuant to contracts, plan documents, and other communications to employees and/or retirees.

## INTERNAL REVENUE SERVICE ISSUES ADDITIONAL PENSION PROTECTION ACT GUIDANCE

The Internal Revenue Service recently issued additional guidance to retirement plan sponsors regarding the Pension Protection Act of 2006 ("PPA"). Among other topics, the guidance addresses the new "qualified optional survivor annuity" requirements that apply to many plans and the Roth IRA rollover rules that will apply to most plans.

### "Qualified Optional Survivor Annuity"

Under defined benefit pension plans, money purchase plans, and certain defined contribution plans that offer annuity forms of payment, the required or normal form of payment for a married participant generally is a joint and survivor annuity that provides the participant with a lifetime benefit and provides the participant's surviving spouse with some percentage of that lifetime benefit. For example, a 50 percent joint and survivor annuity provides a surviving spouse with a lifetime benefit that is 50 percent of the benefit payable while both the participant and the spouse are alive. (The required or normal form of payment often is referred to as the "qualified joint and survivor annuity" or "QJSA".) Many plans allow participants to waive the QJSA form of payment and elect a different form of payment, including survivor annuities with different survivor annuity percentages (e.g., a 100 percent joint and survivor annuity), single life annuities, or lump-sum payments.

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Effective for distributions that commence in plan years beginning after 2007, the joint and survivor annuity requirements were amended by the PPA to provide that affected plans must provide a participant who waives the plan's QJSA form of payment an opportunity to elect a "qualified optional survivor annuity" or "QOSA". A QOSA is defined as an annuity for the life of the participant with a survivor annuity percentage for the life of the participant's spouse that is equal to a specified applicable percentage of the amount payable during the joint lives of the participant and the participant's spouse.

The "specified applicable percentage" of the survivor annuity portion of the QOSA will be based on the plan's QJSA. If the surviving spouse annuity percentage of the plan's QJSA is less than 75 percent, then the plan's QOSA must provide a surviving spouse annuity percentage of 75 percent. If the plan's QJSA surviving spouse annuity percentage is 75 percent or more, then the plan's QOSA must be 50 percent.

A plan that offered joint and survivor annuity forms of payment that satisfy the new QOSA requirements prior to the enactment of the PPA need not be amended. However, plan sponsors that want to comply with the QOSA requirements by eliminating a current optional form of payment may do so only to the extent such elimination is permitted by the anti-cut-back rules.

In all cases, the QOSA must be the actuarial equivalent of a single life annuity for the life of the participant. The QOSA requirements do not apply to preretirement survivor annuities.

### Rollovers to Roth IRAs

Prior to the changes made by the PPA, a Roth IRA could only accept rollover contributions from another Roth IRA, from a non-Roth IRA, or from a designated Roth account in a qualified retirement plan. (Rollovers from non-Roth IRA sources can only be made by individuals who have adjusted gross income that does not exceed certain limits and may require such individuals to include some or all of the rollover in gross income.) The amendments made by the PPA now allow Roth IRAs to accept rollover contributions from plans that are qualified under Internal Revenue Code Section 401(a), from annuity plans that satisfy the requirements of Internal Revenue Code Section 403(a) or 403(b), and from eligible governmental plans described in Internal Revenue Code Section 457(b).

All plans that make eligible rollover distributions after 2007 must permit the recipient of such a distribution to elect a direct rollover to a Roth IRA. The rollover can be made through a direct rollover from the plan to the Roth IRA, or can be made by the recipient after receiving a distribution of an amount eligible for rollover. Through 2009, recipients who have modified adjusted gross income exceeding \$100,000, or who are married and file a separate tax return, may not make rollover contributions to Roth IRAs. The administrator of the distributing plan, however, is not responsible for ensuring that the recipient is eligible to make a rollover contribution to a Roth IRA.

Sponsors of retirement plans that offer annuity forms of payment should review the QOSA requirements to determine what changes, if any, need to be made to the plan and/or administrative practices. Sponsors of all plans that make eligible rollover distributions should review the plan's distribution procedures to ensure that rollovers to Roth IRAs can be accommodated. Although operational compliance with these rules may be required now, appropriate plan amendments generally may be adopted as late as the last day of the plan year that begins in 2009.

If you have any questions about this memorandum, please contact Steve Daley (315-218-8237, [sdaley@bsk.com](mailto:sdaley@bsk.com)) or any of the other members of our Employee Benefits Practice Group listed below.

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