

## IRS Provides Final Guidance Regarding Retroactive Annuity Starting Dates

Generally, before a qualified plan can begin to make benefit payments, it must provide participants and their spouses with a written explanation of their right to receive a Qualified Joint and Survivor Annuity (QJSA). This notice must be provided at least 30 days and no more than 90 days *before* the Annuity Starting Date (ASD). The Small Business Job Protection Act of 1996 (SBJPA) provided an exception to this advance notice requirement for defined benefit plans.

The IRS has now published final rules for providing QJSA notices *after* a participant's ASD, thereby permitting retroactive ASDs. These rules apply to *plan years beginning on or after January 1, 2004*. They do not apply to governmental plans or to church plans that have not elected to be covered by ERISA.

A defined benefit plan does not have to provide for retroactive ASDs. If a plan wants to permit retroactive ASDs, the plan document must specifically provide for them. In addition, the participant must have the right to have benefits calculated as of the retroactive ASD or the current date and must affirmatively elect a retroactive ASD.

A retroactive ASD is permitted only if the following requirements are met:

- Benefits must be determined as the retroactive annuity starting date, using the mortality and interest assumptions in effect as of that date. This determination must satisfy the section 415 benefit limits in effect on that date and apply the section 417(e)(3) present value assumptions in effect on that date, if applicable (for example, if a single sum payment is being made).
- In general, the benefit calculation must also satisfy both the section 415 benefit limits in effect on the actual payment beginning date and, if applicable, the section 417(e)(3) present value assumptions in effect on that date. However, this requirement does not apply if payments begin no more than 12 months after the retroactive ASD and are not made in a single sum, or other form of payment that is subject to section 417(e)(3).
- The participant must receive a make-up payment that reflects any missed periodic payments, based on the retroactive ASD. This payment must include an appropriate adjustment for interest from the date the payments would have been made to the actual payment date. Both the make-up payment and the ongoing benefit payments are exempt from the 10% excise tax on pre-age 59½ distributions. These regulations do not indicate whether make-up payments are eligible rollover distributions.

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- Spousal consent may be needed even if payment is made in the form of a QJSA. If the amount of the survivor benefit payable to the spouse based on the retroactive ASD is less than the amount of the minimum required survivor benefit that would be payable if the actual payment beginning date were the ASD, the spouse as of the payment beginning date must consent to the distribution. This consent must be provided no more than 90 days before the first payment date.
- If payment is made as of a retroactive ASD in a form other than a QJSA, participant and spousal consent notices must be provided no less than 30 days and no more than 90 days before the actual payment beginning date, unless the 30-day waiver provision applies. The election to receive these benefits must be made after these notices are provided.

*A plan may impose additional requirements on the election of retroactive ASDs. For example, a plan may limit this option to participants who choose to receive annuity payments and not make it available if a participant elects a single sum payment.*

Plan sponsors whose plans currently permit retroactive ASDs should review their plan documents to make sure the existing provisions comply with the new rules. If changes are needed to comply with these rules, they should be made effective the first day of the plan's 2004 plan year and the appropriate plan amendment should be adopted no later than the last day of the 2004 plan year. The final rules do not provide any exception to the anticutback rules that would permit the wholesale removal of existing retroactive ASD provisions, in the situation where the provisions already exist but the plan sponsor does not want to revise them to comply with the new rules. Before taking any action to remove existing retroactive ASD provisions, plan sponsors should discuss this situation with legal counsel.

If Prudential Retirement provides document services for your plan and you would like to revise retroactive ASD provisions or add these provisions to your plan, please contact your Prudential representative for assistance.

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