

Public Law 104-188 (110 Stat. 1755) (SBJPA), creates an exception to the rules of section 417(a)(3)(A), effective for plan years beginning after December 31, 1996. Section 417(a)(7)(A) provides that, notwithstanding any other provision of section 417(a), a plan may furnish the QJSA explanation after the annuity starting date, as long as the applicable election period is extended for at least 30 days after the date on which the explanation is furnished. Thus, section 417(a)(7)(A) allows the annuity starting date to be a date that is earlier than the date the QJSA explanation is provided, thereby allowing the retroactive payment of benefits that are attributable to the period before the QJSA explanation is provided. Section 417(a)(7)(A)(ii) provides that the Secretary may limit the application of the provision permitting the selection of a retroactive annuity starting date by regulations, except that the regulations may not limit the period of time by which the annuity starting date precedes the furnishing of the written explanation other than by providing that the retroactive annuity starting date may not be earlier than termination of employment.

Section 205(c)(8) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829) (ERISA), provides a parallel rule to section 417(a)(7) of the Code that applies under Title I of ERISA, and authorizes the Secretary of the Treasury to issue regulations limiting the application of the general rule. Thus, Treasury regulations issued under section 417(a)(7) of the Code apply as well for purposes of section 205(c)(8) of ERISA.

Explanation of Provisions

In accordance with section 417(a)(7)(A), these regulations provide that the QJSA explanation may be furnished on or after the annuity starting date under certain circumstances. The regulations refer to the annuity starting date in such cases as the "retroactive annuity starting date", define how payments are made in the case of a retroactive annuity starting date, and set conditions for the use of a retroactive annuity starting date.

Like the proposed regulations, the final regulations provide that a retroactive annuity starting date may be used only if the plan provides for it and the participant affirmatively elects to use the retroactive annuity starting date. If a participant affirmatively elects a retroactive annuity starting date, the participant must be put in approximately the same situation he or she would have been in had benefit

payments actually commenced on the retroactive annuity starting date. Accordingly, in the case where a participant affirmatively elects a retroactive annuity starting date, the plan benefits must be determined as of that retroactive annuity starting date (including the application of section 415 and, if applicable, section 417(e)(3) as of that retroactive annuity starting date). If the plan benefits are determined in that manner, future periodic payments for a participant who elects a retroactive annuity starting date will be the same as the periodic payments that would have been paid to the participant had payments actually commenced on the retroactive annuity starting date. In addition, the participant must receive a make-up amount to reflect any missed payments (with an appropriate adjustment for interest from the date the payments would have been made to the date of actual payment).

Several commentators suggested that an adjustment for interest should not be required where the period between the retroactive annuity starting date and the date payments begin was less than three or four months. It was argued that the requirement of an interest adjustment in such a case may create burdens for the plan that are more significant than the additional money that may be paid to the participant. The Treasury Department and the IRS continue to believe that an appropriate adjustment for interest is needed for make-up payments. Thus, the final regulations retain the rule that an appropriate adjustment is required for make-up payments. The extent to which an adjustment is appropriate for a particular make-up payment depends on the facts and circumstances related to that payment.

The final regulations retain the rules from the proposed regulations that provide that the notice, consent, and election rules of section 417(a)(1), (2), and (3) apply to the retroactive payment of benefits but with several modifications. These modifications generally reflect the fact that the existing timing rules relating to notice and consent are generally determined with reference to an annuity starting date that is after the furnishing of the QJSA explanation by a period of up to 90 days.¹ If legislation currently

¹ For example, section 417(a)(1) provides that a participant may elect to waive the QJSA within the "applicable election period" which is defined by section 417(a)(6) as the 90-day period ending on the annuity starting date. Similarly, § 1.417(e)-1(b)(3)(i) provides that the written consent of the plan participant and the participant's spouse must be made no more than 90 days before the annuity starting date. Also, § 1.417(e)-1(b)(3)(ii) provides

pending in Congress changing the 90-day QJSA election period to 180 days is enacted, it is anticipated that the regulations will be modified to reflect that change.

The final regulations also retain the special spousal consent rule provided for under the proposed regulations. Under this special rule, the participant's spouse as of the time distributions actually commence must consent to the retroactive annuity starting date election, if the survivor payments under the retroactive annuity are less than under a QJSA with an annuity starting date after the date the QJSA explanation was provided. This special rule applies even if the form of benefit that the participant elects as of the retroactive annuity starting date is a QJSA. Thus, for example, where a QJSA that begins after the QJSA explanation is furnished would provide \$1,000 monthly to the participant with a survivor annuity of \$500 monthly to the spouse, and a QJSA with a retroactive annuity starting date would provide \$900 monthly to the participant with a survivor annuity of \$450 monthly to the spouse, together with a \$20,000 make-up payment to the participant, the participant would be required to obtain the consent of the current spouse in order to elect the retroactive annuity starting date. Spousal consent would be required in this example because the spouse has a statutory entitlement to a survivor benefit of at least \$500 per month under a QJSA with a current annuity starting date.

Various comments were received regarding this spousal consent requirement. For example, it was suggested that spousal consent should not be required in the cases of short delay if the QJSA form is elected, or where the survivor benefit under the retroactive annuity starting date is at least 95% of the survivor annuity payable under a current QJSA, because requiring consent in such a case would create additional work and confusion and result in little benefit to the spouse. The regulations are not changed in this regard, as the Treasury Department and the IRS believe that spousal protection cannot be diminished below the statutorily prescribed QJSA without spousal consent. However, these regulations provide that such consent is only necessary where the survivor annuity is less than 50% of the amount of the annuity payable during the life of the participant under a currently commencing QJSA. Thus, in the

that the QJSA explanation must generally be provided no less than 30 days and no more than 90 days before the annuity starting date.