

IRS Proposes Normal Retirement Age Rules for Governmental Plans

In recently proposed regulations on normal retirement age specific to governmental plans, the IRS allows for an NRA based on years of service — both instead of, and in conjunction with, age. The proposed rules also set forth safe harbors on NRA that are available only to governmental plans. These provisions address many of the concerns governmental plan sponsors expressed in response to the 2007 NRA regulations. While all governmental plans should review their terms in light of the proposal, it is expected that most would be able to keep their current NRA definition intact under these rules.

Background

The concept of “normal retirement age” (NRA) — when a participant can retire and start receiving full benefits without the employer’s consent — is tied to several plan qualification rules under the Code, including rules on in-service distributions, definitely determinable benefits, and vesting.

Although governmental plans escape the vesting rules that apply to ERISA-covered plans, they must follow pre-ERISA vesting rules. Those rules require full vesting of contributions made to, or benefits payable under, the plan for any employee who has (1) reached the plan’s NRA and (2) satisfied any “reasonable and uniformly applicable” plan requirements on length of service or participation. The NRA under the pre-ERISA vesting rules is generally the lowest age specified in the plan when an employee can retire without the employer’s consent and receive unreduced retirement benefits based on years of service at the retirement date.

Governmental Plan Concerns with 2007 Final NRA Regulations

In 2007, the IRS issued final regulations defining NRA that generally provide that plans must contain an NRA; the NRA cannot be earlier than the earliest age that is “reasonably representative” of the typical retirement age for the industry in which the covered workforce is employed; and an NRA of age 62 or later meets the reasonably representative requirement. If the NRA is below age 62 but not below



age 55, a facts and circumstances test applies to determine whether it is reasonably representative. An NRA below age 55 is presumed not to be reasonably representative unless the IRS determines otherwise based on a facts and circumstances analysis. See our [June 6, 2007 For Your Information](#).

Comment. The primary rationale for setting a “reasonably representative” NRA was to limit the payment of plan benefits to periods after actual retirement rather than allowing for in-service withdrawals. Defining NRA as an unreasonably early date, and then permitting distributions at that time without requiring termination of employment, would contradict the general requirement to provide for benefits *after* retirement.

The 2007 regulations were initially effective for governmental plan beginning in 2009, but public employers raised concerns about their application in the governmental plan context. Because many governmental plans express NRA as the completion of a period of service, or as age plus years of service equaling a specified number, some governmental employees are eligible to retire well before age 62 — and some even before age 55.

For example, if a governmental plan provides that an employee reaches NRA when he or she attains 25 years of service (without regard to age), and an employee started working for the governmental employer at age 18, that employee’s NRA would be 43.

Furthermore, many governmental plans do not explicitly define NRA as the 2007 regulations require. Raising and/or defining a governmental plan’s NRA usually requires a statutory change, which is a matter under legislative control and not easy to accomplish. (See our [August 21, 2015](#), [February 3, 2015](#), [April 23, 2014 For Your Information](#) publications to learn about legal protections for public employee pensions.)

Following a series of delays, in [Notice 2012-29](#) the IRS said it would modify the 2007 regulations as applied to governmental plans and solicited comments from stakeholders on proposed changes. Many of the comments urged the IRS to permit governmental plans to define NRA by reference to a period of service — at least for public safety employees.

Proposed Rules Allow NRA Based on Years of Service, Feature Special Safe Harbors

On January 27, 2016, the IRS proposed [regulations](#) on NRA for governmental plans. As discussed below, the proposed rules reflect input from the comments to Notice 2012-29 in permitting NRA to be based on years of service. If finalized as proposed, most governmental plans would not have to make any changes to their definition of NRA.

General Rules

Under the proposal, a governmental plan:

- Can use a period of service (rather than an age) to determine NRA, if that period is reasonable, uniformly applicable, and consistent with other pre-ERISA rules relating to NRA — one of which allows a governmental plan to specify an NRA below age 65 if that represents the age when employees customarily retire in the given industry

- Need not explicitly define the term NRA, but must specify the earliest age when a participant can retire without the employer's consent and receive unreduced retirement benefits. The IRS will consider that age to be the plan's NRA for any qualification requirement that is based on a plan's NRA
- That does not permit in-service distributions before age 62 need not comply with the reasonably representative requirement of the 2007 regulations, as modified by the changes in the proposed regulation and discussed below

Under the proposal, a governmental plan that *does not* permit in-service distributions before age 62 need not comply with the reasonably representative requirement of the 2007 regulations, as modified by the changes in the proposed regulation.

Reasonably Representative Requirement Applies, but Safe Harbors Available

The proposed rules would apply the reasonably representative requirement in the 2007 regulations to governmental plans, meaning that the NRA under a governmental plan cannot be earlier than the earliest age that is reasonably representative of the typical retirement age for the workforce's industry, and would include the general safe harbor for satisfying this reasonably representative requirement in the 2007 regulations. However, they would also provide additional safe harbors specific to governmental plans:

General Safe Harbor. NRA of age 62, or the later of age 62 and another specified date — such as 5 years of service — i.e., the reasonably representative safe harbor of the 2007 regulations.

Safe Harbors for Non-Public Safety Employees.

- Age 60 and 5 years of service
- Age 55 and 10 years of service
- Combined age and years of service of 80 or more (e.g., age 55 with 25 years of service)
- Any age with 25 years of service, combined with a safe harbor that includes an age

Comment. The IRS incorporated an age component into the “any age with 25 years of service” safe harbor because, otherwise, a newly hired 63-year-old employee could not retire until age 88.

Safe Harbors for Public Safety Employees.

- Age 50
- Any combination of age and service of 70 or more (e.g., age 55 with 15 years of service)
- Any age with 20 years of service (appropriate for public safety employees who typically have relatively short career spans beginning at a young age)

Comment. Like the 2007 NRA regulations, the proposed rule limits “public safety employees” to public employees who provide police protection, firefighting services, or emergency medical services. This definition could create obstacles if a public plan covers other categories of public safety employees, for example, prison guards or probation officers, with NRAs below age 55.

A governmental plan with an NRA that does not satisfy a safe harbor could still meet the reasonably representative requirement — but that will be determined based on a facts and circumstances test.

Additionally, the proposed regulations allow a governmental plan the flexibility to provide for multiple NRAs for different employee classifications, such as employees working in different units or employees hired before or after a specified date.

Effective Date and Comments

The proposed regulations would be effective for employees hired during plan years beginning on or after the later of January 1, 2017, or the close of the first legislative session of the legislative body with authority to amend the plan that begins on or after the date that is three months after the final regulation is published in the *Federal Register*.

Comments on the proposed regulation are due by April 26, 2016.

In Closing

While governmental plan sponsors should review plan terms in light of these proposed NRA rules, it's expected that most — if not all — plans can keep their current NRA provisions intact. For plans that don't permit the benefit payments to start before termination of employment, changes to the definition of NRA are unnecessary. For others, because the proposed rules afford governmental plans a good deal of flexibility in using different combinations of age and service requirements for NRA, any need to change NRA rules should be minimal.

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