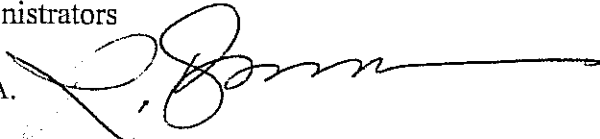




Klausner & Kaufman  
PROFESSIONAL ASSOCIATION  
ATTORNEYS AT LAW

## MEMORANDUM

TO: All Pension Clients/Administrators

FROM: Klausner & Kaufman, P.A. 

RE: Worker, Retiree, and Employer Recovery Act of 2008 (H.R. 7327)

DATE: December 15, 2008

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Last week, Congress passed important pension and tax legislation, the “Worker, Retiree, and Employer Recovery Act of 2008.” The Act flew through Congress using special fast track procedures, including unanimous voice votes during the final hours of the Congressional session. The President is expected to sign the Act into law shortly. This memo will briefly summarize the provisions of most interest to our governmental clients. The Act also contains detailed technical corrections to the Pension Protection Act (PPA) of 2006, PPA rollback provisions “relating to the economic crisis,” and business stimulus provisions.

The three provisions described in this memo are as follows:

- 1) Section 124 of the Act (ADEA Section 4(i)) involving the determination of market rate of return for governmental plans - provides that the use of a higher than market rate of return does not constitute per se age discrimination;
- 2) Section 845 of the Act (IRC Section 402(l)) involving distributions from governmental retirement plans for health and long-term care insurance for public safety officers - clarifies that the \$3,000 health insurance exclusion for public safety officers applies to self insured plans;
- 3) Section 201 of the Act (IRC Section 401(a)(9)) involving a temporary waiver of required minimum distribution rules for 2009 - provides relief for seniors age 70<sup>1/2</sup> or older who would otherwise have been required to take distributions from their retirement plans.

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### **Age Discrimination Clarification Involving Market Rates of Return**

DROP plans and other governmental hybrid plans may continue to use above market interest rates without violating the Age Discrimination in Employment Act. The Act provides that governmental retirement plans that credit individual account balances with a specified interest rate will be permitted to use a rate that exceeds the “market rate of return” (as defined by the Treasury Department), provided that the interest rate used by the governmental plan was set by Federal, State, or local law.

In 2006 the Pension Protection Act gave Treasury the authority to determine a “market interest rate” for hybrid pension plans. The Equal Employment Opportunity Commission (EEOC) is required to rely on those rules for determining ADEA compliance. However, Treasury only has authority on this subject over private plans, not public plans. The Act clarifies that the use of above market interest rates by public plans is not a per se ADEA violation. This special treatment does not apply, however, if the rate of return or method of crediting interest violates another requirement of ADEA.

### **\$3,000 Health Insurance Exclusion for Public Safety Officers**

Championed by NCPERS, the PPA created an exclusion for up to \$3,000 of health insurance premiums for retired public safety officers. The Act clarifies that the exclusion applies to coverage under an accident or health plan (rather than only accident or health insurance from a private insurance company). To be excluded, the amounts must be distributed from a public safety officer’s former employer’s retirement plan. When determining the portion of a distribution that would otherwise be includible in income, the otherwise includible amount is determined as if all amounts to the credit of the eligible public safety officer in all eligible retirement plans were distributed during the taxable year. The provision also clarifies that the income exclusion only applies with respect to distributions from the plan (or plans) maintained by the employer from which the individual retired as a public safety officer.

### **Suspension of Required Minimum Distributions (RMD) for 2009**

Of interest to all qualified retirement plans, the Act contains a one-year suspension of the required minimum distribution (RMD) for 2009. Under current law, seniors over the age of 70 ½ are required to begin taking distributions from qualified retirement accounts. The Act provides that the RMD suspension is available to anyone, regardless of their total retirement account balances.

During the presidential campaign, both candidates agreed the current RMD requirements were counterproductive in the current market environment. In particular, the current rules were criticized because the mandatory withdrawals are based on the value of an account at the end of the prior year. In other words, the current RMD rules do not take into account 2008’s investment losses, which would have forced seniors to draw down already depleted retirement accounts. Note that the Act leaves in place RMD requirements for 2008.

### **Miscellaneous Provisions**

The Act also contains a variety of technical and clarifying changes to the Pension Protection Act of 2006 (PPA, P.L. 109-280), including changes for underfunded private plans and rollovers for non-spouse beneficiaries of qualified plan participants.

**Rollovers by Non-Spouse Beneficiaries:** Under current law, spouse beneficiaries of an inherited qualified plan account may make a trustee-to-trustee transfer of part (or all) of the deceased employee's account balance in a qualified plan to an IRA. The transfer is treated as an eligible rollover distribution, and the receiving IRA is treated as an inherited IRA. Under Section 108(f) of the Act, effective for plan years beginning after Dec. 31, 2009, qualified plans would be *required* to permit rollovers out of the plan by non-spouse beneficiaries.

**Reimbursements for Medical Care from Governmental Plans:** A plan established by a state or local government to reimburse certain medical care expenses incurred by state or local government employees on a tax-free basis will not lose this favorable tax treatment just because the plan provides for reimbursements of medical expenses incurred by a deceased plan participant's non-spouse/non-dependent beneficiary.

We anticipate that additional memos and updates may be forthcoming regarding this detailed Act. Our firm would like to extend congratulations to NCPERS, NASRA and the other members and supporters of the public pension community who labored diligently on this legislation.