



TaxNewsFlash

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IRS guidance (FAQs) for employers seeking to rehire retirees or retain employees after retirement age (COVID-19)

The IRS today issued a release in an effort to help address labor shortages related to the coronavirus (COVID-19) pandemic.

The IRS release—[IR-2021-208](#) (October 22, 2021)—advises employers that they generally will not jeopardize the tax status of their pension plans if they rehire retirees or permit distributions of retirement benefits to current employees who have reached age 59½ years (or the plan's normal retirement age). This release is intended to help certain employers look for ways to encourage retirees to return to the workforce and also to encourage experienced employees to stay on the job.

In connection with this release, the IRS added two new [frequently asked questions \(FAQs\)](#)* that are designed as guidance for public and private employers that sponsor pension plans for their employees. The FAQs highlight existing ways that employers can meet their employment objectives and still comply with the plan qualification rules, as follows:

- An employer can generally choose to address unforeseen hiring needs by rehiring former employees, even if those employees have already retired and begun receiving pension benefit payments.
- If permitted under plan terms, those employees may continue receiving the benefits after they are rehired.
- An employer can generally choose to make retirement distributions available to existing employees who have reached age 59½ years (or the plan's normal retirement age).

An IRS release earlier in October 2021 clarified that FAQs on newly enacted tax legislation or other topics are not precedential but may offer penalty protection for taxpayers that relied on them. Read [TaxNewFlash](#)

Full text of new FAQs

Rehires Following Bona Fide Retirement; In-Service Distributions

Q1. A qualified pension plan that does not provide for in-service distributions commences benefit distributions to an individual who applies for retirement benefits and experiences a bona fide retirement. If the plan sponsor rehires the individual due to unforeseen hiring needs related to the COVID-19 pandemic, will the rehire cause that individual's prior retirement to no longer be considered a bona fide retirement? (added 10/22/2021)

A1. Generally, no. Treasury regulations generally require a qualified pension plan to be maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement or attainment of normal retirement age. See Treas. Reg. § 1.401(a)-1(b)(1)(i). Accordingly, a plan that does not permit in-service distributions may commence benefit distributions to an individual only when the individual has a bona fide retirement. Although the determination of whether an individual's retirement under a plan is bona fide is based on a facts and circumstances analysis (in the absence of plan terms specifying the conditions under which a retirement will be considered bona fide), a rehire due to unforeseen circumstances that do not reflect any prearrangement to rehire the individual will not cause the individual's prior retirement to no longer be considered a bona fide retirement under the plan. For example, if a public school district sponsoring a qualified pension plan experiences a critical labor shortage due to the COVID-19 pandemic that was unforeseen at the time of an individual's prior bona fide retirement, the public school district rehires the individual to help ease the labor shortage, and the plan terms do not define a bona fide retirement in a way that prevents the rehire, the individual's reemployment would not cause the prior retirement to fail to be a bona fide retirement. Consequently, if plan terms permit, benefit distributions could continue after the rehire.

In addition, if the sponsor of a qualified pension plan wishes to rehire a retired employee to fill an unforeseen hiring need related to the COVID-19 pandemic, the sponsor should analyze the impact of the rehire under the plan by taking into account any plan terms, including any need for plan amendments, relating to rehires. For example, plan sponsors should review any plan terms requiring that an individual who retires and commences benefit distributions not be rehired within a specified period, any plan terms relating to the suspension of distributions upon rehire, and any other plan terms that may have an impact on the pension benefit of a rehire.

Q2: May a qualified pension plan permit individuals who are working to commence in-service distributions? (added 10/22/2021)

A2: Yes. A qualified pension plan generally may allow individuals to commence in-service distributions if the individuals have attained either age 59½ or the plan's normal retirement age. See Internal Revenue Code section 401(a)(36) (in-service distributions generally permitted at age 59½); final regulations on distributions from a pension plan upon attainment of normal retirement age (Treas. Reg. § 1.401(a)-1(b), TD 9325, 72 FR 28604); proposed regulations on the applicability of the normal retirement age regulations to governmental pension plans (Prop. Treas. Reg. § 1.401(a)-1(b)(2)(v), 81 FR 4599); and Section F of Notice 2020-68, 2020-38 IRB 567 (regarding recent changes to in-service distribution rules under § 401(a)(36). However, distributions commencing to an individual before age 59½ may be subject to a 10% additional tax under Internal Revenue Code section 72(t), unless the distributions fit within an exception to that tax (for a description of the exceptions to the 10% additional tax under section 72(t), see [Retirement Topics - Exceptions to Tax on Early Distributions](#)).

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