

Survivor Benefits Update

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Recent legislation has changed several components of survivor benefits. Survivor benefits are composed of multiple allowances that surviving spouses, children, and other dependents may be eligible to receive due to the death of a servicemember. These allowances are either in the form of monthly payments such as Dependency and Indemnity Compensation (DIC),¹ Dependent Education Assistance,² and Survivor Benefit Program (SBP),³ or lump sum payments from Service Members Group Life Insurance (SGLI)⁴ and the Death Gratuity.⁵ This update will highlight those changes so that legal assistance attorneys can effectively assist servicemembers and surviving Family members understand what benefits they are eligible to receive.

National Defense Authorization Act for Fiscal Year 2007⁶

The National Defense Authorization Act for Fiscal Year 2007 (NDAA 2007) made several changes to SBP, SGLI, and other benefits.⁷ First, SBP was amended to allow for the election of a new beneficiary upon the death of the originally designated beneficiary.⁸ Previously, when the primary beneficiary died, the only option was to withdraw from the SBP.⁹ Now, if the primary beneficiary dies, the servicemember participating in the plan may elect a natural person of insurable interest such as a child, new spouse, or parent within 180 days after the death of the previous beneficiary.¹⁰ However, if the participant in the plan dies within two years of electing the follow on beneficiary, the election of the new beneficiary is deemed ineffective and the amount taken from the participant's retired pay will be paid in lump sum to the deceased participant's follow-on beneficiary.¹¹ In addition to allowing the selection of a follow-on beneficiary, there are also rules for changes in the premium coverage when a new beneficiary is designated. Specifically, the amount of premiums paid by the participant under the plan will be equal to the amount of retired pay that would have been reduced if the beneficiary had survived and as if the previous beneficiary was the same age as the new beneficiary.¹²

The SBP was further amended by the NDAA 2007 to allow surviving spouses with dependent children to pass the benefits of the SBP to those dependent children for all servicemember deaths occurring after 7 October 2001.¹³ The National Defense Authorization Act of Fiscal Year 2004 (NDAA 2004) allowed surviving spouses of servicemembers who died on active duty after 23 November 2004 to receive monthly payments under the SBP.¹⁴ These surviving spouses could also elect that the SBP payments go to the surviving dependent children of the servicemember.¹⁵

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¹ 38 U.S.C.S. §§1301–1323 (LexisNexis 2008).

² *Id.* §§ 3501–3567.

³ 10 U.S.C.S §§ 1447–1460B (LexisNexis 2008).

⁴ 38 U.S.C.S §§ 1965–1980.

⁵ 10 U.S.C.S § 1478.

⁶ Pub. L. No. 109-364, 120 Stat. 2083 [hereinafter NDAA 2007].

⁷ *Id.*

⁸ *Id.* § 643.

⁹ 10 U.S.C.S. § 1448. The other options for withdrawal from SBP include: between the second and third anniversary of enrollment in the program; when a beneficiary is no longer eligible, such as when a child beneficiary is over eighteen or twenty-two if a full-time student; or in the case of spousal coverage, when the spouse and servicemember divorce. *Id.*

¹⁰ NDAA 2007, *supra* note 6, § 643.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* § 644.

¹⁴ Pub. L. No. 108-136, 117 Stat. 1392.

¹⁵ *Id.*

The NDAA 2007 also modified the payment of premiums for SGLI. Servicemembers who were deployed for either Operation Enduring Freedom (OEF) or Operation Iraqi Freedom (OIF) will have the maximum coverage amount of SGLI reimbursed to the servicemember if withdrawn from the servicemember's pay as of 1 November 2006.¹⁶ This section of the NDAA 2007 altered the National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006) which allowed for the reimbursement to the servicemember the increase in the amount of SGLI premiums when the coverage increased \$150,000 from \$250,000 to \$400,000 for those servicemembers deployed to OEF or OIF.¹⁷

Finally, the NDAA 2007 changed other benefits for surviving Family members of a dual military couple. If one of the members dies, the surviving servicemember will continue to receive the housing allowance of the deceased servicemember for one year after the date of death.¹⁸

National Defense Authorization Act for Fiscal Year 2008¹⁹

The SBP changes from the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008) called for the limitation of recoupment for annuity amounts previously paid subject to offset for DIC and the creation of a special allowance for persons affected by the required offset between SBP and DIC.²⁰ The limitation on the recoupment amount calls for any amount subject to offset between SBP and DIC previously paid to a surviving spouse or former spouse recouped only to the extent that the amount paid exceeds any amount refunded from the deceased servicemember's retired pay due to the offset between SBP and DIC.²¹ For example, if a servicemember used \$3000 of retirement pay as the base amount for the annuity for SBP to the surviving spouse, the amount paid to the surviving spouse would be 55% of the base amount of \$3000 or \$1650. The amount of DIC is currently \$1091 and will reduce the amount of SBP by that same amount. Therefore, the amount of offset leaves SBP in the amount of \$559 going to the surviving spouse and \$2000 of retired pay refunded. Under this section of the NDAA 2008, if the amount paid to the spouse before the offset was more than the \$2000 refunded amount of retired pay, the amount in excess would also be recouped. Spouses affected by section 643 of the NDAA 2008 should receive a notice explaining the DIC offset and refund of retired pay detailing how those amounts were arrived at.²²

Second, the NDAA 2008 created a special survivor indemnity allowance for persons affected by the offset between SBP and DIC.²³ If a surviving spouse or former spouse is subject to the offset between SBP and DIC beginning 1 October 2008, those surviving and former spouses affected will be entitled to an extra monthly annuity of \$50 a month for fiscal year 2009.²⁴ This amount increases ten dollars each fiscal year until fiscal year 2013 when the annuity amount stays at \$100 each month until 28 February 2016.²⁵ This section of the NDAA 2008 will expire on that date.²⁶

The NDAA 2008 also changes the designation of beneficiaries for the death gratuity.²⁷ Starting 1 July 2008, servicemembers "may designate one or more persons to receive all or a portion of the amount payable" of the death gratuity.²⁸ Each beneficiary designated may receive any amount of the death gratuity in 10% increments up to the full amount.²⁹ However, if the servicemember has a spouse and the spouse is not a beneficiary of the death gratuity or does not

¹⁶ NDAA 2007, *supra* note 6, § 606.

¹⁷ Pub. L. No. 109-163, § 613, 119 Stat. 3136.

¹⁸ NDAA 2007, *supra* note 6, § 605.

¹⁹ Pub. L. No. 110-181, 122 Stat. 3.

²⁰ *Id.* §§ 643, 644.

²¹ *Id.*

²² *Id.* § 643.

²³ *Id.* § 644.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § 645.

²⁸ *Id.*

²⁹ *Id.*

receive the entire death gratuity amount, the spouse is notified that the servicemember did not designate the spouse as a beneficiary for the entire amount of the death gratuity.³⁰ Moreover, if the servicemember does not designate 100% of the death gratuity to the named beneficiaries, the death gratuity will be paid to the surviving spouse, if any; if there is no surviving spouse, then to the servicemember's children and their descendants.³¹

Finally, there are other changes that went into effect during 2008. First, the NDAA 2008, allowed for the transportation of the deceased servicemember's children, including step-children and illegitimate children, siblings, and the person authorized to direct disposition to attend the servicemember's burial ceremonies.³² Second, commencing 1 April 2008, all surviving spouses receiving SBP will receive 55% of the base amount of retired pay designated by the servicemember spouse for SBP.³³ This marked the end of the phase-out of the benefit decrease for surviving spouses once they reached age sixty-two.³⁴ Moreover, as of 1 October 2008, retirees who are over the age of seventy and have paid into the survivor benefit plan for at least thirty years will no longer have their retirement pay deducted for survivor benefit plan premiums.³⁵ Those retirees are considered to be paid up for the survivor benefit plan.

National Defense Authorization Act for Fiscal Year 2009³⁶

The National Defense Authorization Act for Fiscal Year 2009 (NDAA 2009) further modifies the sections concerning SBP enacted in the NDAA 2008 for SBP. First, section 631 of the NDAA 2009 extends the survivor indemnity allowance to surviving spouses and former spouses of servicemembers who die on active duty.³⁷ The survivor indemnity annuity payments begin for these survivors on 1 October 2008.³⁸ Second, section 632 of the NDAA 2009 allows for the correction of reduction in survivor benefit plan payments for those spouses who are age sixty-two and now receiving the full 55% of survivor benefit payments due to the changes in SBP from the National Defense Authorization Act for Fiscal Year 2005.³⁹ This section states that if, because of the recalculation of annuities under the phase-out of the reduction of SBP and the supplemental SBP, the amount of the annuity would be less than without the phase-out, the Secretary of Defense will adjust the annuity amounts to eliminate the reduction in payment to the surviving spouse or former spouse.⁴⁰

Heroes Earnings Assistance and Relief Tax Act of 2008⁴¹

The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) made several changes in how survivor benefits are taxed, transferred and considered in light of other benefits. Specifically, the HEART Act created a new requirement for civilian qualified retirement plans under a new subsection of Internal Revenue Code (IRC) section 401, tax-qualified plans.⁴² The new subsection requires that in the case of participating servicemembers who die while performing qualified military service, that the servicemember's survivors are entitled to any benefits that the participating servicemember would have been entitled to, but for the servicemember's death.⁴³ Further, for benefit accrual purposes, this section treats the servicemember who cannot return to civilian employment due to death or disability as returning to work the day before death

³⁰ *Id.*

³¹ *Id.*

³² *Id.* § 632.

³³ Pub. L. No. 108-375, 118 Stat. 1811 (2003).

³⁴ *Id.*; see also Major Dana Chase, TJAGLCS Practice Notes, *Survivor Benefits Update*, ARMY LAW., Feb. 2006, at 26.

³⁵ *Id.*

³⁶ Pub. L. No. 110-417, 122 Stat. 4356 (2008).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Pub. L. No. 110-245, 122 Stat. 1624 (2008) [hereinafter HEART Act].

⁴² *Id.*

⁴³ *Id.*

or disability and having employment terminate on the date of death or disability.⁴⁴ Therefore, if a participating servicemember's qualified plan provides for life insurance benefits or survivor benefits that are contingent upon the death of the employee as termination of employment, then the qualified plan must pay those benefits to the surviving beneficiary of a participating servicemember who dies during qualified military service.⁴⁵

Second, the HEART Act provides that the military death gratuity can be deposited into a Roth IRA or an Education Savings Account (ESA).⁴⁶ Contributions of military death gratuities to Roth IRAs and ESAs are treated as qualified rollover contributions under this new statute as long as the contribution is made within one year of the date the beneficiary receives the payment.⁴⁷ This means that these contributions are not subject to the annual contribution limits or the adjusted gross income phase-out limits.⁴⁸ This new statute is in effect for all death gratuities paid from death or injuries occurring on or after 7 October 2001.⁴⁹

Third, the HEART Act changes the tax treatment of benefits veterans and surviving Family members receive from the state due to a servicemember's duty in a combat zone. Section 112 of the HEART Act amends section 134(b) of the IRC adding certain state payments to the list of non-taxable qualified military benefits.⁵⁰ Therefore, any death gratuity, tax credits, or burial benefits paid by a state to a veteran or surviving Family member due to that servicemember's duty in a combat zone, made before or after June 2008, are not taxable by the federal government.

Next, those veterans and Family members receiving social security supplemental income (SSI) had some changes to their benefit under the HEART Act. First, the treatment of all uniformed service cash compensation will now be treated as earned income for SSI purposes.⁵¹ Previously, only military basic pay and pay excluded due to service in a combat zone or qualified hazardous duty area were considered earned income.⁵² By treating this pay as earned income, SSI benefits are not reduced as quickly as if the payments were treated as unearned income.⁵³ Further, the HEART Act provides that state annuities for certain veterans, such as those who receive funds because they are blind, disabled, or elderly will be disregarded in determining supplemental security income benefits.⁵⁴ These payments are also not going to be counted as a resource by the SSI program for that month.⁵⁵ If these payments were counted as a resource, there would be a dollar for dollar reduction in SSI benefits.⁵⁶

Veterans Benefits Improvement Act of 2008⁵⁷

The Veterans Benefits Improvement Act of 2008 (Veterans Act) makes further changes to survivor benefits with the creation of new services and amending SGLI. First, section 222 of the Veterans Act creates the office of survivors assistance.⁵⁸ This office is to serve as a resource for survivors and dependents of veterans and deceased servicemembers

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* § 109.

⁴⁷ *Id.*

⁴⁸ *Id.* Roth IRAs for 2008 is \$5000. I.R.C. §§ 408A and 530; Rev. Proc. 2007-66. The annual contribution limits for Coverdell education savings accounts is \$2000. *Id.* The adjusted gross income phase-out limits for 2008 is \$101,000 to \$116,000 for single taxpayers and \$159,000 to \$169,000 for married filing jointly taxpayers. *Id.*

⁴⁹ HEART Act, *supra* note 41, § 109.

⁵⁰ *Id.*

⁵¹ *Id.* § 201.

⁵² Social Security Act § 1612(a), 42 U.S.C.S. § 1382(a) (2000) (Medicare Provision).

⁵³ *Id.* § 1612(a)(2).

⁵⁴ HEART Act, *supra* note 41, § 202.

⁵⁵ *Id.*

⁵⁶ 20 C.F.R. § 416.1201 (2008).

⁵⁷ Pub. L. No. 110-389, 122 Stat. 4145 (2008) [hereinafter Veterans Act].

⁵⁸ *Id.* § 222.

regarding benefits and services furnished by the Department of Veterans Affairs.⁵⁹ Second, the Veterans Act also calls for the Comptroller General to report on adequacy of DIC to maintain survivors of veterans who die from service-connected disabilities.⁶⁰ This report requires the Comptroller General to determine the adequacy of the program in replacing the income of a deceased veteran or servicemember and suggest improvements to the program to “improve or enhance the effects” of DIC payments as replacement income.⁶¹

Finally, the Veterans Act makes changes to SGLI by allowing servicemembers to treat a stillborn child as an insurable dependent under SGLI.⁶² Therefore, stillborn children fall under Family SGLI and are automatically under the \$10,000 coverage for dependent children.⁶³ The Veterans Act also expands coverage under SGLI to members of the Individual Ready Reserve (IRR) and their spouses.⁶⁴ This section also allows the Office of Servicemembers Group Life Insurance to set the premiums for spouses of those servicemembers in the IRR, negating the requirement that all premiums must be the same for all servicemembers.⁶⁵ Section 403 of the Veterans Act also reduces the period of coverage for dependents after the servicemember leaves the service.⁶⁶ Dependents will no longer be covered under Family SGLI for 120 days after the member separates from service.⁶⁷ However, dependents will still be covered for 120 days after the servicemember’s death.⁶⁸

These recent changes to the various components of survivor benefits will have an impact on those currently receiving benefits and those who will receive them in the future. Understanding these changes and how they affect surviving Family members will allow legal assistance attorneys to provide the best service and advice possible to Families who have lost a servicemember.

⁵⁹ *Id.*

⁶⁰ *Id.* § 223.

⁶¹ *Id.*

⁶² *Id.* § 402.

⁶³ 38 U.S.C.S. §§ 1965–1970 (LexisNexis 2008).

⁶⁴ Veterans Act, *supra* note 57, § 403.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 38 U.S.C.S. § 1968(a)(5)(B)(i).