

109<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 1401

To amend the Internal Revenue Code of 1986 to clarify the proper treatment of differential wage payments made to employees called to active duty in the uniformed services, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JULY 14, 2005

Mr. GREGG (for himself, Mr. ROBERTS, and Mr. ALEXANDER) introduced the following bill; which was read twice and referred to the Committee on Finance

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## A BILL

To amend the Internal Revenue Code of 1986 to clarify the proper treatment of differential wage payments made to employees called to active duty in the uniformed services, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Uniformed Services  
5       Differential Pay Protection Act”.

1 **SEC. 2. INCOME TAX WITHHOLDING ON DIFFERENTIAL**  
 2 **WAGE PAYMENTS.**

3 (a) IN GENERAL.—Section 3401 of the Internal Rev-  
 4 enue Code of 1986 (relating to definitions) is amended by  
 5 adding at the end the following new subsection:

6 “(i) DIFFERENTIAL WAGE PAYMENTS TO ACTIVE  
 7 DUTY MEMBERS OF THE UNIFORMED SERVICES.—

8 “(1) IN GENERAL.—For purposes of subsection  
 9 (a), any differential wage payment shall be treated  
 10 as a payment of wages by the employer to the em-  
 11 ployee.

12 “(2) DIFFERENTIAL WAGE PAYMENT.—For  
 13 purposes of paragraph (1), the term ‘differential  
 14 wage payment’ means any payment which—

15 “(A) is made by an employer to an indi-  
 16 vidual with respect to any period during which  
 17 the individual is performing service in the uni-  
 18 formed services while on active duty for a pe-  
 19 riod of more than 30 days, and

20 “(B) represents all or a portion of the  
 21 wages the individual would have received from  
 22 the employer if the individual were performing  
 23 service for the employer.”

24 (b) EFFECTIVE DATE.—The amendment made by  
 25 this section shall apply to remuneration paid after Decem-  
 26 ber 31, 2005.

1 **SEC. 3. TREATMENT OF DIFFERENTIAL WAGE PAYMENTS**  
2 **FOR RETIREMENT PLAN PURPOSES.**

3 (a) PENSION PLANS.—

4 (1) IN GENERAL.—Section 414(u) of the Inter-  
5 nal Revenue Code of 1986 (relating to special rules  
6 relating to veterans' reemployment rights under  
7 USERRA) is amended by adding at the end the fol-  
8 lowing new paragraph:

9 “(11) TREATMENT OF DIFFERENTIAL WAGE  
10 PAYMENTS.—

11 “(A) IN GENERAL.—Except as provided in  
12 this paragraph, for purposes of applying this  
13 title to a retirement plan to which this sub-  
14 section applies—

15 “(i) an individual receiving a differen-  
16 tial wage payment shall be treated as an  
17 employee of the employer making the pay-  
18 ment,

19 “(ii) the differential wage payment  
20 shall be treated as compensation, and

21 “(iii) the plan shall not be treated as  
22 failing to meet the requirements of any  
23 provision described in paragraph (1)(C) by  
24 reason of any contribution which is based  
25 on the differential wage payment.

1           “(B) SPECIAL RULE FOR DISTRIBUTIONS.—

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3           “(i) IN GENERAL.—Notwithstanding  
4           subparagraph (A)(i), for purposes of sec-  
5           tion 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii),  
6           403(b)(11)(A), or 457(d)(1)(A)(ii), an in-  
7           dividual shall be treated as having been  
8           severed from employment during any pe-  
9           riod the individual is performing service in  
10          the uniformed services described in section  
11          3401(i)(2)(A).

12          “(ii) LIMITATION.—If an individual  
13          elects to receive a distribution by reason of  
14          clause (i), the plan shall provide that the  
15          individual may not make an elective defer-  
16          ral or employee contribution during the 6-  
17          month period beginning on the date of the  
18          distribution.

19          “(C) NONDISCRIMINATION REQUIRE-  
20          MENT.—Subparagraph (A)(iii) shall apply only  
21          if all employees of an employer performing serv-  
22          ice in the uniformed services described in sec-  
23          tion 3401(i)(2)(A) are entitled to receive dif-  
24          ferential wage payments on reasonably equiva-  
25          lent terms and, if eligible to participate in a re-

1           tirement plan maintained by the employer, to  
2           make contributions based on the payments. For  
3           purposes of applying this subparagraph, the  
4           provisions of paragraphs (3), (4), and (5), of  
5           section 410(b) shall apply.

6           “(D) DIFFERENTIAL WAGE PAYMENT.—  
7           For purposes of this paragraph, the term ‘dif-  
8           ferential wage payment’ has the meaning given  
9           such term by section 3401(i)(2).”

10          (2) CONFORMING AMENDMENT.—The heading  
11          for section 414(u) of such Code is amended by in-  
12          serting “AND TO DIFFERENTIAL WAGE PAYMENTS  
13          TO MEMBERS ON ACTIVE DUTY” after “USERRA”.

14          (b) DIFFERENTIAL WAGE PAYMENTS TREATED AS  
15          COMPENSATION FOR INDIVIDUAL RETIREMENT PLANS.—  
16          Section 219(f)(1) of the Internal Revenue Code of 1986  
17          (defining compensation) is amended by adding at the end  
18          the following new sentence: “The term ‘compensation’ in-  
19          cludes any differential wage payment (as defined in sec-  
20          tion 3401(i)(2)).”

21          (c) EFFECTIVE DATE.—The amendments made by  
22          this section shall apply to plan years beginning after De-  
23          cember 31, 2005.

24          (d) PROVISIONS RELATING TO PLAN AMEND-  
25          MENTS.—

1           (1) IN GENERAL.—If this subsection applies to  
2 any plan or annuity contract amendment—

3           (A) such plan or contract shall be treated  
4 as being operated in accordance with the terms  
5 of the plan or contract during the period de-  
6 scribed in paragraph (2)(B)(i), and

7           (B) except as provided by the Secretary of  
8 the Treasury, such plan shall not fail to meet  
9 the requirements of the Internal Revenue Code  
10 of 1986 or the Employee Retirement Income  
11 Security Act of 1974 by reason of such amend-  
12 ment.

13           (2) AMENDMENTS TO WHICH SECTION AP-  
14 PLIES.—

15           (A) IN GENERAL.—This subsection shall  
16 apply to any amendment to any plan or annuity  
17 contract which is made—

18           (i) pursuant to any amendment made  
19 by this section, and

20           (ii) on or before the last day of the  
21 first plan year beginning on or after Janu-  
22 ary 1, 2008.

23           (B) CONDITIONS.—This subsection shall  
24 not apply to any plan or annuity contract  
25 amendment unless—

- 1 (i) during the period beginning on the  
2 date the amendment described in subpara-  
3 graph (A)(i) takes effect and ending on the  
4 date described in subparagraph (A)(ii) (or,  
5 if earlier, the date the plan or contract  
6 amendment is adopted), the plan or con-  
7 tract is operated as if such plan or con-  
8 tract amendment were in effect; and
- 9 (ii) such plan or contract amendment  
10 applies retroactively for such period.

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