

Governmental Plans Are Different: A Regulatory Overview

Many rules that otherwise apply to qualified retirement plans either do not apply to governmental plans qualified under Internal Revenue Code Section 401(a) or apply differently. This article provides a high-level introduction to governmental tax-qualified retirement plans and highlights many of the differences in applying rules of the Code. Differences in application of many of the rules are summarized in convenient tables. This article also briefly discusses the applicability of the Age Discrimination in Employment Act (ADEA) to governmental plans.

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Governmental plans are not subject to the Employee Retirement Income Security Act of 1974 (ERISA) and are not subject to many provisions of the Internal Revenue Code, although some Code sections apply differently to governmental plans. This article provides a high-level introduction to governmental tax-qualified retirement plans and highlights many of the differences in applying rules of the Code. This article also briefly discusses the applicability of the Age Discrimination in Employment Act (ADEA) to governmental plans. This article does not consider 403(b) or 457 plans of governmental employers, nor does it consider governmental health and welfare plans.¹

What Is a Governmental Plan?

Code Section 414(d) and ERISA Section 3(32) define a *governmental plan* as “a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the forego-

ing.”² The definition goes on to include certain Railroad Retirement Act plans, plans of certain international organizations exempt from taxation and certain plans of Indian tribal governments.³

There are currently no regulations defining governmental plans. A 1989 revenue ruling issued by the Internal Revenue Service (IRS) has provided some guidance about whether a retirement plan is a governmental plan using a facts-and-circumstances analysis and has been the basis for subsequent private letter rulings on the subject.⁴ Late in 2011, the U.S. Treasury Department and IRS issued an advance notice of proposed rulemaking (ANPRM) to further define *governmental plan* under Code Section 414(d).⁵ The ANPRM was a preview of regulations that may be proposed, for which the comments have been sought, and which currently have no effect. There is currently no timetable for issuing the regulations. Although the ANPRM applies only for purposes of Code Section 414(d) and not ERISA Section 3(32), the Department of Labor (DOL) and the Pen-

sion Benefit Guaranty Corporation (PBGC) were consulted in its development.

Note that some entities can be both a governmental entity under Code Section 414(d) and an organization exempt under Code Section 501(a) that is described in Code Section 501(c), if separately qualified for each, which can give rise to *dual-qualified* plans of such an entity.⁶

No ERISA Preemption for Governmental Plans

ERISA does not apply to governmental plans, so it does not preempt state or other laws.⁷ The Title I reporting, disclosure, participation, vesting, funding and fiduciary responsibility provisions of ERISA do not apply to governmental plans. The Title IV plan termination insurance provisions of ERISA also do not apply. Because there is no ERISA preemption, state and local governmental plans may be subject to state laws regarding reporting, disclosure, participation, vesting, funding or fiduciary responsibility. Unless a state has enacted some ERISA-like statute that preempts other state laws, more than one state statute may apply to governmental plans of that state and its local governments. Laws applicable to state and local governmental plans can vary by state. Governmental plans that are not state or local plans may be subject to additional federal laws.⁸

Because ERISA does not apply, governmental plans are not required to:

- File Form 5500 series annual reports or provide an ERISA annual funding notice or summary annual report⁹
- Pay PBGC premiums (Plan participants do not receive PBGC insurance coverage.)
- Distribute a summary plan description (SPD) to plan participants, although most governmental plan sponsors provide summary plan information to participants¹⁰
- Follow ERISA claims-and-appeals procedures, although state law may require a claims-and-appeals process for state and local governmental plans, and federal law may require a claims-and-appeals process for federal governmental plans
- Provide an ERISA Section 204(h) advance notice of an amendment significantly reducing the rate of future

benefit accruals or early retirement benefits or subsidies, although most governmental plans communicate plan changes to participants, and other laws may require an advance notice

- Satisfy ERISA fiduciary rules, although many states have their own rules on fiduciary responsibilities, which may or may not align with ERISA standards, and IRS has interpreted the exclusive benefit rule in the Code to require prudence when investing plan assets (Some states may restrict or prescribe permissible plan investments.)
- File Form 8955-SSA to report separated participants who have deferred vested benefits.¹¹

ADEA Generally Applies to Governmental Plans

ADEA generally applies to state and local governmental plans. However, the U.S. Supreme Court prohibited individual claims for damages against state governments under the 11th Amendment to the U.S. Constitution in *Kimel v. Florida Board of Regents*.¹² Nevertheless, *Kimel* did not prohibit individual claims for damages against local governments. Most federal courts have permitted claims for damages against local governments, with some exceptions. *Kimel* also did not prohibit injunctive relief against state and local governments nor federal enforcement of ADEA against state and local governments. ADEA applies to many federal government agencies and their plans.¹³

ADEA generally prohibits both the cessation of, or reduction in the rate of, a participant's benefit accrual under a defined benefit (DB) plan because of age and the cessation of allocations, or reduction in the rate at which amounts are allocated, to a participant's account under a defined contribution (DC) plan because of age.¹⁴

Cash balance/hybrid plan rules of the Pension Protection Act of 2006 may apply to governmental plans under ADEA, even if they do not apply under ERISA or the Code. The similarly situated test, market rate of return and preservation of capital rules, plan termination requirements and plan conversion rules are part of ADEA requirements, although there is a special rule for governmental plans regarding the market rate of return.¹⁵

Code Provisions That Apply to Section 401(a) Plans

Governmental plans are not subject to a number of Code provisions, while some sections have limited application and

others apply differently to governmental plans. Table I lists Code sections that apply to governmental plans qualified under Code Section 401(a).

TABLE I

Code Provisions That Apply to Section 401(a) Plans

Code Section	Description
72(a)–72(e)	<p>Income Inclusion Rules</p> <p>The income inclusion rules include determining the exclusion ratio, investment in the contract rules, the simplified method for qualified plans and rules for amounts not received as annuities.</p>
72(p)	<p>Plan Loan Requirements</p> <p>Plan loans are rare in defined benefit (DB) plans and more common in defined contribution (DC) plans.</p>
72(t)	<p>Additional Tax on Early Distributions</p> <p>The additional tax on early distributions includes exceptions for higher education expenses, first-time home buyers and qualified reservist distributions, as well as tax recapture rules. The tax does not apply to distributions:</p> <ul style="list-style-type: none"> • Made on or after the age of 59½ • That are part of a series of substantially equal payments made for life or life expectancy • Made after separation from service after attainment of the age of 55 • On account of disability • Made to a beneficiary or estate on or after death of the participant.
401(a)(1)	<p>Written Plan Requirement With Definitely Determinable Benefits</p> <p>Benefits must be determined in accordance with a definite written program and arrangement that is communicated to employees.¹⁶ A DB plan must systematically provide for payment of definitely determinable benefits after retirement or attainment of normal retirement age (NRA).¹⁷ A DB plan must specify actuarial assumptions to be definitely determinable.¹⁸</p>
401(a)(2)	<p>Exclusive Benefit Rule</p> <p>It must be impossible to use or divert qualified plan assets for any purpose other than the exclusive benefit of plan participants and beneficiaries at any time prior to the satisfaction of all plan liabilities with respect to participants and beneficiaries.</p>
401(a)(8)	<p>Forfeitures Unavailable to Increase DB Plan Benefits</p> <p>Qualified DB plans must prohibit the use of forfeitures to increase the benefits that any employee would otherwise receive under the plan.</p>
401(a)(9)	<p>Required Minimum Distributions (RMDs)</p> <p>Governmental qualified plans must satisfy the RMD requirements, except that no actuarial adjustment is required for commencement after the age of 70½, and the 5% owner rules do not apply. A governmental plan is treated as satisfying the RMD rules if it complies with a reasonable and good faith interpretation of the rules.¹⁹</p>

TABLE I continued

Code Provisions That Apply to Section 401(a) Plans

Code Section	Description
401(a)(17)	Compensation Limit The limit on compensation for purposes of determining plan contributions or benefits applies to governmental qualified plans. A higher limit may apply to certain grandfathered plan participants. ²⁰
401(a)(24)	Group Trust A group trust will not be disqualified for holding funds of a governmental plan or funds from a governmental entity intended to satisfy obligations with respect to such plan.
401(a)(27)	Contributions Need Not Be Based on Profits If a governmental DC plan is technically a profit-sharing plan rather than a money purchase pension plan, contributions can be made without respect to profits.
401(a)(30)	Limitation on Elective Deferrals If a governmental plan permits elective deferrals, the plan must provide that the amount of such deferrals under the plan and all other plans of the employer may not exceed the limit of Code Section 402(g)(1)(A).
401(a)(31)	Direct Rollovers A governmental plan must permit direct rollovers from the plan to an eligible retirement plan, which includes an individual retirement account (IRA) or individual retirement annuity, a qualified plan, a 403(a) annuity plan, a 403(b) plan and a governmental 457(b) plan. The special tax notice of Code Section 402(f) must be provided. ²¹
401(a)(36)	In-Service Distribution at the Age of 62 Governmental DB plans may provide for in-service distributions at the age of 62. ²²
401(a)(37)	Death Benefits While on Qualified Military Service A governmental qualified plan must provide that if a participant dies while performing Code Section 414(u) qualified military service, the participant's beneficiaries are entitled to any additional benefits provided under the plan (other than benefit accruals relating to the period of qualified military service) had the participant resumed and then terminated employment on account of death.
401(b)	Remedial Amendment Period Governmental plans must be timely amended to comply with qualification requirements. ²³
401(h) and 420	Retiree Medical Accounts Governmental qualified pension or annuity plans may provide retiree medical benefit accounts, subject to the provisions of Code Sections 401(h) and 420.
401(k)	Qualified Cash or Deferred Arrangements State and local governmental entities generally cannot establish Code Section 401(k) plans. However, certain governmental 401(k) plans are grandfathered. ²⁴ Rural cooperatives and Indian tribal governments can establish and maintain 401(k) plans. ²⁵ The federal thrift savings plan is a DC plan similar to a 401(k) plan and is to be treated as a trust described in Code Section 401(a). ²⁶ The limits on elective deferrals under Code Section 402(g) apply to governmental plans.

TABLE I continued

Code Provisions That Apply to Section 401(a) Plans

Code Section	Description
402(b)(1)	Tax Consequences for Disqualified Plan Employer contributions to a qualified plan that is disqualified may be included in the gross income of plan participants. ²⁷
402(g)	Limitation of Exclusion of Elective Deferrals From Gross Income The exclusion from gross income of elective deferrals (which may include Roth contributions) under a governmental plan may not exceed the current dollar limitation, as may be increased by aged 50 catch-up contributions.
411(e)	Vesting Standards and NRA Qualified governmental plans must satisfy pre-ERISA vesting standards. Employee contributions must be immediately vested, and employer-derived benefits must be vested upon plan termination or partial termination. ²⁸ A plan that is subject to the pre-ERISA vesting rules must provide for full vesting of the contributions made to or benefits payable under the plan for any employee who has attained NRA under the plan and satisfied any reasonable and uniformly applicable requirements as to length of service or participation described in the plan. ²⁹ NRA in a DB or annuity plan under the pre-ERISA vesting rules is generally the lowest age specified in the plan, at which the employee has the right to retire and receive retirement benefits without actuarial or similar reduction because of retirement before some later specified age. ³⁰ Plan sponsors can rely on proposed Treasury regulations that provide guidance on vesting and NRA in governmental plans, pending issuance of final regulations. ³¹
413	Collectively Bargained and Multiple Employer Plans Governmental plans are subject only to limited provisions of Code Section 413, such as the exclusive benefit rule of 413(b)(3) for multiemployer plans and 413(c)(2) for multiple employer plans, because governmental qualified plans are not subject to Code Sections 401(a)(4), 410(a), 411 or 412 that are referenced in Code Section 413.
414(a)	Service With Predecessor Employer Qualified plan rules about recognizing service with a predecessor employer apply to governmental plans.
414(b), 414(c), 414(m) and 414(o)	Controlled group The determination of the controlled group of employers with respect to governmental plans is based on a reasonable and good faith interpretation of the rules and definitions under Code Sections 414(b), 414(c), 414(m) and 414(o). ³²
414(h)(2)	Pickup Contributions State and local governmental plans and plans of Indian tribal governments are permitted to treat certain employee contributions as employer contributions. ³³
414(n)	Leased Employees Governmental plans may need to treat certain leased employees as employees of the plan sponsor for limited purposes under Code Section 414(n)(3), such as Code Sections 401(a)(17) and 415.
414(p)	Qualified Domestic Relations Orders (QDROs) Governmental qualified plans are not subject to the QDRO rules. ³⁴ However, if a governmental plan distributes benefits based on a domestic relations order that creates or recognizes an alternate payee's right to benefits under the plan, the distribution is treated as if made pursuant to a QDRO, even if the order fails to specify the details required of QDROs. ³⁵

TABLE I continued

Code Provisions That Apply to Section 401(a) Plans

Code Section	Description
414(q)	<p>Highly Compensated Employees</p> <p>Governmental plans are not excepted from the definition of highly compensated employees, but application is limited because Code Sections 401(a)(4) and 410(b) do not apply.</p>
414(r)	<p>Qualified Separate Lines of Business (QSLOBs)</p> <p>Governmental plans are not excepted from the QSLOB rules, but application is limited because Code Sections 401(a)(4) and 410(b) do not apply.</p>
414(s)	<p>Nondiscriminatory Compensation</p> <p>Governmental plans are not excepted from the rules for nondiscriminatory compensation, but application is limited because Code Sections 401(a)(4) and 410(b) do not apply.</p>
414(u)	<p>USERRA Reemployment Rights and Differential Wage Payments</p> <p>Governmental plans generally are not excepted from the rules applicable to veteran's reemployment rights and the treatment of differential wage payments under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). However, the federal thrift savings plan is excepted.³⁶</p>
414(v)	<p>Age 50 Catch-Up Contributions</p> <p>Governmental plans that permit elective deferrals (which may include Roth contributions) may permit age 50 catch-up contributions.</p>
414(w)	<p>Permissive Withdrawals of Deferrals</p> <p>Governmental plans that permit elective deferrals (which may include Roth contributions) may permit withdrawals of elective contributions under an automatic contribution arrangement in the 90 days following the first automatic contribution.</p>
415(b)	<p>Limitation on DB Plan Benefits</p> <p>Governmental qualified DB plans are subject to Section 415 limits on annual benefits but are modified as follows:</p> <ul style="list-style-type: none"> • The limitation that annual benefits cannot exceed 100% of average compensation for the participant's highest three years of compensation does not apply.³⁷ • The reduction in the dollar limitation for benefits commencing prior to the age of 62 does not apply to: <ul style="list-style-type: none"> —Disability payments³⁸ —Death benefits³⁹ —Certain participants in DB plans maintained by a state, Indian tribal government or any political subdivision thereof, with at least 15 years of service as a full-time employee of any police or fire department of the state or political subdivision or as a member of the Armed Forces of the United States.⁴⁰ • The reduction for participation or service of less than ten years does not apply to: <ul style="list-style-type: none"> —Disability payments⁴¹ —Death benefits.⁴²

TABLE I continued

Code Provisions That Apply to Section 401(a) Plans

Code Section	Description
415(b) continued	<ul style="list-style-type: none"> The limitation is equal to the accrued benefit for participants who first became participants before January 1, 1990 in a plan so electing before the close of first plan year beginning after December 31, 1989 for plans maintained by any state or political subdivisions thereof, or any agency or instrumentality thereof, or an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either, all the participants of which are employees of such entity performing essential governmental functions and not commercial activities.⁴³
415(c)	<p>Annual Additions and Alternative Rule for Postseverance Compensation</p> <p>Governmental qualified DC plans are subject to Section 415 limits on annual additions, but repayment of cashouts from a governmental qualified DC plan, including interest, with respect to an amount previously refunded upon a forfeiture of service credit under the plan or another governmental plan maintained by a state or local government within the same state are not annual additions.⁴⁴</p> <p>For purposes of the Code Section 415 rules regarding compensation paid after severance from employment, a governmental plan may provide for the substitution of the calendar year in which the severance from employment occurs for the limitation year in which the severance from employment occurs.⁴⁵</p>
415(m)	<p>Qualified Governmental Excess Benefit Arrangements</p> <p>A qualified governmental excess benefit arrangement provides benefits otherwise limited by Code Section 415 in either a governmental DB plan or governmental DC plan.⁴⁶ A portion of a governmental plan is a qualified excess benefit arrangement if:</p> <ul style="list-style-type: none"> Such portion is maintained solely to provide participants the benefit otherwise payable under the plan that exceeds the applicable Section 415 limits No election for a participant to defer compensation under such portion, directly or indirectly, is provided at any time The excess benefits are not paid from a trust forming part of such governmental plan unless such trust is maintained solely for the purpose of providing such excess benefits.
415(n)	<p>Purchase of Permissive Service Credits</p> <p>The purchase of permissive service credits is accomplished by additional voluntary participant contributions to a governmental DB plan that increases service credit under the plan, subject to limitations on what and how much service credit is permitted.⁴⁷</p>
503(b)	<p>Prohibited Transactions</p> <p>The prohibited transaction rules of Code Section 4975 do not apply to governmental plans, but the prohibited transaction rules of Code Section 503 apply to governmental 401(a) plans.⁴⁸ The trust holding assets of a governmental plan may lose its tax-exempt status in the case of a prohibited transaction described in Code Section 503(b) between the plan and the employer.⁴⁹</p>
3405	<p>Tax Withholding on Plan Distributions</p> <p>Governmental plans must withhold and deposit federal taxes on plan distributions, provide withholding elections and Forms 1099-R, and file Form 945 with respect to taxes withheld.⁵⁰</p>

Governmental plans do not need to file for a change in plan year but do need to file Form 5308 for change in trust year unless the change satisfies the requirements for automatic approval.⁵¹ An individually designed governmental plan must file Form 5300 if applying for an initial determination letter from IRS regarding the tax-qualified status of the plan, or Form 5310, if applying for a determination about the continuing qualified status of the plan upon termination of the plan.⁵² If applying for a determination letter, governmental plans must provide notice to interested parties.⁵³

Code Provisions Not Applicable to Section 401(a) Plans

Table II lists Code sections not applicable to governmental plans qualified under Code Section 401(a). However, state or other federal laws may impose requirements similar to these Code section requirements on governmental plans. Plan sponsors and advisors would be well served to confirm what other requirements, if any, may apply.

TABLE II

Code Provisions Not Applicable to Section 401(a) Plans

Code Section	Description
401(a)(3), 401(a)(6) and 410	Minimum Participation Standards Governmental plans need not meet the minimum participation requirements of Code Sections 401(a)(3), 401(a)(6) or 410. ⁵⁴
401(a)(4)	Nondiscrimination Testing Governmental plans are exempt from the nondiscrimination requirements of Code Section 401(a)(4). ⁵⁵
401(a)(10) and 416	Top-Heavy Plan Rules Top-heavy plan requirements of Code Sections 401(a)(10) and 416 do not apply to governmental plans. ⁵⁶
401(a)(11) and 417	Joint and Survivor Annuities Qualified joint and survivor annuity (QJSA) and qualified preretirement survivor annuity (QPSA) requirements of Code Sections 401(a)(11) and 417 do not apply to governmental plans. ⁵⁷ No spousal consent or relative values statement is required, nor do restrictions on cashouts apply.
401(a)(12)	Plan Merger, Consolidation or Asset Transfer Plan asset transfer requirements of Code Section 401(a)(12) do not apply to governmental plans. ⁵⁸
401(a)(13)	Assignment and Alienation of Plan Benefits The nonalienation and nonassignment requirements of Code Section 401(a)(13) do not apply to governmental plans. ⁵⁹
401(a)(14)	Latest Benefit Commencement Dates Governmental plans need not commence benefits under Code Section 401(a)(14) by the latest of a participant's NRA, termination of service or tenth anniversary of plan participation. ⁶⁰
401(a)(15)	Benefits Not Decreased on Account of Increase in Social Security Benefits Governmental plans need not follow the rules of Code Section 401(a)(15), which say plans cannot decrease benefits due to increases in Social Security benefits or the Social Security wage base. ⁶¹

TABLE II continued

Code Provisions Not Applicable to Section 401(a) Plans


Code Section	Description
401(a)(19)	Forfeiture of Accrued Benefit Due to Withdrawal of Participant Contributions Governmental plans need not follow the rules of Code Section 401(a)(19) that no part of a participant's accrued benefit derived from employer contributions may be forfeited solely because of the participant's withdrawal of participant contributions. ⁶²
401(a)(20)	Notice to Pension Benefit Guaranty Corporation (PBGC) of DB Plan Distributions Upon Plan Termination Governmental plans need not notify PBGC under Code Section 401(a)(20) of distributions upon plan termination. ⁶³
401(a)(26)	Additional Participation Requirements for DB Plans Governmental plans need not satisfy the additional participation requirements for DB plans under Code Section 401(a)(26). ⁶⁴
401(a)(32)	Failure to Make Certain Payments During a Liquidity Shortfall Code Section 401(a)(32) does not apply to a governmental plan because Code Sections 412, 430(j)(4) and 433(f)(5) do not apply. ⁶⁵
401(a)(33)	Prohibition on Increasing Plan Liabilities During Bankruptcy Governmental plans are not covered by Employee Retirement Income Security Act (ERISA) Section 4021 and thus are not covered by Code Section 401(a)(33). ⁶⁶
401(a)(34)	Transfer of Missing Participant Benefits to PBGC Upon Plan Termination Code Section 401(a)(34) is not applicable to governmental plans because governmental plans are exempted from Title IV of ERISA.
401(k)(3)	Actual Deferral Percentage (ADP) Testing ADP testing of elective deferrals (which may include Roth contributions) does not apply to governmental plans. ⁶⁷
401(l)	Integration With Social Security Code Section 401(l) rules for integrating plan benefits with Social Security are generally not applicable to governmental plans. ⁶⁸
401(m)(2)	Actual Contribution Percentage (ACP) Testing ACP testing of matching and employee (after-tax) contributions in a DC plan does not apply to governmental plans, because Code Section 401(a)(4) does not apply. ⁶⁹
409A	Income Inclusion of Deferred Compensation Under Nonqualified Plans Code Section 409A does not apply to 401(a) tax qualified plans, whether governmental or not. ⁷⁰
410(b)	Minimum Coverage Requirements Minimum coverage requirements of Code Section 410(b) do not apply to governmental plans. ⁷¹
411(a)	Minimum Vesting Standards Governmental plans are exempt from the minimum vesting standards of Code Section 411(a) but must satisfy the pre-ERISA vesting requirements. ⁷² See the description for Code Section 411(e) in Table I, "Code Provisions that Apply to Section 401(a) Plans."

TABLE II continued

Code Provisions Not Applicable to Section 401(a) Plans)

Code Section	Description
411(b)	Accrual Rules Governmental plans are exempt from the accrual rules of Code Section 411(b). ⁷³
411(c)	Allocation of Accrued Benefits Between Employee and Employer Contributions Governmental plans are exempt from the Code Section 411(c) rules regarding allocating accrued benefits between employee and employer contributions. ⁷⁴
411(d)(3)	Vesting Upon Termination, Partial Termination or Discontinuance of Contributions Governmental plans are exempt from the vesting rules of Code Section 411(d)(3) but, under the pre-ERISA vesting rules, governmental plans must vest benefits or contributions upon plan termination, partial termination or the complete discontinuance of contributions. ⁷⁵ See the description for Code Section 411(e) in Table I, "Code Provisions that Apply to Section 401(a) Plans."
411(d)(6)	Anticutback Rules Governmental plans are exempt from the anticutback rules of Code Section 411(d)(6). ⁷⁶
412	Minimum Funding Standards Governmental plans are exempt from the minimum funding standards of Code Section 412. ⁷⁷
4980	Tax on Reversion of Qualified Plan Assets to Employer Governmental plans are exempt from the tax on reversions under Code Section 4980. ⁷⁸

In Summary

This article is intended to be a helpful overview of most of the key differences between governmental tax-qualified retirement plans and nongovernmental tax-qualified retirement plans. The author does not purport to have covered all differences or to have described the listed differences in detail. Nevertheless, this article should serve as a welcome introduction to differences between governmental and nongovernmental retirement plans qualified under Code Section 401(a) and a quick reference guide to most of those differences. 

Endnotes

1. A brief discussion of state and local governmental 403(b) and 457(b) plans can be found in "Charter School Benefits Conundrum: Governmental Plans or Not?" D. Schwallie, *Journal of Deferred Compensation*, Volume 20, No. 14 (Winter 2015).

2. Employee Retirement Income Security Act (ERISA) Section 3(32) actually says "established or maintained" but is otherwise identical to the Code Section 414(d) definition.

3. *Governmental plan* includes "any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which

is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669)" and "a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function)." [Code §414(d)]

4. Rev. Rul. 89-49.

5. 76 Fed. Reg. 69172 (November 8, 2011). The following link to the IRS website provides information on recent developments under Code §401(a) regarding governmental plans, including the advanced notice of proposed rulemaking (ANPRM): www.irs.gov/retirement-plans/governmental-plans-under-internal-revenue-code-section-401a-recent-developments.

6. IRS Chief Counsel Memorandum, POSTS-101840-07, July 9, 2007.

7. ERISA §§4(b)(1) and 4021(b)(2).

8. For example, Public Law 95-595, §§120-124 imposes annual reporting requirements similar to those of ERISA §103 on plans of the federal government and various federal agencies. Such annual report must be furnished to Congress and the comptroller general and is not required to be provided to participants and beneficiaries. The comptroller general, rather than independent public accountants, performs plan audits.

9. Instead, for state and local governments, a comprehensive annual financial report (CAFR), which includes governmental retirement plan information, is publicly available. The annual report required by Public Law 95-595 for plans of the federal government and various federal agencies includes funding information.

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10. State law may require distribution of some sort of summary to participants in state or local plans.
11. Code §6057(a).
12. 528 U.S. 62 (2000).
13. Age Discrimination in Employment Act (ADEA) §15.
14. ADEA §4(i)(1). Limited exceptions to the general rules are specified in ADEA §4(i).
15. ADEA §4(i)(10). A rate of return or method of crediting interest established pursuant to any provision of federal, state or local law (including any administrative rule or policy adopted in accordance with any such law) shall be treated as a market rate of return and a permissible method of crediting interest, but only if such rate or method does not violate any other requirement of ADEA.
16. Treas. Reg. §1.401-1(a)(2).
17. Treas. Reg. §§1.401(a)-1(b)(1) and 1.401-1(b)(1)(i).
18. Code §401(a)(25). However, actuarial assumptions in a governmental plan are not subject to the anticutback rules of Code §411(d)(6), but changes may be subject to state or other federal law.
19. Treas. Reg. §1.401(a)(9)-1, Q&A-2(d).
20. Treas. Reg. §1.401(a)(17)-1(d)(4)(ii). A *grandfathered participant* is an individual who first became a plan participant prior to first day of the first plan year beginning after the earlier of (1) December 31, 1995 or (2) the last day of the plan year by which a plan amendment reflecting the Omnibus Budget Reconciliation Act of 1993 reduction in the compensation limit was both adopted and effective. The compensation limit does not apply to a grandfathered participant to the extent it would reduce compensation below the amount allowed to be taken into account under the plan as in effect on July 1, 1993 (as adjusted, if the plan allowed for cost of living adjustments). "Thus, for example, if a plan as in effect on July 1, 1993, determined benefits without any reference to a limit on compensation, then the annual compensation limit in effect under this section will not apply to any [grandfathered] participant in any future year." *IRS Notice 2017-64* provides that the 2018 limit for grandfathered participants in plans that provided for cost of living adjustments to the limit on July 1, 1993 is \$405,000 as compared to the regular compensation limit for 2018 of \$275,000.
21. The potential penalty under Code §6652(i) for failure to provide the special tax notice applies to governmental plans.
22. Grandfathered governmental 401(k) plans may permit distribution of elective deferrals at the age of 59 1/2. See later discussion of 401(k). Governmental DC plans may specify an age prior to 62 for distribution of employer contributions. Governmental DB plans may specify a NRA earlier than the age of 62. See later discussion of vesting and NRA under Code §411(e)(2).

23. The remedial amendment period for governmental plans is described in Revenue Procedure 2016-37.
24. Treas. Reg. §1.401(k)-1(e)(4)(iv). If a state or local governmental unit adopted a 401(k) plan before May 7, 1986, then any 401(k) plan adopted by the unit at any time is treated as adopted before that date.
25. Treas. Reg. §1.401(k)-1(e)(4)(ii).
26. Code §7701(j). Link to fact sheet with additional information about the federal thrift savings plan: www.tsp.gov/PDF/formspubs/oc94-20.pdf.
27. Even if IRS were reluctant to impose taxes on plan participants, it could impose withholding taxes on the amounts included in participant income and assess failure to withhold and deposit penalties on the employer. Code §§3403, 6651 and 6656.
28. Treas. Reg. §1.401-6(b)(2), which is pre-ERISA.
29. Rev. Rul. 66-11 and preamble to Prop. Reg. §1.401(a)-1(b)(2)(v).
30. Preamble to Prop. Reg. §1.401(a)-1(b)(2)(v). Under pre-ERISA vesting rules, use of a period of service to determine NRA under a governmental plan would be permissible if the period of service used is reasonable and uniformly applicable. Absent an explicit definition of NRA, the plan must specify the earliest age at which a participant has the right to retire without consent of the employer and receive retirement benefits based upon the full amount of the participant's service on the date of retirement without actuarial or similar reduction because of retirement before some later specified age.
31. Prop. Treas. Reg. §1.401(a)-1(b)(2)(v). The proposed regulations provide three safe harbor NRAs specific to public safety employees in addition to the following four safe harbors:
 1. Aged 60 and five years of service
 2. Aged 55 and ten years of service
 3. Sum of age plus years of service equal to or greater than 80
 4. The earlier of 25 years of service or any of the above three safe harbors.
- An April 30, 2012 IRS memorandum for manager, EP Determinations, from acting director EP Rulings and Agreements, provided three safe harbor vesting schedules for purposes of issuing favorable determination letters to governmental plans:
 1. Vested after 15 years of creditable service (e.g., years of employment or years of participation)
 2. Graded vesting schedule of five to 20 years of creditable service
 3. Vested after 20 years of creditable service (only applicable to vesting schedule for a group in which substantially all of the participants are qualified public safety employees).
32. The controlled group definition under *IRS Notice 89-23* (the 80% control or funding test) is considered a reasonable (but not exclusive) interpretation of these definitions consistent with the unique nature of governmental entities. IRS general information letter to August D. Fields (August 20, 1991).
33. In a governmental plan where the contributions of employing units are designated as employee contributions, but the employer "picks up" the contributions, the contributions are treated as employer contributions. The employing unit must take formal action that the contributions on behalf of a specific class of employees, although designated as employee contributions, will be paid by the employing unit in lieu of employee contributions. A participating employee must not have a cash or deferred election right with respect to the designated employee contributions from and after the date of the "pick-up." Participating employees must not be permitted to opt out of the "pick-up" or to receive the contributed amounts directly instead of having them paid by the employing unit to the plan. Rev. Rul. 2006-43.
34. Code §414(p)(9).
35. Code §414(p)(11).
36. Code §414(u)(10) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) regulation §1002.260(b).
37. Code §415(b)(11).
38. Code §415(b)(2)(I)(i).
39. Code §415(b)(2)(I)(ii).
40. Code §§415(b)(2)(G) and 415(b)(2)(H).
41. Code §415(b)(2)(I)(i).
42. Code §415(b)(2)(I)(ii).

43. Code §415(b)(10).
44. Code §415(k)(3).
45. Treas. Reg. §415(c)-2(e)(5).
46. Treasury regulation §1.415(b)-1(b)(4) expressly states that the limitations of 415(b) do not apply to a qualified governmental excess benefit arrangement as defined in 415(m)(3). IRS private letter ruling 200526025 (April 8, 2005) permitted a 415(m)(3) excess plan with respect to a 401(a) DC plan of a county government. IRS private letter ruling 200148054 (July 16, 2001) permitted a 415(m)(3) excess plan with respect to a 403(b) plan of a state university system. 2007 Treasury regulations do not expressly state that the limitations of 415(c) do not apply to a 415(m)(3) excess plan, but Code §415(m)(1) exempts benefits under such excess plan from all §415 limits.
47. Purchase of permissive service credits must satisfy Code §415 limits either by (1) treating all such contributions as annual additions, but they do not count against the compensation percentage under Code §415(c)(1)(B), or (2) treating the accrued benefit from all such contributions as an annual benefit under §415(b), but they do not count against the pre-62 reduction limit under Code §415(b)(2)(C).
48. Code §503(a).
49. Prohibited transactions between a plan and the employer under Code §503(b) include:
- Lending any plan assets to the employer without receipt of adequate security and a reasonable rate of interest
 - Paying any compensation to the employer in excess of a reasonable amount
 - Making any part of plan services available on a preferential basis
 - Making any substantial purchase on behalf of the plan of securities or other property for more than adequate consideration
 - Selling any substantial part of plan securities or other property for less than an adequate consideration
 - Engaging in any other transaction which results in a substantial diversion of plan income or corpus.
50. See instructions to Forms 945 and 1099-R.
51. See instructions to Form 5308.
52. Rev. Proc. 2016-37.
53. Rev. Proc. 2017-4.
54. Code §§401(a)(5)(G) and 410(c).
55. Code §401(a)(5)(G).
56. Code §401(a)(10)(B)(iii).
57. See the last sentence following Code §401(a)(37). Code §417 actuarial assumptions may be needed for purposes of Code §415(b).
58. See the last sentence following Code §401(a)(37).
59. See the last sentence following Code §401(a)(37).
60. See the last sentence following Code §401(a)(37).
61. See the last sentence following Code §401(a)(37).
62. See the last sentence following Code §401(a)(37).
63. See the last sentence following Code §401(a)(37).
64. Code §401(a)(26)(G).
65. Code §401(a)(32)(A).
66. ERISA §4021(b)(2).
67. Code §401(k)(3)(G).
68. Code §§401(a)(5)(D) and 401(a)(5)(G).
69. Code §401(m)(1) and Treas. Reg. §1.401(m)-1(b)(2).
70. Code §§409A(d)(1) and 409A(d)(2). Code §409A also does not apply to 457(b) and 415(m) plans.
71. Code §410(c).
72. Code §411(e).
73. Code §411(e).
74. Code §411(e).
75. Code §411(e).
76. Code §411(e). State laws may impose anticutback rules or even more restrictive rules. For example, the Illinois state constitution protects accrued and future retirement benefits, and courts in California have judicially developed a “vested rights doctrine” that protects state government benefits. At the time of this writing, the California vested rights doctrine, also known as the *California rule*, is being reconsidered by the state courts, including the California Supreme Court.
77. Code §412(e)(2).
78. Code §4980(c)(1)(B).

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