

## A free newsletter for estate planners, from Natalie B. Choate

Dear estate planning professional:

!!!! I've moved !!!!! I'm now of counsel to a great Boston law firm, Nutter McClennen & Fish LLP. Please update your Rolodex, Blackberry, Outlook, etc. to reflect my new contact info:

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To contact me regarding legal services, client consultations, and the like, go to the website [www.nutter.com](http://www.nutter.com). For free advice and schmoozing, continue to contact me through [www.ataxplan.com](http://www.ataxplan.com). Ataxplan Publications has relocated too... the new address is PO Box 51371, Boston MA 02205-1371.

I know that converting investments into an annuity contract is one way to protect assets while still qualifying for government "Medicaid" assistance, but the technicalities of how you do that are way beyond me (and they've recently changed, too). Dale M. Krause, J.D., stepped in to fill this gap: He's a lawyer who knows the Medicaid rules AND he's an insurance agent who sells "Medicaid Qualified" annuities. [www.medicaidannuity.com](http://www.medicaidannuity.com). Speaking of Medicaid, planning for disabled beneficiaries is a growing area of practice. The National Academy of Elder Law Attorneys ([www.NAELA.org](http://www.NAELA.org)) has long been a leader in this field; now there's also the Academy of Special Needs Planners ([www.specialneedsplanners.com](http://www.specialneedsplanners.com)).

Shame on the IRS. They have a web page with summary descriptions of various types of trusts including qualified personal residence trusts, charitable lead trusts, and other common perfectly legal estate planning trusts...and the page is entitled "Abusive Trust Tax Evasion Schemes - Special Types of Trusts." See <http://www.irs.gov/businesses/small/article/0,,id=106553,00.html>. Why do they want the public to think that QPRTs (which were invented by the IRS) and charitable lead trusts are abusive tax evasion schemes?

Whenever I have a question about retirement plan distributions of course I turn to my own book, *Life and Death Planning for Retirement Benefits* (6<sup>th</sup> ed. 2006, [www.ataxplan.com](http://www.ataxplan.com)). But when I have a question about retirement plans generally, I turn to *The Pension Answer Book* by Stephen J. Krass. ERISA lawyers need a full multi-volume pension service; the rest of us need this book, the best one-volume law reference work out there about qualified retirement plans and IRAs. From Aspen Publishers (a division of Wolters Kluwers), [www.aspenpublishers.com](http://www.aspenpublishers.com). Recent price \$225.

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Until the next issue,  
Natalie B. Choate

## Separation vs. Severance vs. Retirement

What's the difference between separation from service, severance from employment, and retirement? All three are "triggering events" for permitted retirement plan distributions under certain circumstances, but each is a triggering event for a different thing.

**Separation from service:** To receive favorable treatment for employer stock containing "net unrealized appreciation" (NUA), the individual must receive a "lump sum distribution" (LSD) from a qualified plan. An LSD is the distribution of the participant's entire account balance within one taxable year of the recipient following the most recent triggering event. Separation from service is one such triggering event; see § 402(e)(4)(D)(i), I-IV. "An employee will be considered separated from the service...only upon the employee's death, retirement, resignation or discharge, and *not* when the employee continues on the same job for a different employer as a result of the liquidation, merger or consolidation, etc., of the former employer." Rev. Rul. 79-336, 1979-2 C.B. 187 (emphasis added). Note the focus on the *job*, rather than on who signs the paycheck: Mo works for X Corp., which is acquired by and merged into Y Corp. Mo still does the same job at the same desk, but now his paychecks are signed by Y Corp. Even though Mo no longer works for X Corp., he can't qualify for LSD/NUA treatment based on a supposed "separation from service" from X Corp.

**Severance from employment:** Before 2002, separation from service was also used as a triggering event for determining whether an individual's *elective deferral account* under a § 401(k) or § 403(b) plan could be distributed. However, because determination of whether "separation from service" has occurred can be notoriously difficult, Congress replaced it with severance from employment for this purpose (though *not* for LSD purposes!). § 401(k)(2)(B)(i)(I), effective for distributions after 2001. "An employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan. An employee does not have a severance from employment if, in connection with a change of employment, the employee's new employer maintains such plan with respect to the employee. For example, a new employer maintains a plan with respect to an employee by continuing or assuming sponsorship of the plan or by accepting a transfer of plan assets and liabilities (within the meaning of section 414(l)) with respect to the employee." Reg. § 1.401(k)-1(d)(2); Regs. § 1.403(b)-2(b)(19), § 1.403(b)-6(h) (effective in 2009). Note this definition keys off the *plan*, not the *job*. The employee may be working at the same job at the same desk, but if the new acquiring company that is now signing the her paycheck does not maintain the 401(k) plan that the old company had, she has severed from employment (even if she hasn't "separated from service").

**Retirement:** Whether an employee has "retired" matters for determining whether the employee has reached his or her required beginning date (RBD). The RBD is (for all 403(b) plans, and for qualified plans sponsored by an employer of which the employee is not a 5% owner) "April 1 of the calendar year following the later of (I) the calendar year in which the employee attains age 70½, or (II) the calendar year in which the employee retires." § 401(a)(9)(C). What does it mean to "retire?" We know that the employment the employee must retire from is "employment with the *employer maintaining the plan*." Reg. § 1.401(a)(9)-2, A-2(a), § 1.403(b)-6(e)(3) [eff. 2009]; emphasis added. That sounds similar to severance from employment. Beyond this, there is no definition of "retirement." So whether "retirement" is the same as separation from service, or as severance from employment, or something else altogether, remains to be seen. If you find out what retirement means please let me know.