

109TH CONGRESS
1ST SESSION

S. 1142

To provide pay protection for members of the Reserve and the National Guard, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 26, 2005

Ms. LANDRIEU (for herself, Mr. GRAHAM, Mr. ALLEN, Mr. DURBIN, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To provide pay protection for members of the Reserve and the National Guard, 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 “Helping Our Patriotic
5 Employers at Helping Our Military Employees Act of
6 2005” or the “HOPE at HOME Act of 2005”.

1 **SEC. 2. NONREDUCTION IN PAY WHILE FEDERAL EM-**
2 **PLOYEE IS PERFORMING ACTIVE SERVICE IN**
3 **THE UNIFORMED SERVICES.**

4 (a) IN GENERAL.—Subchapter IV of chapter 55 of
5 title 5, United States Code, is amended by adding at the
6 end the following:

7 **“§ 5538. Nonreduction in pay while serving in the**
8 **uniformed services**

9 “(a) An employee who is absent from a position of
10 employment with the Federal Government in order to per-
11 form service in the uniformed services for a period of more
12 than 90 days shall be entitled to receive, for each pay pe-
13 riod described in subsection (b), an amount equal to the
14 amount by which—

15 “(1) the amount of basic pay which would oth-
16 erwise have been payable to such employee for such
17 pay period if such employee’s civilian employment
18 with the Government had not been interrupted by
19 that service, exceeds (if at all)

20 “(2) the amount of pay and allowances which
21 (as determined under subsection (d))—

22 “(A) is payable to such employee for that
23 service; and

24 “(B) is allocable to such pay period.

25 “(b)(1) Amounts under this section shall be payable
26 with respect to each pay period (which would otherwise

1 apply if the employee's civilian employment had not been
2 interrupted)—

3 “(A) during which such employee is entitled to
4 reemployment rights under chapter 43 of title 38
5 with respect to the position from which such em-
6 ployee is absent (as referred to in subsection (a));
7 and

8 “(B) for which such employee does not other-
9 wise receive basic pay (including by taking any an-
10 nual, military, or other paid leave) to which such
11 employee is entitled by virtue of such employee's ci-
12 vilian employment with the Government.

13 “(2) For purposes of this section, the period during
14 which an employee is entitled to reemployment rights
15 under chapter 43 of title 38—

16 “(A) shall be determined disregarding the provi-
17 sions of section 4312(d) of title 38; and

18 “(B) shall include any period of time specified
19 in section 4312(e) of title 38 within which an em-
20 ployee may report or apply for employment or reem-
21 ployment following completion of service in the uni-
22 formed services.

23 “(c) Any amount payable under this section to an em-
24 ployee shall be paid—

25 “(1) by such employee's employing agency;

1 “(2) from the appropriation or fund which
2 would be used to pay the employee if such employee
3 were in a pay status; and

4 “(3) to the extent practicable, at the same time
5 and in the same manner as would basic pay if such
6 employee’s civilian employment had not been inter-
7 rupted.

8 “(d) The Office of Personnel Management shall, in
9 consultation with Secretary of Defense, prescribe any reg-
10 ulations necessary to carry out the preceding provisions
11 of this section.

12 “(e)(1) The head of each agency referred to in section
13 2302(a)(2)(C)(ii) shall, in consultation with the Office,
14 prescribe procedures to ensure that the rights under this
15 section apply to the employees of such agency.

16 “(2) The Administrator of the Federal Aviation Ad-
17 ministration shall, in consultation with the Office, pre-
18 scribe procedures to ensure that the rights under this sec-
19 tion apply to the employees of that agency.

20 “(f) For purposes of this section—

21 “(1) the terms ‘employee’, ‘Federal Govern-
22 ment’, and ‘uniformed services’ have the same re-
23 spective meanings as given in section 4303 of title
24 38;

1 “(2) the term ‘service in the uniformed services’
2 has the meaning given that term in section 4303 of
3 title 38 and includes duty performed by a member
4 of the National Guard under section 502(f) of title
5 32 at the direction of the Secretary of the Army or
6 Secretary of the Air Force;

7 “(3) the term ‘employing agency’, as used with
8 respect to an employee entitled to any payments
9 under this section, means the agency or other entity
10 of the Government (including an agency referred to
11 in section 2302(a)(2)(C)(ii)) with respect to which
12 such employee has reemployment rights under chap-
13 ter 43 of title 38; and

14 “(4) the term ‘basic pay’ includes any amount
15 payable under section 5304.”.

16 (b) CLERICAL AMENDMENT.—The table of sections
17 for chapter 55 of title 5, United States Code, is amended
18 by inserting after the item relating to section 5537 the
19 following:

 “5538. Nonreduction in pay while serving in the uniformed services or National
 Guard.”.

20 (c) EFFECTIVE DATE.—The amendments made by
21 this section shall apply with respect to pay periods (as de-
22 scribed in section 5538(b) of title 5, United States Code,
23 as added by this section) beginning on or after September
24 11, 2001.

1 **SEC. 3. READY RESERVE-NATIONAL GUARD EMPLOYEE**
 2 **CREDIT ADDED TO GENERAL BUSINESS**
 3 **CREDIT.**

4 (a) **READY RESERVE-NATIONAL GUARD CREDIT.**—
 5 Subpart D of part IV of subchapter A of chapter 1 of
 6 the Internal Revenue Code of 1986 (relating to business-
 7 related credits) is amended by adding at the end the fol-
 8 lowing:

9 **“SEC. 45J. READY RESERVE-NATIONAL GUARD EMPLOYEE**
 10 **CREDIT.**

11 “(a) **GENERAL RULE.**—For purposes of section 38,
 12 the Ready Reserve-National Guard employee credit deter-
 13 mined under this section for any taxable year is an amount
 14 equal to 50 percent of the actual compensation amount
 15 for such taxable year.

16 “(b) **DEFINITION OF ACTUAL COMPENSATION**
 17 **AMOUNT.**—For purposes of this section, the term ‘actual
 18 compensation amount’ means the amount of compensation
 19 paid or incurred by an employer with respect to a Ready
 20 Reserve-National Guard employee on any day during a
 21 taxable year when the employee was absent from employ-
 22 ment for the purpose of performing qualified active duty.

23 “(c) **LIMITATION.**—No credit shall be allowed with
 24 respect to a Ready Reserve-National Guard employee who
 25 performs qualified active duty on any day on which the

1 employee was not scheduled to work (for reason other than
2 to participate in qualified active duty).

3 “(d) DEFINITIONS.—For purposes of this section—

4 “(1) QUALIFIED ACTIVE DUTY.—The term
5 ‘qualified active duty’ means—

6 “(A) active duty, other than the training
7 duty specified in section 10147 of title 10,
8 United States Code (relating to training re-
9 quirements for the Ready Reserve), or section
10 502(a) of title 32, United States Code (relating
11 to required drills and field exercises for the Na-
12 tional Guard), in connection with which an em-
13 ployee is entitled to reemployment rights and
14 other benefits or to a leave of absence from em-
15 ployment under chapter 43 of title 38, United
16 States Code, and

17 “(B) hospitalization incident to such duty.

18 “(2) COMPENSATION.—The term ‘compensa-
19 tion’ means any remuneration for employment,
20 whether in cash or in kind, which is paid or incurred
21 by a taxpayer and which is deductible from the tax-
22 payer’s gross income under section 162(a)(1).

23 “(3) READY RESERVE-NATIONAL GUARD EM-
24 PLOYEE.—The term ‘Ready Reserve-National Guard
25 employee’ means an employee who is a member of

1 the Ready Reserve of a reserve component of an
2 Armed Force of the United States as described in
3 sections 10142 and 10101 of title 10, United States
4 Code.

5 “(4) CERTAIN RULES TO APPLY.—Rules similar
6 to the rules of section 52 shall apply.

7 “(e) PORTION OF CREDIT MADE REFUNDABLE.—

8 “(1) IN GENERAL.—In the case of an eligible
9 employer of a Ready Reserve-National Guard em-
10 ployee, the aggregate credits allowed to a taxpayer
11 under subpart C shall be increased by the lesser
12 of—

13 “(A) the credit which would be allowed
14 under this section without regard to this sub-
15 section and the limitation under section 38(e),
16 or

17 “(B) the amount by which the aggregate
18 amount of credits allowed by this subpart (de-
19 termined without regard to this subsection)
20 would increase if the limitation imposed by sec-
21 tion 38(e) for any taxable year were increased
22 by the amount of employer payroll taxes im-
23 posed on the taxpayer during the calendar year
24 in which the taxable year begins.

1 The amount of the credit allowed under this sub-
2 section shall not be treated as a credit allowed under
3 this subpart and shall reduce the amount of the
4 credit otherwise allowable under subsection (a) with-
5 out regard to section 38(c).

6 “(2) ELIGIBLE EMPLOYER.—For purposes of
7 this subsection, the term ‘eligible employer’ means
8 an employer which is a State or local government or
9 subdivision thereof.

10 “(3) EMPLOYER PAYROLL TAXES.—For pur-
11 poses of this subsection—

12 “(A) IN GENERAL.—The term ‘employer
13 payroll taxes’ means the taxes imposed by—

14 “(i) section 3111(b), and

15 “(ii) sections 3211(a) and 3221(a)
16 (determined at a rate equal to the rate
17 under section 3111(b)).

18 “(B) SPECIAL RULE.—A rule similar to
19 the rule of section 24(d)(2)(C) shall apply for
20 purposes of subparagraph (A).”.

21 (b) CREDIT TO BE PART OF GENERAL BUSINESS
22 CREDIT.—Subsection (b) of section 38 of such Code (re-
23 lating to general business credit) is amended by striking
24 “plus” at the end of paragraph (18), by striking the period

1 at the end of paragraph (19) and inserting “, plus”, and
 2 by adding at the end the following:

3 “(20) the Ready Reserve-National Guard em-
 4 ployee credit determined under section 45J(a).”.

5 (c) DENIAL OF DOUBLE BENEFIT.—Section 280C(a)
 6 (relating to rule for employment credits) is amended by
 7 inserting “45J(a),” after “45A(a),”.

8 (d) CONFORMING AMENDMENT.—The table of sec-
 9 tions for subpart D of part IV of subchapter A of chapter
 10 1 of the Internal Revenue Code of 1986 is amended by
 11 inserting after the item relating to section 45I the fol-
 12 lowing:

“Sec. 45J. Ready Reserve-National Guard employee credit.”.

13 (e) EFFECTIVE DATE.—The amendments made by
 14 this section shall apply to taxable years beginning after
 15 the date of the enactment of this Act.

16 **SEC. 4. READY RESERVE-NATIONAL GUARD REPLACEMENT**
 17 **EMPLOYEE CREDIT.**

18 (a) IN GENERAL.—Subpart B of part IV of sub-
 19 chapter A of chapter 1 of the Internal Revenue Code of
 20 1986 (relating to foreign tax credit, etc.) is amended by
 21 adding after section 30A the following new section:

22 **“SEC. 30B. READY RESERVE-NATIONAL GUARD REPLACE-**
 23 **MENT EMPLOYEE CREDIT.**

24 “(a) ALLOWANCE OF CREDIT.—

1 “(1) IN GENERAL.—In the case of an eligible
2 taxpayer, there shall be allowed as a credit against
3 the tax imposed by this chapter for the taxable year
4 the sum of the employment credits for each qualified
5 replacement employee under this section.

6 “(2) EMPLOYMENT CREDIT.—The employment
7 credit with respect to a qualified replacement em-
8 ployee of the taxpayer for any taxable year is equal
9 to 50 percent of the lesser of—

10 “(A) the individual’s qualified compensa-
11 tion attributable to service rendered as a quali-
12 fied replacement employee, or

13 “(B) \$12,000.

14 “(b) QUALIFIED COMPENSATION.—The term ‘quali-
15 fied compensation’ means—

16 “(1) compensation which is normally contingent
17 on the qualified replacement employee’s presence for
18 work and which is deductible from the taxpayer’s
19 gross income under section 162(a)(1),

20 “(2) compensation which is not characterized
21 by the taxpayer as vacation or holiday pay, or as
22 sick leave or pay, or as any other form of pay for
23 a nonspecific leave of absence, and

24 “(3) group health plan costs (if any) with re-
25 spect to the qualified replacement employee.

1 “(c) QUALIFIED REPLACEMENT EMPLOYEE.—For
2 purposes of this section—

3 “(1) IN GENERAL.—The term ‘qualified re-
4 placement employee’ means an individual who is
5 hired to replace a Ready Reserve-National Guard
6 employee or a Ready Reserve-National Guard self-
7 employed taxpayer, but only with respect to the pe-
8 riod during which—

9 “(A) such Ready Reserve-National Guard
10 employee is receiving an actual compensation
11 amount (as defined in section 45J(b)) from the
12 employee’s employer and is participating in
13 qualified active duty, including time spent in
14 travel status, or

15 “(B) such Ready Reserve-National Guard
16 self-employed taxpayer is participating in such
17 qualified active duty.

18 “(2) READY RESERVE-NATIONAL GUARD EM-
19 PLOYEE.—The term ‘Ready Reserve-National Guard
20 employee’ has the meaning given such term by sec-
21 tion 45J(d)(3).

22 “(3) READY RESERVE-NATIONAL GUARD SELF-
23 EMPLOYED TAXPAYER.—The term ‘Ready Reserve-
24 National Guard self-employed taxpayer’ means a
25 taxpayer who—

1 “(A) has net earnings from self-employ-
2 ment (as defined in section 1402(a)) for the
3 taxable year, and

4 “(B) is a member of the Ready Reserve of
5 a reserve component of an Armed Force of the
6 United States as described in section 10142
7 and 10101 of title 10, United States Code.

8 “(d) COORDINATION WITH OTHER CREDITS.—The
9 amount of credit otherwise allowable under sections 51(a)
10 and 1396(a) with respect to any employee shall be reduced
11 by the credit allowed by this section with respect to such
12 employee.

13 “(e) LIMITATIONS.—

14 “(1) APPLICATION WITH OTHER CREDITS.—
15 The credit allowed under subsection (a) for any tax-
16 able year shall not exceed the excess (if any) of—

17 “(A) the regular tax for the taxable year
18 reduced by the sum of the credits allowable
19 under subpart A and sections 27, 29, and 30,
20 over

21 “(B) the tentative minimum tax for the
22 taxable year.

23 “(2) DISALLOWANCE FOR FAILURE TO COMPLY
24 WITH EMPLOYMENT OR REEMPLOYMENT RIGHTS OF
25 MEMBERS OF THE RESERVE COMPONENTS OF THE

1 ARMED FORCES OF THE UNITED STATES.—No credit
2 shall be allowed under subsection (a) to a taxpayer
3 for—

4 “(A) any taxable year, beginning after the
5 date of the enactment of this section, in which
6 the taxpayer is under a final order, judgment,
7 or other process issued or required by a district
8 court of the United States under section 4323
9 of title 38 of the United States Code with re-
10 spect to a violation of chapter 43 of such title,
11 and

12 “(B) the 2 succeeding taxable years.

13 “(f) GENERAL DEFINITIONS AND SPECIAL RULES.—

14 For purposes of this section—

15 “(1) ELIGIBLE TAXPAYER.—The term ‘eligible
16 taxpayer’ means a small business employer or a
17 Ready Reserve-National Guard self-employed tax-
18 payer.

19 “(2) SMALL BUSINESS EMPLOYER.—

20 “(A) IN GENERAL.—The term ‘small busi-
21 ness employer’ means, with respect to any tax-
22 able year, any employer who employed an aver-
23 age of 50 or fewer employees on business days
24 during such taxable year.

1 “(B) CONTROLLED GROUPS.—For pur-
2 poses of subparagraph (A), all persons treated
3 as a single employer under subsection (b), (c),
4 (m), or (o) of section 414 shall be treated as a
5 single employer.

6 “(3) QUALIFIED ACTIVE DUTY.—The term
7 ‘qualified active duty’ has the meaning given such
8 term by section 45J(d)(1).

9 “(4) SPECIAL RULES FOR CERTAIN MANUFAC-
10 TURERS.—

11 “(A) IN GENERAL.—In the case of any
12 qualified manufacturer—

13 “(i) subsection (a)(2)(B) shall be ap-
14 plied by substituting ‘\$20,000’ for
15 ‘\$12,000’, and

16 “(ii) paragraph (2)(A) of this sub-
17 section shall be applied by substituting
18 ‘100’ for ‘50’.

19 “(B) QUALIFIED MANUFACTURER.—For
20 purposes of this paragraph, the term ‘qualified
21 manufacturer’ means any person if—

22 “(i) the primary business of such per-
23 son is classified in sector 31, 32, or 33 of
24 the North American Industrial Classifica-
25 tion System, and

1 “(ii) all of such person’s facilities
2 which are used for production in such busi-
3 ness are located in the United States.

4 “(5) CARRYBACK AND CARRYFORWARD AL-
5 LOWED.—

6 “(A) IN GENERAL.—If the credit allowable
7 under subsection (a) for a taxable year exceeds
8 the amount of the limitation under subsection
9 (e)(1) for such taxable year (in this paragraph
10 referred to as the ‘unused credit year’), such
11 excess shall be a credit carryback to each of the
12 3 taxable years preceding the unused credit
13 year and a credit carryforward to each of the
14 20 taxable years following the unused credit
15 year.

16 “(B) RULES.—Rules similar to the rules of
17 section 39 shall apply with respect to the credit
18 carryback and credit carryforward under sub-
19 paragraph (A).

20 “(6) CERTAIN RULES TO APPLY.—Rules similar
21 to the rules of subsections (c), (d), and (e) of section
22 52 shall apply.”.

23 (b) NO DEDUCTION FOR COMPENSATION TAKEN
24 INTO ACCOUNT FOR CREDIT.—Section 280C(a) of the In-

1 ternal Revenue Code of 1986 (relating to rule for employ-
2 ment credits), as amended by this Act, is amended—

3 (1) by inserting “or compensation” after “sala-
4 ries”, and

5 (2) by inserting “30B,” before “45A(a),”.

6 (c) CONFORMING AMENDMENT.—Section 55(c)(2) of
7 the Internal Revenue Code of 1986 is amended by insert-
8 ing “30B(e)(1),” after “30(b)(3),”.

9 (d) CLERICAL AMENDMENT.—The table of sections
10 for subpart B of part IV of subchapter A of chapter 1
11 of the Internal Revenue Code of 1986 is amended by add-
12 ing after the item relating to section 30A the following
13 new item:

“Sec. 30B. Credit for replacement of activated military reservists.”.

14 (e) EFFECTIVE DATE.—The amendments made by
15 this section shall apply to taxable years beginning after
16 the date of the enactment of this Act.

17 **SEC. 5. INCOME TAX WITHHOLDING ON DIFFERENTIAL**
18 **WAGE PAYMENTS.**

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

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

24 “(1) IN GENERAL.—For purposes of subsection
25 (a), any differential wage payment shall be treated

1 as a payment of wages by the employer to the em-
 2 ployee.

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

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

11 “(B) represents all or a portion of the
 12 wages the individual would have received from
 13 the employer if the individual were performing
 14 service for the employer.”.

15 (b) EFFECTIVE DATE.—The amendment made by
 16 this section shall apply to remuneration paid after Decem-
 17 ber 31, 2004.

18 **SEC. 6. TREATMENT OF DIFFERENTIAL WAGE PAYMENTS**

19 **FOR RETIREMENT PLAN PURPOSES.**

20 (a) PENSION PLANS.—

21 (1) IN GENERAL.—Section 414(u) of the Inter-
 22 nal Revenue Code of 1986 (relating to special rules
 23 relating to veterans’ reemployment rights under
 24 USERRA) is amended by adding at the end the fol-
 25 lowing new paragraph:

1 “(11) TREATMENT OF DIFFERENTIAL WAGE
2 PAYMENTS.—

3 “(A) IN GENERAL.—Except as provided in
4 this paragraph, for purposes of applying this
5 title to a retirement plan to which this sub-
6 section applies—

7 “(i) an individual receiving a differen-
8 tial wage payment shall be treated as an
9 employee of the employer making the pay-
10 ment,

11 “(ii) the differential wage payment
12 shall be treated as compensation, and

13 “(iii) the plan shall not be treated as
14 failing to meet the requirements of any
15 provision described in paragraph (1)(C) by
16 reason of any contribution which is based
17 on the differential wage payment.

18 “(B) SPECIAL RULE FOR DISTRIBU-
19 TIONS.—

20 “(i) IN GENERAL.—Notwithstanding
21 subparagraph (A)(i), for purposes of sec-
22 tion 401(k)(2)(B)(i)(I), 403(b)(7)(A)(ii),
23 403(b)(11)(A), or 457(d)(1)(A)(ii), an in-
24 dividual shall be treated as having been
25 severed from employment during any pe-

1 riod the individual is performing service in
2 the uniformed services described in section
3 3401(i)(2)(A).

4 “(ii) LIMITATION.—If an individual
5 elects to receive a distribution by reason of
6 clause (i), the plan shall provide that the
7 individual may not make an elective deferral or
8 employee contribution during the 6-month
9 period beginning on the date of the
10 distribution.

11 “(C) NONDISCRIMINATION REQUIRE-
12 MENT.—Subparagraph (A)(iii) shall apply only
13 if all employees of an employer performing service
14 in the uniformed services described in section
15 3401(i)(2)(A) are entitled to receive differential
16 wage payments on reasonably equivalent terms and,
17 if eligible to participate in a retirement plan
18 maintained by the employer, to make contributions
19 based on the payments. For purposes of applying
20 this subparagraph, the provisions of paragraphs (3),
21 (4), and (5), of section 410(b) shall apply.

22 “(D) DIFFERENTIAL WAGE PAYMENT.—
23 For purposes of this paragraph, the term ‘dif-
24

1 ferential wage payment’ has the meaning given
2 such term by section 3401(i)(2).”.

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

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

14 (c) EFFECTIVE DATE.—The amendments made by
15 this section shall apply to plan years beginning after De-
16 cember 31, 2004.

17 (d) PROVISIONS RELATING TO PLAN AMEND-
18 MENTS.—

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

21 (A) such plan or contract shall be treated
22 as being operated in accordance with the terms
23 of the plan or contract during the period de-
24 scribed in paragraph (2)(B)(i), and

1 (B) except as provided by the Secretary of
2 the Treasury, such plan shall not fail to meet
3 the requirements of the Internal Revenue Code
4 of 1986 or the Employee Retirement Income
5 Security Act of 1974 by reason of such amend-
6 ment.

7 (2) AMENDMENTS TO WHICH SECTION AP-
8 PLIES.—

9 (A) IN GENERAL.—This subsection shall
10 apply to any amendment to any plan or annuity
11 contract which is made—

12 (i) pursuant to any amendment made
13 by this section, and

14 (ii) on or before the last day of the
15 first plan year beginning on or after Janu-
16 ary 1, 2007.

17 (B) CONDITIONS.—This subsection shall
18 not apply to any plan or annuity contract
19 amendment unless—

20 (i) during the period beginning on the
21 date the amendment described in subpara-
22 graph (A)(i) takes effect and ending on the
23 date described in subparagraph (A)(ii) (or,
24 if earlier, the date the plan or contract
25 amendment is adopted), the plan or con-

1 tract is operated as if such plan or con-
2 tract amendment were in effect, and

3 (ii) such plan or contract amendment
4 applies retroactively for such period.

○