

**PUBLIC SECTOR EMPLOYER/SPONSOR
TYPES OF TRUSTS FOR USE WITH HRAs**

Trust Feature	VEBA (501(c)(9))	Section 115
Investment	Trust-directed, participant directed, or none	Trustee-directed, participant directed, or none
Tax treatment of participant benefits (including benefits paid with earnings)	Tax-free	Tax-free
Tax treatment of trust income	Tax-free ¹	Tax-free ²
Assets available to creditors	No	No
IRS Ruling Required	Yes	No, but recommended ³
Treatment of assets upon termination of trust	No reversion to employer	Reversion to employer allowed, but by design can be prohibited ⁴
Counted for GASB 43 OPEB	Yes	Yes ⁵
Participation	Must be "voluntary" ⁶	May be mandatory

¹ VEBA Trusts are ordinarily subject to tax (at trust rates) on the trust's unrelated business income. Code § 511(d). However, the unrelated business income rules do not apply to the VEBAs to which substantially all of the contributions are made by employers that were exempt from tax throughout the prior 5-taxable year period.

² The unrelated business income rules of the Code do not apply to Section 115 trusts.

³ In most cases, a trust maintained by a state or political subdivision for purposes of funding welfare benefits will be considered an integral part of the state or political subdivision, thereby entitling it to the benefits of Section 115. However, the IRS takes the position that whether an organization (trust) is an integral part depends on the facts and circumstances, such as the political subdivision's degree of control and financial commitment to the trust.

⁴ Under GASB 43 the OPEB liability will be "unfunded" if funds are not segregated and/or if they may revert to the employer.

⁵ Unclear whether the GASB will recognize a 115 trust as fully satisfying the GASB 43 specifications for a qualified OPEB trust or equivalent arrangement.

⁶ Technically, participation in the trust (and underlying plan) must be "voluntary". However, participation may be mandatory if no detriment to employee.

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Control of Trust	Generally, must be controlled by member (employees), independent trustee, or trustees or fiduciaries some of which are designated by members ⁷	Certain level of control by employer required
Multiple Employers	Yes, more than one employer may contribute to the trust.	Yes ⁸
State Regulation of Investments	No	Likely ⁹

⁷ It appears this requirement means the employer cannot be the trustee or otherwise have control of the trust (i.e., have power to remove the trustee), although we are aware of numerous VEBAs approved by the IRS where this is the case. One possible way the employer could be the trustee is if the employer is designated as the trustee in a collective bargaining agreement ("CBA"), although there is no authority providing so. Also, it is unclear whether the designation of a trustee in a CBA will meet the requirements where the plan/trust also benefits non-bargained employees.

⁸ PLR 97-23042.

⁹ Many states regulate the investment of "public funds," which, depending on the particular language of the statute, may include funds held in a Section 115 trust.