

### 3.25 H.R. 2146–Defending Public Safety Employees' Retirement Act

H.R. 2146 ([PL 114-26](#)<sup>85</sup>) was signed into law on June 29, 2015, and basically takes the “retire in your 55th year of age rule” and replaces the “55” with “50.” Simple enough? It means that if you work at least one day into your 50<sup>th</sup> year of birth, and then retire, you will be covered by the new law. Furthermore, H.R. 2146 also cleared the way for folks who already retired in their 50<sup>th</sup> year of age to switch from life expectancy-based TSP distributions to distributions they control. On December 18, 2015, the 2016 Consolidated Appropriations Act extended the benefits of H.R. 2146 to include Nuclear Materials Couriers, U.S. Capitol Police, Supreme Court Police and DSS Agents of the Department of State.

The complete list of positions covered by H.R. 2146:

- 1) Law Enforcement Officer
- 2) Firefighter
- 3) Customs and Border Protection Officer
- 4) Air Traffic Controller
- 5) Nuclear Materials Courier
- 6) U.S. Capitol Police
- 7) Supreme Court Police
- 8) DSS Agents of the Department of State

What was always missing from H.R. 2146 was coverage for those folks that retired before they attained the age of 50, with the required 25 years or more of service. For the past seven years or so, this group of folks was not covered under H.R. 2146. If they wanted to make a penalty-free TSP withdrawal, that had to be done as a life-expectancy installment payment or under one of the options under IRC § 72(t). Many of these folks stayed on until January of the year they turned age 50, just so they could get covered under H.R. 2146.

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<sup>85</sup> <https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>

On December 23, 2022, Section 329 of the *Consolidated Appropriations Act, 2023*, corrected that oversight. Effective with the date of enactment of the *Consolidated Appropriations Act, 2023*, these folks now enjoy the same penalty-free withdrawal rules under H.R. 2146. As you can see below, Section 329 modifies IRC § 72(t)(10) with “age 50 or 25 years of service under the plan, whichever is earlier” where before IRC § 72(t)(10) just stated “age 50” after the initial implementation of H.R. 2146.

***SEC. 329. MODIFICATION OF ELIGIBLE AGE FOR EXEMPTION FROM EARLY WITHDRAWAL PENALTY.***

*(a) IN GENERAL.—Subparagraph (A) of section 72(t)(10), as amended by this Act, is further amended by striking “age 50” and inserting “age 50 or 25 years of service under the plan, whichever is earlier”.*

*(b) EFFECTIVE DATE.—The amendment made by this section shall apply to distributions made after the date of the enactment of this Act.*

Of course, anyone who follows me knows that I’m not a big Roth TSP fan for SCEs and this is another reason why. As I interpret it, H.R. 2146 does not apply to the Roth TSP. Quite frankly, no one has issued any guidance on this yet, but since the old “55 rule” didn’t apply to the Roth TSP and H.R. 2146 basically replaced “55” with “50 or 25 years of service under the plan, whichever is earlier” in the same part of IRC § 72(t), I’m going to provide guidance that H.R. 2146 does *not* apply to the Roth TSP. For the Roth TSP, you will have to be age 59½ with funds on deposit for five years in order for your distributions to be “qualified,” meaning that the entire amount is nontaxable. Of course, that’s no longer an issue, since the TSP will now allow you to withdraw from your Traditional or Roth balance, so folks in this position may want to direct that their withdrawal be funded from their Traditional balance.

### **3.26 H.R. 2146 and TSP 1099-R Reporting for Annuitants**

In order for the TSP to issue a Form 1099 indicating that a distribution has been made pursuant to H.R. 2146, the TSP needs to know if the participant qualifies as having retired from one of these eight positions:

- 1) Law Enforcement Officer
- 2) Firefighter
- 3) Customs and Border Protection Officer
- 4) Air Traffic Controller
- 5) Nuclear Materials Courier
- 6) U.S. Capitol Police
- 7) Supreme Court Police
- 8) DSS Agents of the Department of State

If you are a SCE and not employed in one of the above-listed eight positions, then H.R. 2146 does not apply to you. Not all SCE positions are covered by H.R. 2146. The TSP is reporting it does not always have these position codes on file as a normal part of updating participant records to indicate the position code for annuitants when they retire. The TSP is working with employing agencies to ensure the TSP receives these codes so that the proper Form 1099-R coding can be performed by the TSP. If the TSP does not have the position code in its records, and you received a distribution of funds pursuant to H.R. 2146, you will receive a Form 1099-R that indicates “early withdrawal—no known exception,” which will appear to the IRS that a penalty applies to your withdrawal. Don’t panic!

The TSP will not issue an amended Form 1099-R. All you need to do is file an additional form with your tax return. Form 5329 is used for the purpose of supplying the IRS with the reason the reported Form 1099-R reason code is inaccurate. Below is a sample of the top portion of Form 5329 for a SCE who received \$24,000 of payments from the TSP during 2022 under H.R. 2146 rules. Below the sample form is the reason code detail from Form 5329 instructions.

H.R. 2146 and TSP 1099-R Reporting for Annuitants

Form <b>5329</b> Department of the Treasury Internal Revenue Service	<b>Additional Taxes on Qualified Plans                  (Including IRAs) and Other Tax-Favored Accounts</b> Attach to Form 1040, 1040-SR, or 1040-NR. Go to <a href="http://www.irs.gov/Form5329">www.irs.gov/Form5329</a> for instructions and the latest information.	OMB No. 1545-0074 <b>2022</b> Attachment Sequence No. <b>29</b>
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Name of individual subject to additional tax. If married filing jointly, see instructions. <b>Amy Q. Agent</b>	Your social security number <b>NNN-NN-NNNN</b>
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<b>Fill in Your Address Only if You Are Filing This Form by Itself and Not With Your Tax Return</b>	Home address (number and street), or P.O. box if mail is not delivered to your home <b>123 Main Street</b>	Apt. no.
	City, town or post office, state, and ZIP code. If you have a foreign address, also complete the spaces below. See instructions. <b>Anytown, ZZ NNNNN</b>	
	Foreign country name	Foreign province/state/county
	Foreign postal code	

If you **only** owe the additional 10% tax on the full amount of the early distributions, you may be able to report this tax directly on Schedule 2 (Form 1040), line 8, without filing Form 5329. See instructions.

**Part I Additional Tax on Early Distributions.** Complete this part if you took a taxable distribution (other than a qualified disaster distribution) before you reached age 59½ from a qualified retirement plan (including an IRA) or modified endowment contract (unless you are reporting this tax directly on Schedule 2 (Form 1040)—see above). You may also have to complete this part to indicate that you qualify for an exception to the additional tax on early distributions or for certain Roth IRA distributions. See instructions.

<b>1</b>	Early distributions includible in income (see instructions). For Roth IRA distributions, see instructions.	<b>1</b>	<b>24000</b>
<b>2</b>	Early distributions included on line 1 that are not subject to the additional tax (see instructions). Enter the appropriate exception number from the instructions: <b>02</b> . . . . .	<b>2</b>	<b>24000</b>
<b>3</b>	Amount subject to additional tax. Subtract line 2 from line 1 . . . . .	<b>3</b>	<b>0</b>
<b>4</b>	<b>Additional tax.</b> Enter 10% (0.10) of line 3. Include this amount on Schedule 2 (Form 1040), line 8 . . . . . <b>Caution:</b> If any part of the amount on line 3 was a distribution from a SIMPLE IRA, you may have to include 25% of that amount on line 4 instead of 10%. See instructions.	<b>4</b>	

**Exceptions to the Additional Tax on Early Distributions**

**No. Exception**

- 01** Qualified retirement plan distributions (doesn't apply to IRAs) you receive after separation from service when the separation from service occurs in or after the year you reach age 55 (age 50 for qualified public safety employees).

Additionally, I recommend you add a personal statement to your tax return that indicates that you are covered under H.R. 2146. Personally, I deal with this every tax year. My own TSP Form 1099-R indicates an "early withdrawal, no known exception," since they do not have the "P" code on file for me. If you are using TurboTax and answer the interview questions accurately, TurboTax will automatically create a Form 5329 for your return. It's easier for me to file a simple Form 5329 than to spend hours on the phone and email trying to fix the "P" code issue. Quite frankly, "who cares?" If I can fix it in 90 seconds with a Form 5329, why spend 90 minutes trying to fix it with the TSP? Eventually, it will get corrected.

## H.R. 2146 and TSP 1099-R Reporting for Annuitants

TSP Bulletin 15-4<sup>86</sup> speaks to the topic of the “P” code and provides agency instructions for submitting the P code. You may find this useful when dealing with your agency for a correction because you retired before the implementation of H.R. 2146. The following is copied from Bulletin 15-4: *“If an agency determines that an employee who separated with an “S” (Separated) code before the creation of the “P” code qualifies as a public safety employee, the agency may resubmit an EDR for that employee with the appropriate “P” code. If agencies do not identify public safety employees by sending the “P” code, the 1099-R will not reflect an exemption to the early withdrawal penalty. In this case, qualifying individuals would have to establish their eligibility for the exemption by filing IRS Form 5329 directly with the IRS.”*

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<sup>86</sup> <https://www.tsp.gov/bulletins/15-4/>