



National
Consumer Law
Center



National Consumer
Bankruptcy Rights Center

GUIDE TO THE HAVEN ACT¹

November 2019

I. About the HAVEN Act

The Honoring American Veterans in Extreme Need Act of 2019 (“HAVEN Act”) excludes certain benefits paid to veterans or their family members from the definition of current monthly income (“CMI”) found in the Bankruptcy Code. The HAVEN Act amends § 101(10A) of the Bankruptcy Code and supplements the 2005 amendments to the Code that excluded other government benefits, such as social security income.

II. Text of the HAVEN Act

The HAVEN Act’s language amending § 101(10A) of the Bankruptcy Code is as follows:

“Section 101(10A) of title 11, United States Code, is amended by striking subparagraph (B) and inserting the following:

- (B)(i) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent); and
- (ii) excludes—
 - (I) Benefits received under the Social Security Act (42 U.S.C. 301 et seq.);
 - (II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;

¹ Authors Tara Twomey, Executive Director, National Consumer Bankruptcy Rights Center (NCBRC) and Of Counsel, National Consumer Law Center (NCLC) and Liz Klinger, Intern, National Consumer Law Center, thank Jessica Hopton Youngberg of Veterans Legal Services, in conjunction with the American Bankruptcy Institute Veterans Affairs Task Force, for preparing the Benefits Table in this article. Thank you also to Jay Bender and Kristina M. Stanger of the American Bankruptcy Institute Veterans Affairs Task Force, and Erin Shank, John Rao, and Edward Boltz.

(III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism; and

(IV) *any monthly compensation, pension, pay annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.*²

Paragraph (IV) is the new language added by the HAVEN Act.

III. Current Monthly Income

Both chapters 7 and 13 use a calculation called current monthly income (“CMI”). CMI is the monthly average of certain income that the debtor received in the six calendar months before the bankruptcy filing, including income from all sources and any amount paid by an entity other than the debtor on a regular basis for the household expenses of the debtor.³ In chapter 13 cases, CMI provides the starting point for disposable income that debtors may be required to pay to their unsecured creditors.⁴ In chapter 7 cases, if the debtor’s CMI exceeds a defined level (usually the state’s median family income) and the individual has mostly consumer debts, the debtor is subject to the means test.⁵ The means test takes the debtor’s CMI and then deducts certain allowed expenses; if the debtor’s income after this calculation exceeds expenses by a certain amount, there is a presumption of abuse, and the bankruptcy court can dismiss the case.⁶

There are several explicit statutory exemptions from the calculation of CMI: benefits received under the Social Security Act (including SSI, unemployment compensation, TANF assistance, Medicaid funds provided to care for disabled individuals, and more), payments to victims of war crimes or international or domestic terrorism on account of their status as victims, and now, thanks to the HAVEN Act, certain benefits paid to veterans or their family members.⁷

² HAVEN Act, H.R. 2938 (2019).

³ 11 U.S.C. § 101(10A). See National Consumer Law Center, Consumer Bankruptcy Law and Practice § 13.4.3.2 (11th ed. 2016), updated at www.nclc.org/library.

⁴ National Consumer Law Center, Consumer Bankruptcy Law and Practice § 12.3.4.4 (11th ed. 2016), updated at www.nclc.org/library.

⁵ *Id.*

⁶ *Id.* at § 13.4.5.1; see also 11 U.S.C. § 707(b)(2).

⁷ 11 U.S.C. § 101(10A)(B)(ii).

IV. What does the HAVEN Act do?

The HAVEN Act excludes certain benefits paid to veterans or their family members from the calculation of CMI used in chapter 7 and chapter 13 bankruptcy cases. Excluded sources of income are as follows:

- Disability and death benefits paid by the Veterans Administration under Title 38 of the United States Code
- Monthly special compensation for catastrophic injuries or illnesses paid to service members under 37 U.S.C. § 439
- Any combat-related special compensation paid by the Department of Defense under 10 U.S.C. § 1431a
- Disability severance pay paid by the Department of Defense under 10 U.S.C. § 1212
- Any payment by the Department of Defense to a survivor in connection with the death of a member of the uniformed services. See 10 U.S.C. § § 1431-1456
- Disability-related military retired pay paid by the Department of Defense to a service member retired under 10 U.S.C. § § 1201-1202, 1204-1205, except that such payments are excluded from CMI only to the extent that they exceed the military retired pay that the service member would have received if the service member had retired without a disability.⁸

Certain other types of benefits, however, are included, such as: monthly special compensation from the Department of Defense, and retirement pay for people on the temporary disability retired list.⁹ Additionally, if a veteran receives retirement benefits under 10 U.S.C. Ch. 61, those retirement benefits are excluded from CMI calculation only if they exceed the amount of retired pay he or she would be entitled to under any provision of Title 10, other than Chapter 61.¹⁰

Stated more simply, if disability pay exceeds what the veteran would have received in retirement pay, then the amount excluded from the calculation of CMI is the difference between what the veteran receives in disability less what he or she would have received for retirement. For example: a veteran receives \$1500 in disability benefits, but would have qualified for \$1000 in retirement benefits; the amount of retirement benefits must be subtracted from the amount of disability benefits, and thus, only \$500 is excludable from the calculation of CMI.

⁸ “HAVEN Act – Frequently Asked Questions,” https://www.justice.gov/ust/file/haven_act_faqs.pdf/download

⁹ *Id.*

¹⁰ 11 U.S.C. § 101(10A)(B)(ii)(IV).

V. Which benefits eligible?

To determine if a veteran’s benefits are eligible to be excluded from the CMI calculation, look to their award letters, paystubs, and service records to see which benefits they are receiving. eBenefits and myPay can also be used to see which types of benefits they receive. Once you know which types of benefits your client receives, consult the following chart that lists and explains excluded benefits.¹¹

BENEFITS TABLE¹²

| BENEFIT | CITATION | DESCRIPTION ¹³ |
|--|--|---|
| Disability Retired Pay¹⁴ | 10 U.S.C. §§ 1201, 1204 | Paid monthly to former or current servicemember upon permanent or temporary military retirement due to disability; pay computed under 10 U.S.C. § 1401. |
| Permanent Disability Retirement | 10 U.S.C. §§ 1202, 1205 (Chapter 61, Title 10) | |
| Temporary Disability Retirement | | |
| Disability Severance Pay | 10 U.S.C. § 1212; see also 10 U.S.C. §§ 1203, 1206 | Paid as lump sum to servicemember upon military separation due to disability when circumstances do not meet criteria for disability-based military retirement |
| Combat-Related Special Compensation (CRSC)¹⁵ | 10 U.S.C. § 1414; see also 38 U.S.C. §§ 5304-5305 | Paid monthly to military retiree who has a combat-related disability; cannot be paid concurrently with CRDP |

¹¹ The following chart and all included footnotes were created by Jessica Hopton Youngberg from Veterans Legal Services for the ABI Task Force on Veterans and Servicemembers Affairs (Aug. 2019).

¹² The Benefits Table was created by Jessica Hopton Youngberg of Veterans Legal Services in conjunction with the ABI Veterans Affairs Task Force.

¹³ Benefit descriptions, including website links, are provided for basic informational purposes only. The descriptions should not be relied upon in evaluating potential eligibility for a listed benefit because not all eligibility criteria are stated.

¹⁴ Military retirements based upon disability are governed by chapter 61 of Title 10 (10 U.S.C. §§ 1201-1222). The HAVEN Act permits the exclusion of Chapter 61-based retired pay from “current monthly income” only to the extent that such retired pay exceeds the amount of retired pay that the debtor would be entitled to receive if retired under another provision of Title 10. Information about retired pay computation can be found in Chapter 71 of Title 10 (10 U.S.C. §§ 1401-1415), as well as on the Defense Finance and Accounting Service’s website at <https://www.dfas.mil/retiredmilitary/plan/estimate.html>.

¹⁵ CRSC has “Special Rules for Chapter 61 Disability Retirees,” 10 U.S.C. § 1413a(b)(3). Given that the HAVEN Act has Chapter 61-related limiting language, *see supra* note 18, additional analysis could be required for a debtor who receives CRSC.

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| Concurrent Retirement & Disability Payment (CRDP)¹⁶ | 10 U.S.C. § 1414; see also 38 U.S.C. §§ 5304-5305 | Paid monthly to military retiree who is concurrently eligible to receive VA Disability Compensation and who has VA disability rating of at least 50%; cannot be paid concurrently with CRSC |
| Survivor Benefit Plan Annuity (as to Disability Retirees under Chapter 61 of Title 10 only) | 10 U.S.C. § 1448; see also 10 U.S.C. § 1201, 1202, 1204, 1205 | Paid monthly to military retiree's eligible beneficiary, after retiree's death |
| Special Survivor Indemnity Allowance | 10 U.S.C. § 1450(c), (m) | Paid monthly to military retiree's surviving spouse or former spouse, after retiree's death, if Survivor Benefit Plan Annuity payments are offset by VA Dependency and Indemnity Compensation payments |
| Special Compensation for Assistance with Activities of Daily Living | 37 U.S.C. § 439 | Paid monthly to current or recent servicemember who requires help with activities of daily living due to catastrophic injury or illness incurred or aggravated in line of duty; cannot be paid concurrently with Aid and Attendance Allowance paid under 38 U.S.C. § 1114(r)(2) |
| VA Disability Compensation Also known as "Service-Connected Disability Compensation" and "Veterans Compensation" | 38 U.S.C. §§ 1104, 1110, 1114(a)-(j), 1115, 1131, 1134 | Paid monthly to veteran who has a disability due to disease or injury incurred or aggravated while serving on active duty, or otherwise related to that service; payment amount depends upon disability rating (10% to 100%) and whether the veteran has qualifying dependents |
| VA Special Monthly Compensation Can include Aid and Attendance Allowance or Housebound Allowance | 38 U.S.C. §§ 1114(k)-(s), 1134 | Paid monthly to veteran who receives VA Disability Compensation and who has special circumstances warranting additional compensation such as having specific service-connected anatomical losses or having need for daily in-home personal health care services |

¹⁶ CRDP has "Special Rules for Chapter 61 Disability Retirees," 10 U.S.C. § 1413a(b). Given that the HAVEN Act has Chapter 61-related limiting language, *see supra* note 18, additional analysis could be required for a debtor who receives CRDP.

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| VA Dependency and Indemnity Compensation | 38 U.S.C. §§ 1502, 1513, 1521, 5312 | Paid monthly as subsistence benefits to veteran who meets low income and net worth criteria, satisfies service requirements, and is either at least age 65 or “permanently and totally disabled” (generally due to non-service-connected disability); payment amounts depends upon whether the veteran has qualifying dependents and in-home health care needs |
| Can include Aid and Attendance Allowance and Housebound Allowance | | |
| VA Veterans Pension¹⁷ | 38 U.S.C. §§ 1502, 1513, 1521, 5312 | Paid monthly as subsistence benefit to veteran who meets low income and net worth criteria, satisfies service requirements, and is either at least age 65 or “permanently and totally disabled” (generally due to non-service-connected disability); payment amount depends upon whether the veteran has qualifying dependents and in-home health care needs |
| Also known as “Non-Service-Connected Disability Pension” | | |
| Can include Aid and Attendance or Housebound Allowance | | |
| VA Vocational Rehabilitation & Employment Subsistence Allowance | 38 U.S.C. § 3108 | Paid monthly to veteran who has service-connected disability and who is participating in vocational rehabilitation program under Chapter 31 |

Once you have determined which types of benefits your client receives, and the amount of each type, include the amount in the designated spot on Official Form 122A-1 (for chapter 7), Official Form 122C-1 (for chapter 13), or Official Form 122B (for chapter 11). These forms were amended effective October 1, 2019 to account for the HAVEN Act’s passage. A link to each form is included in Appendix A of this Guide, as is the Bankruptcy Forms for Individuals guide, which includes detailed instructions on how to prepare the forms.

VI. Applicability

The HAVEN Act was signed by the President and became law on August 23, 2019. No future effective date is specified in the language of the bill, so it becomes effective when the President signs it. Therefore, any chapter 7 or chapter 13 bankruptcies filed on or after August 23, 2019 benefit from the HAVEN Act’s effect on CMI calculation. It is less clear, however, if the statute will affect cases that were already existing on that date.

¹⁷ As indicated in the description, this benefit can be paid based upon age without a qualifying disability. If so paid, the income would not be excludable from “current monthly income” under the HAVEN Act. If a veteran is eligible for the benefit based upon age and, separately, based upon a qualifying disability it might be possible to rely upon the latter eligibility and to exclude the income from “current monthly income.” See 38 U.S.C. § 1513(b).

Retroactivity is generally disfavored unless Congress evinces a clear intent that a statute should be retroactively applied.¹⁸ The Supreme Court in *Landgraf* set forth a roadmap for determining if a statute can be retroactively applied. First, “the Court must determine whether Congress has prescribed the statute’s proper reach by expressly addressing the issue of retroactivity.”¹⁹ If the statute does not mention retroactivity, then the court “must determine whether the new statute would have retroactive effect, i.e. whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”²⁰ If the statute would operate in any of these ways, it should not be applied retroactively.

Some courts have held that a statute may be retroactively applied “when the change in the statute is merely remedial in nature or relates only to modes of procedure which neither create nor impair any substantive rights.”²¹ In this context, a statute is substantive if it “defines and regulates rights” and it is procedural if it “neither impairs nor enlarges such rights but merely prescribes a method for enforcing them or for obtaining redress for a grievance.”²² In *In re Gailey, Inc.*, the bankruptcy court retroactively applied an amendment to § 547(b) of the Bankruptcy Code that eliminated a reason-to-believe requirement to prove entitlement of the trustee to avoid preferential transfers to a creditor, reasoning that such an amendment was merely procedural.²³

The HAVEN Act does not contain any explicit language regarding retroactive applicability, so a bankruptcy court would likely look to see if applying the Act to cases existing before August 23, 2019 would have a “retroactive effect,” as defined in *Landsgraf*. Contrary to *Landsgraf*, the HAVEN Act serves to actually increase the rights a party possessed by allowing a veteran debtor to exclude eligible benefits from a CMI calculation. This, in turn, increases the chance that the veteran debtor will be able to benefit from the protections of chapter 7 or chapter 13 bankruptcy. Additionally, the change instituted by the HAVEN Act may be procedural rather than substantive, because it merely changes the prescribed method for calculating a debtor’s CMI. It does not impair or enlarge the right of a debtor to seek relief through consumer bankruptcy. A veteran debtor’s expectations for a bankruptcy proceeding would not be frustrated by retroactive application of the HAVEN Act; rather, it would provide more certainty for their expectation that bankruptcy will be a fresh start.

The legislative history of the HAVEN Act also suggests that Congress intended the statute to have retroactive effect, despite there being no express language granting retroactive application. The HAVEN Act was introduced and passed to correct an “obvious inequity:”²⁴ that Social Security benefits are not counted in a CMI calculation, but veterans’ disability benefits were. As this was a problem for veteran debtors during the time the bill was introduced in

¹⁸ *Landgraf v. Uzi Film Prods.*, 511 U.S. 244, 264, 114 S. Ct. 1483, 1496 (1994).

¹⁹ *In re B.C.B. Dispatch, Inc.*, 201 B.R. 629, 633 (Bankr. W.D.N.Y. 1996) (citing *Landgraf*, 511 U.S. at 280, 114, S. Ct. at 1505).

²⁰ *Id.*

²¹ *In re Gailey, Inc.*, 119 B.R. 504, 510 (Bankr. W.D. Pa. 1990) (citing *French v. Grove Mfg. Co.*, 656 F.2d 295, 298 (8th Cir. 1981).

²² *Id.* (citing *U.S. v. Kairys*, 782 F.2d 1374, 1381 (7th Cir.), *cert. denied*, 476 U.S. 1153, 106 S. Ct. 2258 (1986)); *see also Landgraf*, 511 U.S. at 273-75 (stating that application of an intervening statute that changes procedural rules in suits arising before its enactment does not raise concerns about retroactivity).

²³ *Id.*

²⁴ HAVEN Act Legislative History.

Congress, it is sensible to come to the conclusion that the legislative intent was for the Act to apply to bankruptcies currently pending, as well as bankruptcies that were yet to be filed.

VII. FAQs

1. How does the Act affect enforcement under § 707(b)(2) of the Bankruptcy Code and the determination of whether the presumption of abuse arises for servicemembers or their family members filing for chapter 7 relief under the Bankruptcy Code?²⁵

Answer: Servicemembers or their family members who file for bankruptcy relief under chapter 7 should exclude income covered by the Act from the calculation of CMI. The calculation of CMI is the starting point for determining whether a chapter 7 bankruptcy case is presumed abusive under § 707(b)(2).²⁶

2. How does the Act affect chapter 13 cases?²⁷

Answer: Servicemembers and their family members who file for bankruptcy relief under chapter 13 should exclude income covered by the Act from the calculation of CMI, which may affect the determination of projected disposable income available for a chapter 13 plan.²⁸

3. Will the U.S. Trustee Program (USTP) require debtors to produce documentation to support any servicemembers' benefits that they exclude from the calculation of CMI?²⁹

Answer: The USTP will limit its requests for documents related to income excluded from CMI under the HAVEN Act so as to not unduly burden debtors. The USTP does not routinely request from debtors documents not otherwise required by the Bankruptcy Code or Rules without a specific need for additional information.³⁰

4. How does the Act affect the USTP's enforcement under § 707(b)(3) of the Bankruptcy Code (bad faith and the totality of the circumstances), and the determination of a debtor's actual ability to repay creditors?³¹

Answer: By modifying the definition of "current monthly income," the HAVEN Act does not directly impact § 707(b)(3)'s provisions providing for dismissal of cases based on the debtor's bad faith or under the totality of the circumstances.

²⁵ "HAVEN Act – Frequently Asked Questions," https://www.justice.gov/ust/file/haven_act_faqs.pdf/download.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

5. Are eligible benefits now treated just like Social Security income and disclosed on Schedule I? Is there any need to disclose the benefits at all?

Answer: Consumer bankruptcy lawyers are currently split on this issue. Some practitioners treat veterans' benefits covered by the HAVEN Act like Social Security income, disclosing on Schedule I and then deducting on Schedule J or arguing for their exclusion. This is probably the safest route, because other exempt sources of income – retirement plans, paid-for cars, etc. – are disclosed.

6. In a chapter 13 case, are veterans' benefits now included in the calculation of projected monthly income as well as current monthly income?

Answer: Likely yes. Several Courts of Appeal have held that Social Security benefits are excluded in both CMI and projected monthly income in chapter 13 cases.³² These cases cite the clear Congressional intent behind the 2005 amendments to the Bankruptcy Code, and so, because the HAVEN Act merely adds on to those amendments, it is likely that eligible veterans' benefits can also be excluded from projected monthly income.

7. If the Act can apply retroactively, could a chapter 13 case be modified or converted to a chapter 7 case?

Answer: Generally speaking, a debtor has an absolute right to convert a chapter 13 case to chapter 7, without any showing of hardship.³³ However, if a case is converted to chapter 7, a Means Test calculation may be required after conversion.³⁴ If the HAVEN Act can apply retroactively, even if a Means Test calculation would not be required after conversion, a veteran debtor may choose to file a new set of schedules that reflect the exempted veteran's benefits, despite the fact that a new set of schedules generally does not need to be filed in this situation.

³² See, e.g., *In re Ragos*, 700 F.3d 220 (5th Cir. 2012); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011); *In re Carpenter*, 614 F.3d 930 (8th Cir. 2010).

³³ National Consumer Law Center, *Consumer Bankruptcy Law and Practice* § 13.7.2 (11th ed. 2016), updated at www.nclc.org/library.

³⁴ *Id.*