



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

CC:EBEO:Br.4EMadden  
FREV-112322-99  
OCT 13 1999

MEMORANDUM FOR DIRECTOR, EXEMPT ORGANIZATIONS DIVISION  
OP:E:EO  
Attn: Cheryl Chasin and Edwin Brown

FROM: Assistant Chief Counsel  
Office of the Associate Chief Counsel (Employee Benefits  
and Exempt Organizations) CC:EBEO

SUBJECT: [REDACTED]

This memorandum responds to your request dated July 16, 1999, for assistance regarding whether the [REDACTED] should be denied tax-exempt status under section 501(c)(9) of the Internal Revenue Code.

Based on our review of the administrative file, we understand that [REDACTED] and its affiliate, [REDACTED] established the VEBA in [REDACTED] to provide medical and group-term life insurance benefits for employees of [REDACTED] and [REDACTED] and [REDACTED] are in the business of leasing employees to third-party companies to fill positions in [REDACTED]. These third-party companies are not all [REDACTED] companies; instead, they are engaged in many different types of businesses. Highly compensated employees are not required to make contributions to the VEBA, but other employees are required to make contributions to the VEBA in varying amounts, depending upon the employer to whom they are leased. Different waiting periods are used to determine eligibility to participate in the VEBA based on the employer to whom an employee is leased. It is unclear whether highly compensated employees have a waiting period.

[REDACTED]

PMTA: 01541

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We agree with your conclusion that the VEBA provides disproportionate benefits to highly compensated employees under sections 1.501(c)(9)-2(a)(2) and 1.501(c)(9)-4(a) of the Income Tax Regulations because these employees are not required to make contributions to the VEBA. Additionally, this may violate the nondiscrimination requirements of section 505 of the Code.<sup>1</sup>

Turning to the different waiting periods and contributions of the leased employees (without regard to any highly compensated employees), these facts raise the question of whether there is discrimination under section 505 of the Code. Generally, the fact that employees have different waiting periods and contributions based on the employer to whom they are leased may not raise the issue of whether there is discrimination unless the practical effect of these requirements is to discriminate in favor of highly compensated employees. It is unclear from the administrative file whether the practical effect is to discriminate in favor of highly compensated employees.

It is also unclear from the administrative file whether highly compensated employees have waiting periods and whether any waiting periods are different from those of other employees. These facts may also demonstrate discrimination in favor of highly compensated employees.

Aside from these issues, which we believe █████ might easily remedy, our review of the administrative file indicates that there may not be an employment-related common bond as required by section 1.501(c)(9)-2(a) of the regulations. Because the employees work for many different types of companies (not limited to the █████ industry) and this case involves leased employees, to establish that there is a common bond █████ would have to demonstrate that they, rather than the companies receiving the services of the employees are in fact the common-law employers of the employees. As indicated in section 3.02(8) of Rev. Proc. 99-3, I.R.B. 1999-1, however, we have a "no rule" position concerning the issue of whether a professional staffing corporation or the subscriber is the employer of individuals under the common law. Thus, qualification of the VEBA in this case turns on an issue that we cannot rule on. █████

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<sup>1</sup> Note that the nondiscrimination requirements of sections 105(h) and 79(d) of the Code must be satisfied in this particular case.

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If you have any questions regarding this memorandum, please contact Erinn Madden in my office. She can be reached at (202) 622-6060.

MARY OPPENHEIMER  
Assistant Chief Counsel

BY:   
Mark Schwimmer  
Chief, Branch 4

Attachment (1) - Administrative File