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OFFICE OF THE CHIEF COUNSEL

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The Honorable Rodney P. Frelinghuysen
Member, U.S. House of Representatives
30 Schuyler Place, 2nd Floor
Morristown, New Jersey 07960

Dear Representative Frelinghuysen:

I am responding to your letter of June 26, 2015, on behalf of your constituent, _____, requesting a review of the _____ policy for retiring employees who wish to both collect their state pension and volunteer in an official capacity in their community.

_____ wrote that he recently retired as a police officer from his local police department. Upon retirement, _____ intended to continue serving as an administrative officer in a local volunteer fire department (a position for which he receives a stipend) and as a crossing guard. However, under _____ law, _____ had to terminate all employment for a period of 180 days.

_____ requires a bona fide severance from employment (defined as a complete termination of an employee's employment relationship with the employer for at least 180 days) before retirement benefits can begin. _____ argues that since he does not accrue pension benefits from his two part-time positions, the _____ law should not apply to his particular situation.

The rule above is a matter of state law, so we are unable to provide a response to this particular situation. However, you may find helpful the following general information about the federal tax rules in this area.

Our regulations generally require that a pension plan be established and maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement (section 1.401(a)-1(b)(1) of the Treasury regulations). These regulations include two exceptions to the general rule that payments must begin after the participant retires:

- Payments can begin after the participant reaches normal retirement age (as defined in the plan)
- Payments can begin after the participant reaches age 62

Our regulations also provide that, as a general rule, a normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed (section 1.401(a)-1(b)(2)(i)). For a plan in which substantially all of the participants are qualified public safety employees (as defined under section 72(t)(10)(B)), a normal retirement age of 50 or later satisfies this requirement (section 1.401(a)-1(b)(2)(v)). Thus, a plan can make distributions to employees before they retire as long as the payments begin after the attainment of normal retirement age (as defined in the plan document) or after an employee reaches age 62. We are drafting proposed regulations to provide additional guidance on the application of the normal retirement age requirements to plans sponsored by government entities. Notice 2012-29, 2012-18 I.R.B. 872, described this project and requested comments from interested parties.

Section 72(t) imposes a 10 percent additional tax on any distribution that a taxpayer receives from a qualified retirement plan, unless the distribution qualifies for an exception. Under one of these exceptions, the 10 percent additional tax does not apply to a distribution from a defined benefit retirement plan made to a qualified public safety employee who separates from service after reaching age 50. For distributions made after December 31, 2015, recent legislation removes the requirement that, in order to be eligible for this exception, the distribution must be from a defined benefit retirement plan. Therefore, the exception will be available for distributions from other types of retirement plans as well. See generally Section 2 of Defending Public Safety Employees' Retirement Act, Public Law No. 114-26 (129 Stat. 319) (2015).

State or local retirement systems typically have retirement plan provisions addressing when a participant is treated as terminating employment and also the reemployment of retirees who have begun receiving pension payments. These provisions often are intended to prevent a retiree who is receiving a public pension from simultaneously receiving a public salary. Whether such plan provisions are included in a state or local government retirement plan, as well as the interpretation of these provisions, is ultimately a choice for the state or local government.

I hope this information is helpful. If you have any questions, please contact me at _____, or _____ and _____ at _____.

Sincerely,

By: _____
Victoria A. Judson
Associate Chief Counsel
(Tax Exempt & Government Entities)