



OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
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WASHINGTON, D.C. 20224

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The Honorable John B. Larson
Member, U.S. House of Representatives
221 Main Street, 2nd Floor
Hartford, CT 06106

Attention:

Dear Representative Larson:

I am responding to your inquiry dated September 11, 2019, on behalf of your constituent who asked for clarification about the rules on an eligible deferred compensation plan under Section 457(b). You explained that he will be retiring before the end of this year and is considering receiving a payout for unused sick leave in January of 2020, and in January of 2021.

Specifically, he asked whether he can defer a portion of the payments under his Section 457(b) plan. You explained that his employer and the corporation administering the plan gave him conflicting interpretations of certain plan provisions.

Unfortunately, in a general information letter, we cannot comment on how a particular provision of an employer's retirement plan may be applied. However, below is general information about the federal tax rules on eligible deferred compensation plans under Section 457(b).

Regulations under Section 457(b) provide, in relevant part, that a Section 457(b) plan may permit deferrals to be made for former employees with respect to payment for unused accrued bona fide sick leave (but only if the employee would have been able to use the leave if employment had continued) if:

- (1) Those amounts are paid by the later of 2½ months after severance from

employment or the end of the calendar year that includes the date of severance from employment, and

- (2) Those amounts would have been included in the definition of compensation if they were paid prior to the employee's severance from employment.

The regulations provide the following examples:

Example 1. (i) Facts. Participant G, who is age 62 in year 2007, is an employee who participates in an eligible plan providing a normal retirement age of 65 and a bona fide sick leave and vacation pay program of the eligible employer. Under the terms of G's employer's eligible plan and the sick leave and vacation pay program, G is permitted to make a one-time election to contribute amounts representing accumulated sick pay to the eligible plan. G has a severance from employment on January 12, 2008, at which time G's accumulated sick and vacation pay that is payable on March 15, 2008, totals \$12,000. G elects, on February 4, 2008, to have the \$12,000 of accumulated sick and vacation pay contributed to the eligible plan.

(ii) Conclusion. Under the terms of the eligible plan and the sick and vacation pay program, G may elect before March 1, 2008, to defer the accumulated sick and vacation pay because the agreement providing for the deferral is entered into before the beginning of the month in which the amount is currently available and the amount is bona fide accumulated sick and vacation pay, as described in [Section 1.415(c)-2(e)(3)(iii)], and that is payable by the later of 2½ months after severance from employment or the end of the calendar year that includes the date of severance from employment by G. Thus, under this section and [Section 1.415(c)-2(e)(3)(iii)], the \$12,000 is included in G's includible compensation for purposes of determining G's includible compensation in year 2008.

Example 2. (i) Facts. Same facts as in Example 1, except that G's severance from employment is on May 31, 2008, G's \$12,000 of accumulated sick and vacation pay is payable on September 15, 2008 (which is by the later of 2½ months after severance from employment or the end of the calendar year that includes the date of severance from employment by G), and G's election to defer the accumulated sick and vacation pay is made before May 1, 2008.

(ii) Conclusion. Under this section and [Section 1.415(c)-2(e)(3)(iii)], the \$12,000 is included in G's includible compensation for purposes of determining G's includible compensation in year 2008.

Example 3. (i) Facts. Employer X maintains an eligible plan and a vacation leave plan. Under the terms of the vacation leave plan, employees generally accrue three weeks of vacation per year. Up to one week's unused vacation may be carried over from one year to the next, so that in any single year an employee may have a maximum of four weeks' vacation time. At the beginning of each calendar year, under the terms of the eligible plan (which constitutes an agreement providing for the deferral), the value of any unused vacation time from the prior year in excess of one week is automatically contributed to the eligible plan, to the extent of the employee's maximum deferral limitations. Amounts in excess of the maximum deferral limitations are forfeited.

(ii) Conclusion. The value of the unused vacation pay contributed to X's eligible plan pursuant to the terms of the plan and the terms of the vacation leave plan is treated as an annual deferral to the eligible plan for January of the calendar year. No amounts contributed to the eligible plan will be considered made available to a participant in X's eligible plan.

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

Sincerely,

Cheryl Press
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Qualified Plans Branch 4
Office of the Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and
Employment Taxes)