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From: Jim Linn [mailto:jlinn@llw-law.com]
Sent: Thursday, February 02, 2012 5:14 PM
To: Marchman, Stephanie M.
Subject: IRS Guidance on Reemployment After Retirement

Stephanie,

The short answers to your questions concerning reemployment after retirement are:

1. The IRS general rule on reemployment following retirement is if both the employer and employee know at the time of 'retirement' that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of employment has not occurred upon 'retirement' and the employee has not legitimately retired.

2. The 2006 Pension Protection Act created IRC section 401(a)(36), providing that for plan years beginning after December 31, 2006, pension plans may allow participants who attain the age of 62 and who have not separated from service, to receive a retirement benefit under he plan while they continue in employment.

The longer version follows, and PLR 201147038 is attached. After you have a chance to review, please call me with any questions.

PLR 201147038, issued on 1/19/10, states: "**if both the employer and employee know at the time of 'retirement' that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of employment has not occurred upon 'retirement' and the employee has not legitimately retired."**

The PLR was responding to a taxpayer's request for a ruling regarding the payment of subsidized early retirement benefits in conjunction with the default schedule arising out of a rehabilitation plan that was required as a result of the plan actuary certifying the plan to be in critical status. The taxpayer proposed to eliminate all subsidized early retirement benefits, including unreduced service pensions. The taxpayer proposed to give the 300 participants who were eligible to retire and receive an unreduced service pension notice 60 days prior to the date that the subsidized service pension benefit is eliminated. **Prior to elimination of the benefit, the Taxpayer proposes to allow employees to "retire" on one day in order to qualify for the subsidized service pension benefit, and return to work the very next day or perhaps after a week has passed. However, neither the employer nor the employee anticipate that the "retirement" will actually terminate the employment or relieve the employee of the services he/she performs for the employer.**

The PLR concluded that employees who "retire" on one day in order to qualify for a benefit under the Plan, with the explicit understanding between the employer/employee that they are not separating from

service with the employer, are not legitimately retired. Such retirements would violate section 401 (a) of the Code and result in disqualification of the Plan under section 401(a) of the Code.

In support of this conclusion, the PLR states that Section 1.401-1(a)(2) of the Income Tax Regulations ("Regulations") provides that a qualified pension plan is a definite written program and arrangement that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits. A qualified pension plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement. Further , section 1.401(a)-1(b)(i) of the Regulations provides that in order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section).

In general an employee separates from service with the employer if the employee dies, retires, or otherwise has a termination of employment with the employer. Section 1.409A-1(h)(1)(i) of the Regulations. Whether a termination of employment has occurred is based on whether the facts and circumstances **indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed** (whether as an employee or an independent contractor) **over the immediately preceding 36-month period** (or the full period of services to the employer if the employee has been providing services to the employer less than 36 months). Section 1.409A-1(h)(1)(ii) of the Regulations. The facts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business. *Id.* The regulations provide the following example:

> An employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment caused the employee to be presumed to have continued in employment because the employee is providing services at a rate equal to the rate at which the employee was providing services before the termination of employment, the facts and circumstance in this case would demonstrate that at the time the employee originally ceased to provide services, the employee and the service recipient reasonably anticipate that the employee would not provide services in the future.

Further, in *Meredith v. Allsteel, Inc.*, 11 F.3d 1354 (7th Cir. 1993), the Court determines the date an employee actually retired by applying common law rules of contract interpretation thus finding that the word retire was to be given its ordinary meaning. The court opined: "In common parlance, retire means to leave employment after a period of service. See Webster's Ninth New Collegiate Dictionary 1007 (1986) (retire is "to withdraw from one's position or occupation: to conclude one's working or professional career")." In *Ahng v. Allsteel,Inc.* 96 F.3d 1033 (7th Cir. 1996) the Court reviewed *Meredith v. Allsteel, Inc.*, and let the definition of the word retire stand as provided in *Meredith v. Allsteel, Inc.*

The PLR concludes that taken together, sections 1.409A-1(h)(1)(i) and 1.409A-1(h)(1)(ii) provide that when an employee legitimately retires, he separates from service with the employer. Accordingly if both the employer and employee know at the time of "retirement" that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of employment has not occurred upon "retirement" and the employee has not legitimately retired.

However, the PLR also notes that in accordance with section 401(a)(36) of the Code, employees who have attained age 62 upon benefit commencement may qualify for and receive a retirement benefit under the Plan while they continue in employment.

Jim

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Re: the tax preferred status... if qualification is lost, contributions made by the employee and employer would be treated and taxed as income.

Scott

From: Heffner, Scott D.
Sent: Wednesday, November 19, 2014 11:28 AM
To: Benton, Mark S.
Subject: FW: IRS Guidance on Reemployment After Retirement

Mark,

Here's Stephanie's email to Charter Officers.

The GG and GRU guidelines were brought down in July of 2013. I attached those here as well so you can see how they were not in strict accordance with either the IRS guidance or our practice (for example, the guidelines didn't differentiate between those under 62 and those in the safe harbor category).

Please let me know if you need additional detail.

Thanks,

Scott

From: Varvel, Steven C.
Sent: Wednesday, February 13, 2013 4:31 PM
To: Heffner, Scott D.
Subject: FW: IRS Guidance on Reemployment After Retirement

From: Marchman, Stephanie M.
Sent: Thursday, February 23, 2012 5:30 PM
To: Radson, Marion J.; Blackburn, Russ D.; Hunzinger, Robert E; Godshalk, Brent L.; Lannon, Kurt M.; Howard, Cecil E. (howardce@cityofgainesville.org)
Cc: Barnard, Sandy; McClary, Lynn E.; Rountree, Becky L.; Varvel, Steven C.
Subject: FW: IRS Guidance on Reemployment After Retirement

Charter Officers,
To follow up on our discussion at the charter officers' meeting this morning, the attached email from Jim Linn, special counsel we use from time to time on pension matters, as well as the attached IRS ruling letter, provides the rules regarding reemployment of retirees after retirement. Essentially, City employees must actually retire (terminate their employment) to receive their retirement benefit. If both the employer and employee know at the time of "retirement" that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of employment has not occurred upon "retirement" and the employee has not legitimately retired. If the City is allowing employees to collect retirement benefits after not legitimately retiring, "[s]uch retirements would violate section 401 (a) of the Code and result in disqualification of the Plan under section 401(a) of the Code." Therefore, it is my advice that the City's managers follow these rules and develop procedures and practices to ensure that these rules are followed to avoid disqualification of the City's pension plans. I will be working with HR to develop procedures on this matter for your consideration. In the interim, I recommend that the City's managers heed these rules.

Thank you,

Varvel, Steven C.

From: Heffner, Scott D.
Sent: Tuesday, September 29, 2015 12:54 PM
To: Varvel, Steven C.
Subject: FW: IRS Guidance on Reemployment After Retirement
Attachments: PLR 2011 47038 Reemployment.pdf; 27 - Rehiring City Retirees.pdf; 27A Rehiring City Retirees.pdf; GRU Rehire Retiree Guideline.docx

Boom!

From: Heffner, Scott D.
Sent: Monday, December 01, 2014 10:53 AM
To: McBride, Cheryl F.; Dorsey, Tiffany C.; Gainey, Audrey M.; Graetz, Laura J.; Virden, Rhonda K.
Subject: FW: IRS Guidance on Reemployment After Retirement

FYI

From: Heffner, Scott D.
Sent: Wednesday, November 19, 2014 5:26 PM
To: Heffner, Scott D.
Subject: FW: IRS Guidance on Reemployment After Retirement

(h)*Separation from service*—
(1)*Employees*—
(i)*In general.* An employee separates from service with the employer if the employee dies, retires, or otherwise has a termination of employment with the employer. However, for purposes of this paragraph (h)(1), the employment relationship is treated as continuing intact while the individual is on military leave, sick leave, or other bona fide leave of absence if the period of such leave does not exceed six months, or if longer, so long as the individual retains a right to reemployment with the service recipient under an applicable statute or by contract. For purposes of this paragraph (h)(1), a leave of absence constitutes a bona fide leave of absence only if there is a reasonable expectation that the employee will return to perform services for the employer. If the period of leave exceeds six months and the individual does not retain a right to reemployment under an applicable statute or by contract, the employment relationship is deemed to terminate on the first date immediately following such six-month period. Notwithstanding the foregoing, where a leave of absence is due to any medically determinable physical or mental impairment that can be expected to result in death or can be expected to last for a continuous period of not less than six months, where such impairment causes the employee to be unable to perform the duties of his or her position of employment or any substantially similar position of employment, a 29-month period of absence may be substituted for such six-month period.
(ii)*Termination of employment.* Whether a termination of employment has occurred is determined based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed (whether as an employee or an independent contractor) over the immediately preceding 36-month period (or the full period of services to the employer if the employee has been providing services to the employer less than 36 months). Facts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business. An employee is presumed to have separated from service where the level of bona fide services performed decreases to a level equal to 20 percent or less of the average level of services performed by the employee during the immediately preceding 36-month period. An employee will be presumed not to have separated from service where the level of bona fide services performed continues at a level that is 50 percent or more of the average level of

service performed by the employee during the immediately preceding 36-month period. No presumption applies to a decrease in the level of bona fide services performed to a level that is more than 20 percent and less than 50 percent of the average level of bona fide services performed during the immediately preceding 36-month period. The presumption is rebuttable by demonstrating that the employer and the employee reasonably anticipated that as of a certain date the level of bona fide services would be reduced permanently to a level less than or equal to 20 percent of the average level of bona fide services provided during the immediately preceding 36-month period or full period of services provided to the employer if the employee has been providing services to the service recipient for a period of less than 36 months (or that the level of bona fide services would not be so reduced). For example, an employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment may cause the employee to be presumed to have continued in employment because the employee is providing services at a rate equal to the rate at which the employee was providing services before the termination of employment, the facts and circumstances in this case would demonstrate that at the time the employee originally ceased to provide services, the employee and the service recipient reasonably anticipated that the employee would not provide services in the future. Notwithstanding the foregoing provisions of this paragraph (h)(1)(ii), a plan may treat another level of reasonably anticipated permanent reduction in the level of bona fide services as a separation from service, provided that the level of reduction required must be designated in writing as a specific percentage, and the reasonably anticipated reduced level of bona fide services must be greater than 20 percent but less that 50 percent of the average level of bona fide services provided in the immediately preceding 36 months. The plan must specify the definition of separation from service on or before the date on which a separation from service is designated as a time of payment of the applicable amount deferred, and once designated, any change to the definition of separation from service with respect to such amount deferred will be subject to the rules regarding subsequent deferrals and the acceleration of payments. For purposes of this paragraph (h)(1)(ii), for periods during which an employee is on a paid bona fide leave of absence (as defined in paragraph (h)(1)(i) of this section) and has not otherwise terminated employment pursuant to paragraph (h)(1)(i) of this section, the employee is treated as providing bona fide services at a level equal to the level of services that the employee would have been required to perform to receive the compensation paid with respect to such leave of absence. Periods during which an employee is on an unpaid bona fide leave of absence (as defined in paragraph (h)(1)(i) of this section) and has not otherwise terminated employment pursuant to paragraph (h)(1)(i) of this section, are disregarded for purposes of this paragraph (h)(1)(ii) (including for purposes of determining the applicable 36-month (or shorter) period).

From: Heffner, Scott D.
Sent: Wednesday, November 19, 2014 2:44 PM
To: Owen, Pamela J.
Subject: FW: IRS Guidance on Reemployment After Retirement

Pam,

Since this is such a hot topic, I wanted to forward to you the guidance relied upon by Stephanie, Steve, et. al. Other than using "reasonably" where the word "reasonable" should have been used, this guidance is thorough and easy to understand. In addition, it should be clarified that the rule for providing limited service is actually

> "...the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date would permanently decrease to no more than 20 percent of the average level of bona fide services performed over the immediately preceding 36-month period..."

A technicality, maybe; but "8 hours" is more a rule of thumb than a verbatim citation from the reg's. And once the participant reaches age 62, that limitation is removed.