

Part III - Administrative, Procedural, and Miscellaneous

Amounts Paid Pursuant to a Leave-Sharing Plan to Assist Employees Affected by a Major Disaster Declared by the President of the United States

Notice 2006-59

PURPOSE

This notice provides guidance on the federal tax consequences of certain leave-sharing plans that permit employees to deposit leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster, as defined herein.

BACKGROUND

Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5170, provides that the President may declare an event a major disaster. The President also may determine that the major disaster warrants individual assistance or individual and public assistance from the federal government under the Stafford Act. *See, e.g.*, 42 U.S.C. § 5170b.

Section 9004 of Pub. L. No. 105-18, 5 U.S.C. § 6391, provides that in the event of a major disaster or emergency, as declared by the President, that results in severe adverse effects for a substantial number of employees, the President may direct the Office of Personnel Management to establish a leave-sharing plan for federal

employees who are adversely affected by the disaster or emergency.

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived.

Under the facts of Rev. Rul. 90-29, 1990-1 C.B. 11, an employer establishes a leave-sharing plan under which employees who suffer “medical emergencies” may qualify as recipients of leave surrendered to the employer, or deposited in an employer-sponsored leave bank, by other employees. The ruling concludes that the amounts the employer pays to a leave recipient pursuant to the plan are includible in the gross income of the recipient under § 61 as compensation for services provided by that recipient to the employer, and “wages” for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), the Railroad Retirement Tax Act (RRTA), the Railroad Unemployment Repayment Tax (RURT), and income tax withholding, unless excluded therefrom under a specific provision of the Code. The ruling also concludes that an employee who surrenders leave to the employer or deposits leave in the leave bank pursuant to the plan does not realize any income or incur any deductible expense or loss upon the surrender or deposit of the leave or its use by the recipient. The ruling also states that its conclusions and rationale apply only to bona fide employer-sponsored leave-sharing arrangements.

DEFINITIONS

Major disaster means (a) a major disaster as declared by the President under § 401 of the Stafford Act, 42 U.S.C. § 5170, that warrants individual assistance or

individual and public assistance from the federal government under that Act, or (b) a major disaster or emergency as declared by the President pursuant to 5 U.S.C. § 6391, in the case of employees described in that statute.

Major disaster leave-sharing plan means a plan that meets the requirements of this notice.

Leave donor means a current employee of the employer whose voluntary written request to deposit leave in a leave bank under a major disaster leave-sharing plan is approved by the employer.

Leave recipient means a current employee for whom the employer has approved an application to receive leave under a major disaster leave-sharing plan.

Family member means any family member as defined by the major disaster leave-sharing plan.

MAJOR DISASTER LEAVE-SHARING PLAN

For purposes of this notice, a major disaster leave-sharing plan is a written plan meeting each of the following requirements:

1. The plan allows a leave donor to deposit accrued leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster. For purposes of the plan, an employee is considered to be adversely affected by a major disaster if the disaster has caused severe hardship to the employee or a family member of the employee that requires the employee to be absent from work.

2. The plan does not allow a leave donor to deposit leave for transfer to a specific leave recipient.

3. The amount of leave that may be donated by a leave donor in any year generally does not exceed the maximum amount of leave that an employee normally accrues during the year.

4. A leave recipient may receive paid leave (at his or her normal rate of compensation) from leave deposited in the leave bank. Each leave recipient must use this leave for purposes related to the major disaster.

5. The plan adopts a reasonable limit, based on the severity of the disaster, on the period of time after the major disaster occurs during which a leave donor may deposit the leave in the leave bank, and a leave recipient must use the leave received from the leave bank.

6. A leave recipient may not convert leave received under the plan into cash in lieu of using the leave. However, a leave recipient may use leave received under the plan to eliminate a negative leave balance that arose from leave that was advanced to the leave recipient because of the effects of the major disaster. A leave recipient also may substitute leave received under the plan for leave without pay used because of the major disaster.

7. The employer must make a reasonable determination, based on need, as to how much leave each approved leave recipient may receive under the leave-sharing plan.

8. Leave deposited on account of one major disaster may be used only for employees affected by that major disaster. Except for an amount so small as to make accounting for it unreasonable or administratively impracticable, any leave deposited under a major disaster leave-sharing plan that is not used by leave recipients by the end of the period specified in paragraph 5, above, must be returned within a reasonable period of time to the leave donors (or, at the employer's option, to those leave donors who are still employed by the employer) so that the donor will be able to use the leave. The amount of leave returned to each leave donor must be in the same proportion as the amount of leave donated by the leave donor bears to the total amount of leave donated on account of that major disaster.

GUIDANCE

The IRS will not assert that a leave donor who deposits leave in an employer-sponsored leave bank under a major disaster leave-sharing plan realizes income or has wages, compensation, or rail wages with respect to the deposited leave, provided that the plan treats payments made by the employer to the leave recipient as "wages" for purposes of FICA, FUTA, and income tax withholding, and as "compensation" for purposes of RRTA and "rail wages" for purposes of RURT, unless excluded therefrom under a specific provision of the Code. A leave donor may not claim an expense, charitable contribution, or loss deduction on account of the deposit of the leave or its use by a leave recipient.

DRAFTING INFORMATION

The principal author of this notice is Shareen S. Pflanz of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice, contact Shareen S. Pflanz at (202) 622-4920 (not a toll-free call).