

Internal Revenue Service

Department of the Treasury
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Legend

Plan =

State S =

Agency A =

Dear :

This responds to your authorized representative's letter and subsequent correspondence, on behalf of State S and its Plan, requesting a ruling concerning the Plan relating to State S's volunteer firefighters' and ambulance workers' service award program (the "Plan") which the state intends to be a length of service award plan (LOSAP) described in section 457(e)(11)(B) of the Internal Revenue Code of 1986 (the "Code"). State S and its political subdivisions are represented to be eligible employers described in section 457(e)(1).

State S has established the program reflected in the Plan for the benefit of long-term bona-fide volunteers (as defined in the Code and the Plan) who perform firefighting or rescue squad services for the eligible volunteer fire departments or ambulance service auxiliaries within the state which participate in the Plan. The program is established to provide length of service awards in the amounts and at the time determined under the Plan to such volunteers within State S in recognition of their long-term volunteer service. Within most of State S, its governmental fire protection and ambulance service functions are performed by these volunteer-staffed entities.

The volunteer fire companies and ambulance service auxiliaries in State S which are eligible to participate in the Plan are represented to be instrumentalities of that state. These entities receive a significant portion of their funding from State S and its political subdivisions, as well as from donations by local citizens. These entities are also extensively overseen and regulated by Agency A in State S.

State S's retirement system board has established a fund to hold contributions to the Plan from, among other sources, the local volunteer fire departments or ambulance service auxiliaries. Contributions to this fund are held and invested by the board but these amounts remain the segregated property of the contributing entities subject to the claims of these entities' creditors until distributed as benefit payments. The Plan provides for a \$3,000 limit on the benefits payable to a volunteer with respect to any Plan year.

Any eligible volunteer rescue squad member or volunteer fire department member of an entity participating in the Plan, who meets the requirements and criteria established in the Plan, would become a participant in the Plan. The Plan provides that an eligible member may not receive compensation from the department or auxiliary squad for performing firefighting and prevention services or emergency medical and ambulance services other than reimbursement for (or reasonable allowance for) reasonable expenses, incurred in the performance of such services, or reasonable benefits (including benefits under the Plan) and nominal fees for such services, customarily paid by the eligible entities within State S in connection with the performance of such services by volunteers.

Once an eligible member has attained the age set forth in the Plan with the required years of service for a participating volunteer fire department or ambulance service auxiliary in State S, he or she would be entitled to a monthly benefit in an amount determined under the Plan. The Plan also includes provisions regarding the reduced amounts a member would receive if he or she ceases his or her services in State S or membership in the program before attaining the age and year of service requirement.

The Plan provides that all amounts deferred under the Plan in the Fund and all income attributable to such amounts will remain (until made available to the participant or beneficiary) solely the property and rights of the contributing entity, subject only to the claims of the entity's general creditors. The Plan also provides that a participant or beneficiary has only an unsecured right to benefits under the Plan. The rights of any participant or beneficiary to payments under the Plan are nonassignable and nontransferable.

Section 451(a) of the Code and section 1.451-1(a) of the regulations provide that an item of gross income is includible in gross income for the taxable year in which actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under section 1.451-2(a) of the regulations,

income is constructively received in the taxable year during which it is credited to the taxpayer's account, set apart, or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Various revenue rulings have considered the tax consequences of nonqualified deferred compensation arrangements. Rev. Rul. 60-31, Situations 1-3, 1960-1 C.B. 174, holds that a mere promise to pay, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also, Rev. Rul. 69-650, 1969-2 C.B. 106, and Rev. Rul. 69-649, 1969-2 C.B. 106.

Section 457 of the Internal Revenue Code of 1986 governs the taxation of *eligible deferred compensation plans of eligible employers*. The term "eligible employer" is defined in section 457(e)(1) as a state, political subdivision of a state, and any agency or instrumentality of a state or political subdivision of a state, and any other organization (other than a governmental unit) exempt from tax under subtitle A of the Code. An "eligible deferred compensation plan" as defined in section 457(b) must, among other things, provide that the maximum amount which may be deferred under the plan for a taxable year shall not exceed the lesser of the applicable dollar amount (which is \$16,500 for 2009) or 100 percent of the participant's includible compensation.

Section 457(f)(1)(A) provides that if a plan of an eligible employer providing for a deferral of compensation is not an eligible deferred compensation plan, compensation deferred under such plan shall be included in the participant's gross income for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation.

Section 457(e)(11)(A)(ii) provides that a plan paying solely length of service awards to bona fide volunteers or their beneficiaries on account of qualified service performed by such volunteers is treated as not providing for the deferral of compensation under section 457. Section 457(e)(11)(C) defines qualified services as fire fighting and prevention services, emergency medical services and ambulance services.

Section 457(e)(11)(B) provides special rules applicable to a length of service award plan (LOSAP). Section 457(e)(11)(B)(i) defines the term "bona fide volunteer" to include only persons whose only compensation received for performing the services are reimbursements for (or reasonable allowances for) reasonable expenses incurred in performing such services or reasonable benefits (including length of service awards) and nominal fees for such services, customarily paid by eligible employers in connection with the performance of such services by volunteers.

Section 457(e)(11)(B)(ii) provides that a LOSAP may not provide for an aggregate amount of length of service awards exceeding \$3,000 accruing with respect to any year of service by a volunteer.

Section 3121(a)(5)(I) provides that any payment made to, or on behalf of, an employee or his beneficiary under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer as defined in section 457(e)(1) is not treated as "wages" for purposes of determining whether Federal Insurance Contribution Act (FICA) tax apply to such payment.

In light of the original documents and information presented on July 16, 2008, including the relevant State S statutory provisions, the proposed amendments to the Plan submitted on December 29, 2008 (which it is represented will be adopted by State S) and the other representations made, we conclude as follows:

1. State S's Plan constitutes a length of service awards plan described in section 457(e)(11)(A)(ii) of the Code. Therefore, the Plan is not subject to section 457(b) or (f) of the Code.
2. Amounts paid to members under the Plan from the Fund are not wages for purposes of FICA tax, pursuant to section 3121(a)(5)(I).
3. Amounts paid or otherwise made available to eligible members under the Plan are includible in the recipient's gross income in accordance with section 451 only in the taxable year(s) when such amounts are paid or otherwise made available.

No opinion is expressed concerning the timing of the inclusion in income of amounts deferred under any deferred compensation plan other than the Plan described above. If the Plan is significantly modified, this ruling will not necessarily remain applicable. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Cheryl Press
Senior Counsel, Qualified Plans Branch 2
(Employee Benefits)
(Tax Exempt & Government Entities)

Enclosure: (1)

cc: