



Statewide Administration Assembly

Resolution 2014-02: In Support of UAF Staff Council's Resolution 2014-250-3

WHEREAS, we, the Statewide Administration Assembly, resolve to support UAF Staff Council's Resolution 2014-250-3: Resolution Concerning Leave Share for those on Intermittent Family Medical Leave (FML)

THEREFORE BE IT RESOLVED, the Statewide Administration Assembly advises Staff Alliance and the UA administration to support this change in the regulation.

Dory Straight 7/17/14

Dory Straight, President
Statewide Administration Assembly

Date

Attachment: UAF Staff Council Resolution 2014-250-3



Staff Council Office
907-474-7056
907-474-5213 fax
www.uaf.edu/uafgov/staff-council

UAF Governance

P.O. Box 757500, Fairbanks, Alaska 99775-7500

MEMORANDUM

TO: LaNora Tolman, Executive Officer, UA System Governance

FROM: Nicole Dufour, Executive Secretary, UAF Staff Council

DATE: May 21, 2014

SUBJECT: UAF Staff Council - Resolution 2014-250-3: Resolution Concerning Leave Share for Those on Intermittent Family Medical Leave (FML)

UAF Staff Council respectfully submits the attached 'Resolution Concerning Leave Share for Those on Intermittent Family Medical Leave (FML),' which was unanimously approved by UAF Staff Council at Meeting #250, on May 13, 2014. UAF Staff Council requests that this resolution be placed on record and added to the June Staff Alliance agenda.

A copy of this resolution with supporting documentation is attached. Please contact the UAF Staff Council Office if you have any questions or need additional information.

Attachment

cc: Carey Brown, Chair, UA Staff Alliance
Brian Rogers, Chancellor, University of Alaska Fairbanks
Erik Seastedt, UA Chief Human Resources Officer
Erika Van Flein, UA Director of Benefits
Dana Platta, Statewide Administrative Assembly

Naturally Inspiring.

UAF is an AA/EQ employer and educational institution.

UAF STAFF COUNCIL RESOLUTION 2014-250-3

UAF Staff Council unanimously approved the following resolution at Staff Council Meeting #250, on May 13, 2014:

**UNIVERSITY OF ALASKA FAIRBANKS
STAFF COUNCIL
RESOLUTION CONCERNING LEAVE SHARE FOR THOSE
ON INTERMITTENT FAMILY MEDICAL LEAVE (FML)**

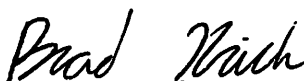
WHEREAS, the University of Alaska is reviewing regulations including those affecting the leave share program; and

WHEREAS, under the proposed changes, there is a consecutive ten day requirement to qualify for the leave share program; and


WHEREAS, personnel on intermittent FML may not be absent for ten consecutive days, yet may still exhaust all available sick and annual leave balances; and

WHEREAS, IRS letter 200720017 allowed a program with leave donation for a medical emergency including intermittent absences that are related to the same illness or condition; now

THEREFORE, LET IT BE RESOLVED, UAF Staff Council proposes that University Regulation, Part IV- Human Resources, chapter 04.06- Benefits and Leave, paragraph R04.06.130. Sick Leave, subparagraph D, Leave Share Program, strike the word "consecutive" from the ten day requirement to qualify for the leave share program (as noted in the attached document).



Brad Krick, UAF Staff Council President



Date

Attachments: Proposed Changes to UA Regulation R04.06 - Draft
IRS Letter Ruling 200720017

Attached is a draft copy of the proposed change to University Regulation, Part IV - Human Resources; Chapter 04.06 - Benefits and Leave (pages 17-21 only; the section concerning the Leave Share Program) as found on May 12, 2014 here:

<http://www.alaska.edu/files/research/04-06RegentsPolicy-revisions-from-HR-4-16-14-latest.doc>

In the draft, the policy on the Leave Share Program as it relates to employees on FML has been rewritten to make things clearer than previous policies. However, there is a consecutive 10-day absence required in a leave without pay (LWOP) status before the employee is eligible to participate in the program. An employee on intermittent FML may or may not have 10 consecutive days in a LWOP status, but could very easily exhaust all sick and annual leave. IRS guidelines allow those that qualify for intermittent FML to be eligible for a leave share program (IRS letter 200720017).

A recent example is a UAF employee who was on intermittent FML. In a five-week window (25 work days), the employee was in a LWOP status for 17 days. There were no 10 consecutive day instances during that period. This employee was not (and under the new guidelines as they are proposed would not be) eligible for fellow employees to assist through the Leave Share Program.

Therefore, the following changes are recommended:

Page 18, definition of Leave Share Recipient. In the fourth line after the term FML leave, insert, "(including intermittent)"

Page 18, definition of Medical Emergency. In the fifth line after the words FML leave, insert, "(including intermittent)";

In the seventh line, strike the word, "consecutive".

Page 19, paragraph c. Review of Application. In the fourth line, after the words FML leave, insert, "(including intermittent)";

In the sixth line, strike the word "consecutive".

Page 20, third paragraph, starting with the words, "After the leave share...". In the first line, strike the word "consecutive".

(NOTE: In the attached document, the yellow highlights along with the strikethrough words are the proposed change as found on the Statewide web site referenced above. The green highlights are Staff Council's proposed change.)

11. Paid sick leave may be denied if an employee fails to timely notify the supervisor, fails to provide evidence of the qualifying event, or fails to provide medical certification.
12. Paid sick leave is discontinued immediately:
 - a. upon employee's return to work status;
 - b. upon determination by the employee's supervisor with professional medical advice that the employee is able to return to work;
 - c. upon refusal or failure by the employee to submit clear evidence of a qualifying event on request or as required (in this case, the leave may be retroactively disallowed);
 - d. when the employee is eligible and qualified for disability retirement under the applicable state retirement system or Social Security;
 - e. upon exhaustion of sick leave;
 - f. after the third day of disability, for an employee with a workers' compensation claim; or
 - g. upon the expiration of the employee's job assignment.
 - h. upon termination for any reason or no reason.
13. Sick leave requests which are not covered in regulation or requests for special consideration are to be submitted through administrative channels to the regional Human Resources office. The regional Human Resources office, after evaluation, will forward a copy of the request and its recommendations to the chief human resources officer for final determination.

D. Leave Share Program [Changes proposed in this section are from M. Hostina and A. Lynch along with Erika Van Flein and Erik Seastedt]

1. Purpose: The leave share program is established to allow employees to donate sick leave to an employee who needs additional leave coverage for a medical emergency that will require the prolonged absence of the employee from duty and will result in the substantial loss of income to the employee ~~voluntarily transfer hours from their unused sick leave balance to the sick leave balance of an employee with a catastrophic medical event.~~
2. Definitions:

For the purpose of this regulation, the following terms will have the meaning as indicated below.

Employee: An employee is any person in the employment of the university in a position that is eligible to accrue sick leave, except for extended temporary employees. ~~An "employee" is all persons in the employment of the university in positions that are eligible to accumulate sick leave. This excludes all extended temporary employees eligible to accrue sick leave.~~

Leave Share Sick-leave Donor: An employee who voluntarily requests transfer of accrued sick leave hours to the sick leave account of a sick leave share recipient.

Leave Share Recipient: An employee whose application to receive sick leave from the accrued sick leave account of Leave Share Donor(s) has been approved in accordance with subsection 3 (c) below, and whose leave has been designated as FML leave (including intermittent) for a serious health condition in accordance with R04.06.144B, University Family and Medical Leave. ~~**Sick-leave Recipient:** An employee who has filed a request to receive sick leave from the accrued sick leave account of donor(s).~~

Medical Emergency: A serious health condition of the employee or the employee's immediate family member that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available. The employee's absence for the medical emergency must be designated as FML leave (including intermittent) for a serious health condition in accordance with R04.06.144B and must exceed the employee's accrued leave balances by 10 or more consecutive work days.

~~**Qualifying Event:** For purposes of the leave share program, the catastrophic medical event of an employee or immediate family member that requires an absence from work by the employee for a period of time that extends 10 working days in excess of all accrued leave balances.~~

~~Upon meeting the definition of a qualifying event, 5 working days of donated leave will be credited retroactively to the recipient.~~

3. Procedures

a. Program Participation: A full-time employee may participate in the leave share program for a maximum of 65 scheduled working days (520 hours) during a rolling 12-month period measured backward from the date the employee uses any donated sick leave, for each calendar year. ~~Part-time employees will~~ may participate according to their prorated proportion of full-time.

~~**Leave Transfers:** The transfer of leave hours from the donor(s) to the recipient will be done on an as-needed basis by pay period.~~

~~**Exclusions:** Leave cannot be donated to employees receiving compensation under Workers' Compensation, Long-Term Disability, or any other compensation plan, or to any employees not eligible to use accrued sick leave.~~

3. Procedures

Procedures for request and use of the leave share program are available through the employee's regional personnel office.

The personnel director or designee at each MAU and statewide administration is responsible for the coordination and implementation of the procedures described herein.

a. Request for Leave Share Hours Transfer

A regular employee or a personal representative may request leave share hours by completing the leave share request form and by completing the Family and Medical Leave (FML) application.

b. Review of Request Application for Leave Share Hours

A regular employee or the employee's representative may request leave share hours by completing the leave share application and the Family and Medical Leave (FML) application.

The personnel director or designee will consider the request and determine whether the leave share hours transfer request and FML application complies with regulation. The review will include determining that the qualifying event will require a sick leave without pay (SLWOP) period in excess of 10 working days (80 working hours) for full-time employees; verifying that all available leave hours of the applicant are or will be exhausted; and compliance with all provisions of this and other policy and regulation pertaining to sick leave and FML.

c. Administration of an approved Review of Application

The regional human resources director or designee will consider the application and determine whether the employee is eligible for leave share, whether the employee's absence is a medical emergency and has been designated as FML leave (including intermittent) in accordance with R04.06.144B, and whether the employee has been on sick leave without pay (SLWOP) for the medical emergency for a period of at least ten (10) consecutive work days.

d. Exclusions

Leave cannot be donated to employees receiving compensation under Workers' Compensation, Long Term Disability, or any other compensation plan, to any employees not eligible to accrue and use accrued sick leave.

e. Administration of Approved Application

The employee is responsible for requesting donations. If sufficient timeleave is not donated, and at the employee's request, the regional personnel director dean or director of the employee's department may will issue a systemwide request for sick leave donations on behalf of the leave share recipient (anonymity may be requested). This notice will remain posted until donated leave is no longer necessary or a total of 65 working days has been offered for donation.

An employee who wishes to donate sick leave to a leave share recipient will complete a sick leave donation form and submit it to the regional human resources office. Donation forms are to be submitted to the regional personnel office of the university unit which made the request. Donations will be accepted on a first come, first used basis. Sick leave hours will be transferred on an as-needed basis each pay period.

After the leave share recipient has used ten (10) consecutive days of sick leave without pay (SLWOP) for the medical emergency, the transfer of leave hours from the leave share donor(s) to the leave share recipient will be made on an as-needed basis by pay period. Five working days of donated leave will be credited retroactively to the recipient.

The leave share recipient may not receive more than the actual number of hours needed. Leave share donations may not be used for the first five days of the qualifying ten (10) working day SLWOP period. Donations may not be used beyond a leave share recipient's termination date, exhaustion of FML leave, or exhaustion of leave share benefit, whichever occurs first, or beyond a leave share donor's termination date.

The sick leave donation form will not be valid for more than the number of hours needed by the recipient in a given pay period. Separate forms may be submitted each pay period for additional donations. Donations may not be used beyond the donor's termination date or for 5 working days of the qualifying 10 working day SLWOP period.

Donors will receive notification from the payroll office when the hours they donated have been transferred from the donor's sick leave balance to the recipient's sick leave balance. If a donor's sick leave donation is not needed by the recipient, the leave share transfer form will be returned to the donor destroyed.

df. Impact on Leave Share Donor

According to I.R.S. Revenue Ruling 90-29, an employee who donates donating sick leave under a bona-fide employer-sponsored leave-sharing program for medical emergencies hours to another employee does not realize any income or incur any deductible expense or loss either upon the surrender or deposit of that leave or its use by the recipient.

Sick leave donated and used by the recipient is the property of the recipient and will not be returned to the donor.

eg. Impact on the Leave Share Recipient

~~According to~~ In accordance with I.R.S. Revenue Ruling 90-29, amounts paid by an employer to a leave share recipient pursuant to a bona-fide employer-sponsored leave sharing plan for medical emergencies are included in the gross income of the recipient as compensation. ~~The recipient may not receive more than the actual number of hours needed.~~

fh. Disapproval of leave recipient application Request for Reconsideration of Denial

~~If an applicant is informed by the regional personnel office that the request has been employee's application for leave share is denied, the applicant may request reconsideration within ten (10) working days reconsideration by the chancellor (or designee) or, if the applicant is a statewide administration employee, the president (or designee). Any reconsideration constitutes the final administrative determination of the matter by the University and is not grievable subject to appeal, grievance, or arbitration. Any further review of such decisions must be pursued within 30 days of the final decision in accordance with Alaska Rule of Appellate Procedure 602(a)(2).~~

gi. Prohibition of Coercion

An employee may not directly or indirectly intimidate, threaten, or coerce any other employee or otherwise interfere with such an employee's right to choose whether or not to donate, receive, or use sick leave under the leave share program.

hj. Records

The leave share and FML application, decision, and other relevant documentation will be maintained separately from employee's permanent personnel file. A record of the number of hours used from the leave share program will be kept in the permanent payroll file.

(01-26-09)

R04.06.141. Holidays

A. Paid Holidays

The following paid holidays are observed by the University of Alaska:

1. New Year's Day

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: 200720017

Release Date: 5/18/2007

**Index Number: 61.30-00, 3101.00-00,
3111.00-00, 3121.01-00,
3301.00-00, 3306.02-00,
3401.01-00, 3402.00-00**

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact: _____, ID No.

Telephone Number: _____

Refer Reply To:
CC:ITA:B05
PLR-152644-06
Date:
February 09, 2007

Legend

Taxpayer =
State A =
Policy =
Modified Policy =

Dear :

This is in response to your request for a private letter ruling dated November 6, 2006, submitted by the authorized representatives of Taxpayer. Rulings are requested below concerning Taxpayer's income tax withholding and employment tax obligations with respect to leave transferred by employees of Taxpayer to other employees of Taxpayer under the Policy currently maintained by Taxpayer. Similar rulings are also requested concerning leave transferred pursuant to the Modified Policy currently being considered by Taxpayer for implementation.

FACTS

Taxpayer is a publicly traded healthcare services company with facilities in numerous states. Taxpayer's accounting period is the calendar year, and it uses the accrual method of accounting for maintaining its books and records and for filing its federal tax returns. Taxpayer's corporate headquarters is in State A.

Taxpayer maintains various programs under which its employees accrue paid leave time that may be used for various reasons, including vacation, personal days and sick days. Employee requests for time off must request be approved by Taxpayer. If a request is approved, but the employee lacks sufficient hours of paid leave time under the applicable paid leave program at the time leave is to begin, the employee will not receive pay for the time off.

Taxpayer currently maintains Policy pursuant to which employees are allowed to surrender accrued hours of paid leave ("Donor Employee") for the benefit of other employees who need more time off than they have accumulated personally ("Recipient Employee"). Under Policy as currently in effect, an eligible employee may request additional paid leave if the employee experiences a medical emergency, is caring for a spouse or child in the event of a medical emergency, or needs extended time off following the death of a parent, spouse or child. To be eligible to receive surrendered leave under Policy, an employee must be employed by Taxpayer for at least 90 days and must be eligible to accrue paid leave time under the applicable paid leave program. Policy defines "medical emergency" as a major illness or other medical condition (e.g., heart attack, cancer, etc) that requires a prolonged absence from work, including intermittent absences that are related to the same illness or condition. In order to receive surrendered paid leave time, an eligible employee must have exhausted all of his or her own paid leave time, must complete a written request and authorization form, and must have the scheduled time off or leave of absence approved by Taxpayer. The Donor Employee also must complete an authorization form, which must be approved by Taxpayer, before leave can be surrendered. Leave time must be donated to a specific employee who is eligible to receive donated leave time under the Policy (i.e., the Recipient Employee). Policy also includes restrictions on the amount and type of paid leave time that may be surrendered by a Donor Employee. Once surrendered, paid leave hours cannot be returned to the Donor Employee, but will remain available for use by the specific Recipient Employee.

If a Recipient Employee receives paid leave hours under the Policy from a Donor Employee with a different pay rate, the leave time is converted based on the Recipient Employee's pay rate, so that the dollar value of the surrendered leave remains the same, but leave taken by the Recipient Employee is always paid at the Recipient Employee's regular rate of pay. For example, if Donor Employee is regularly paid \$15.00 per hour and surrenders eight hours of paid leave to a Recipient Employee who is regularly paid \$10.00 per hour, the Recipient Employee will receive 12 hours of paid leave, paid at \$10.00 per hour (8 hours x \$15.00 = \$120 value, and \$120.00 value/ \$10.00 per hour = 12 hours).

Taxpayer is considering whether to implement certain modifications to Policy ("Modified Policy") that would allow eligible employees who experience "catastrophic casualty losses" due to terrorist attack, fire or other natural disaster (i.e., hurricane, flood, tornado or other highly destructive storm) to request surrendered paid time off as well. For

purposes of the Modified Policy, a “catastrophic casualty loss” would include severe damage to or destruction of the employee’s primary residence, which requires immediate action by the employee to secure the premises. The Modified Policy may permit employees to donate leave hours to a leave “bank” in the event of a terrorist attack, natural disaster or public health crisis that affects a large number of employees. Leave hours donated to the bank would be available on a first-come, first-served basis, to affected employees whose leave donation requests are approved. The leave bank would be available only for a limited period of time following the crisis event.

Taxpayer is requesting the following four rulings:

- (1) Payments made under the Policy as currently in effect are reportable in the Recipient Employee’s gross income under § 61 of the Internal Revenue Code (the “Code”) and are subject to withholding taxes under §§ 3401, 3121 and 3306 of the Code at the time the Recipient Employee receives the payment.
- (2) Under the Policy as currently in effect, the Recipient Employee who receives the payments with respect to the paid leave time surrendered by the Donor Employee is the sole individual subject to withholding and income tax liability at the time the payment is made, and the Donor Employee who surrendered the paid time off is not subject to income or withholding tax liability, either at the time he or she applies to donate the leave hours or at the time a payment is made by Taxpayer to the Recipient Employee in connection with the surrendered paid leave time.
- (3) Payments made under the Modified Policy after implementation of the proposed changes to the Policy are made are reportable in the Recipient Employee’s gross income under § 61 and are subject to withholding taxes under §§ 3401, 3121 and 3306 at the time the Recipient Employee receives the payment.
- (4) Under the Modified Policy, the Recipient Employee who receives the payments with respect to the paid leave time surrendered by the Donor Employee is the sole individual subject to withholding and income tax liability at the time the payment is made, and the Donor Employee who surrendered the paid time off is not subject to income or withholding tax liability, either at the time he or she applies to donate the leave hours or at the time a payment is made by Taxpayer to the Recipient Employee in connection with the surrendered paid leave time.

LAW AND ANALYSIS -- GROSS INCOME ISSUE

Section 61 of the Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived, including compensation for services.

A basic principle of tax law is that a taxpayer’s assignment to another person of his or her right to receive compensation for personal services does not relieve the taxpayer of the tax liability on the assigned income. See Lucas v. Earl, 281 U.S. 111, 50 S. Ct. 241,

74 L. Ed. 731 (1930), and Helvering v. Eubank, 311 U.S. 122, 61 S. Ct. 149, 85 L. Ed. 81, 1940-2 C.B. 209 (1940), 1940-2 C.B. 209. However, this general "assignment of income" rule does not apply to certain situations involving employer-sponsored leave plans. One situation involves bona fide employer-sponsored (medical) leave-sharing arrangements. Another involves certain qualified employer-sponsored major disaster leave-sharing plans.

The first exception to this general assignment of income rule involves the bona fide employer-sponsored (medical) leave-sharing arrangement described in Rev. Rul. 90-29, 1990-1 C.B. 11. Under the plan in the ruling, employees who suffer medical emergencies may qualify to receive leave surrendered to the employer by other employees or leave deposited by its employees in an employer sponsored leave bank. The ruling holds that the amounts paid by the employer to a leave recipient pursuant to the plan are includable in the gross income of the recipient under § 61 of the Code as compensation for services provided by that recipient to the employer. Rev. Rul. 90-29 further concludes that these amounts are considered "wages" for employment tax purposes, including the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), the Railroad Retirement Tax Act ("RRTA"), and the Railroad Unemployment Repayment Tax ("RURT"), and for income tax withholding purposes, unless otherwise excluded by a specific provision of the Code. The revenue ruling also holds that an employee who surrenders leave to the employer or deposits leave in the leave bank does not realize any income and incurs no deductible expense or loss either upon surrender or deposit of the leave or its use by the recipient employee.

Another exception involves qualified employer-sponsored major disaster leave-sharing plans such as plans that involve 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, 2006-28 I.R.B. 60, provides that the Internal Revenue Service will not assert that a leave donor who deposits leave into an employer-sponsored leave bank under a major disaster leave-sharing plan that meets the requirements set forth in Notice 2006-59 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. Notice 2006-59 defines "major disaster" to mean (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.

In this case, Recipient Employees under the Policy as currently in effect are limited to those employees who experience a medical emergency, care for a spouse or child in the event of a medical emergency, or need extended time off following the death of a parent, spouse or child. The Policy defines “medical emergency” as a major illness or other medical condition (e.g., heart attack, cancer, etc) that requires a prolonged absence from work, including intermittent absences that are related to the same illness or condition. The facts surrounding Policy as currently in effect in this case are close to the facts surrounding the employer-sponsored (medical) leave-sharing arrangement described in Rev. Rul. 90-29. We therefore conclude that, under the facts presented and the representations made, the payments made under the Policy as currently in effect are includible in the Recipient Employee’s gross income under § 61 of the Code. Such payments are not includable in the Donor Employee’s gross income under § 61.

However, Modified Policy with the changes proposed above is distinguishable from the narrow exceptions described above. Because Modified Policy provides a Recipient Employee with paid leave during a time that he or she is facing a catastrophic casualty loss that may or may not involve a personal or family medical emergency, Modified Policy is not limited to a medical emergency leave program. Consequently, it is not within the scope of employer-sponsored (medical) leave-sharing arrangement described in Rev. Rul. 90-29. Modified Policy is also outside the scope of qualified employer-sponsored major disaster leave-sharing plans that meet the requirements of Notice 2006-59 because it is not designed to be limited specifically to aid the victims of a “major disaster” as declared by the President of the United States.

Because the Modified Policy does not meet any of the exceptions described above, the tax consequences to Donor Employees who transfer leave pursuant to the Modified Policy will be governed by the assignment of income doctrine. Applying the doctrine to the facts here, we conclude that a Donor Employee's assignment of his or her right to receive vacation and other similar accrued paid leave under the Modified Policy will not relieve the Donor Employee of the income tax liability on the assigned leave. Therefore, a Donor Employee must include the cash value of any vacation and other similar accrued paid leave that the Donor Employee transfers pursuant to the Modified Policy in his or her gross income under § 61 as compensation for services provided by that employee to Taxpayer.

LAW AND ANALYSIS – EMPLOYMENT TAX ISSUE

Generally, every employer making payment of “wages” must withhold federal income tax pursuant to § 3402 of the Code. For income tax withholding purposes, the term “wages” means all remuneration for services performed by an employee for his employer unless a specific exemption under § 3401(a) applies. In general, income tax is withheld from an employee’s wages when the wages are actually or constructively paid to the employee. See Treas. Reg. § 31.3402(a)-1. Federal Insurance Contribution Act (FICA) taxes are imposed on employees and employers under §§ 3101 and 3111,

respectively. Employers have a duty to collect the employee's share of FICA taxes under § 3101 by withholding the amount of the tax from the employee's "wages." The term "wages" for purposes of FICA means, with certain exceptions, all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash. See § 3121(a). Typically, wages are subject to FICA tax when they are actually or constructively paid to the employee. See Treas. Reg. § 31.3121(a)-2. Additionally, the employer must pay an excise tax (FUTA tax) on the total "wages" the employer pays to an employee. The term "wages" for purposes of FUTA is similar to the FICA wage definition. See § 3306(b). Again, FUTA taxes are imposed when an employee is actually or constructively paid. See Treas. Reg. §§ 31.3301-2, 31.3301-3(b) and 31.3301-4.

As noted above, the amounts an employer pays to an employee who receives paid leave pursuant to a bona fide employer sponsored (medical) leave-sharing plan, like the one in Rev. Rul. 90-29, are includible in that employee's gross income under § 61 of the Code, and they are considered "wages" of that employee for employment tax purposes (unless otherwise excluded by the Code). Moreover, pursuant to Rev. Rul. 90-29, an employee who surrenders leave to the employer or deposits leave into a leave bank maintained by the employer does not realize any income.

Because the Policy in this case is a bona fide employer sponsored (medical) leave-sharing plan similar to the one described in Rev. Rul. 90-29, we conclude that the payments made by Taxpayer to a Recipient Employee with respect to the paid leave time surrendered by the Donor Employee under the Policy are includable in the Recipient Employee's gross income under § 61 of the Code, and that they should be treated as "wages" of the Recipient Employee for employment tax purposes. Therefore, such payments made by Taxpayer to the Recipient Employee are subject to the tax withholding requirements and taxes provided by §§ 3402, 3101, 3102, 3111, 3121, and § 3301, respectively, at the time of payment. .

Moreover, in accordance with Rev. Rul. 90-29, the Donor Employee who surrenders leave under the Policy does not have income under § 61 of the Code, and thus is not treated as the recipient of "wages" subject to employment taxes in connection with the surrendered leave. The Donor Employee therefore is not subject to any withholding or employment tax obligations relating to the payments.

However, the Modified Policy, as proposed, does not qualify as a bona fide (medical) leave-sharing plan or a qualified major disaster leave-sharing plan. Therefore, the cash value of the surrendered paid leave is includable in the Donor Employee's gross income under § 61 of the Code, and thus should also be treated as the "wages" of the Donor Employee for employment tax purposes. Accordingly, these wages are subject to the tax withholding requirements and taxes provided by §§ 3402, 3101, 3102, 3111, 3121, and § 3301, respectively.

In addition, the Recipient Employee who receives payments of surrendered paid leave under the Modified Policy is not treated as the recipient of "wages" subject to employment tax. The Recipient Employee is not subject to any withholding or employment tax obligations relating to the payments. However, with respect to whether the Recipient Employee has gross income under § 61 of the Code for reasons other than compensation for services provided to Taxpayer, we note that under section 4.02(1) of Rev. Proc. 2006-3, 2006-1 I.R.B. 122, 129, the Service ordinarily will not issue letter rulings on any matter in which the determination is primarily one of fact. Because the reasons that Donor Employees of Taxpayer may transfer paid leave under the Modified Policy is primarily one of fact, we cannot express an opinion regarding the federal income tax consequences of the subject payments to the Recipient Employees who receive the cash value of the surrendered paid leave under the Modified Policy.

HOLDINGS

We hold that payments with respect to surrendered paid leave under the Policy, as currently in effect, made to a Recipient Employee are includable in the Recipient Employee's gross income under § 61 of the Code and are "wages" subject to withholding taxes under §§ 3401, 3121 and 3306 at the time the Recipient Employee receives the payment. Moreover, the Recipient Employee who receives the payments with respect to the surrendered paid leave is the sole individual subject to withholding and income tax liability at the time the payment is made. The Donor Employee who surrendered the paid leave is not subject to income tax liability or withholding tax liability, either at the time he or she applies to donate the leave hours or at the time a payment is made by Taxpayer to the Recipient Employee in connection with the surrendered paid leave time.

We further hold that payments with respect to surrendered paid leave under the Modified Policy, after the implementation of the changes contemplated by Taxpayer, are includable in the Donor Employee's gross income under § 61 of the Code and are "wages" subject to withholding taxes under §§ 3401, 3121 and 3306. The Donor Employee is the sole individual subject to wage withholding tax liability at the time the payment is made.

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.

We express no opinion, except as specifically ruled above, as to the federal income tax treatment of the transaction under any other provisions of the Code and regulations that may be applicable or under any other general principles of federal income taxation. Neither is any opinion expressed as to the tax treatment of any conditions existing at the time of, or effects resulting from, the transaction(s) that are not specifically covered by the above ruling.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely yours,

William A. Jackson
Branch Chief, Branch 5
Office of Associate Chief Counsel
(Income Tax & Accounting)