Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

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PLR-101025-21

Date:
April 09, 2021

In Re:

Taxpayer	=
Plan	=
State	=
Special Employee	=
Date 1	=
Date 2	=
Date 3	=

Dear :

This is in response to your request dated December 22, 2020, in which you request a private letter ruling regarding Taxpayer's administration of its retirement plan.

The following facts and representations have been submitted under penalties of perjury in support of the rulings requested:

Taxpayer is the sponsor of Plan, a defined benefit plan, which is a governmental plan within the meaning of § 414(d) of the Internal Revenue Code and a qualified plan within the meaning of § 401(a). Plan provides for mandatory employee contributions that are picked up by the employer in accordance with § 414(h)(2).

On Date 1, State legislature enacted legislation to amend Plan to provide that certain retirees who are receiving benefits from Plan may be rehired by a school system as a Special Employee. Under the legislation, which was clarified by additional legislation

enacted on Date 2, such a retiree is a beneficiary of Plan who retired on or before Date 3 after becoming eligible for normal retirement under Plan. Plan provides that normal retirement occurs at age with years of creditable service, age with years of creditable service, or years of creditable service with no minimum age. To qualify to be a Special Employee, the retiree must be reemployed by a local board of education to provide classroom instruction as a teacher, as defined under State law, employed on an annual contract to provide classroom instruction at a certain category of school or schools. In order to be eligible to be a Special Employee, a retiree must have retired on or before Date 3, prior to the passage of the legislation. Thus, any retiree who is eligible to be hired as a Special Employee could not have had a prearrangement to return to employment in that role at the time of his or her retirement.

The legislation provides salary limitations for a retiree hired as a Special Employee. Also, a Special Employee is limited to a contract term of one school year, although the language does not provide a limit on recurring contracts. A participant who has been retired for at least six months and who is hired as a Special Employee will not have his or her earnings counted for purposes of determining whether Plan's suspension of benefit provisions apply and will not earn additional benefits during such employment. Therefore, a retiree who is hired as a Special Employee will continue to receive benefits under Plan.

A retiree hired to be a Special Employee may not elect to transfer from a Special Employee position into a regular benefits-eligible position that is subject to Plan's contribution requirements. Rather, the available job is determined by the employer. Each local board must inform Taxpayer annually if it will not employ anyone as a Special Employee for that school year, and if the local board employs anyone as a Special Employee, the local board is responsible for ensuring compliance with the prohibition on a Special Employee electing into a benefits-eligible position.

Ruling Requested

Taxpayer requests a ruling that the amended Plan language will not create an employee election that would constitute a cash or deferred arrangement within the meaning of § 401(k).

Applicable Law

Section 401(k)(1) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of § 401(a) merely because the plan includes a qualified cash or deferred arrangement as defined in § 401(k)(2).

Section 401(k)(2)(A) defines a cash or deferred arrangement as any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of § 401(a), under which a covered

employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash.

Section 1.401(k)-1(a)(1) provides that a plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, does not satisfy the requirements of § 401(a) if the plan includes a cash or deferred arrangement. For this purpose, a cash or deferred arrangement is part of a plan if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement. Because a defined benefit plan is not a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, if a defined benefit plan includes a cash or deferred arrangement, it does not satisfy the requirements of § 401(a).

Section 1.401(k)-1(a)(2) provides that, subject to certain exceptions, which are inapplicable in this case, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of § 401(a).

Section 1.401(k)-1(a)(3)(i) defines a cash or deferred election as any direct or indirect election (or modification of an earlier election) by an employee to have the employer either: (A) provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available, or (B) contribute an amount to a trust, or provide an accrual or other benefit under, a plan deferring the receipt of compensation.

Section 414(h)(1) provides that any amount contributed to an employees' trust described in § 401(a), or under a plan described in § 403(a), shall not be treated as having been made by the employer if it is designated as an employee contribution.

Section 414(h)(2) provides that, for purposes of § 414(h)(1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of § 414(d) (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

Analysis

In order for there to be a cash or deferred election, a retiree who is rehired as a Special Employee must have a direct or indirect election (or modification of an earlier election) to have the Taxpayer either provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available, or contribute an amount to a trust, or provide an accrual or other benefit under a plan deferring the receipt of compensation. Such an election would occur if an employee was given an election

whether to accrue benefits under Plan (and have contributions to Plan paid from the employee's compensation) or not accrue benefits (and therefore receive compensation unreduced by contributions).

In this case, a retiree under Plan who is rehired as a Special Employee in connection with the amended Plan makes no election as to whether to receive cash or to make a contribution to Plan. A Special Employee is not eligible to accrue further benefits under Plan and is not eligible to elect a position that would result in eligibility for further benefit accruals (and therefore require contributions to Plan). Instead, a rehired retiree continues to receive retirement benefits from Plan. Moreover, the terms of full-time regular employment differ significantly from being hired as a Special Employee; for example, being a Special Employee involves a one-year contract under which the employer controls whether the retiree is hired as a Special Employee, and whether that retiree is hired for the following year. A retiree hired as a Special Employee cannot elect to be hired into a traditional role while working as a Special Employee. Therefore, we rule that the amended Plan language permitting the hiring of a retiree to be a Special Employee does not create an employee election that could constitute a cash or deferred arrangement within the meaning of § 401(k).

The ruling contained in this letter is based upon information and representations submitted by your authorized representatives and accompanied by a penalties of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(16)(b). This office has not verified any of the material submitted in support of the request for ruling, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2021-1, § 11.05.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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

Sincerely,

Laura B. Warshawsky
Chief, Qualified Plans Branch 1
Office of Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and Employment Taxes)

cc: