Section 457.—Deferred Compensation Plans of State and Local Governments and Tax-Exempt Organizations

26 CFR 1.457–1: Compensation deferred under eligible deferred compensation plans.

Cash or deferred arrangements; nonqualified deferred compensation. This ruling specifies the criteria to be met in order to automatically defer a certain percentage of an employee's compensation into that employee's account in an eligible deferred compensation plan sponsored by the eligible employer.

Rev. Rul. 2000–33

ISSUE

Will a deferred compensation plan fail to be an "eligible deferred compensation plan" described in § 457(b) of the Internal Revenue Code merely because deferrals are made under an arrangement whereby a fixed percentage of an employee's compensation is deferred on the employee's behalf under the plan unless the employee affirmatively elects to receive the amount in cash?

FACTS

County M, a political subdivision of State X, maintains Plan A, an eligible deferred compensation plan described in § 457(b). Under Plan A, any employee of County M, including a newly hired employee, may choose to enter into an agreement pursuant to which the employee's taxable compensation is reduced and deferrals to the employee's account in Plan A are credited by County M on the employee's behalf. The employee may designate a percentage of the employee's compensation as elective deferrals, subject to the limitations of § 457(b). Plan A does not permit any other type of deferrals, and no other plan of County M permits employees to make elective deferrals. Deferrals under Plan A are immediately nonforfeitable and are subject to the limitations and requirements of § 457(b).

County M proposes to implement, effective the next January 1, an automatic election feature in Plan A under which, if a newly hired or current employee has not affirmatively elected to receive cash compensation or to have at least 2 percent of compensation deferred under Plan A, his or her compensation will automatically be reduced by 2 percent, and this amount will be credited to the employee's account in Plan A. An election not to make deferrals or to defer a different percentage of compensation can be made at any time. Elections filed at a later date are effective for the month next following the date the election is filed.

In the case of a new employee, the election not to make deferrals will be effective for the first month after the individual first became an employee and for subsequent months (until superseded by a subsequent election) if filed within a reasonable period of time ending before the beginning of the month. Thus, if a new employee files an election to receive cash in lieu of making deferrals and the election is filed a reasonable period ending before the beginning of the first month after the individual first becomes an employee, then no deferrals for that (or any subsequent) month are made on the employee's behalf to Plan A until the employee makes a subsequent affirmative election to reduce his or her compensation. At the time the employee is hired, the employee will receive a notice that explains the automatic election and the employee's right to elect to have no such deferrals made under the plan or to alter the amount of those deferrals, including the procedure for exercising that right and the timing for implementation of any such election.

The proposed amendment to Plan A also provides that, with respect to current employees, if the employee files an election to receive cash in lieu of making deferrals and the election is filed during the reasonable period ending on the January 1 effective date, then no deferrals for the period beginning on or after the January 1 effective date are made on the employee's behalf under Plan A until the employee makes a subsequent affirmative election to reduce his or her compensation. At the beginning of the reasonable period ending on the January 1 effective date, each current employee receives a notice that explains the new automatic election and the employee's right to elect to have no such deferrals made under the plan or to alter the amount of those deferrals, including the procedure for exercising that right and the timing for implementation of any such election.

Thereafter, each employee is notified annually of his or her deferral percentage, and of his or her right to change the percentage or to elect not to make deferrals, including the procedure for exercising that right and the timing for implementation of any such election.

Plan A provides that deferrals will be invested in accordance with the participant's election among a broad range of investment funds held by the trustee of Plan A or, if no investment election is made by a participant, in the trust's balanced fund which includes both diversified equity and fixed income investments.

LAW AND ANALYSIS

Section 457(a) provides that in the case of a participant in an eligible deferred compensation plan, any amount

of compensation deferred under the plan, and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income is paid or otherwise made available to the participant or other beneficiary.

Section 457(b) defines the term "eligible deferred compensation plan." Section 457(b)(4) and §1.457–2(g) of the Income Tax Regulations provide that an "eligible deferred compensation plan" must provide that compensation will be deferred for any calendar month only if an agreement providing for the deferral has been entered into before the beginning of such month.

No provision of § 457(b) limits deferrals under an eligible plan to elective or voluntary deferrals, nor do the provisions of § 457(b) (including the limitations of § 457(b)(2) and (3)) distinguish between elective or voluntary deferrals and other types of deferrals. *See* Notice 87–13, Q &A 26, 1987–1 C.B. 432, 444. In the case of these other types of deferrals, the requirements of § 457(b)(4) are satisfied without the employee entering into an agreement to defer compensation. Rather, the obligation of the employer (or the obligation of the employee as a condition of employment) satisfies § 457(b)(4).

Similarly, the automatic election procedure described above will not cause a plan to fail the requirements of § 457(b)(4). In the absence of an affirmative election to the contrary entered into before the beginning of the month, deferrals with respect to compensation for the month will be made pursuant to the automatic election procedure. Alternatively, if an employee makes an affirmative election to change the automatic election and receive a corresponding amount in cash, the employee's affirmative election will govern any deferrals for the month. In either case, the deferrals for a month with respect to an employee are clearly established before the beginning of the month, and the requirements of § 457(b)(4) are satisfied.

HOLDING

Where, as under the proposed amendment to Plan A, the obligation to make deferrals with respect to an employee's compensation for a month is established before the beginning of a month by either an automatic election or by an agreement to alter the terms of the automatic election and receive cash in lieu of making deferrals, an eligible deferred compensation plan will satisfy the requirements of § 457(b)(4).

PAPERWORK REDUCTION ACT

The collection of information contained in this revenue ruling has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1695.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue ruling is in the third, fourth, and fifth paragraphs in the section headed "FACTS". The collection of information is necessary to ensure that the increased retirement savings due to automatic enrollment is truly voluntary. The collection of information is needed to obtain a benefit. The likely respondents are state and local governmental entities, and to a lesser extent, not-for-profit organizations.

The estimated total annual reporting burden is 500 hours. The estimated average annual burden per respondent is 1 hour. The estimated number of respondents is 500. The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

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