

POLICY SERVICES ADVISORY

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Voluntary Transfer of Accrued Annual and Sick Leave

Policy Advisory Discussion

Policy Advisory No. 115. GCCG — Professional / Support Staff Voluntary Transfer of Accrued Annual and Sick Leave. House Bill 403aa which passed in the first legislative session of 2015 directed New Mexico School Districts to implement policies pursuant to the statutory language that provide employees who earn annual or sick leave the opportunity to donate annual or sick leave to another employee for a medical emergency.

To begin the discussion of the transfer of annual and sick leave to another employee, Policy Services consulted United States Internal Revenue Services (IRS) rules and interpretations to determine how taxes on donated leave would be handled for federal tax purposes. In the process, a definition for a medical emergency was found as well as an IRS private letter response which explained the IRS position on transfer of leave in an organization. In a February 09, 2007, private letter response, the Internal Revenue Services Office of Associate Chief Counsel provided the following analysis on employment tax issues, which summarize the income issues raised by the transfer of leave, as described in New Mexico House Bill 403aa. A portion of that letter as applicable is found below:

"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.

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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. Rule 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. Rule 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. *****"*

IRS Rev. Rule 90-29, 1990-1 C.B. 11 describes a medical emergency for purposes of shifting of the tax burden as follows: "A '*medical emergency*' is defined under the plan as a medical condition of the employee or a family member of the employee 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 apart from the leave-sharing plan."

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The above explanation and definition provide a base or starting point given that Federal Law and Rule supersede State law and Rule. The assignment of income doctrine is that except as otherwise provided by law, 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. Rule 90-29 indicates the shift of tax burden from the donor to the recipient based on an employer sponsored leave plan. The three key elements therefor, are an employee controlled donation of leave plan, a transfer of leave time in dollar amounts, and adhering to the definition of medical emergency as approved in Rule 90-29.

Rule 90-29 provides that in leave sharing:

- The assignment of income doctrine is that except as otherwise provided by law, 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.
- Rule 90-29 provides that an employee who suffers a medical emergency as defined in the law may qualify to receive leave surrendered to the employer by other employees or deposited by its employees in an employer sponsored leave bank.
- a written application describing the medical emergency must be submitted to the employer by or on behalf of the employee requesting additional paid leave under the leave-sharing plan.
- The rule further indicates that the amounts paid by the employer to a leave recipient through the plan are included in the gross income of the recipient and not that of the donor of the leave.
- The applicant must have exhausted all of his or her paid leave to receive leave sharing.
- Payments of donated leave, must be made on a dollar for dollar value basis and converted from the donor to the recipients normal rate of compensation.
- The leave sharing plan by the employer must have restrictions on the amount of leave that can be surrendered and the manner in which leave will be granted to eligible leave recipients.

These major provisions of Revised Rule 90-29 must guide the preparation of a policy implementing House Bill 403 in order that the employee who surrenders the leave is not held responsible for the tax liability of the surrendered wages.

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Disability Insurance paid for by the employer may be available in some districts for non work related injuries. Given this possibility and the fact that both the federal rule and House Bill 403 require restrictions on the amount of leave that can be surrendered and the amount of leave granted, a reasonable amount of leave should be retained by any possible donor.

Under the employer paid for New Mexico State Disability Insurance plan short term disability payments over a twenty-four (24) week period require a twenty-eight (28) day elimination period while the recipient is unable to work in order to qualify. Long term disability may begin following the short term disability period and continue for a two year period. Districts should determine if they have disability insurance available through employer payment, and if so, should have any potential donor maintain the twenty-eight (28) days needed to cover the elimination period for short term disability.

Even lacking the disability insurance program it would be prudent to require potential staff donors to maintain a similar amount as that required for short term disability, if possible, to cover any personal or family illnesses of an extensive nature. Policy Services would suggest that districts contact their insurance provider to determine what the cost might be to participate in the State of New Mexico Disability Insurance Program. The cost may be comparable to allowing a donated leave policy or unlimited leave accumulation as it relates to future budget obligations. The district should keep in mind that accumulated leave can be quantified into dollars and should be budgeted as an expense item.

House Bill 403, in its major provisions, requires the school district to have policies that:

- Provide for donation of leave in the case of a medical emergency.
- Only a reasonable amount of leave may be donated annually and a minimum amount of leave must be maintained in the donor's account.
- Donations may be limited to donation to employees within an organizational unit.
- The application process must include;
 - A method of soliciting donated leave;
 - Documentation of the identity of the donor and recipient of leave;
 - A certified document by a health care provider that describes the nature, severity and anticipated duration of the emergency medical condition of the recipient, and that includes a statement that the recipient is unable to work all or a portion of the recipients work hours, and
 - Other information the employing agency may reasonably require.

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- Those requesting leave shall first use all annual, sick and personal day leave that the employee has accrued and any compensatory time due prior to receiving donated leave.
- The conversion of the value of the donor's leave based on the donor's hourly rate of pay to hours of leave for the recipient based on the recipient's hourly rate of pay; and
- All unused donated leave shall revert to the donating employees on a prorated basis.

House Bill 403 further provides that if any provision of the bill conflicts with a properly negotiated current collective bargaining agreement, the provisions shall not apply.

House Bill 403 dictates that school district's provide policy that implements statements in the law. In the following recommended policy, regulations and exhibits, Policy Services will include those State law statements as well as the intent of the IRS in their interpretation of how a plan can be implemented so as to shift the taxable burden of the transferred leave to the recipient. Policy Services will follow the express intent of H.B. 403 that the policy be a transfer of annual and sick leave. The IRS does recognize a banked leave policy not spoken to in H.B. 403 but it must be similarly structured to assure compliance with Rule 90-29.

Recommendation

The Policy , **GCCG–Professional / Support Staff Voluntary Transfer of Accrued Annual and Sick Leave** as recommended for adoption has been prepared to meet the needs of each school district, to provide financial stability and to provide guidelines to prevent unnecessary expenses that would affect the budget for educating children. As such, the authorized limit, by policy, on the amounts of leave to be retained by the donor, the amount transferred, and the amount of leave allowed are set in policy. These limits are not specified in the legislation though limits are a requirement of the statute and the IRS rule. Each school district can establish these limits as they see fit. The same holds true for the limit to the contract year for authorized use of the transferred leave. The district may override this limitation to the contract year feature of the policy should they see fit, but must recognize that establishing a limit to the districts financial liability is a prudent practice. Again, the district must use caution since the district is not only providing transferred leave to an employee who will be absent, but the district must also, in most cases, provide payment to the replacement for that person during the absence, an expense which is in addition to the leave. In the case of long term absence this could be a substantial figure not typically budgeted.

House Bill 403 permits but does not require, that donations of leave may be limited to employees within an organizational unit. This was incorporated into the recommended policy to avoid undue pressure on subordinates to donate to supervisory employees. It also avoids the problem of employees with much higher wages soliciting for leave support among hourly wage employees given that the leave payments are converted into hourly wages as

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earned from the donor and are paid in hourly or daily wages as earned by the recipient. Also, limiting donations within organizational units, discourages the soliciting of favor by subordinate employees through donation of leave. This may be particularly important in that the names of the donor and recipient are required and these will be associated in the application process and when leave is returned to donors' prorata when not used.

The application process per House Bill 403 requires documentation of the identity of the donor and recipient of the leave. This may create a privacy issue should the district name the individual in the posting of a request for donations or reveal who the donor is to the recipient. To keep liability to a minimum regarding the recipient, a signed statement allowing the use of the recipients name is included in one of the exhibits. If the district does not reveal the name of the recipient or the donor, if that is possible, then it may be able to drop the limitation based on donations by organizational units or make the limit less constraining. By observation, Policy Services has noted that keeping the names of both donor and recipient private is difficult if at all possible.

One major consideration is that the IRS specifically requires use of their definition of Medical Emergency. The IRS has in multiple letters of interpretation disallowed expansion of this definition. Another part of the recommended policy was that the decision to allow the donation and receipt of the transfer rests with the School District as an employer controlled leave program. This is accomplished through the directions given by the board in policy to the Superintendent for selection of recipients. The IRS has approved the procedure for transfer of leave based on that transfer being by the employee to the employer who then approves the use by an eligible employee as found in the plan. This is primary to shift the tax liability from donor to recipient. The policy provides for this by indicating the eligibility requirements to be considered by a Superintendent appointed committee and placing the final decision with the Superintendent who represents the district.

Below you will find a policy that defines medical emergency, limits the donations, provides for the notice and receipt, and eligibility for donated leave. Regulations are provided specifying the application content and establishing the screening committee. Forms are provided as exhibits for requesting transferring of leave, certification by the health care professional of medical emergency, authorization to disclose health information, and donation of leave.

To assist the district in making the final determination for policy the four following questions should be answered and the results submitted with the adoption of the policy:

What amount of accrued annual leave and sick leave is to be retained in accrual by the donating employee? Annual _____ Sick Leave (or equivalent) _____ or Both _____

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What amount of accrued annual leave and sick leave may be donated by an individual employee? Combined Annual and Sick Leave (or equivalent) to be donated _____

Do you wish to limit donations by organizational unit as suggested? Yes _____ No _____ If no what is your determination: Example professional and support staff to be separate. _____

Do you wish to limit the donations to allow recipient leave to be for the current contract year? Yes _____ No _____ If no what limit will you place on the amount of donated leave for an individual? _____

With the answers to these four (4) questions a date of adoption and the complete name, address, and phone number of the person to whom the request is to be sent, the policy can be personalized to your district's needs and still comply with the requirements of the House bill and IRS rule.

Please note that an asterisk (*) was used in the policy and other documents following lines that may involve the change of the information found in the recommended documents per answers to the above questions.

Cautions related to current negotiated leave policies allowing for Transfer of Leave.

Policy Services has done almost sixty (60) reviews of local school district policies since 2004 and has read or reviewed the negotiated agreements for those districts who had them at the time of review. If the district had a negotiated leave transfer or leave bank policy at the time that was included in the policy manual, it was not copyrighted nor approved by Policy Services. At that time, there were no provisions in New Mexico law for such a policy nor were the financial responsibilities, as found in *Rev. Rule 90-29, 1990-1 C.B. 11* considered. The most noticeable issue in the negotiated agreements reviewed was the tendency to have the decision as to who would receive the leave vested in a committee, not the district or its administrative representative, therefore making it other than a district plan. Another issue found in the negotiated agreements regarding donated leave or a leave bank was that many districts used a leave day as equivalent for any level of employee contrary to the dollar for dollar requirement in the rule. Other issues may also exist.

Policy Services would therefore provide warning that should the Internal Revenue Service review the current policies or negotiated agreements in many of the State of New Mexico School Districts, whether negotiated or employer sponsored, it is likely that they would be determined not to comply with the rule cited and therefore put the leave donors at risk of having to pay the tax requirements on the wages donated.

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Policy Services

Materials of a legal nature in support of this advisory may be found following the text of the Policies below. If you have any questions, or requests call Policy Services at (505) 469-0193 or E-mail Dr. Donn Williams, Policy Services Director at [nmsbapolicy@cox.net].

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Policy Services

Advisory 115

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Policy Services

PROFESSIONAL / SUPPORT STAFF VOLUNTARY TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE

The District recognizes the existence of circumstances under which non-job-related, seriously incapacitating, and extended illnesses and injury may exhaust accrued leave of employees. To provide some measure of relief in such situations, a limited mechanism, based upon voluntary transfer of accrued annual or sick leave, is established. The mechanism will be termed transfer of accrued annual or sick leave for a medical emergency. The definition of a 'medical emergency' will be as follows: A medical condition of the employee or a family member of the employee 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 apart from the leave-sharing plan.

Limits to Donations:

- The donated leave will be limited to annual leave or sick leave (sick leave will be any paid leave that the district, by policy, allows to be used for that purpose).
- Donations will be limited by organizational structure to prevent undue influence and conflict of interest issues. *
 - Employees who are licensed (certificated) professional educators shall be limited to donating leave for use by those who are licensed (certificated) professional educators.
 - Other employees (support staff) shall be limited to donating leave for use by other support staff.
 - Central office and building level professional staff supervisory personnel may only donate to other professional staff supervisory employees.
- The person donating may only donate already accrued leave up to twenty (20) days and shall maintain in accrued leave at least twenty-eight (28) days of sick leave (or the equivalent) at the time of the donation. *
- Donations will be by accrued days of leave, using either the donor's current daily wages or hourly wages earned for each donated day. The recipient shall receive the the donation converted to the daily wages they currently earn.
- All donations shall be for the current contract year and shall not exceed that period based upon the current contract earnings of the person to whom the donation is made.
*

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- All donations shall be on behalf of a specific recipient with the donation made to the district plan for transfer of leave based upon a medical emergency.
- All unused donated leave shall revert to the donating employees on a prorated basis.

Notice and receipt of donations .

- Notice of need for leave donations will be posted by need for licensed professional staff, central office and building level professional supervisory staff, and support staff including the name of the individual. (*)
- Posting will be by placing the notice of need at the central office, and by the mailboxes used for staff members of the district.
- Forms will be provided on which employees may make their donations known to the district office.

Eligibility (for use of transferred leave). The approved applicant shall:

- Be a full-time employee (an employee eligible to earn sick leave).
- Have a "medical emergency" as defined in this policy.
- Have exhausted all earned/accrued leave of any nature or kind including compensatory time and be eligible for an unpaid leave of absence.
- Not be eligible at the time of request for disability benefits, including but not limited to Social Security.
- Be one whose return to duty is projected to occur no later than the beginning of their next contract year. *
- Submit an application, which shall be received by the District office at least ten (10) days prior to the beginning of the applicant's unpaid leave status, when practicable.

Determining eligibility:

- The Superintendent shall appoint an advisory committee consisting of at a minimum, one health education professional, one support staff member, one licensed teacher and one professional supervisory person to review the applications and make a recommendation to the Superintendent.
- The Superintendent shall receive the applications and make the final determination of eligibility using the criterion of eligibility and in consideration of the recommendation of the advisory committee.

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No continuing rights are established by this policy. In compliance with established procedure, the Governing Board reserves the right to modify, change, or delete any policy in accord with its own guidelines. An appeal of the decision of the Superintendent may only be taken using the Staff Grievance Policy GBK.

Adopted: date of manual adoption

LEGAL REF.: To be announced

CROSS REF.: GBK - Staff Grievance
GCC - Professional / Support Staff Leaves and Absences
GDC - Support Staff Leaves and Absences

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REGULATION**REGULATION****PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE****(Application Screening)**

The application must be in writing.

The application must be supported by a certified document by a health care provider that describes the nature, severity, and anticipated duration of the emergency medical condition of the recipient and that includes a statement that the recipient is unable to work all or a portion of the recipient's work hours.

The application should be received by the District office prior to the applicant beginning unpaid leave status.

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Policy Services

REGULATION**REGULATION****PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE****(Application Screening Committee)**

A committee consisting of at a minimum one health education professional, one licensed teacher, one support staff member, and one professional supervisory person as appointed by the Superintendent are to review the applications and make a recommendation to the Superintendent who will approve or deny the leave. The applications are to be reviewed in accord with the guidelines found in policy and as presented below:

The approved applicant shall:

- Be a full-time employee (an employee eligible to earn sick leave).
- Have a "medical emergency" as defined in this policy.
- Have exhausted all earned/accrued leave of any nature or kind including compensatory time and be eligible for an unpaid leave of absence.
- Not be eligible for disability benefits, including but not limited to Social Security.
- Be one whose return to duty is projected to occur no later than the beginning of their next contract year. *
- Submit an application, which shall be received by the District office at least ten (10) days prior to the beginning of the applicant's unpaid leave status, when practicable.

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EXHIBIT

EXHIBIT

**PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE**

TRANSFER OF LEAVE REQUEST FORM

Name _____

Date of Application _____

Mailing Address _____
Street or Box Number City State Zip

() _____
Home Phone Number Work Location Job Title

Submit this request form to the Superintendent of Schools at least ten (10) days before the leave is to commence, when practicable. Use of the transferred leave counts towards FMLA leave used by employees.

For determination of eligibility, please answer each of the following questions. Put an ex (x) in the appropriate response column.

YES NO

- Is this your first claim for this particular condition?
- Have you exhausted all earned/accrued leave of any nature or kind including compensatory time?
- Have you attached to this application a signed STATEMENT OF A HEALTH CARE PROFESSIONAL verifying this condition?

By my signature below I give permission to the district to use my name and employment information in requesting transfer of leave donations.

In addition to the statement provided by my health care professional, I also agree to submit to an examination by a health care provider of the School Board's choice, if requested to do so, at the school district's expense.

Employee Signature

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Administrator Signature if Employee unable to sign

DATES OF TRANSFERRED LEAVE REQUESTED

I request leave from _____ to _____

I request a reduced schedule on the following dates _____

I request intermittent leave according to the following schedule _____

The total number of days of Transferred Leave that I request is _____

EMPLOYEE STATEMENT

I agree to return to work on _____. If circumstances change such that I will not be able to return to work on that date, I agree to notify my supervisor within two days with updated leave information and will submit an updated health care professional's statement to the Leave Administrator.

Signature _____ Date _____

TO BE COMPLETED BY THE TRANSFER LEAVE ADMINISTRATOR

Prior transfer leave request confirmed by date _____

Leave is Approved Denied for the following reason(s): _____

Administrator Signature Date

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EXHIBIT

EXHIBIT

**PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE**

**EMPLOYEE TRANSFER LEAVE PROGRAM STATEMENT OF HEALTH CARE
PROFESSIONAL**

After completing this form, please send to:

Name of Patient _____
Last First MI

If the patient is not an employee of the District above
what is the relationship to the employee _____

Please answer the following questions (attach additional pages if necessary):

1. Describe the nature of the illness/injury (diagnosis) _____
2. State the approximate date the illness/injury commenced, and the probable duration of the illness/injury (and also the probable duration of the patient's present incapacity , if different).

3. Will it be necessary for the patient to be on an intermittent or a less than full schedule as a result of the illness/injury (including for treatment described in item 6 below)?
Yes _____ No _____

If yes, give the estimated date of return to full-time work
or a normal schedule. _____

4. If the patient will be absent from a full schedule because of treatment of the illness/injury on an intermittent or part-time basis, provide an estimate of the

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probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery, if any.

5. If any of these treatments will be provided by another provider of health services (e.g. physical therapist), please state the nature of the treatments. _____

6. Is it necessary for the patient to be absent from work for treatment?

Yes _____ No _____

7. What is the date you first required the patient to begin treatment for the illness or injury? _____

This is to certify that this patient has suffered a medical condition that will require the patient to take a prolonged absence from performing his/her normal duties or in the alternative requires a family member of the patient as care taker to take a prolonged absence from their duties to assist in the care of the patient during treatment and recovery.

Health Care Provider Signature

Name (please print)

Date

Street or Box Address

City

State

ZIP

Telephone Number

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EXHIBIT

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**PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE**

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION

Name of Patient _____
Last First MI

I authorize the use or disclosure of the above individual's health information as described in this form.

The following Physician or Physician's office is authorized to make the disclosure.

Address _____

Specifically describe the illness or injury to be used or disclosed.

This information may be disclosed to and used by the following individual or organization for the purpose of providing leave transfer:

_____ **School District ***

I understand that I have a right to revoke this authorization at any time. I understand that if I revoke this authorization, I must do so in writing and present my written revocation to:

_____ **School District Superintendent ***

I understand that the revocation will not apply to information that has already been released in response to this authorization.

Unless otherwise revoked, this authorization will expire on the following date _____
event _____ condition _____

If no expiration date, event or condition is specified, this authorization will expire in six months.

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I understand that authorizing the disclosure of this health information is voluntary. I can refuse to sign this authorization. I understand that I may inspect or copy the information to be used or disclosed. If I have questions about disclosure of my health information, I can contact the Superintendent of Schools.

Signature of Employee

Date

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EXHIBIT

EXHIBIT

**PROFESSIONAL / SUPPORT STAFF VOLUNTARY
TRANSFER OF ACCRUED ANNUAL OR SICK LEAVE**

Request to donate annual or sick leave

Name _____

Date of Application _____

Mailing Address _____
Street or Box Number City State Zip

(____) _____
Home Phone Number Work Location Job Title

I request that annual or sick leave be transferred to the leave account of an approved leave recipient (name if applicable) [_____] under the Transfer of Annual or Sick Leave Policy of this District.

As of the date indicated below I have enough leave accrued to my account to cover the transfer request in accord with the requirements of the District Policy. The amount of annual and sick leave I am transferring also does not reduce my accrued leave below that allowed by policy.

I understand that my decision to transfer leave is not revocable. If a sufficient balance of unused leave remains after the recipient's medical emergency has terminated, I will have a pro-rated share returned to me during either the current leave year or the following leave year.

I have not been directly or indirectly intimidated, threatened or coerced, or promised any benefit by any employee for the purpose of donating or using leave.

Conditions and Limitations to Donations:

- The donated leave will be limited to annual leave or sick leave (sick leave will be any paid leave that the district, by policy, allows to be used for that purpose).
- Donations will be limited by organizational structure and to prevent undue influence and conflict of interest issues. *

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- Employees who are licensed (certificated) professional educators shall be limited to donating leave for use by those who are licensed (certificated) professional educators.
 - Other employees (support staff) shall be limited to donating leave for use by other support staff.
 - Central office and building level professional staff supervisory personnel may only donate to other professional staff supervisory employees.
- The person donating may only donate already accrued leave and shall maintain in accrued leave at least twenty-eight (28) days of annual/sick leave (or the equivalent) at the time of the donation. *
 - Donations will be by accrued days of leave, using either the donor's current daily wages or hourly wages earned for each donated day. The recipient shall receive the the donation converted to the daily wages they currently earn.
 - All donations shall be for the then current contract year and shall not exceed that period based upon the current contract earnings of the person to whom the donation is made. *
 - All donations shall be on behalf of a specific recipient with the donation made to the district plan for transfer of leave based upon a medical emergency.
 - All unused donated leave shall revert to the donating employees on a prorated basis.

Signature of Employee

Date

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RELEVANT SUPPORT MATERIALS

REVENUE RULE 90-29

1990-1 C.B. 11, 1990-15 I.R.B. 5.

Internal Revenue Service
Revenue Ruling

AMOUNTS PAID BY AN EMPLOYER PURSUANT TO A LEAVE-SHARING PLAN

Published: April 9, 1990

Section 61. - Gross Income Defined, 26 CFR 1.61-2: Compensation for services, including fees commissions, and similar items.

Amounts paid by an employer pursuant to a leave-sharing plan. Amounts paid by an employer pursuant to a leave-sharing plan are includible in the gross income of the recipient as compensation for services provided by the recipient to the employer and are wages for employment tax purposes.

ISSUE

What are the federal income tax consequences to employees under the leave-sharing plan described below?

FACTS

An employer established a plan whereby its employees who suffer 'medical emergencies' may qualify as recipients of leave surrendered to the employer by other employees or leave deposited by its employees in an employer-sponsored leave bank. A 'medical emergency' is defined under the plan as a medical condition of the employee or a family member of the employee 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 apart from the leave-sharing plan. Under the provisions of the plan, a written application describing the medical emergency must be submitted to the employer by or on behalf of the employee requesting additional paid leave under the

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Policy Services

leave-sharing plan. After the application has been approved and the employee has exhausted all of his or her paid leave, the employee is eligible to receive additional paid leave (to be paid at his or her normal rate of compensation) with respect to leave surrendered to the employer or leave deposited in the leave bank. The plan contains restrictions on the amount of leave that may be surrendered to the employer or deposited in the leave bank and also contains rules as to the manner in which surrendered or deposited leave will be granted to eligible leave recipients.

HOLDING

The amounts paid by the employer to a leave recipient pursuant to the plan are includible in the gross income of the recipient under section 61 of the Code as compensation for services provided by that recipient to the employer. These amounts are considered 'wages' for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, the Railroad Retirement Tax Act, the Railroad Unemployment Repayment Tax, and income tax withholding, unless excluded therefrom under a specific provision of the Code. 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 the surrender or deposit of the leave or its use by the recipient. The holding and underlying rationale of this ruling apply only to bona fide employer-sponsored leave-sharing arrangements.

DRAFTING INFORMATION

The principal author of this revenue ruling is P. Val Strehlow of the Office of Assistant Chief Counsel (Income Tax and Accounting). For further information regarding this revenue ruling, contact Mr. Strehlow on (202) 377-9586 (not a toll-free call).

Rev. Rul. 90-29, 1990-1 C.B. 11, 1990-15 I.R.B. 5.

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Internal Revenue Service

Number: **200720017**

Release Date: 5/18/2007

Department of the Treasury

Washington, DC 20224

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

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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

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subject to withholding taxes under §§ 3401, 3121 and 3306 of the Code at the time the Recipient Employee receives the payment.

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.

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.

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.

(2)

(3)

(4)

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.

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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

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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.

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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

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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.

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Sincerely yours,

William A. Jackson Branch Chief, Branch 5

Office of Associate Chief Counsel (Income Tax & Accounting)

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House Bill 403

AN ACT

RELATING TO PUBLIC EMPLOYEES; PROVIDING FOR PUBLIC EMPLOYERS TO IMPLEMENT A LEAVE DONATION POLICY FOR EMPLOYEES WITH MEDICAL EMERGENCIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. LEAVE DONATION POLICY.--

A. State agencies, political subdivisions and school districts shall implement policies that provide for employees who earn annual or sick leave the opportunity to donate annual or sick leave to another employee for a medical emergency. The policy shall provide:

(1) that a reasonable amount of leave may be donated by an employee annually and that each employee shall maintain a certain minimum amount of leave before making a donation of leave in excess of that amount;

(2) that the donation may be limited to a donation between employees within an organizational unit;

(3) for an application process for donated leave that includes:

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(a) a method of soliciting donated leave;

(b) documentation of the identity of the donor and recipient of leave;

(c) a certified document by a health care provider that describes the nature, severity and anticipated duration of the emergency medical condition of the recipient and that includes a statement that the recipient is unable to work all or a portion of the recipient's work hours; and

(d) other information that the employing agency may reasonably require;

(4) that an employee who wishes to request donated leave shall first use all annual, sick and personal day leave that the employee has accrued and any compensatory time due prior to receiving donated leave;

(5) for conversion of the value of the donor's donated leave based on the donor's hourly rate of pay to hours of leave for the recipient based on the recipient's hourly rate of pay; and

(6) that unused donated leave at the end of a medical emergency or when no longer needed shall revert to the donating employees on a prorated basis.

B. To the extent any provision of this section conflicts with a current collective bargaining agreement negotiated pursuant to the Public Employee Bargaining Act, the

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provisions of this section shall not apply. _____

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Site location for the information on **State of New Mexico Disability Insurance:**

https://www.mybenefitsnm.com/Documents/Disability_Policy_July_2013_Final_1.PDF

Please contact your insurance provider to determine if your district has or is eligible to participate in the Disability Insurance program.

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