


MEMORANDUM

OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY

DATE: August 24, 2011

TO: Terri Cook

CC: Lew Bauman, Leslie Girard, Curtis Weeks Michael Miller, Keith Honda, Terri Cook, Gary Giboney, Dianne Dinsmore & Patsy Girard & Al Freidrich

FROM: Charles J. McKee, County Counsel 

SUBJECT: Employer & Employee PERS Contributions under IRC 414(h)(2)

I was asked to review a resolution and Board Report for the Board of Supervisors of the Water Resources Agency (WRA) regarding the employer "pick-up" of the employee share of PERS contributions. As explained below, employer "pick-up" of the employee share of retirement plan contributions may be made pre-tax as long as the employer makes such a designation under section 414(h)(2) of the Internal Revenue Code (IRC). To qualify, the employer must adopt a resolution, or similar action, and forward the action document to PERS. Previously, the County paid both the employer and employee share of contributions for miscellaneous employees. The subject resolution was spurred by the recent changes to union contracts and proposed changes to unrepresented units wherein all employees would "pay" a portion of the employee contribution to PERS. I understand you inquired of PERS whether the County's resolution adopted in 2007 would cover these changes. PERS responded affirmatively, but indicated that WRA needed its own resolution.

The proposed resolution is essentially identical with a 2007 County resolution. These resolutions have the Boards resolving that the employer is "picking-up" the **entire** share of the employee contributions. In 2007, a change was made to the safety bargaining units so that those employees contributed a share towards the employee portion similar to what is being proposed now for miscellaneous category employees. These actions appear to be contrary to the resolution language adopted in 2007 and current proposed resolution because it looks like the employee is also contributing. I understand that County HR received an opinion on this apparent discrepancy from outside labor counsel. The email advice indicated that although it looked inconsistent, PERS requires such a resolution and the amounts were not reported to PERS as income. No further detail or analysis is provided.

It is not clear to me that PERS will not allow any changes to the sample form resolution on this issue as long as it follows section 414(h)(2), IRS regulations and case law. I suggest you clarify with PERS and the Boards can adopt more consistent language in an amended resolution. We can assist in crafting the question to PERS..

Regardless of PERS mandates on the form, the Board can adopt the proposed resolution as drafted. However, this is not merely because PERS requires this exact language since PERS cannot grant the County authority over Federal tax laws by saying this is the only resolution they will accept. Rather, the Board can adopt the

resolution proposed because the IRS and the Courts allow the public employer to share the benefit of pre-tax contributions with employees by designating contributions as employer paid even if the employee is also "contributing" as long as certain conditions are met. Foil v. Commissioner of Internal Revenue, (5th Cir. 1990) 920 F.2d 1196; IRS Revenue Ruling 2006-43 & CalPERS Circular Letter (10/03/2008) 200-049-08. The IRS and the courts allow public employers to may designate all contributions as employer paid because, in contrast to private employers, they cannot easily shift compensation from salary to retirement contributions. The public employer therefore is granted the power to designate employee contributions as employer paid and qualify the payments as pre-tax under IRC section 414(h)(2) if:

1. The employer takes official action (e.g. a resolution) to adopt a 414(h)(2) plan;
2. The employer makes an official designation of the contributions as "employer paid;"
3. The plan does not allow the employee the choice to receive the money instead of contributing to the plan; and
4. The money cannot be included in gross income of the employee.

I note in your communication with PERS that they think we have adopted an EPMC. This memorandum does not opine on the necessity of adopting an EPMC. I recommend contacting PERS to clarify that we do not have an EPMC and to determine their requirements on the issue.

I also recommend that this memorandum be included with the materials you submit to the Board of Supervisors for the Water /resources Agency, included with your records for the 2007 action of the County Board of Supervisors and in your records on this matter.