



FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

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MEMORANDUM FOR THOMAS K. EMSWILER
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SUBJECT: Contributions of unused leave to the TSP

This memorandum addresses whether IRS Revenue Rulings 2009-31 and 2009-32 permit the Thrift Savings Plan (TSP) to allow participants to contribute the dollar value of unused paid time off to their TSP accounts. Absent a legislative change, TSP participants cannot contribute the dollar value of unused paid time off to their TSP accounts.

Background

Revenue Ruling 2009-31 sanctions contributions to section 401(k) plans of the dollar value of unused paid time off that is in excess of the plan's carryover limit and would otherwise be forfeited or cashed out at year-end. Revenue Ruling 2009-32 sanctions contributions to section 401(k) plans of the dollar value of unused paid time off that would otherwise be distributed to an employee as a lump-sum at the time of termination of employment. For purposes of both rulings, a "paid time off" plan refers to "a sick and vacation leave plan under which a participant may take paid leave without regard to whether leave is due to illness or incapacity."

Annual leave offered by the government to Federal employees is the type of benefit described in Revenue Rulings 2009-31 and 2009-32. It falls within the purview of the fact scenarios described Revenue Ruling 2009-31 because section 6304, Title 5, United States Code, establishes limitations on the amount of annual leave a Federal employee may carry over from one leave year to the next and the employee forfeits the excess over the carryover limit. It also falls within the purview of the fact scenarios described Revenue Ruling 2009-32 because, under sections 5551 and 5552, Title 5, United States Code, Federal agencies must make a lump-sum payment for accumulated and accrued annual leave when an employee separates from Federal service.

With respect to sick leave, Revenue Rulings 2009-31 and 2009-32 are not directly applicable because such leave is not subject to forfeiture at year-end, may not be cashed out, and cannot be taken without regard to illness or incapacity.

Analysis

Revenue Ruling 2009-31 and Revenue Ruling 2009-32 are premised on the assumption that the plan's governing document has been amended to require or permit participants to contribute the dollar value of unused paid time off to their retirement plan accounts. Because the TSP was established by Congress, the Federal Employees' Retirement System Act of 1986 (FERSA) functions as the TSP's governing plan document. It is therefore determinative that FERSA does not currently require or permit participants to contribute the dollar value of unused paid time off to their TSP accounts.

Pursuant to sections 8351(b)(2)(A) and 8432(a)(1), Title 5, United States Code, a civilian employee's "basic pay" is the only allowable source of TSP contributions. Unused paid time off is not included in the definition of basic pay.¹ See 5 U.S.C. § 8331(3). Moreover, section 8331(3), Title 5, United States Code, explicitly excludes "lump-sum leave payments under subchapter VII of chapter 55" from the definition of basic pay.²

For the foregoing reasons, federal employees cannot contribute unused annual leave or unused sick leave to their TSP accounts unless Congress amends FERSA to specifically allow them to do so.

¹ Statutory contribution rules permit uniformed services members to also contribute from bonus and special pay. 5 U.S.C. § 8440e(d)(2).

² Section 8401, Title 5, United States Code, explains that the term "basic pay" has the same meaning for purposes of Chapter 84 as is given to such term by Section 8331(3), Title 5, United States Code.