

# Firehouse Lawyer

Volume 7, Number 7

July 17, 2007

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## Disability Leave Supplement – Are You Doing It Right?

In Washington, there is a statutory scheme providing for supplemental payments for fire fighters injured while on duty, or otherwise eligible for temporary total disability (also known as "time loss") payments under the workers compensation statutes. Infrequently, but occasionally, clients have simple or complex questions about how this statutory scheme works and whether they are administering it correctly. This article is the direct result of two different inquiries recently asked of me about this set of laws.

I will review the basics of how this disability leave supplement (DLS) statutory scheme is supposed to work, based on reference to the statutes themselves. RCW 41.04.500 provides for a system of funding used to supplement the "time loss" payment from the Department of Labor & Industries, which technically is referred to as "temporary total disability" under RCW 51.32.090.

RCW 41.04.505 provides that the DLS shall be an amount which, when added to the "time loss" moneys under RCW 51.32.090 will result in the employee receiving the same pay that he/she would have received for full time active service, which one might call "full pay". One *does* have to take into account that time loss payments from L&I are not subject to federal income taxes or social security taxes. The clear legislative intent here is to make the employee whole when they are off work from an on the job injury, without of course giving them a windfall or more money than they would have earned by working.

RCW 41.04.510 provides the details for payment. First, it should be noted that the DLS entitlement begins on the sixth calendar day from and after the date of injury. Presumably, this means any intervening days off work must be paid by using the sick leave balance, if any, of the employee, or some other leave if no sick leave is available. One half of the DLS shall be charged against the employee's accrued sick leave balance. Sick leave days or hours are converted into dollar amounts based on the employee's monthly salary, converted to an hourly rate. For these statutes, base monthly salary excludes voluntary or involuntary deductions and also overtime pay.

### Inside This Issue

- 1 Disability Leave Supplement – Are You Doing It Right?
- 4 Have a Safe and Quiet Summer
- 4 Disclaimer

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The other half of the DLS is paid or funded directly out of the employer's pocket. See RCW 41.04.510(3). When the employee's paid leave runs out, he/she receives only the employer's portion.

The DLS continues so long as the employee is receiving "time loss" funds under RCW 51.32.090, but **the maximum is six months from the date of injury or illness for the DLS.** RCW 41.04.515.

With doctor's approval, and if the employer has available such work, the employee "shall perform" light duty tasks while receiving DLS. RCW 41.04.520. Insurance benefits continue during this time. RCW 41.04.525.

If sick leave is exhausted during the period of disability, there is a two month buy back option. In other words, for two months after returning to duty, the employee with no sick leave accrued may draw prospectively (in advance) upon sick leave the employee is expected to accrue up to a maximum of three days or three work shifts, whichever is greater. Any such sick leave drawn prospectively must be charged against earned sick leave until the balance gets back to zero. If the employee separates while still owing back some drawn sick leave, the employer may deduct it from wages due upon separation. RCW 41.04.530.

Finally, RCW 41.04.535 provides that nothing in this statutory scheme prevents the employer and the union from agreeing to better benefits.

The tricky part of all of this lies in the actual logistics of dealing with the money and the sick leave balances. I suspect that part can be successfully addressed once one understands the concept outlined in boldface in paragraph three above. I think the first step for payroll is to determine the proper amount to be designated as "full pay" which of course is their net monthly pay check, after proper deductions. You are just trying to get to that dollar figure. You must take into account that the funds from L&I "time loss" are not subject to taxes or FICA. If you have trouble determining that "full pay" amount, please feel free to discuss that with me or any attorney familiar with the statutes.

As mentioned above, this can be tricky, and in fact I have had at least three clients tell me they have done it three different ways. I hope this helps in understanding some of the issues that can arise under these statutes.

A second question relates to the taxability of the funds received as disability leave supplement. The following discussion is the result of a second client inquiry. The client asked for my legal opinion as to

whether the moneys paid to an employee under the disability leave supplement statutes (RCW 41.04.500 et seq.) are taxable income. Apparently, in the past the client had been withholding for income taxes and social security on those particular moneys, at least with regard to the part charged to the employee's leave balances.



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After reviewing IRS publications and the statutory scheme, it is my opinion that the disability leave supplement payments are **not** subject to income taxes or social security. As stated above, under RCW 41.04.505, the supplement shall be an amount that, when added to the amount payable under RCW 51.32.090 (temporary total disability from L&I, also known as "time loss"), will result in the employee receiving the same pay he or she would have received for full time active service, taking into account that industrial insurance payments are not subject to federal income or social security taxes. I conclude that what this means is that the employer is endeavoring to replicate the employee's net pay, just as if he/she were working.

The question is whether the disability leave supplement as defined and broken down in RCW 41.04.510 is subject to federal income and social

security taxes. Of course, we know that workers' compensation payments under RCW 51.32.090 are not taxable. One pertinent statute is RCW 41.04.525, which states in part: "The disability leave supplement provided in RCW 41.04.510(3) shall *not be considered salary or wages for personal services...*" (emphasis added). That implies, at least for the employer's portion of the supplement, the money is not taxable income. But it leaves open the question about the "employee's portion" mentioned in RCW 41.04.510 (2), i.e. the one half of the supplement charged to the employee's leave balances. The state statutes simply do not address the taxability of that part, one way or the other.

To answer that remaining question, I have looked to IRS Publication 15-A (January 2007). On page 14, I found a discussion of "Payments That Are Not Sick Pay." The discussion makes it clear that workers' compensation payments are not subject to employment taxes, as we knew. But then the discussion continues about other payments "*in the nature of* workers compensation." The publication states:

"State and local government employees, such as police officers and firefighters, sometimes receive payments due to injury in line of duty under a statute that is not the general workers' compensation law of a state. If the statute limits benefits to work-related injuries or sickness and does not base payments on the employee's age, length of service, or prior contributions, the statute is 'in the nature of' a workers' compensation law. Payments under a statute in the nature of a workers' compensation law are not sick pay and are not subject to employment taxes."

I have concluded that RCW 41.04.500 et seq.—the disability leave supplement statutory scheme—is exactly that type of statute; it is in the nature of workers compensation under the above definition. The publication makes reference to Treasury Decision 9233 for further elaboration. I then reviewed Internal

Revenue Bulletin 2006-3, which makes extensive reference to T.D. 9233 and the parallel IRS regulations. Having reviewed that, I found all of it to be consistent with the discussion above regarding statutes "in the nature of" workers' compensation. While I am not a "tax lawyer" in any sense of the word, and do not claim any special expertise with respect to the Internal Revenue Code, it seems to me that the foregoing is the only reasonable interpretation of the disability leave supplement statutes, taken together with the IRS publications.

Therefore, in summary, it is my opinion that both workers' compensation "time loss" payments and the disability leave supplement payments, in their entirety, are not subject to the aforesaid employment taxes. As I said above, if Washington fire districts need help with the detailed workings of these laws, given a particular set of facts, just let me know.

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## HAVE A SAFE AND QUIET SUMMER

Things have been relatively quiet here at the office of the Firehouse Lawyer during the summer months. Since our golf club is hosting the U.S.G.A. Junior Girls national championship (and I have agreed to be a caddy!) from July 20-July 28, I am going to be out of the office a bit more than usual but clients know how to find me. I will still be in the office whenever I am not out on the links. Stay safe and enjoy this beautiful weather.