

N.D.A.G. Letter to Person (Oct. 14, 1988)

October 14, 1988

Mr. Alan Person
Executive Director
North Dakota Public Employees Retirement System
1930 Burnt Boat Drive
P.O. Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your September 19, 1988, letter in which you discuss the requirements of section 89 of the Internal Revenue Code (26 U.S.C. § 89) and seek my opinion on two related questions. As you state in your letter, section 89 requires that employers' group health and life insurance programs comply with the statute's nondiscrimination requirements. In addition, section 89 requires that certain employee benefits, such as cafeteria plans, group legal service plans, tuition reimbursement programs, and other employee fringe benefits, be set forth in a written plan document and be legally enforceable.

If an employer's group health and life insurance programs are not in compliance with the nondiscrimination requirements set forth in Internal Revenue Code section 89, a portion of the benefits offered to highly compensated employees may be taxable. In addition, the Internal Revenue Service may impose the applicable employee and employer penalties for failure to make the necessary tax withholdings.

The two issues on which you seek my opinion are as follows:

1. Who is considered to be the "employer" for the purpose of determining whether the state's Uniform Group Insurance Program complies with section 89? Specifically, is the state of North Dakota as a whole or is each individual payroll division responsible for determining section 89 compliance?
2. If it is determined that the state of North Dakota, as opposed to each payroll division, is responsible for section 89 compliance, which state agency is responsible for performing the necessary testing of the state's benefit plans to insure that they meet the qualification requirements?

In your letter you indicate that section 89 requires the "employer" to make certain calculations to determine whether the group health and life insurance programs meet the new nondiscrimination requirements. Section 89 does not expressly impose an affirmative duty on the employer to make such calculations. However, as a practical matter, the employer must comply with section 89 to avoid potential penalties that could be imposed

on the employer and employee for failure to report taxable income and make the necessary withholdings.

Section 89 does not define the term "employer" nor has the Internal Revenue Service issued regulations on this matter. In the absence of unambiguous statutory or regulatory guidance, it is reasonable to impose the responsibility of section 89 compliance on the entity that controls the provision of insurance benefits for state employees. The issue then becomes whether the state as a whole or individual payroll divisions exercise that control.

Under N.D.C.C. § 54-52.1-02 "eligible employees" are entitled to participate in the Uniform Group Insurance Program, which includes health and life insurance coverage. "Eligible employee" is defined in N.D.C.C. § 54-52.1-01(4) as "every permanent employee who is employed by a governmental unit," including members of the legislative assembly, judges of the supreme court, and certain employees of political subdivisions. N.D.C.C. § 54-52-01(7) defines "governmental unit" to include "the state of North Dakota" and does not refer to the individual payroll divisions.

N.D.C.C. § 54-52.1-06 requires that "each department, board, or agency" pay from its funds appropriated for "payroll and salary" the necessary premiums for insurance coverage of its employees enrolled in the Uniform Group Insurance Program. In addition, the individual agencies must pay the premium necessary for the basic \$1,000 term life insurance provided each state employee. N.D.C.C. § 54-52.1-01(7).

It is clear that the state's Uniform Group Insurance Program is a benefit established by the Legislature and must be provided to all "eligible employees" of the state on a uniform basis. The individual departments, boards, and agencies have no discretion in deciding whether their employees will participate. Because the Uniform Group Insurance Program is being offered by the state of North Dakota, as opposed to the individual agencies, it is my opinion that state government as a whole controls the provision of insurance benefits for state employees and is responsible for section 89 compliance.

It should be noted that the definition of "governmental unit" in N.D.C.C. § 54-52-01(7) includes counties, cities, and school districts. Under chapter 54-52.1 those political subdivisions that choose to participate in the North Dakota Public Employees' Retirement System are authorized to extend the benefits of the Uniform Group Insurance Program to their employees. N.D.C.C. § 54-52.1-03.1. Therefore, a question could arise as to whether the state of North Dakota is also responsible for section 89 compliance for the insurance benefits offered by those political subdivisions that participate in the state's Uniform Group Insurance Program. An analysis of chapter 54-52.1, however, shows that the state does not have the requisite control over the political subdivision's insurance programs. Section 54-52.1-03.1 authorizes the governing body of any participating county, city, or school district to extend the benefits of the Uniform Group Insurance Program to its employees but does not require such coverage. In addition, the governing body is free to determine the employer contribution towards the total monthly premium amount required for each participating eligible employee. Clearly, the state of North Dakota has no control over the provision of insurance benefits for participating counties, cities, and school districts.

Accordingly, it is my opinion that the state of North Dakota is not responsible for section 89 compliance testing for these participating political subdivisions.

Having determined that the Uniform Group Insurance Program is provided by the State of North Dakota for state employees and should be analyzed on a government-wide basis for purposes of section 89 compliance, it is necessary to answer your second inquiry regarding which agency of state government is responsible for determining that compliance. The Uniform Group Insurance Program is administered by the Public Employees Retirement Board under N.D.C.C. ch. 54-52.1. No other state agency has responsibility over the Uniform Group Insurance Program.

As administrator of the Uniform Group Insurance Program, PERS should make an initial determination of whether the plan might potentially violate the nondiscrimination rules of section 89. If PERS concludes that further compliance testing is warranted, it should determine whether additional resources will be required to conduct this testing. If additional resources are necessary, PERS should take the appropriate steps to insure that this issue is presented to the Legislative Assembly. The Legislative Assembly can then provide the requisite funding and assign the responsibility of section 89 compliance testing to the appropriate state agency. If additional resources are not necessary to analyze the program for section 89 compliance, the matter can probably be handled administratively by PERS or another state agency that is better equipped to do the testing.

I trust this response will be of assistance to you.

Sincerely,

Nicholas J. Spaeth

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