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EMERGING ISSUES IN THE FIELD OF HUMAN RESOURCES

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I. INTRODUCTION

The challenges of operating a school during a pandemic have been significant. As soon as one issue resolves (think OSHA ETS), a new issue seems to arise. This presentation will cover some of the issues that are emerging in the field of human resources, including new union demands, issues with sick leave banks, burdensome data requests, staffing shortages, issues with outsourcing, and really grumpy employees with bad attitudes.

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel. ©2022 Rupp, Anderson, Squires & Waldspurger, P.A.

III. LEAVE SHARING PROGRAMS (SICK LEAVE BANKS)

- A. General Sick Leave Bank.** A general sick leave bank typically works in the following manner: The employer gives employees the option of voluntarily donating a certain amount of sick leave or PTO to a bank. Employees who have run out of paid leave can use leave that has been donated to the bank under the same basic terms and conditions that the employee could use his or her own sick leave. Some school districts have sick leave banks that place a cap on the number of days an employee may withdraw from the bank. Other school districts have agreed with the union to establish a committee that is

charged with determining who is eligible to withdraw leave from the bank and the amounts that may be withdrawn.

- B. Medical Emergency Leave Bank.** A medical emergency leave-sharing bank is similar to a standard leave-sharing bank, but the leave accumulated in the bank is available only to employees with “medical emergencies,” as defined by the IRS.
- C. Assignment of Income Doctrine.** In the 1930 case of *Lucas v. Earl*, the U.S. Supreme Court held that income is taxable to the person who earns it, and a person cannot escape taxation by assigning income to another person. As a result, an employee generally may not avoid income taxes by giving part of his or her income to a third person.
- D. Revenue Ruling 90-29: Exception to Assignment of Income Doctrine**

- 1. **Facts.** An employer established a leave sharing plan that allows employees who suffer “medical emergencies” to receive leave deposited by its employees in an employer-sponsored leave bank.

The plan defined a “medical emergency” 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.

The plan required an employee to submit a written application describing the medical emergency to the employer. The plan contained restrictions on the amount of leave that could be donated to the leave bank and also contained restrictions on who was eligible to receive leave from the bank.

- 3. **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.
- 4. **Summary of Revenue Ruling 90-29.** In Revenue Ruling 90-29, the IRS looked at a program under which employees who were undergoing a “medical emergency” could qualify as recipients of leave time surrendered to the employer by other employees or leave time deposited by employees in an

employer-sponsored leave bank. The IRS ruled that the income would be taxed to the recipient of the leave, but not the donor. In issuing this ruling, the IRS created an exception to the assignment of income doctrine. *See also* Private Letter Ruling 2007200017 (2007).

E. Tax Consequences for General Sick Leave Bank. Under the “assignment of income doctrine,” an employee who donates PTO or sick leave to a general sick leave bank must pay taxes on the value of the PTO or sick leave that has been donated. The employer is required to report the donated sick leave as compensation for the employee who donated the leave and for the employee who withdrew the leave from the bank. The employer is also required to withhold the appropriate income and FICA tax for both employees.

F. Tax Consequences for Medical Emergency Leave Bank.

1. **Tax consequences for donor.** An employee who donates PTO or sick leave to a medical emergency leave-sharing plan is not required to recognize compensation income for the value of donated PTO or sick leave. As a result, the employer is not required to report the value of the donated PTO or sick leave on the donor’s W-2 or withhold income tax or FICA tax from the donor’s compensation. The donor may not take a charitable contribution deduction.
2. **Tax consequences for donee.** An employee who uses PTO or sick leave from a medical emergency sick leave bank must report the value of the donated PTO or sick leave as income. Accordingly, the employer must report the payments on the recipient employee’s Form W-2 and withhold income tax and FICA tax from the payments.

G. Creating a Medical Emergency Sick Leave Bank

1. **Term and condition of employment.** If the employee group has an exclusive representative, the district must obtain the exclusive representative’s agreement on the plan. This is typically accomplished through an MOA or the CBA. If the employee group does not have an exclusive representative, the district should draft a comprehensive policy that outlines all aspects of the leave sharing program, including the application process.
2. **Define “medical emergency” consistent with Revenue Ruling 90-20.** Based on Revenue Ruling 90-29, the conservative approach is to define a “medical emergency” 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 apart from the leave-sharing plan. (Note: In Letter Ruling 200720017, the IRS approved a plan in which a prolonged absence included intermittent absences related to the same condition or illness.)

3. **Develop plan requirements that are consistent with the plan requirements in Revenue Ruling 90-29.** The medical emergency sick leave plan that was approved by the IRS contained the following:
 - a. A requirement that the recipient employee submit to the employer a written application describing the medical emergency;
 - b. A limitation stating that additional paid leave may be granted from the medical emergency leave bank only after the employer has approved the written application and the employee has exhausted all of his or her accrued PTO or sick leave;
 - c. A cap on the amount of PTO or sick leave that may be donated by an employee;
 - d. Rules for how donated PTO or sick leave will be granted to eligible recipients.
4. **Additional recommendations.**
 - a. Establish a reasonable and consistently applied cap on the number of days of leave that an employee can draw from an emergency leave bank.
 - b. Develop a standardized application form so that all applicants who want to draw from an emergency medical leave bank are required to supply the same information.
 - c. Do not make any representations about the potential tax consequences of a leave sharing program. In the applicable MOA or district policy, add a statement that the district makes no representations about the taxable consequences of the program to any person.
5. **May the plan give a donor the option of designating the employee who will receive the leave or to designating the leave for the general use of employees in need?** In a private letter ruling the IRS stated that the ability of employees to designate who will receive the donated leave does not make the donated leave taxable to the donor employee, provided that the recipient has a medical emergency. But this type of practice raises other concerns. For example, what if employees choose not to donate to a particular employee because of his or her protected class status?

H. Common Issues with All Leave Sharing Programs. Leave sharing programs can increase a school district's costs and give rise to a number of complex issues. For example:

1. **Increased costs.** A sick leave band can increase an employer's costs for many reasons. For example:
 - a. Many times the donated leave would not have been used in the absence of a leave sharing program.
 - b. Commentators suggest that lower paid employees are more likely to donate time while higher paid employees are more likely to draw benefits. When an employer allows a leave sharing program, the leave generally must be paid at the *recipient's* normal compensation rate.
 - c. A shared leave program typically results in increased administrative complexity and costs.
 - d. A shared leave program typically results in increased legal costs.
2. **Privacy and morale issues.** Employees often want to know who is using donated leave and why. A decrease in morale and participation can occur if employees view another employee as "milking the system" and using the leave without a true medical emergency.
3. **Difficult interpretation issues.** Shared leave programs can give rise to difficult questions about whether an employee has a medical emergency. For example:
 - a. Does an employee who has prolonged absences for "multiple chemical sensitivity" or an allergy to wi-fi (electromagnetic hypersensitivity) have a medical emergency?
 - b. Does an employee who has prolonged absences in connection with the birth of a child have a medical emergency?
 - c. Does an employee who has prolonged absences because of depression or anxiety about coming to work have a medical emergency?
4. **Discrimination claims.** Leave sharing programs can give rise to discrimination claims from disgruntled employees who may believe that leave was not donated to them because of their protected class status.