

## IRS Ruling Approves One-time Election to Waive Nontaxable Benefit

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In a recently released private letter ruling (PLR 200914018), the Internal Revenue Service allowed a one-time election between the waiver of a nontaxable benefit (retiree medical coverage) and an increase in pay. This would not seem surprising, except that the IRS has taken the position under the Code Section 125 proposed Treasury regulations (REG-142695-05, August 6, 2007) that cafeteria plans governed by Code Section 125 are the exclusive means for providing a choice to an employee between cash and a nontaxable benefit.

The ruling involved a company and an association (presumably a union) that agreed certain employees would have a one-time, irrevocable election to waive existing retiree health insurance coverage in exchange for a higher rate of pay in the future. Once this election to waive the benefit is made, it cannot be changed. In its ruling, the IRS applied the tax doctrine of constructive receipt, which provides that an amount not actually received can be taxed whenever it is effectively made available to the recipient, unless the taxpayer's control of its receipt is subject to substantial limitations or restrictions, such as giving up a valuable right to get current cash. The ruling did not address the Code Section 125 cafeteria plan rules. (This is not the first time the IRS has allowed a one-time election under the doctrine of constructive receipt; in a similar ruling (PLR 200120024), the IRS permitted a one-time election for employees of a tax-exempt entity to waive a richer benefit package in exchange for cash.)

### Effect on Employers

Officially, a private letter ruling applies only to the party receiving it. What the IRS will allow in the future is an open question, but this ruling could indicate that an employee choice between cash compensation and a nontaxable benefit may be possible without adverse tax consequences if the election is:

- A one-time election;

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- A waiver or surrender of a nontaxable benefit otherwise available;
- Made in advance of having a right to income; and
- Irrevocable.

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