SIDE LETTER AGREEMENT NO. 1 AMENDING THE MOU BETWEEN MOUNTAIN VIEW PROFESSIONAL FIREFIGHTERS, LOCAL 1965 AND THE CITY OF MOUNTAIN VIEW

The City of Mountain View ("City") and the Mountain View Professional Firefighters ("Union") are parties to a Memorandum of Understanding ("MOU") with a term of July 1, 2007 through June 30, 2011.

FLSA OVERTIME

1. Section 4.00 of the MOU establishes the methodology for the calculation of FLSA overtime. The parties have developed an alternative agreement for this calculation as described below. The formula for this calculation is outlined in "Attachment A" of this Side Letter.

2. Based on this agreement, the 2.75 percent pay provided for in Section 4.00 of the MOU as in-lieu compensation will remain in base pay for all bargaining unit members. The scheduled July 2010 cost-of-living adjustment will be reduced by 1.0 percent (an estimated $125,000) to offset FLSA costs moving forward (from 4.2 percent to 3.2 percent).

3. Section 4.00 will be amended to reflect the following method of calculation for "FLSA" (regularly scheduled) overtime:

a. Bargaining unit members' regular pay will be based on 192 hours in a 24-day work period.

b. Additional regularly scheduled FLSA overtime pay (at one-half the member's regular hourly rate) compensates a member for up to 10 regularly scheduled hours worked above the 182 hours of straight time worked in the 24-day work period.

c. The City will calculate FLSA (regularly scheduled) overtime pay based on actual hours worked, in accordance with the FLSA and the Department of Labor definition of what is considered "compensable hours of work" (also known as "sweat time"), except that for purposes of this provision of determining entitlement to FLSA overtime pay for regularly scheduled overtime, the following leaves shall also be counted as hours worked:

i. Bereavement Leave, City-Granted Leave, Jury Duty, Rest Period, Leave for Training/Seminar/Conferences, Fire Union Leave, Other Union Leave, Fire Training, Paramedic Training, Paramedic Meetings, Meetings, Vacation, Floating Holidays and Workers' Compensation Leave for Doctor's Appointments.

d. The following leaves shall not be counted as hours worked:

i. Sick Leave, Military Leave, Administrative Leave, Disciplinary Leave, Workers' Compensation Leave for other than Doctor's Appointments and Unpaid Leave.

e. The parties must meet and confer on the inclusion of any new leaves or any leaves not addressed in this provision as hours worked.

f. The City will continue to use a 24-day work period for the calculation of FLSA overtime.

4. All other overtime worked outside of regularly scheduled hours will be paid at time and one-half of a member's "regular rate of pay."

5. By this Agreement, members in this bargaining unit agree that all claims, allegations, defenses and legal right to any unpaid FLSA regularly scheduled overtime compensation incurred before the date of this Agreement are hereby extinguished (an estimated $194,600). Any bargaining unit member eligible to receive back pay compensation for regularly scheduled overtime under FLSA will sign a waiver releasing the City from any liability for prior FLSA regularly scheduled overtime worked through the date of adoption of the Agreement.

COST SHARE

6. Local 1965 members will receive a 3.2 percent cost-of-living adjustment effective the first pay period ending in July 2010 and then 3.2 percent will be deducted, through payroll, on a pretax basis and applied towards the Employer's PERS contribution as employee cost share. This additional 3.2 percent cost share of the Employer's PERS contribution shall sunset and cease on the last pay period ending in June 2012.

7. The City has adopted Resolution No. 14249A, providing for employer pickup of PERS contributions that permits member contributions to be made on a pretax basis.

8. City staff will agree to recommend to the City Council passing a resolution for a contract amendment with CalPERS to convert up to 4.0 percent of cost share in Section 7.01 of the MOU into an additional member contribution, increasing the member contribution from 9.0 percent up to the amount provided by the cost-sharing formula and reaffirm the City's implementation of the provisions of Section 414(h)(2) of the Internal Revenue Code.

9. The City has consulted outside legal counsel with expertise in tax law regarding the ability to deduct on a pretax basis the employee cost shares required by

the MOU but which are not eligible to be credited as an employee contribution (3.2 percent) in an amendment to the City's contract with PERS. The City has been advised that these deductions can be made on a pretax basis and will be done in accordance with this Side Letter. The City has provided members with a copy of the memorandum regarding these deductions, attached to this Side Letter as Attachment B.

10. The first paragraph of Section 1.00, "Salary," of the MOU will be amended to read as follows:

> Effective the first pay period ending in July 2007, the City shall increase the salary ranges of all classifications in the bargaining unit by four and one-half percent (4.5%) cost-of-living adjustment (COLA) and a four percent (4.0%) equity adjustment which will be applied to the PERS cost share for the enhanced 3 Percent at 50 retirement benefit, as further described in Section 7.01.

11. Section 7.01, "3 Percent at 50," of the MOU will be amended to read as follows:

> The parties acknowledge the PERS Employer Rate may increase or decrease from year to year based on the PERS actuarial valuations. At any time when the PERS Employer Rate exceeds 16.268 percent, employees agree to pay fifty percent (50%) of the amount between 16.268 percent and 24.268 percent, by adjusting the deduction for the amount of the employee-paid PERS Contribution (9 percent). If the PERS Employer Rate increases or decreases, the City will increase or decrease the employees' payment to fifty percent (50%) of the amount above 16.268 percent accordingly. In the event the PERS Employer Rate returns to or decreases below 16.268 percent, the City will decrease the employee PERS contribution (to nine percent (9%)). The employees will assume proportional responsibility (inasmuch as Fire Managers, Police Managers and Police Officers are part of the safety plan) for the costs above 16.268 percent.
>
> The employee agrees to pay fifty percent (50%) of the amount between 16.268 percent and 24.268 percent for each year of the contract. This amount does not compound and the maximum amount the employee will contribute is four percent (4%).
>
> The cost-sharing formula is illustrated by the following example: In Year 1 of the contract, the Employer/Agency PERS rate is 24.317 percent. Deducting 16.268 percent, the difference is 8.049 percent. Employer and Employee share 50/50 in this

difference. Therefore, each party would be responsible for 4.0245 percent; however, the employees are responsible for only up to a maximum of 4 percent. In Year 2, the Employer/Agency rate is 24.0 percent. Deducting 16.268 percent, the difference is 7.732 percent. Each party is responsible for 50 percent of the cost, which equals 3.866 percent. The employees would be responsible for 3.866 percent.

12. City staff will agree to recommend to the City Council passing a resolution for a contract amendment with CalPERS to credit the cost of the preretirement Option 2 death benefit in Sections 7.09 and 7.10 of the MOU to the member's PERS account.

13. If, during the term of this MOU, members agree to any additional PERS cost shares, or in the event that any existing member's PERS cost share is eligible to be credited as an employee contribution, the parties agree to meet and consider amendments to the PERS contract to allow the employee contribution to be credited to the member's PERS account.

GRIEVANCE RESOLUTION

14. In the interest of goodwill and to move forward cooperatively, the parties intend this Agreement to act as a comprehensive settlement of the May 12, 2009 Formal Grievance of Mountain View Professional Firefighters, Local 1965, related to the calculation of the PERS cost share. The PERS cost-share formulas were different for Local 1965 and the Police Officers Association for Fiscal Years 2003-04, 2004-05 and 2005-06. The difference in formula resulted in an estimated $219,100 loss of compensation for Local 1965 members. The PERS rate also decreased in Fiscal Year 2006-07. While the Police Officers' PERS cost share contribution was reduced by 3.599 percent, Local 1965's share was not decreased. The difference in percentage contribution resulted in a loss of wages estimated at a minimum of $325,600 for Local 1965 members. In an attempt to acknowledge these differences, the City will pay Local 1965 the sum of One Hundred Thousand Dollars ($100,000) for the benefit of the bargaining unit members. The Union hereby waives, releases and discharges, and agrees that it will not institute, prosecute or pursue any grievances, complaints, claims, charges, actions and causes of action which it asserts or could assert against the City regarding any currently known PERS cost-share issue and will withdraw any pending actions related to the PERS cost share, including the May 12, 2009 grievance against the City. Likewise, the City hereby waives, releases and discharges, and agrees that it will not institute, prosecute or pursue any grievances, complaints, claims, charges, actions and causes of action which it asserts or could assert against the Union regarding the PERS cost share, known or unknown.

MOU ONE-YEAR EXTENSION

15. The parties agree to extend the term of the Memorandum of Understanding for one (1) year, with a termination date of June 30, 2012.

16. The Union agrees to receive zero COLA for Fiscal Year 2011-12.

CITY OF MOUNTAIN VIEW

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Finance and Administrative
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MOUNTAIN VIEW PROFESSIONAL
FIREFIGHTERS, LOCAL 1965

John Miguel, President
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IAFF, Local 1965

PJK/2/FIN
546-10-07-10SLA-E^

Attachment A

FLSA CALCULATION

This calculation is for a 7(k) exempt 24-day work period.

Hourly Rate = biweekly base salary/112 hours or biweekly base salary x 26 (pay periods)/15.1667 (number of 24-day work periods in a year, 364 days/24)/192 hours.

Regular Rate of Pay = hourly rate of pay + applicable pay types (all other remunerations as specified in 29 USC Section 207 and calculated pursuant to 29 CFR Section 778.113) (e.g., applicable Section 207 pay types/192 hours).

FLSA Scheduled Overtime = "Regular Rate of Pay" x .5 x hours earned up to 10 hours based on a 24-day work period.

For FLSA scheduled overtime, hours earned shall include the definition as provided in FLSA OVERTIME, Section 4 of this Agreement.

All Other Overtime = "Regular Rate of Pay" x 1.5 x overtime hours earned in a 24-day work period.

For all other overtime, all paid leave hours shall count towards regularly scheduled work hours.

PJK/2/FIN
546-10-07-10A-E^

HansonBridgett

CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

Memorandum

TO: Patty Kong
Jannie Quinn
City of Mountain View

FROM: Anne C. Hydorn

CC: Robert Blum

DATE: November 22, 2010

RE: **Taxability of Mandatory Cost-Sharing Contributions under PERS**

The City of Mountain View is in negotiations with the Mountain View Professional Firefighters, Local 1965 (Union). Under their current MOU and a new side-letter agreement, the City and the Firefighters agreed to share the cost of the City's PERS contribution rate under the 3% at age 50 formula.[1] The City deducts these cost-sharing contributions from the Firefighters' paychecks.

As you requested, this memorandum addresses the tax treatment of these cost-sharing contributions under the federal tax laws. Although we have provided information on cost-sharing arrangements under PERS as a matter of general background, this memorandum only addresses the federal tax issues.

I. SUMMARY

There are two alternative tax rules that provide a basis for the City to deduct the Firefighter's cost-sharing contributions from the Firefighters' paychecks on a pre-tax basis – (1) the Code section 414(h)(2) pick-up rules, and the (2) the constructive receipt theory.

As discussed in greater detail below, there may be some question as to whether cost-sharing contributions qualify as pre-tax pick-ups if they are not designated as "member contributions" under the City's PERS contract. This would be accomplished by amending the City's PERS contract to include the City's cost-sharing arrangement, as will be recommended to the City Council under the new side-letter agreement (at least for some portion of the cost-sharing contributions).

Nevertheless, even if the IRS were to conclude that any portion of the cost-sharing contributions do not qualify as "pick-ups," the constructive receipt rules provide an alternative and equally reasonable basis for excluding the cost-sharing contributions from tax.

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[1] "Firefighters" for purposes of this memorandum, includes all City employees covered under the MOU between the City and the Mountain View Professional Firefighters, Local 1965.

II. BACKGROUND FACTS

The City provides retirement benefits to its employees under the California Public Employees Retirement System (PERS). PERS requires that both the City and its employees make contributions to PERS.

The PERS statute establishes the required member contribution rate for PERS retirement benefits. This amount is based on the member's retirement formula. The Firefighters' PERS retirement formula is 3% at age 50 and requires a normal member contribution rate of 9%. The City can deduct these PERS-required member contributions from salary on a pre-tax basis provided the City has adopted a "pick-up" resolution under Internal Revenue Code section 414(h)(2). The City did this in 1985 and plans to adopt a reconfirming 414(h)(2) pick-up resolution at PERS's recommendation.

The City has a current MOU with the Union, extended through recent negotiations until June 2012. In addition to the 9% PERS-required member contribution, the MOU requires the Firefighters to pay for a portion of the City's PERS contribution rate under the 3% at age 50 formula. Under this cost-sharing arrangement, if the City's PERS contribution rate exceeds 16.268 percent, the Firefighters must pay 50% of the excess above 16.268 percent, up to a maximum additional 4%.

We understand that the City did not amend its PERS contract to include this cost-sharing arrangement. Therefore, PERS does not credit the Firefighters' cost-sharing contributions to their member accounts, making those contributions unavailable for a refund if a Firefighter is eligible for and requests a withdrawal of his or her accumulated contributions.

In their recent negotiations, the City and Union have agreed to expand the cost-sharing arrangement through a side letter agreement. As of July 2010, the Firefighters received a 3.2% COLA. Until June 2012, the City will deduct this 3.2% COLA from the Firefighters' paychecks as an additional cost-sharing contribution. The City has also agreed to recommend to the City Council that the Council amend the City's PERS contract to include the 4% cost-sharing arrangement under the MOU so that PERS will credit those contributions as member contributions in the future.[2]

III. DISCUSSION

A. Cost-Sharing Arrangements under PERS

Below we provide information regarding cost-sharing arrangements under PERS as a matter of general background.

[2] A similar agreement was reached to convert the cost of the Preretirement Option 2 Death Benefit into member contributions.

The PERS statute provides that a contracting agency and its employees may agree in writing to share the cost of any *optional benefit* under the agency's contract with PERS.[3] PERS provides a list and description of all the optional benefits available under PERS in its publication titled Optional Benefits Listing, PERS-CON-40. For purposes of the cost-sharing rules, optional benefits include enhanced retirement formulas that are above the minimum retirement formula required for an employee classification (*e.g.*, 3% at age 50 is an enhanced benefit formula for safety employees).

An agency can make the cost-sharing arrangement part of its PERS contract under Government Code sections 20516(a)-(e). If this is done, PERS credits the increased employee contributions as member contributions, effective as of the date of the contract amendment effective date.[4]

An agency and its employees can also agree to this kind of arrangement independently and outside of the PERS contract amendment process under Government Code section 20516(f). In that case, the arrangement is not part of the agency's PERS contract and PERS does not credit the increased employee contributions as member contributions.[5] They remain credited as an employer contribution and are not available as a refund to employees who are eligible for and request a withdrawal of their accumulated contributions.

With this background in mind, we discuss the taxation of these cost-sharing contributions under federal tax law below.

B. Tax Treatment of Cost-Sharing Contributions

The issue is whether there is any basis for the Firefighters' mandatory cost-sharing contributions to be made on a pre-tax basis.

There are two alternative tax rules that provide a basis for the City to deduct the Firefighter's cost-sharing contributions from the Firefighters' paychecks on a pre-tax basis – (1) the Code section 414(h)(2) pick-up rules, and the (2) the constructive receipt theory. We discuss each in greater detail below.

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[3] Years ago, PERS guidance stated that this arrangement could only be applied to new optional benefits, which the statute itself does not require. *See* Cal. Gov't Code § 20516; PERS-CON-40 (Revised 8/01). More recent PERS guidance eliminated that requirement. *See* Optional Benefits Listing, PERS-CON-40 (Rev. 1/10). To be sure, we also confirmed with PERS representatives that cost-sharing can apply to any optional benefit under an agency's contract, not only those newly-acquired. The PERS statute, however, prohibits it from applying to an optional benefit elected before January 1, 1979. Cal. Gov't Code § 20516(b).

[4] Cal. Gov't Code § 20516(a); Optional Benefits Listing, PERS-CON-40.

[5] At a recent CalPERS conference, several CalPERS representatives emphasized this point.

1. 414(h)(2) Pick-Ups

Under the tax rules, employee contributions to PERS are treated as after-tax contributions unless there is a statutory exception in the Code. Picked up contributions made to a governmental retirement plan are one such exception under Code section 414(h)(2).

The City can characterize "employee contributions" as "pick-ups" under Code section 414(h)(2), in which case the contributions will be treated as pre-tax. The City adopted a section 414(h)(2) pick-up resolution back in 1985 to do this. The issue, however, is whether the cost-sharing contributions under the MOU can also be 414(h)(2) pick-ups in addition to the Firefighters' normal 9% member contributions.

There is very little authority on what is covered by section 414(h)(2), although the IRS has set out the general criteria in a series of Revenue Rulings, most recently restated in Revenue Ruling 2006-43, that must be satisfied to have pre-tax pick-up contributions.[6] These general criteria are as follows:

- The employer must take formal action (*e.g.*, through a resolution adopted by the governing body) to provide for the pick-up. This action must only apply prospectively, not retroactively.
- The employer must specify that the contributions, though designated as employee contributions, are being paid by the employer in lieu of contributions by the employee.
- Employees must not be permitted to "opt out" of the pick-up, or to receive the contributed amounts directly instead of having the employer pay them directly to the plan.

None of these criteria, however, deal with whether pick-ups can be used where the employee is paying for part of the employer's contributions to a retirement plan. We believe, however, that there is a reasonable basis for treating the employee contributions made under Government Code 20516 as pick-ups if the criteria set out above are met as follows:

- The City must pickup the contributions by formal action. This is met because the City adopted the required pick-up resolution in 1985 (and will adopt a reconfirming resolution, as well).
- The pickups must be designated as employee contributions. It is not clear under the tax laws who must make this designation. If PERS must make this designation (i.e., they must be "member contributions" under PERS), then this element is not met when cost-sharing contributions are being made outside of the PERS contract—because, as discussed above, contributions under section 20516(f) are not member contributions under PERS. If the employer can make this designation (under an MOU, for example), then this requirement should be met. Note that PERS seems to take the position that

[6] Rev. Rul. 2006-43, 2006-2 CB 329 (Aug. 8, 2006).

only those contributions that it designates as "member contributions" can be made on a pre-tax 414(h)(2) pick-up basis and its sample resolution evidences this point.[7] But the PERS position is not conclusive because PERS does not have the authority to make federal tax determinations.

- The Firefighters cannot have the option to receive these amounts directly instead of having the City make contribute them to PERS. This is met because the contributions are mandatory under the MOU and there is no choice to receive the amounts in cash.

Therefore, if the requirement in the second bullet can be met by the City designating the cost-sharing contributions as "employee contributions" in the MOU, we believe it is possible for employee contributions under section 20516(f) (as well as under 20516(a)-(e)) to be pre-tax under section 414(h)(2). As a practical matter, any payments by employees that are contributed to PERS should be "employee contributions." But the IRS may disagree with this position.

And we have to warn you that practicality does not always govern under the tax laws. To the extent any part of the cost-sharing arrangement becomes part of the City's PERS contract (as is being suggested under the new side-letter agreement), this requirement clearly would be met for those contributions because PERS itself will designate those contributions as "member contributions." Until that is done, however, there is some question as to whether the IRS would agree that the additional cost-sharing contributions qualify as Code section 414(h)(2) pick-ups.

2. <u>Constructive Receipt</u>

But even if the IRS were to conclude that the cost-sharing contributions made under section 20516(f) do not meet the pick-up rules because they are not "designated employee contributions," the constructive receipt rules nevertheless provide an alternative and equally reasonable basis for excluding the contributions from tax.

a. General Rule

Compensation is includible in gross income when actually or "constructively received."[8] The Firefighters do not "actually" receive the deducted amounts because the City deducts those amounts from their paychecks as required by the MOU. The tax issue, therefore, is whether the Firefighters constructively receive the cost-sharing contributions that the MOU requires, which would result in those contributions being taxable as compensation.

Under the doctrine of constructive receipt, the general rule is that income is taxed to an individual "in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have

[7] See the PERS sample 414(h)(2) resolution, which states "'[e]mployee contributions' shall mean those contributions to the Public Employees' Retirement System which are deducted from the salary of employees and are *credited to individual employee's accounts* pursuant to California Government Code section 20691." (*Emphasis added*).
[8] Treas. Reg. § 1.451-1(a).

drawn upon it during the taxable year if notice of intention to withdraw had been given."[9] Constructive receipt is designed to prevent taxpayers from manipulating their income tax by controlling which taxable year in which the income will be taxed or by electing to exchange taxable income for a non-taxable benefit. In this case, the issue is timing—whether the Firefighters have a choice to exchange immediately taxable income (*i.e.*, salary) for income that will be taxed later (*i.e.*, PERS retirement benefits).

Revenue Ruling 75-539 is a key IRS ruling in this area of law. It is an oft-cited example of how the IRS has applied constructive receipt to an employee's choice to convert accrued leave into cash or other nontaxable benefits. In that ruling, retiring employees were allowed to choose between receiving cash equal to the value of their unused sick leave—a taxable benefit—or having the value of that sick leave applied toward premium payments for retiree health insurance—a nontaxable benefit.[10] The IRS concluded that because employees could choose to receive cash, they were in constructive receipt of their accrued sick leave. Consequently, the entire value of the employee's accrued sick leave was includible in their taxable income, whether the employee actually chose to receive cash or allocated the cash to the retiree health premiums.

Although the context of this ruling is different than the exact issue here, the same principles apply. Generally, if a taxpayer has an opportunity to receive income, the IRS takes the position that the taxpayer "constructively received" the income even if the taxpayer opted not to receive it at that time. In such a case, the income is taxable when constructively received regardless of the taxpayer's choice to receive it at a later date.

b. Exception—Receipt is Subject to Substantial Limitations or Restrictions

When the taxpayer does not have choice or there are other substantial limitations or restrictions on the taxpayer's control of receiving the income, the IRS generally concludes differently.

In Private Letter Ruling 200351002, a state had a leave program stating that the value of any unused leave remaining at an employee's retirement or termination would be contributed to the state's 401(a) or 457(b) plan up to the applicable limits on contributions to those plans under the Code.[11] The state (not the individuals) decided how the deferrals would be allocated and any amounts that could not be allocated due to plan limits would be forfeited. The IRS ruled that the

[9] Code § 451(a); Treas. Reg. § 1.451-2(a).
[10] Rev. Rul. 75-539, 1975-2 CB 45.
[11] Priv. Ltr. Rul. 200351002 (Sept. 5, 2003). Note that Private Letter Rulings only apply to the party seeking the ruling and may not be cited as precedent. However, they do indicate the position that the IRS is likely to take on the issue.

amounts were not constructively received because the contributions to the plans were "automatic and mandatory" and never made available to the employee in cash.[12]

Similarly, in Private Letter Ruling 9515010, an employer had a collective bargaining agreement with its police officers. The agreement provided that a fixed percentage of their salaries would be contributed to a post-retirement accident and health plan. The police officers had no option of otherwise receiving those amounts in cash--the amounts would only be available as medical benefits in retirement. Because the police officers had no choice about whether the employer would pay the amounts in cash or in post-retirement health benefits, the IRS ruled that these mandatory contributions would not be taxable under the doctrine of constructive receipt.

Other rulings, other than those discussed above, also conclude that when contributions are made on a mandatory basis and an employee has no option of receiving cash, the result is the same.[13] In summary, the IRS has consistently held that the key factor in finding income as constructively received is the employee's ability to elect cash or defer receipt of cash. The IRS has also ruled that income was not constructively received in situations in which an employee had no choice to elect cash in lieu of some other benefit. Thus, there is strong support in the tax law that the use of mandatory salary deductions to fund retirement benefits, including contributions required under a collectively-bargained agreement, should not be taxable under the constructive receipt rules.

The Firefighters' cost-sharing contributions (both under the existing MOU and the new side-letter agreement) are mandatory. Every Firefighter under the agreement is subject to these provisions and cannot otherwise receive the cost-sharing contributions in cash. In other words, there is no choice. Accordingly, based on the various rulings discussed above, the City has a reasonable basis under the constructive receipt rules for treating these contributions as pre-tax even if the pick-up rules do not apply.

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If you have any questions regarding this memorandum, please call Anne Hydorn at 415-995-5893.

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[12] *See also* Priv. Ltr. Rul. 200311043 (Mar. 14, 2003) (ruling that an employer's mandatory contribution of an employee's forfeitable vacation pay at the end of the year into a 401(k) plan was not constructively received because employees had no right to receive cash).

[13] *See e.g.*, Priv. Ltr. Rul. 9827040 (Apr. 7, 1988) (the automatic and mandatory conversion of accumulated, unused sick leave into a retirement plan contribution did not result in constructive receipt of income because the employees could not elect to receive those amounts in cash); Priv. Ltr. Rul. 9840006 (Jun. 23, 1998) (same); Priv. Ltr. Rul. 200007021 (Nov. 19, 1999) (when an employee cannot receive cash in lieu of contributions to a premium account in a health and welfare plan, neither the contributions nor the health care reimbursements are taxable); Priv. Ltr. Rul. 200247050 (Aug. 26, 2002) (mandatory contributions to an employee benefit plan under the terms of a collective bargaining agreement are not taxable under constructive receipt because cash compensation was not an option).

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.