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LEGAL ALERT

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IRS Continues to Rule Favorably on VEBA Domestic Partner Benefits

In Private Letter Ruling 201022023 (March 11, 2010), the Internal Revenue Service continued its practice of approving welfare benefits for domestic partners from a voluntary employees' beneficiary association (VEBA) within certain parameters set by the Internal Revenue Code and regulations.

The IRS has issued at least four other rulings similarly approving such benefits. See PLR 9850011 (December 11, 1998); PLR 200108010 (November 17, 2000); PLR 200537036 (June 21, 2005); and PLR 200953029 (October 7, 2009). Taken together, these five rulings conclude:

- A VEBA may provide an otherwise permissible "life benefit" (including a monthly survivorship benefit), payable by reason of the death of an employee, to a designated beneficiary who is a domestic partner without further limitation.

- A VEBA may provide otherwise permissible health benefits to a domestic partner who is a dependent of the employee within the meaning of IRC §152, without further limitation. For this purpose, the VEBA may rely on a certification from the employee and domestic partner with respect to the financial, residential and other requirements to qualify as a dependent under §152.

- A VEBA may provide otherwise permissible health benefits to a domestic partner who is not a §152 dependent of the employee, subject to a de minimis limitation. Benefits for non-dependent domestic partners (together with any other "impermissible" benefits) will be de minimis if they are no more than 3% of the total benefits provided by the VEBA in a plan year. In these circumstances, the 1998 and 2000 rulings explain the tax consequences of the domestic partner coverage:

    - The value of the domestic partner coverage, over the amount paid by the employee for that coverage, is taxable to the employee and also constitutes FICA and FUTA wages.
    - The VEBA is responsible for remitting income tax withholding and FICA and FUTA taxes, including the employer's share of those taxes. The VEBA may treat the coverage as provided on an annual basis for these purposes.
    - The value of the coverage is combined with the wages paid to the employee by his or her employer for purposes of determining whether the employee has exceeded the OASDI wage base for the year.
    - If the VEBA pays the employee's share of FICA without collecting it from the employee, that amount is also treated as taxable income and FICA and FUTA wages. In Advisory Opinion 2001-05A (June 1, 2001), issued as companion guidance to the 2000 PLR, the Labor Department opined that such a tax gross-up is allowable under ERISA, if provided for in the plan document as an additional benefit (but not a plan expense).

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If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com