

Opinion No. 80-33

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COUNTIES

Funds credited to an employee's account under a deferred compensation plan authorized by Section 10-7-8 NMSA 1978 are subject to state laws governing the deposit and investment of public funds.

FACTS

Section 10-7-8 NMSA 1978 provides that:

"State agencies, state or educational institutions and political subdivisions of the state shall be authorized to enter into salary reduction agreements with their employees for the purpose of purchasing annuity contracts and deferred compensation plans when the salary reduction will result in an income tax deferral for the employees under federal law. Such annuity contracts and deferred compensation plans must be authorized by law and approved by the secretary of finance and administration for state agencies and the governing body of political subdivisions for such political subdivisions."

Pursuant to this statute, several counties are apparently considering adopting a deferred compensation plan for their employees.

Under such a plan, an employee may defer receipt of part of his compensation for the purpose of deferring a corresponding part of his income tax liability. In order for the employee to benefit from the tax deferral, Section 457 of the Internal Revenue Code requires the deferred compensation plan to establish specific limitations on the amount of compensation to be deferred; to vest absolute ownership of the deferred compensation in the county; and to permit distribution of the deferred compensation to the employee or his beneficiary only in the event of the employee's death, or termination of employment in the event of certain unforeseeable emergencies.

A participating employee's deferred compensation would be credited by the county to the employee's deferred account and invested in accordance with the particular provisions of the plan. The employee is not liable for taxes on the deferred compensation or the income earned thereon until it is distributed to him.

QUESTIONS

Are funds credited to an employee's account under a deferred compensation plan authorized by Section 10-7-8 NMSA 1978 subject to state laws governing the deposit and investment of public funds?

CONCLUSIONS

Yes.

ANALYSIS

Section 10-7-8 NMSA 1978 authorizes the governing body of a county to establish a deferred compensation plan for its employees which "will result in an income tax deferment for the employees under federal law." The applicable federal law, Section 457 of the Internal Revenue Code, requires that the compensation deferred under the plan, and the income attributable thereto, "shall remain (until made available to the participant or other beneficiary) solely the property and rights of the State (without being restricted to the provision of benefits under the plan) subject only to the claims of the State's general creditors." Thus, that portion of the employee's salary credited to his deferred account remains county money.

OPINION

The committee reports for P.L. 95-600, being the Revenue Act of 1976 in which Section 457 was enacted, state that the employees would have no secured interest in the assets purchased with their deferred compensation and that such assets may not be segregated for their benefit beyond the reach of county creditors. Vol. 4, Standard Federal Tax Reporter 1980, Par. 2899I, p. 35,534. Ownership of the funds in the employee's deferred account does not pass to the employee until the funds are paid out pursuant to the plan.

Because the funds credited to an employee's deferred account must be owned by the county and will be subject to claims of county creditors, they are not distinguishable from the public funds of the county and, accordingly, are governed by state laws relating to the deposit and investment of public funds. For example:

-- Deposits of county funds are restricted to banks or savings and loan associations located within the county. Sections 6-10-10(B) and 6-10-24(B), NMSA 1978.

-- Deposits of county funds in any one federally insured savings and loan association are limited to the amount of the federal insurance for a single public account. Sections 6-10-10(B) and 6-10-24(B), NMSA 1978.

-- Deposits of county funds in banks not insured by the federal deposit insurance corporation must be secured by collateral as prescribed by law. Sections 6-10-15 to 6-10-20 NMSA 1978.

-- County money "not immediately necessary for the public uses of such counties" may only be invested in "Bonds or negotiable securities of the United States of America, the State of New Mexico, or of any county, municipality or school district of New Mexico." Section 6-10-10(F) NMSA 1978.

To the extent that certain of the proposed deferred compensation plans may not be able to operate in compliance with these laws, it has been suggested that Section 10-7-8 was intended to exempt county funds credited to an employee's deferred account from provisions governing the deposit and investment of public money. However, statutory intent is determined primarily by the language of the act, **Winston v. New Mexico State Police Board**, 80 N.M. 310, 454 P.2d 967 (1969), and there is nothing in the plain language of Section 10-7-8 which would warrant reading in such an exemption. Language cannot be read into a statute which makes sense as written. **State ex rel. Barela v. New Mexico State Board of Education**, 80 N.M. 220, 453 P.2d 583 (1969).

{*184} Under Section 10-7-8, counties are authorized to enter into deferred compensation plans with their employees which (1) will result in deferred income taxation for the employee under federal law; (2) are "authorized by law;" and (3) are approved by the governing body of the county. Neither Section 10-7-8 nor Section 457 of the Internal Revenue Code contain any provisions relating to the deposit or investment of the deferred compensation credited to an employee's account. Nevertheless, such an omission cannot be construed as blanket authority for the county to deposit or invest those funds in whatever manner may be defined by the terms of a particular deferred compensation plan.

Rather, the second sentence of Section 10-7-8, which specifically requires the plan itself to be authorized by law, may be construed to indicate legislative intent that the deposits and investments made by the county under the plan must be in accordance with existing law. As a rule, counties may exercise only such authority as is expressly granted by law or can be necessarily implied therefrom. **El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County**, 89 N.M. 313, 551 P.2d 1360 (1976). Counties may deposit and invest public funds only as prescribed by law.

It must be assumed that the legislature, in amending Section 10-7-8 to include deferred compensation plans, see, Laws 1977, Chapter 65, Section 1, was well-informed as to existing law. **State ex rel. Bird v. Apodaca**, 91 N.M. 279, 573 P.2d 213 (1977). If the legislature had intended to exempt the deferred compensation plans authorized by Section 10-7-8 from statutes governing the deposit and investment of public money, it "could easily have done so by the use of simple language." **Bettini v. City of Las Cruces**, 82 N.M. 633, 635, 485 P.2d 967 (1971).

The fact that existing laws may not accommodate the various investment programs incorporated into the proposed plans does not necessarily defeat the intent of the legislature in providing for deferred compensation plans, nor does it render the statute absurd or meaningless. See, **State v. Garcia**, 93 N.M. 51, 596 P.2d 264 (1979). Existing laws may preclude, as a practical matter, the implementation of some proposed

deferred compensation plans but they do not prohibit the adoption of any plan at all. Section 10-7-8 may be reasonably interpreted, as written, to authorize counties to adopt deferred compensation plans without authorizing counties to make deposits and investments contrary to existing laws.

In summary, county funds credited to an employee's deferred account under a deferred compensation plan are not exempted by Section 10-7-8 from state laws governing the deposit and investment of public funds. Such an exemption would have to be specifically defined by the legislature.

ATTORNEY GENERAL

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