



April 16, 2020

Commissioner Charles P. Rettig
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, DC 20224

RE: Request for Clarification and Relief on COVID-19-Related Issues in Employer-Sponsored Welfare Plans

Dear Commissioner Rettig,

As the Head of Government Affairs for the largest association for human resource (HR) professionals, the Society for Human Resource Management (SHRM), I write you regarding the difficulties and disruptions that SHRM's over 300,000 members are having during the COVID-19 pandemic and the need for flexibility from federal agencies to address these difficulties.

As employers and their employees navigate the current crisis, workplace health care has emerged as a critical issue requiring flexibility. SHRM members implement and comply with critical workplace policies every day, including the management and administration of health care benefits. Employer-sponsored plans are the bedrock of the U.S. health care system providing coverage to more than 181 million Americans, representing the largest providers of health care coverage to individuals in the United States.

Specifically, we request the following clarifications and/or relief:

ACA Reporting

Under *Code Sections 4980H, 6055 and 6056*, applicable large employers are subject to annual reporting requirements to the Internal Revenue Service ("IRS"). Due to the pandemic, employers are short-staffed, working remotely, and generally stretched thin because of leaves of absence, child-care limitations, and furloughs. Similar issues plague vendors engaged by employers for reporting compliance. According to a SHRM health care survey, 62 percent of HR professionals polled said reporting requirements were their biggest ACA challenge. Employers that do not file an annual report or file inaccurate forms to the IRS run the risk of incurring significant financial penalties. Furthermore, the crisis has severely delayed physical mail communications impacting J-226 Internal Revenue Service (IRS) letters. Communications from the IRS may not reach an employer in a timely fashion which could result in a delay or lack of response unbeknownst to the employer.

Proposed Relief --

- We request that the IRS issue a grace period until August 1, 2020 for delinquent reports. Code §6721(b)(2) already provides for a penalty reduction for employers who file by August following the due date and we request the IRS enhance this penalty relief.
- In addition, we request that employers that receive J-226 letters distributed on or after March 1, 2020 have an additional 60-90 days for a response following the date of the end of the national, state, and local emergencies.

Affordability Waiver for Pandemic Period

As noted above, under Code Section 4980H, applicable large employers must offer affordable health care coverage to full-time employees or risk a penalty. Employers may use the “measurement/stability period” method to determine full-time status, meaning employees placed on furlough may remain full-time, notwithstanding the reduction in hours. For purposes of ensuring coverage will be affordable, many employers have structured their health plan premiums to comply with the W2 affordability safe harbor under Code Section 4980H. Under the W2 safe harbor, coverage will be deemed affordable as long as the premium for the lowest-cost, self-only minimum value option does not exceed 9.5% (adjusted for inflation) of the employee’s annual W2 wages.

While the safe harbor is intended to provide predictability, employers did not predict a pandemic and the associated economic fallout. Many employers have been forced to furlough workers to preserve capital. While employers are attempting to maintain active employee premium rates during such furloughs, many employers may find that coverage is no longer affordable under the W2 safe harbor because of the employees’ associated reduction in salary. Many employers are facing the difficult decision to instead terminate employment (and trigger COBRA at 102% of the cost) to avoid potential penalties under Code Section 4980H(b).

Proposed Relief -- This is an unintended consequence and the IRS should clarify that, in light of the pandemic, the W2 affordability safe harbor will be met as long as the employee cost for self-only coverage was affordable during the timeframes outside of any applicable furlough window.

Section 125 Mid-Year Election Change Events for Flexible Spending Accounts

Code Section 125 permits employers to offer employees the ability to elect to defer salary before the start of a plan year to be used to pay for health care or dependent care expenses on a pre-tax basis. Employees may only make mid-year election changes to their deferral election if they experience a qualifying life event. IRS rules are intended to cover common, generic scenarios (e.g., marriage, childbirth, loss of other coverage), but they do not specifically address what election changes may be permitted in the context of a pandemic and the associated fallout. Many employers are struggling with employee requests for election changes and whether such a change would be permitted under IRS guidance.

For instance, many employees are seeking to change their dependent care FSA election due to school closures, changes to work locations (i.e., working remotely), loss of daycare provider due to shelter-in-place orders, or changing work schedules. Further, many employees are seeking to

change their health care FSA election due to COVID-19 diagnosis, COVID-19 risks, work-related furloughs, or expansion of permitted health care FSA reimbursements to include over-the-counter drugs or menstrual products under the CARES Act. Other employees have been forced to forgo planned elective medical procedures for which they would have otherwise incurred cost-sharing due to the pandemic. As such, they are at greater risk of forfeiting their health care FSA balance.

Proposed Clarification -- While we believe most COVID-19-related situations would constitute a qualifying mid-year election change event under existing IRS guidance, employers are struggling with reaching that conclusion given the novelty of the situation.

- We request that the IRS clarify that, in light of the pandemic, employers can interpret the existing Section 125 rules to permit more flexibility surrounding health care FSA elections.
 - The IRS should clarify that a reduction in hours (or a furlough) should trigger an election change right for participant health care FSA contributions, regardless of whether the reduction in hours triggers a loss of coverage under the plan.
 - The IRS should implement a retroactive amendment period to permit plans to extend the run-out period deadline given that many employees were dealing with the pandemic and may have missed the window for submitting claims.
 - The IRS should permit an election change to permit employees to implement or increase health care FSA deferrals generally in light of the pandemic, to put individuals on solid financial footing to weather the crisis.

- Given that many employees who carefully contemplated a health care FSA election based on medical procedures that will no longer occur, the IRS should offer a one-time increase to the current \$500 carryover limit, so that employees do not lose access to health care FSA funds.

COVID-19 Special Enrollment Right

As noted above, Section 125 limits mid-year election changes for participants under a Section 125 pre-tax premium arrangement. We understand that most major carriers/third-party administrators are implementing a one-time, pandemic-related special open enrollment window for persons who declined coverage at the start of the calendar year. While this window is optional for self-funded plans, we understand it is mandatory for many fully insured employer-sponsored group plans. This creates an administrative challenge for those plans, as there is no express mid-year qualifying life status event under Section 125 that would permit employees to modify their pre-tax premium election made during open enrollment. As such, employers in these fully insured plans are forced to either disregard IRS rules or permit enrollment on a post-tax basis.

Proposed Clarification -- The IRS should clarify that a carrier-initiated, one-time, pandemic-related special enrollment would constitute a mid-year election change event, permitting participants in Section 125 plan to pay for coverage on a pre-tax basis.

Major Disaster PTO Donation Programs

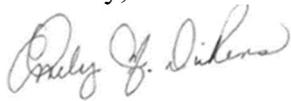
IRS Notice 2006-59 establishes the circumstances under which employers may establish a major disaster relief paid time off (PTO) donation program to allow employees to donate PTO to other affected employees with no tax consequences for the donor. One such condition is that the President must declare relief for a state that has requested “individual assistance or individual and public assistance” under the Stafford Act. While more than 30 states have requested public assistance to date, only a handful have requested individual (or individual and public assistance). This would appear to significantly narrow the pool of individuals eligible to receive donated PTO under an employer major disaster program.

Proposed Clarification -- At a time when employers are desperate to find ways to assist their employees who need time away from work, the IRS should clarify that a request from a state for public assistance (with no accompanying request for individual assistance) is sufficient to trigger the tax relief under IRS Notice 2006-59 for a major disaster PTO donation program.

We appreciate the Department of Treasury’s key role in creating a comprehensive response to COVID-19 relief, including the positive impact that these limited relief measures could provide for employees nationwide.

Thank you for your consideration of these requests.

Sincerely,



Emily M. Dickens, J.D.
Corporate Secretary, Chief of Staff &
Head, Government Affairs
Society for Human Resource Management