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Employee Benefit Plan Review

Ask the Experts

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401(k) Plan Re-Enrollment

Q Participation levels in our 401(k) plan have dipped in recent years. Our company would like to change that. Our plan already auto-enrolls new employees, although a number of employees have opted out completely or reduced their contribution rates over time. Our third-party administrator is recommending that we automatically re-enroll our existing employees into the 401(k) plan at a higher contribution rate. This change would apply to employees who previously opted-out of the 401(k) plan, as well as employees who are currently contributing to the 401(k) plan, but at a level below the contribution rate that we will select. The only group of participants who would not be affected by this change are those who are already deferring compensation into the 401(k) plan at or above the selected deferral rate. Their contribution elections would not be changed. Are we permitted to do this without the employees' permission?

A Yes, what you describe is permitted, and, in fact, has become an increasingly prevalent strategy used in recent years by businesses in order to increase their employees' retirement savings. This is particularly true when a business offers matching contributions within their 401(k) plan that employees are not sufficiently utilizing. This change is typically done after employees have received a couple of rounds of written communications advising them of the upcoming change and explaining to them what they need to do, and by when they need to do it, if they do not want that change to affect them and their 401(k) plan accounts. This process of negative consent is used to effectively get each employee's permission to make the change. In addition, another feature that often accompanies the change you described is a one-time rebalancing of participants' 401(k) plan accounts. Businesses will utilize this strategy when there is a concern that individual participant account balances are not sufficiently diversified or generally do not match participants' risk profiles based on their age (e.g., a 30-year old employee's account balance is invested too conservatively). If this change is made, participant account balances are typically moved into a target date fund or similar investment option whose investment mix changes as the employee approaches retirement age. Again, this change would be made with advance written notice to the employees and an opportunity to opt out. And for all of these changes that we have mentioned, even if an employee does not opt out, he or she can always make any changes afterwards on a go-forward basis in accordance with plan terms (e.g., reducing their deferral contribution percentage, re-balancing their individual account amongst their preferred investment options).

Employer Recoupment of Mistaken HSA Contributions

Q My company recently mistakenly contributed too much money to an employee's Health Savings Account (HSA). Can we recover the excess amount of the HSA contribution?

A It depends on how the mistaken contribution was made. The general rule under Internal Revenue Code (IRC) Section 223(d)(1)(E) is that the interest of an individual in the balance in an HSA is nonforfeitable. However, there is Internal Revenue Service (IRS) guidance that identifies certain limited circumstances under which an employer may recoup contributions to an employee's HSA.[1] Further, the IRS recently issued guidance expanding on the circumstances pursuant to which an employer may recoup mistaken HSA contributions.[2] The IRS has stated that, if there is clear documentary evidence that there was an administrative or process error resulting in a mistaken contribution, an employer may request that the financial institution return the amounts to the employer, with any correction putting the parties in the same position that they would have been in had the error not occurred. The IRS guidance states that employers should maintain documentation to support their assertion that a mistaken contribution occurred. Examples of the types of errors that the IRS has stated may be corrected under this standard include the following:

- If an employee was never an eligible individual under IRC Section 223(c), the employer may request that the financial institution return to the employer the amounts mistakenly contributed to the employee's HSA (however, if the employer does not recover the amounts by the end of the taxable year, then the amounts must be included as gross income and wages on the employee's Form W-2 for the year during which the employer made the contributions);
    - Note, however, that if an employer contributes to the HSA of an employee who ceases to be an eligible individual during a year, the employer may not recoup any amounts that the employer contributed after the employee ceased to be an eligible individual;
- If an employer's HSA contributions exceed the maximum annual contribution allowed in IRC Section 223(b) due to an error, the employer may request that the financial institution return the excess amounts to the employer (but if the employer does not recover the amounts, then the amounts must be included in gross income and wages on the employee's Form W-2 for the year during which the employer made contributions);
    - Note, however, that if an employer contributed amounts that are less than or equal to the maximum annual contribution allowed in IRC Section 223(b), the employer may not recoup any amount from the employee's HSA even though the employer's contributions were made in error;
- If an employer withheld and deposited an amount in an employee's HSA for a pay period that is greater than the amount shown on an employee's HSA salary reduction;
- If an employee receives an amount as an employer contribution that the employer did not intend to contribute, but that was transmitted because an incorrect spreadsheet was accessed, or because employees with similar names were confused with each other;
- If an employee receives an amount as an HSA contribution because it is incorrectly entered by a payroll administrator (whether in-house or third-party) causing the incorrect amount to be withheld and contributed;
- If an employee receives an amount as a second HSA contribution because duplicate payroll files are transmitted;
- If an employee receives an amount as an HSA contribution because a change in employee payroll elections is not processed timely so that amounts withheld and contributed are greater than (or less than) the employee elected;
- If an employee receives an amount because an HSA contribution amount is calculated incorrectly, such as a case in which an employee elects a total amount for the year that is allocated by the system over an incorrect number of pay periods; and
- If an employee receives an amount as an HSA contribution because the decimal position is set incorrectly, resulting in a contribution greater than intended.

When Can Group Health Plan Coverage Terminate for an Employee's Dependent Turning 26?

Q My company sponsors a group health plan for employees and their families, and we know that the health care reform law requires us to cover adult children until age 26. Does this mean that we can terminate coverage for an adult child on the day before he or she turns 26?

A Your company's health plan should satisfy the requirement to cover adult children until age 26 as long as you provide coverage to the employee's adult child through the date before his or her 26th birthday (e.g., if an employee's child will be turning 26 on March 15th, you would need to offer coverage to the employee's child through March 14th). Note, however, that if your company is an "applicable large employer" under the health care reform law (generally meaning that your company (and its affiliates) employed an average of 50 or more full-time employees or equivalents in the prior year), your company could be liable for employer shared responsibility penalties under IRC Section

4980H if you do not offer the employee's child health insurance coverage through the *last day of the month* in which the employee's child turns 26. So, in the above example in which an employee's child will be turning 26 on March 15th, if you want to avoid potential penalties under IRC Section 4980H, you are strongly encouraged to offer the employee's child health insurance coverage through March 31st.[3]

Notes

1. *See* IRS Notice 2008-59.
2. *See* IRS Information Letter 2018-0033.
3. *See* 26 C.F.R. 54.4980H-1(a)(12).

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