



AMERICAN BENEFITS COUNCIL

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RE: Request for Extension of COVID-19 Related Health and Dependent Care Relief Through 2021

Dear Ms. Weiser, Ms. Morrison, Ms. Levy and Mr. Tackney,

I write on behalf of the American Benefits Council (“the Council”) to request that the Treasury Department and the Internal Revenue Service (IRS) extend the duration of certain COVID-19 related guidance previously provided for 2020 regarding dependent care flexible spending arrangements (FSAs), health FSAs and employer-sponsored health coverage. We are sincerely grateful for the significant efforts that the Treasury Department and the IRS have taken in response to the pandemic and related economic crisis and understand that the Treasury Department and the IRS are working to address many urgent priorities. With that in mind, we submit this request because, due to the ongoing nature of the pandemic, additional relief is urgently needed to provide employers flexibility in their efforts to assist employees. This relief would substantially and tangibly benefit employees and employers in this time of crisis.

The Council is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world’s largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

In that regard, our members play a vital role both in providing health care coverage during this unprecedented public health emergency and in mitigating the economic consequences of the pandemic for millions of Americans. Over the course of the pandemic, as employers have made significant efforts to respond, several issues arose which needed additional guidance, flexibility and relief. To address these issues, the Council submitted a number of requests to the Treasury Department and the IRS on April 13, 2020.¹

Included in our April letter was a request that the Treasury Department and the IRS issue guidance to prevent employees from forfeiting substantial accumulated amounts in their health and dependent care FSAs, which they were unable to use due to the unforeseeable circumstances of the pandemic. We also asked that the Treasury Department and the IRS allow employers additional flexibility to permit employees to make mid-year cafeteria plan election changes regarding their health and dependent care FSAs and employer-provided health coverage, in response to the myriad challenges and changes to employees’ circumstances raised by the crisis. We were very appreciative when, not long after, the Treasury Department and the IRS issued Notice 2020-29, which meaningfully responded to these concerns for 2020.

We now follow up because it has become evident that although the relief provided in Notice 2020-29 is set to expire at the end of 2020, the significant issues forming the basis for the relief will continue, in a profound way, well into 2021. As such, as explained below, we ask that the Treasury Department and the IRS extend the relief provided in Notice 2020-29 so that the duration of the relief provided better aligns with the duration of the crisis employees and employers face. Additionally, given that many employers are in the process of, or about to start, annual enrollment during which employees will be asked to make certain benefit elections for the upcoming year, it would be very helpful if any supplemental guidance could be issued as soon as possible.

We also emphasize that we have narrowly tailored our requests for additional relief to the crisis at hand. As was the case with Notice 2020-29, which was issued “[t]o assist with the nation’s response to the 2019 Novel Coronavirus outbreak,” the temporary flexibility requested is well within the longstanding administrative authority of the Treasury Department and the IRS under Internal Revenue Code Section 7805(a). Moreover, for the reasons described in more detail later in this letter, the flexibility we request would also respond to the President’s Executive Order, “Regulatory Relief to Support Economic

¹ See <https://www.americanbenefitscouncil.org/pub/?id=8B12F3A3-1866-DAAC-99FB-999F1A090977>.

Recovery,”² issued on May 19, 2020, which stated, “[i]t is the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged.” The executive order goes on to direct the federal agencies to address the economic emergency by “rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery... .” The relief we are requesting provides a meaningful way for the Treasury Department and the IRS to help employees in the midst of the economic crisis, by allowing employers to help employees avoid forfeiting FSA contributions and to help employees make election changes to meet their very real, yet uncertain, needs.

FLEXIBLE SPENDING ARRANGEMENT FORFEITURES

Extension of Relief

As explained in our April letter, one significant issue that arose early in the pandemic was the prospect that employees would face forfeitures of accumulated amounts in their health and dependent care FSAs due to the unforeseeable circumstances brought about by the pandemic. This is due to the fact that, subject to limited rules allowing carryover and grace periods for health FSAs and grace periods for dependent care FSAs, unused amounts must be forfeited under these arrangements at the end of each plan year.³ As we noted, due to doctor office closures, school and day care closures, stay-at-home orders and the need to social distance, among many other disruptions to daily life, employees and their families were not able to spend their health and dependent care FSA contributions as anticipated. To address this issue, we asked that the Treasury Department and the IRS provide relief to avoid forfeitures of these amounts and we asked that the relief continue through plan years beginning in 2021.

A short time later, the Treasury Department and the IRS issued Notice 2020-29, which responded in part to these concerns by allowing employers to provide an extended claims period for health and dependent care FSAs in 2020. More specifically, the notice provided that “an employer, in its discretion, may amend one or more of its cafeteria plans to permit employees to apply unused amounts remaining in a health FSA or dependent care assistance program as of the end of a grace period ending in 2020 or a plan year ending in

² See <https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/>.

³ Health FSAs may allow a carryover of up to \$550 (indexed) from one plan year to the next, or, in the alternative, a grace period of up to 2.5 months after the end of a plan year in which participants can incur expenses and use their prior year’s remaining FSA balance. Prop. Treas. Reg. § 1.125-1(e), 1.125-5(c); Notice 2013-71; Notice 2020-33. Dependent care FSAs may allow a grace period of up to 2.5 months after the end of the plan year in which participants can incur expenses and use their prior year’s remaining FSA balance. Prop. Treas. Reg. § 1.125-1(e).

2020 to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020.” That is, the notice addressed the issue of FSA forfeitures in 2020, but did not provide relief into 2021, including for calendar year FSAs ending at the end of 2020.

Although we very much appreciate Notice 2020-29, and the speed with which it was issued, we are now following up because it has become clear that additional relief is needed to avoid health and dependent care FSA forfeitures at the end of 2020 and into 2021. Unfortunately, the assumption underlying Notice 2020-29, that is, that “normal” life would resume this fall and employees would be able to use their health and dependent care FSAs in the normal course, has not come to pass.

It continues to be the case that employees are in the position of needing to prioritize social distancing, many schools and child care centers are closed or operating at limited capacity, many summer camps never opened, many doctors’ offices have limited capacity, many doctors’ offices have significant backlogs due to the total shutdown earlier this year, and some employees, including those who are immunocompromised, must defer elective health care. As a result, many employees are facing substantial health and dependent care FSA forfeitures at the end of 2020 and into 2021. We note that, although we appreciate that Notice 2020-29 allowed employers to permit employees to reduce their FSA contributions in light of the pandemic during 2020, our understanding is that, by the time that relief was provided, many employees had already contributed substantial amounts to their FSAs and many employees were hesitant to reduce their contributions due to the substantial ongoing uncertainty regarding the potential future ability to seek health and dependent care at some point this year.

As a result, at the end of 2020, employees could be forced to forfeit health and dependent care FSA accumulated amounts, due to no fault of their own and in the midst of an economic crisis, when forfeiture of any funds is particularly problematic. To address this issue, we request that the Treasury Department and the IRS issue additional guidance extending the duration of the relief provided in Notice 2020-29 to reflect the ongoing nature of the pandemic and its effects. More specifically, we ask that the Treasury Department and the IRS allow an employer, in its discretion, to amend one or more of its cafeteria plans to permit employees to apply unused amounts remaining in a health FSA or dependent care FSA as of the end of a plan year or grace period, if applicable, ending in 2020 and/or 2021 to pay or reimburse expenses incurred for the same qualified benefit through the end of the plan year beginning in 2021.⁴

⁴ On a more technical note, and for the sake of completeness, we also mention that our understanding is that for many purposes, including for nondiscrimination testing under the cafeteria plan and Code Section 105(h) rules, amounts effectively carried over into the extended claims period would not be considered as new contributions for the subsequent plan year. To provide clarity it would be helpful if any responsive guidance would confirm that the extended claims period would not impact nondiscrimination testing.

Health Savings Account Interaction for Health FSAs

Notice 2020-29 provides that an individual who had unused amounts remaining at the end of a plan year or grace period ending in 2020 and who is allowed an extended claims period under a health FSA pursuant to Notice 2020-29 will not be eligible to contribute to a health savings account (HSA) during the extended period, except in the case of a health FSA that is HSA-compatible (i.e., one that reimburses only certain permitted insurance or preventive care and/or one that only reimburses amounts after the deductible in the high deductible health plan (HDHP) is met). Due to the significant number of employees covered by HSA-compatible HDHPs⁵, this aspect of Notice 2020-29 undermines the utility and impact of the relief provided and we ask that it be revised in the event the relief is extended into 2021.

We understand that the rule provided in Notice 2020-29 is based on the general rules regarding HSAs and health FSAs during a grace period, as set out in Notice 2005-86. But the extended claims period provided in Notice 2020-29 differs in some significant ways from a typical grace period. For example, while grace periods extend to a maximum of 2.5 months, the extended claims period we are requesting could extend up to two years, in recognition of the unique and severe crisis employees are facing. For an employer that chooses to offer the extended claims period, requiring that either all employees be rendered ineligible for an HSA or that the employer limit the scope of the FSA reimbursements for all employees for the duration of the extended claims period seems an overly narrow application of the rules and one that can be made more flexible, as justified by the unique challenges presented by the current crisis.

As such, we ask that the Treasury Department and the IRS allow employers to permit employees, on an employee-by-employee basis, to opt-out of the extended claims period, in order to preserve their HSA eligibility. In addition, we ask that the Treasury Department and the IRS allow employers to offer employees the choice between an HSA-compatible health FSA or general purpose health FSA during the extended claims period, on an employee-by-employee basis. This additional flexibility would be generally consistent with HSA-related flexibility provided for health FSAs that provide a carryover⁶ and would significantly assist the many millions of employees enrolled in HSA-eligible HDHPs.

Cash-outs

Due to the pandemic and economic crisis, some employees are experiencing extreme financial hardship and access to any additional funds is vital. Further, for employees who

⁵ Mercer's National Survey for 2019 shows that 59% of employers with over 500 employees offer an HDHP and over 67% of employers with over 200,000 employees offer an HDHP. <https://www.mercer.us/what-we-do/health-and-benefits/strategy-and-transformation/mercero-national-survey-benefit-trends.html>.

⁶ See IRS Office of Chief Counsel Memorandum, Health Flexible Spending Arrangement Carryover and Eligibility for a Health Savings Account, at <https://www.irs.gov/pub/irs-wd/1413005.pdf>.

will experience a termination of employment, an extended claims period for a health or dependent care FSA will not address the issue of forfeiture of accumulated amounts. We raised this issue in our April letter and raise it again now because it continues to be a concern for employers and employees, some of whom are facing a great deal of financial strain due to the pandemic and related economic crisis.

As such, we also request that employers be permitted to allow employees who are terminated from employment during 2020 and 2021 to cash-out their health FSA and dependent care FSA balances (on a taxable basis). This will help provide access to all available funds to help them weather any such financial hardship, and, thus, to have funds available as needed to pay for essential expenses, such as rental or mortgage expenses. More generally, some employers have expressed an interest in being allowed to permit employees to cash out their health and dependent care FSAs amounts that are unused at the end of the 2020 plan year. We ask that you consider providing this option for employers as well as an extended claims period because, for some employers, providing an extended claims period could be administratively burdensome due to the late stage in the year and the inability to reprogram their systems to accommodate an extended claims period. Also, many employers and employees are in the middle of busy annual open enrollment activities.

Relatedly, due to the pandemic, a great many employees are working remotely and no longer commuting to work. Employers appreciate the current flexibility with regard to pre-tax salary reductions for commuter benefits that allow employers to permit an employee to change his/her election for commuter benefits at any time and that allow an employee to carry over unused amounts to the next plan year. However, some employers would like to be able to provide employees the option to cash-out their accumulated commuter benefit balances, because the employees are unlikely to need the benefits for the rest of 2020 and into 2021 and the cash-out could help the employees cover other expenses (e.g., rent, mortgage, groceries), due to the unprecedented economic crisis. Accordingly, we also request that the Treasury Department and the IRS allow employers to offer employees the ability to cash-out pre-tax commuter expense balances in 2020 and 2021. If a narrower request is more feasible, we request that guidance at least allow employers to provide cash-outs of these benefits upon termination of employment during 2020 and 2021.

CAFETERIA PLAN ELECTION CHANGES

Due to the significant and unforeseeable changes in circumstances for employees and employers brought about by the pandemic beginning in early 2020, in our April letter, the Council requested that the Treasury Department and the IRS provide employers with the flexibility to allow mid-year cafeteria plan election changes to support employees' ability to change their health FSA, dependent care FSA and health coverage elections in response

to the pandemic and economic crisis. We asked that this additional flexibility be provided through plan years beginning in 2021.

Soon after we submitted that request, the Treasury Department and the IRS issued Notice 2020-29 which provided that an employer, in its discretion, may amend one or more of its cafeteria plans to allow each employee who is eligible to make salary reduction contributions under the plan to make prospective election changes (including an initial election) during calendar year 2020 regarding employer-sponsored health coverage, a health FSA, or a dependent care FSA, regardless of whether the basis for the election change satisfies the criteria set forth in the cafeteria plan change-in-status regulations (Treas. Reg. § 1.125-4).⁷

This temporary flexibility allowing employers to permit changes in elections during 2020 provided welcome relief to employers and employees. However, it has become apparent that although the relief is set to expire at the end of 2020, the pandemic and its effects will continue well into 2021. And as employees face open enrollment for the 2021 plan year, they are having to grapple with the fact that, due to the pandemic, significant uncertainty continues to exist, substantially undermining their ability to clearly anticipate their health and dependent care needs, and, more generally, their financial circumstances, in 2021.

With regard to elections for health FSAs for 2021, many employees are unsure as to the extent of medical services they will be able to receive and whether physicians, dentists and eye doctors will be performing non-emergent and/or elective procedures. Additionally, for employees that suffer from chronic conditions or are immuno-compromised, they may lack the information and certainty regarding their ability to utilize medical care given the ongoing state of the pandemic. Further, even if the pandemic improves and a vaccine is widely available in 2021, physicians, dentists and eye doctors could be backlogged for an extended period of time, further adding to the uncertainty of expected medical expenses. At the same time, many employees are hesitant to simply forgo health FSA contributions for 2021 because, when the time comes for in-personal medical care to resume in the normal course, we expect that employees and their families will have significant catch-up costs.

⁷ More specifically, Notice 2020-29 provides that “[i]n particular, an employer may amend one or more of its Section 125 cafeteria plans to allow employees to: (1) make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage; (2) revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis (including changing enrollment from self-only coverage to family coverage); (3) revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer; (4) revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis; and (5) revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.”

There is also a great deal of uncertainty for 2021 regarding expected dependent care expenses for employees. As noted above, a great many child care centers, child care providers and camps have remained closed and will do so for the foreseeable future but, possibly, will resume at some point in 2021 if a vaccine becomes widely available. Relatedly, with many schools engaging in full- or part-time online or “virtual” learning, employees may have changing needs as they relate to hiring child care providers to care for their children during the day. Adding to the complexity is that the state of online and in-person learning is quite dynamic, often changing month by month, based on local health metrics, and it is expected that parents could be confronted with changing circumstances throughout the 2021 plan year.

With regard to health plan coverage, many employers have been forced by the pandemic and economic crisis to reduce the hours (and accordingly, the pay) of some of their employees and others will need to do so in the future, as the crisis stretches on. Employees are not in a position to fully anticipate changes to their hours or pay in the coming year and may struggle to afford the coverage they select for 2021 if their financial circumstances change. More generally, even employees whose hours are not reduced may face extreme economic hardship due to changes in their family income and expenses due to the pandemic and related economic crisis, and others may wish to change coverage options for other reasons related to the pandemic, even if not to select a cheaper option.

Taking all of this together, what emerges is that unfortunately, and through no fault of their own, employees’ ability to accurately predict or otherwise anticipate their likely medical and dependent care needs for 2021 is substantially and uniquely undermined by the pandemic and economic crisis. And although the current change-in-election cafeteria plan regulations provide some ability to respond to certain fact patterns, as acknowledged in Notice 2020-29, the current rules are not sufficient to address the myriad scenarios in which employers and employees find themselves, extending into 2021.

Accordingly, in recognition of the extraordinary course of events, we ask that the Treasury Department and the IRS extend through plan years beginning in 2021 the temporary flexibility provided in Notice 2020-29, allowing employers the discretion to allow employees to make prospective election changes regarding health FSAs, dependent care FSAs and health coverage, regardless of whether the basis for the election change satisfies the criteria set forth in the cafeteria plan change-in-election regulations.

In addition, as is the case under Notice 2020-29, we ask that any responsive guidance make clear that employers are being provided with additional flexibility, rather than with additional requirements, regarding mid-year election changes. Employers should have discretion as to if and how, they implement any mid-year election changes, including the ability to provide some but not all of the mid-year changes and the ability to provide the changes to some, but not all, employees. Offering a mid-year election change is a significant administrative and financial undertaking for employers, many of whom, due to the pandemic and the economic crisis, are in financial distress and/or must focus on the

operational needs of their businesses. As such, while some employers may wish to consider offering mid-year election changes in 2021, allowing these changes may not be feasible, or the best course of action, for other employers.

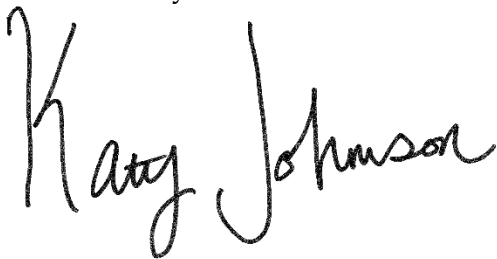
Moreover, it is our understanding that as under Notice 2020-29, under any additional flexibility provided by the Treasury Department and the IRS, employers would have the discretion to determine which types of election changes to allow (e.g., change to a less expensive plan, opportunity to enroll in an FSA) and for which groups of employees (e.g., only part-time employees or employees who were furloughed), as long as the election changes allowed by the employer comply with the cafeteria plan nondiscrimination rules. Based on questions we heard following Notice 2020-29, we request that any responsive guidance make this aspect of employer flexibility clear.

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We greatly appreciate your attention to these requests among the many other essential matters before you and are cognizant of your need to prioritize. The requests in this letter reflect some of the top concerns we are hearing from our employer members and our hope is that, as we are requesting an extension of previously issued guidance, responsive guidance would not be an overly-heavy lift, while at the same time, it would have a very direct and meaningful impact on employees and employers.

If you have any questions or would like to discuss, please do not hesitate to reach out. Thank you again.

Sincerely,

A handwritten signature in black ink that reads "Katy Johnson". The signature is written in a cursive, flowing style.

Katy Johnson
Senior Counsel, Health Policy