



# American Benefits Council

Benefits Briefing: IRS Notice 2015-87

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## ACA Guidance and Implications for Employer-Sponsored Health Plans

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# IRS Notice 2015-87

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- Issued December 16, 2015
- Provides guidance on several ACA tax issues related to employer-sponsored health plans
- Note: Some of the guidance is tri-agency, whereas some is IRS-only
- Comments were requested on Q/As 9, 12, 14, and 15, and were due on February 18, 2016

# IRS Notice 2015-87

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- Part II provides further guidance regarding integrated HRAs and employer payment plans
- Part III “clarifies” aspects of the employer shared responsibility provisions, including:
  - How the “hours or service” determination is impacted by disability and leave payments
  - Use of opt-out payments
- Part IV provides guidance for governmental employers
- Part V addresses how COBRA applies to rolled over FSA amounts
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# Treatment of HRA Amounts

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- **Q/A 7: Determining § 4980H “affordability”**
  - Amounts made available for the current plan year under an HRA that an employee may use to pay premiums for an eligible employer-sponsored plan (even if they can also be used for cost-sharing or other health benefits not covered by the plan), are counted toward the employee’s required contribution when determining “affordability” for purposes of § 4980H

# Treatment of HRA Amounts

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- **Q/A 7: Determining § 4980H “affordability”**
  - Only applies if the amounts are made available “within a reasonable time before” the employee must decide whether to enroll
  - Amounts only apply to immediately subsequent period (e.g., the plan year)
  - Employer contribution is treated as made ratably on a monthly basis
  - Only can be used if HRA is “integrated” with major medical coverage

# Treatment of HRA Amounts

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- **Q/A 7: Determining § 4980H “affordability”**

**Example.** The employee contribution for health coverage under the major medical group health plan offered by the employer is generally **\$200** per month. For the current plan year, the employer makes newly available \$1,200 under an HRA that the employee may use to pay the employee share of contributions for the major medical coverage, pay cost-sharing, or pay towards the cost of vision or dental coverage

Conclusion: The \$1,200 employer contribution to the HRA reduces the employee’s required contribution for the coverage. For purposes of 4980H, the employee’s required contribution for the major medical plan is **\$100** (\$200 - \$100) per month because 1/12 of the \$1,200 HRA amount per month is taken into account as an employer contribution

# Treatment of § 125 Plan “Flex Credits”

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- **Q/A 8:** Clarifies that if the “flex credit” qualifies as a “health flex contribution,” (within the meaning of Treasury Reg. §§1.5000A-3(e)(3)(ii)(E) and 1.36B-2(c)(3)(v)(A)(6), then it counts towards 4980H “affordability”



# Treatment of § 125 Plan “Flex Credits”

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- **Q/A 8:**

- An amount is a “health flex contribution” if:
  1. The employee may not opt to receive the amount as a taxable benefit
  2. The employee may use the amount to pay for MEC, and
  3. The employee may use the amount exclusively to pay for medical care, within the meaning of § 213 (versus other benefits)

# Treatment of § 125 Plan “Flex Credits”

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- **Q/A 8:**

**Example 1:** Employer offers employees coverage under a group health plan through a § 125 cafeteria plan. An employee electing self-only coverage under the health plan is required to contribute \$**200** per month toward the cost of coverage. Employer offers employer flex contributions of \$600 for the plan year that may only be applied toward the employee share of contributions for the group health coverage or contributed to a health flexible spending arrangement (health FSA).

# Treatment of § 125 Plan “Flex Credits”

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- **Q/A 8:**

Conclusion: The \$600 employer flex contribution is a health flex contribution and reduces the employee’s required contribution for the coverage under §§ 36B and 5000A and for purposes of any related consequences under § 4980H(b) (including application of the affordability safe harbors). Because the \$600 employer flex contribution is a health flex contribution, the \$600 is taken into account as an employer contribution (and therefore reduces the employee’s required contribution) regardless of whether the employee elects to apply the health flex contribution toward the employee contribution for the group health coverage or elects to contribute it to the health FSA. For purposes of § 4980H(b) and the related reporting under § 6056 (Form 1095-C), the employee’s required contribution for the group health coverage is **\$150** (\$200 - \$50) per month.

# Treatment of § 125 Plan “Flex Credits”

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- **Q/A 8:** Provides limited transition relief for pre-2017 plan years for arrangements utilizing non-health flex contributions, if:
  1. If the arrangement was “adopted” on or before December 16, 2015; and
  2. There is no substantial increase in the flex contributions after December 16, 2015
- Relief applies for § 4980H “affordability” as well as § 6056 tax reporting
- Note: Relief is disregarded for §§ 5000A and 36B purposes for the individual taxpayer

# Treatment of “Opt-Out” Payments

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- What is an “opt-out” payment?
  - An opt-out payment is an amount that is only available to an employee (in cash or other form) if they forego enrolling in offered employer-sponsored coverage
  - Example: Employee can elect employer-sponsored medical coverage (which is subsidized at a rate of 50%, i.e., \$250 if monthly premium is \$500) or can receive \$100 of additional cash wages

# Treatment of “Opt-Out” Payments

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- **Q/A 9:** Addresses treatment of “opt-out” payments for purposes of determining “affordability” of coverage
- **Provides that the availability of an opt-out payment reduces the affordability of the coverage**

# Treatment of “Opt-Out” Payments

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- **Q/A 9:**

“If an employer offers to an employee an amount that cannot be used to pay for coverage under the employer’s health plan and is available only if the employee declines coverage (which includes waiving coverage in which the employee would otherwise be enrolled) under the employer’s health plan (an opt-out payment), this choice between cash and coverage presented by the offer of an opt-out payment is analogous to the cash-or-coverage choice presented by the option to pay for coverage via salary reduction. **In both cases, the employee may purchase the health plan coverage only at the price of forgoing a specified amount of cash compensation that the employee would otherwise receive** – salary, in the case of a salary reduction, or other compensation, in the case of the opt-out payment.” (Emphasis added.)

# Treatment of “Opt-Out” Payments

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- **Q/A 9:**

**“Accordingly, Treasury and IRS intend to propose regulations reflecting this rule and requesting comments on the treatment of employer offers of opt-out payments under one or more of these sections.** It is anticipated that the proposed regulations will also address and request comments on the treatment of opt-out payments that are conditioned not only on the employee declining employer-sponsored coverage but also on satisfaction of additional conditions (such as the employee providing proof of having coverage provided by a spouse’s employer or other coverage).” (Emphasis added.)



# Treatment of “Opt-Out” Payments

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- **Q/A 9:**

“Treasury and IRS anticipate that the regulations generally will apply only for periods after the issuance of final regulations. **However, Treasury and IRS also anticipate that mandatory inclusion in the employee’s required contribution of amounts offered or provided under an unconditional opt-out arrangement (as defined in the preceding paragraph) that is adopted after December 16, 2015 (a “non-relief-eligible opt-out arrangement”) will apply for periods after December 16, 2015.**” (Emphasis added.)

# Treatment of “Opt-Out” Payments

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- **Q/A 9:**

“For the period prior to the applicability date of regulations, employers are not required to increase the amount of an employee’s required contribution by the amount of an opt-out payment (other than a payment made under a non-relief-eligible opt-out arrangement) for purposes of § 6056 (Form 1095-C), and an opt-out payment (other than a payment made under a non-relief-eligible opt-out arrangement) will not be treated as increasing an employee’s required contribution for purposes of any potential consequences under § 4980H(b).”  
(Emphasis added.)

# Treatment of “Opt-Out” Payments

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- **Q/A 9: Take-aways:**
  - Can disregard opt-out payments when determining affordability and 6056 tax reporting for 2015 tax year
  - If you have a relief-eligible opt-out arrangement, same applies through close of 2016 plan year
  - Otherwise, unconditional opt-out payments will need to be taken into account in determining “affordability” and for § 6056 tax reporting purposes
  - But what about conditional opt-out payments?

# Treatment of “Opt-Out” Payments

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- **Q/A 10: SCA/DBRA Employees**

- Treasury and IRS are continuing to consider how the requirements of the SCA, the DBRA, and the employer shared responsibility provisions under § 4980H may be coordinated
- Until further guidance, and in any event for plan years beginning before January 1, 2017, employer fringe benefit payments (including flex credits or flex contributions) under the SCA or DBRA that are available to employees covered by the SCA or DBRA to pay for coverage under an eligible employer-sponsored plan (even if alternatively available to the employee in other benefits or cash) will be treated as reducing the employee’s required contribution for participation in that eligible employer-sponsored plan for purposes of § 4980H(b), but only to the extent the amount of the payment does not exceed the amount required to satisfy the requirement to provide fringe benefit payments under the SCA or DBRA

# Implications of Transition Relief for Employees

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- **Q/A 11:**
  - Employers using the relief in Q/As 8 - 10 are encouraged to notify employees that they may obtain accurate information about their required contribution taking into account the modifications provided in those Q/As using the employer contact telephone number provided to the employee on Form 1095-C
  - If the modified required contribution is not affordable for purposes of § 36B and the employee is otherwise entitled to the premium tax credit, the employee may claim it on Form 8692, Premium Tax Credit, which is filed with the employee's annual income tax return (regardless of the required contribution or qualifying offer information reported on that employee's Form 1095-C)

# Adjustment to Affordability Under § 36B(c)(2)(C)(iv)

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- **Q/A 12:**

- Code section 36B(c)(2)(C)(iv) provides that in the case of plan years beginning after 2014, the Secretary shall adjust the 9.5% affordability threshold under §36B(c)(2)(C)(i)(II)
- Previously, IRS adjusted the 9.5% threshold to 9.56% for plan years beginning in 2015, and further adjusted the threshold to 9.66 percent for plan years beginning in 2016
- All of the following will be administered consistent with the adjustments to the 9.5% threshold:
  - (1) the affordability safe harbors under § 54.4980H-5(e);
  - (2) the reference to an “offer of coverage” under § 54.4980H-4;
  - (3) the multiemployer plan interim relief
  - (4) the definition of a “qualifying offer” for purposes of §6056 reporting

# Indexing of 4980H Penalty Amounts

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- **Q/A 13:**

- Clarifies that the 2,000 and \$3,000 penalty amounts set forth in § 4980H(b)(1) and (c)(1) are adjusted annually
  - For 2015, the amounts are \$2,080 and \$3,120
  - For 2016, the amounts are \$2,160 and \$3,240

# Hours of Service Calculation

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- Proposed and final § 4980H regulations define an “hour of service”, in part, as each hour for which an employee is paid, “or entitled to payment by the employer, for a period of time during which no duties are performed **due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence** (as defined in 29 CFR 2530.200b-2(a))”



# Hours of Service Calculation

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- Many questions remained:
  - Application of 501 hour limitation of referenced DOL FLSA regulation
  - Long-term versus short-term disability
  - Insured versus self-insured
  - Coverage paid with pre- or post-tax wages

# Hours of Service Calculation

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- **Q/A 14:**
  - 501 hour limitation does not apply
  - No difference between short-term and long-term disability
  - No difference between insured and self-funded
  - BUT, if coverage is paid with after-tax wages, then resulting payments do not result in “hour of service”

# Hours of Service Calculation

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- **Q/A 14:**
  - No “hour of service” resulting from payment of legally required worker’s compensation or unemployment or disability insurance (UI/DI) laws
  - No “hour of service” for payments related solely to medical expense reimbursements

# Hours of Service Calculation

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- **Q/A 14:** Additional (new) questions remain, such as how to mechanically credit hours
  - Ex: Employee is covered by employer-sponsored long-term group disability income coverage, which provides 66% income replacement. Prior to disability, Employee was variable hour employee and employer uses look-back measurement methodology for determining § 4980H obligations

# Additional 4980H Guidance

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- **Q/A 15:** Announces Treasury's intention to issue special "break in service" rules for employees who primarily provide services to educational organizations
- **Q/A 16:** Addresses services provided by AmeriCorps members
- **Q/A 17:** Offer of TRICARE due to employment qualifies as an offer of MEC

# IRS Notice 2015-87

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# Integrated HRAs & EPPs

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- IRS previously issued guidance with Notice 2013-54; provided additional sub-regulatory FAQ guidance
- IRS Notice 2015-87 “supplements” prior guidance

# Integrated HRAs & EPPs

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- **Q/A 1 – Retiree-only HRAs**
  - Clarifies that a retiree-only HRA can reimburse individual insurance premiums (because not subject to ACA's market reform provisions)
  - However, the HRA constitutes employer-sponsored coverage that constitutes MEC and, therefore, the retiree is not eligible for § 36B tax credits and CSRs



# Integrated HRAs & EPPs

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- **Q/A 2 – Formerly integrated HRAs**
  - Addresses whether amounts remaining from an integrated HRA may be used to purchase individual insurance premiums
  - Notice 2015-87 clarifies that to the extent such amounts can be used to purchase individual insurance premiums, the HRA fails to comply with the ACA market reforms

# Integrated HRAs & EPPs

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- **Q/A 3: Pre-2014 Legacy HRA Contributions**
  - Clarifies that amounts credited to HRAs prior to January 1, 2014 may be used to reimburse medical expenses as permitted under the terms of the plans then in effect
  - If the plan had not set the amounts to be credited for 2013, then look to 2012 practice

# Integrated HRAs & EPPs

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- **Q/A 4: Spousal/dependent HRA Coverage**
  - Provides that HRA coverage cannot extend to an employee's spouse or dependent unless the spouse/dependent are also enrolled in qualifying employer-sponsored coverage

# Integrated HRAs

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- **Q/A 4: Spousal/dependent HRA Coverage**

“An HRA is permitted to be integrated with the employer’s other group health plan coverage for purposes of the application of the group market reforms **only as to the individuals who are enrolled in both the HRA and the employer’s other group health plan.** If the spouse and/or dependents are not enrolled in the employer’s group health plan coverage, the coverage of these individuals under the HRA cannot be integrated with the coverage under the employer’s group health plan, and the HRA coverage generally would fail to meet the group market reforms. ” (Emphasis added.)

# Integrated HRAs

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- **Q/A 4: Spousal/dependent HRA Coverage**

“Treasury and IRS will not treat an HRA available for the expenses of family members not enrolled in the employer’s other group health plan for plan years beginning before January 1, 2016, as failing to be integrated with an employer’s other group health plan for plan years beginning before January 1, 2016, nor will they treat an HRA and group health plan that otherwise would be integrated based on the terms of the plan as of December 16, 2015 as failing to be integrated with an employer’s other group health plan for plan years beginning before January 1, 2017, solely because the HRA covers expenses of one or more of an employee’s family members even if those family members are not also enrolled in the employer’s other group health plan.”

# Integrated HRAs & EPPs

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- **Q/A 5: Limited-Scope HRA**
  - Clarifies that an HRA does not violate the ACA's market reforms if it only reimburses individual market premiums for HIPAA-excepted coverages (such as dental- or vision-only insurance)

# Integrated HRAs & EPPs

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- **Q/A 6: Cafeteria plan EPPs**
  - Addresses whether it is permissible to allow employees to use an employer's cafeteria plan to pay for individual insurance premiums via salary reduction
  - Because such an arrangement would give rise to an EPP per Notice 2013-54, and EPPs cannot be used with individual insurance, such arrangements would violate the ACA's market reform rules

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# Government Entities/VA Payments

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- **Q/A 18:** Restates that 414 controlled group rules for determining ALE status should be applied reasonably and in good faith
- **Q/A 19:** States that a separate EIN is needed for each separate government entity for reporting purposes
- **Q/A 20:** Provides clarification on eligibility to contribute to an HSA for individuals who receive VA health care

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# COBRA & FSA Carryovers

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- **Q/A 21: Treatment of carryover**
  - Clarifies that for COBRA purposes, any carryover amount is included when determining the amount of the benefit that a qualified beneficiary is entitled to receive during the remainder of the plan year in which a qualifying event occurs

# COBRA & FSA Carryovers

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- **Q/A 21: Treatment of carryover**

**Example.** An employer maintains a calendar year health FSA that qualifies as an excepted benefit. Under the health FSA, during the open season an employee has elected to reduce salary by \$2,500 for the year. In addition, the employee carries over \$500 in unused benefits from the prior year. Thus, the maximum benefit that the employee can become entitled to receive under the health FSA for the entire year is \$3,000.

The employee experiences a qualifying event that is a termination of employment on May 31. As of that date, the employee had submitted \$1,100 of reimbursable expenses under the health FSA.

Conclusion: The maximum benefit that the employee could become entitled to receive for the remainder of the year as a benefit under the health FSA is \$1,900 ((\$2,500 plus \$500) minus \$1,100).

# COBRA & FSA Carryovers

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- **Q/A 22: Setting of COBRA rate**
  - Provides that when setting the COBRA rate, any carryover amounts must be disregarded

# COBRA & FSA Carryovers

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- **Q/A 22: Setting of COBRA rate**

**Example.** An employee elects salary reduction with respect to a health FSA of \$2,000. The employer provides a matching contribution of \$1,000. In addition, the employee carries over \$500 in unused benefits from the prior year. The employee experiences a qualifying event that is a termination of employment on May 31.

Conclusion: The maximum amount the health FSA is permitted to require to be paid for COBRA continuation coverage for the remainder of the year is 102 percent of 1/12 of the applicable premium of \$3,000 (\$2,000 of employee salary reduction election plus \$1,000 of employer contributions) times the number of **months remaining in the year after the qualifying event.** **The \$500 of benefits carried over from the prior year is not included in the applicable premium.**

# COBRA & FSA Carryovers

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- **Q/A 23: Carryover rights**

- Provides that a carryover right must be provided to COBRA qualified beneficiaries if same right is available to similarly situated non-COBRA beneficiaries.
- However:
  - Not required to allow the COBRA beneficiary to elect additional salary reduction amounts for the carryover period
  - Not required to provide access to any employer contributions to the health FSA made during the carryover period
  - The carryover is limited to the applicable COBRA continuation period

# COBRA & FSA Carryovers

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- **Q/A 23: Carryover rights**

**Example.** An employer maintains a calendar year health FSA which qualifies as an excepted benefit. Under the health FSA, during the open season an employee may elect to reduce salary by \$2,500 for the year. In addition, the plan allows a carryover of up to \$500 in unused benefits remaining at the end of the plan year.

An employee elects salary reduction of \$2,500 for the year. The employee experiences a qualifying event that is a termination of employment on May 31. As of that date, the employee had submitted \$400 of reimbursable expenses under the health FSA. The employee elects COBRA continuation coverage and pays the required premiums for the rest of the year. As a qualified beneficiary, the former employee submits additional reimbursable payments in the amount of \$1,600. At the end of the plan year, there is \$500 of unused benefits remaining.



# COBRA & FSA Carryovers

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- **Q/A 23: Carryover rights**

Conclusion: The qualified beneficiary is allowed to continue to submit expenses under the same terms as similarly situated non-COBRA beneficiaries in the next year, for up to \$500 in reimbursable expenses. The maximum amount that can be required as an applicable premium for the carryover amount for periods after the end of the plan year is zero. The maximum period the carryover is required to be made available is the period of COBRA continuation coverage. In this case, the period is 18 months and terminates at the end of November of the next year. Thus, the health FSA need not reimburse any expense incurred after that November.

# COBRA & FSA Carryovers

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- **Q/A 24: Conditioned carryovers**
  - A health FSA may limit the availability of the carryover of unused amounts (subject to the \$500 limit) to individuals who have elected to participate in the health FSA in the next year, even if the ability to participate in that next year requires a minimum salary reduction election to the health FSA for that next year

# COBRA & FSA Carryovers

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- **Q/A 25: Limited carryovers**
  - A health FSA may limit the ability to carry over unused amounts to a maximum period (subject to the \$500 limit). For example, a health FSA can limit the ability to carry over unused amounts to one year

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# ACA Tax Reporting Relief

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- **Q/A 26: Limited Relief**
  - Provides relief for employers regarding 1095-C reporting from penalties for filing incorrect or incomplete Forms 1094-C and 1095-C under §§ 6721 and 6722, so long as the employer can show:
    - It filed a timely return; and
    - Exercised good faith