

WHAT YOU NEED TO KNOW



## Compliance Recap

September 2018

September was a relatively busy month in the employee benefits world.

The Internal Revenue Service (IRS) released draft 2018 instructions for Forms 1094-B, 1095-B, 1094-C, and 1095-C. The IRS also issued an information letter regarding health flexible spending accounts and guidance on the employer credit for paid family and medical leave. The Congressional Research Service published its updated Federal Requirements for Private Health Insurance Plans.

### UBA Updates

UBA released one new advisor: [IRS Releases Draft Forms and Instructions for 2018 ACA Reporting](#)

UBA updated existing guidance:

- [Highlights of the Summary of Benefits and Coverage Requirement](#)
- [U.S. Supreme Court Upholds ACA Subsidy Eligibility on Federal Exchanges](#)
- [Cafeteria Plans: Qualifying Events and Changing Employee Elections](#)
- [Federal Tax Credit for Employer-Provided Paid Family and Medical Leave](#)
- [MLR Rebate Considerations – Private Plans](#)

### IRS Issues Draft 2018 Instructions for Forms 1094-B, 1095-B, 1094-C, and 1095-C

The Internal Revenue Service (IRS) recently released draft instructions for both the [1094-B and 1095-B](#) and the [1094-C and 1095-C](#) and the draft forms for [1094-B](#), [1095-B](#), [1094-C](#), and [1095-C](#). There are no substantive changes in the forms or instructions between 2017 and 2018, beyond the further removal of now-expired forms of transition relief. There is a minor formatting change to draft Forms 1095-B and 1095-C for 2018. There are dividers for the entry of an individual's first name, middle name, and last name.

In past years, the IRS provided relief to employers who made a good faith effort to comply with the information reporting requirements and determined that they would not be subject to penalties for failure to correctly or completely file. This did not apply to employers that failed to timely file or furnish a statement.

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For 2018, the IRS has stated that it does not anticipate extending the “good faith compliance efforts” relief relating to reporting requirements. Employers should be ready to fully meet the reporting requirements in early 2019 with a high degree of accuracy. There is however relief for *de minimis* errors on Line 15 of the 1095-C.

[Read more about the draft ACA reporting forms and instructions.](#)

## IRS Issues Information Letter Regarding Health FSAs

The Internal Revenue Service (IRS) issued [Information Letter 2018-0012](#) to reiterate that employers can include a provision in a health flexible spending arrangement (FSA) that allows up to \$500 in unused amounts at the end of the plan year to be carried over to the next plan year. However, any carryover amount cannot be accumulated in the health FSA over several years.

The IRS also indicates that a health savings account (HSA) would allow unused amounts to be accumulated and used in any later year. Further, the IRS indicates that a health reimbursement arrangement (HRA) can be structured to allow for unused amounts to be accumulated and used for medical expenses in later years.

## IRS Issues Guidance on Employer Credit for Paid Family and Medical Leave

The Internal Revenue Service (IRS) released [Notice 2018-71](#) (Notice) that provides Q&A guidance on the Internal Revenue Code Section 45S employer credit for paid family and medical leave (FML). The IRS clarified several items in its guidance, including:

- An employer does not need to be subject to Title I of the Family and Medical Leave Act of 1993 (FMLA) to be eligible for the employer credit for FML
- A description of what the employer’s written policy must contain, including sample “non-interference” language
- Under Section 45S, paid leave is considered FML only if the leave is specifically designated for one or more FMLA purposes, may not be used for any other reason, and is not paid by a state or local government or required by state or local law
- An employee does not need to work a minimum number of hours per year to be a qualifying employee
- Each member of a controlled group generally makes a separate election of whether to claim the credit
- An employer must file IRS Form 8994, Employer Credit for Paid Family and Medical Leave, and IRS [Form 3800](#), General Business Credit, with its tax return to claim the credit

[Read more about the IRS’ Q&A guidance.](#)

## CRS Publishes Updated Federal Requirements on Private Health Insurance Plans

The Congressional Research Service (CRS) published its updated [Federal Requirements on Private Health Insurance Plans](#) which summarizes federal requirements that apply to the private health insurance market, including a table that indicates whether a particular federal requirement applies to a fully-insured large group plan, fully-insured small group plan, self-funded plan, or individual coverage.

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## Question of the Month

**Q.** We recently received a medical loss ratio (MLR) rebate. How should the money be distributed?

**A.** If the plan document states how a rebate should be used, then the plan administrator should follow the plan document's terms.

If the plan document is silent on how the rebate should be distributed, then the following general principles apply.

### How should the rebate be divided?

Assuming both the employer and employees contribute to the cost of coverage, the rebate should be divided between the employer and the employees, based on the employer's and employees' relative share. Employers may divide the rebate in any reasonable manner – for example, the rebate could be divided evenly among the employees who receive it, or it may be divided based on the employee's contribution for the level of coverage elected.

Employers are not required to precisely determine each employee's share of the rebate, and so do not need to perform special calculations for employees who only participated for part of the year, moved between tiers, etc.

Using the example that the rebates are based on premiums paid to the carrier for calendar year 2017, the employer may pay the rebate only to employees who participated in the plan in 2017 and are still participating, only to current participants (even though the rebate relates to 2017), or to those who participated in 2017, regardless whether they are currently participating.

Insurers must send a notice to all employees who participated in the plan in 2017 stating that a rebate has been issued to the employer, so employers who choose to limit rebate payments to those who are currently participating should be prepared to explain why the rebate is only being paid to current participants. This might include the fact that since the rebate would be taxable income, the amount involved does not justify the administrative cost to locate former participants and issue a check.

### Are former plan participants entitled to a share of the rebate?

Whether former participants should be included in any rebate allocations depends on the type of plan involved. For ERISA plans, there is no requirement that former participants be included or excluded. However, the Department of Labor's (DOL) Technical Release, in discussing fiduciary decisions regarding distribution of rebates, states that if a fiduciary determines that the cost of including former participants in a rebate distribution approximates the amount of the rebate, the fiduciary may properly decide to allocate the rebate only to current participants. This means that plan fiduciaries should consider whether to include former participants and should make a prudent decision based on all of the facts and circumstances.

For non-federal governmental plans, the interim final regulations specifically require any portion of a rebate that is based on former participants' contributions to be aggregated and used for the benefit of current participants.

For nongovernmental, non-ERISA plans, the interim final regulations provide that if the rebate is paid to the policyholder (which is only permissible if the policyholder has given the insurer written assurance that meets the requirements of the regulations), the policyholder must allocate the rebate to current

## UBA Compliance Advisor

participants only, in the same way as a non-federal governmental plan. If the rebate is paid directly to participants by the insurer (because the policyholder has declined to provide a written assurance), the insurer must distribute the rebate equally among those who were participants during the MLR reporting year on which the rebate is based.

### **How may the employer use the rebate?**

The employer may pay the rebate in cash, use it for a premium holiday, or use it for benefit enhancements. The rebate must be applied or distributed within 90 days after it is received.

A cash rebate is taxable income to the employee if it was paid with pre-tax dollars.

A premium holiday should be completed within 90 days after the rebate is received (or the rebate needs to be deposited into a trust).

Benefit enhancements include reduced copays or deductibles (which may not be practical due to the timing requirements) or wellness-type benefits that the employer would not have offered without the rebate, such as free flu shots, a health fair, a lunch and learn on nutrition or stress reduction, or a nurse line.

### **How should the rebate be provided?**

The employer should consider the practical aspects of providing a rebate in a particular form.

Generally, the larger the amount that would be due to an individual, the more effort the employer should make to directly benefit the person (either through a cash rebate or premium holiday). While benefit enhancements are permissible, a large rebate should be used to provide a direct benefit enhancement, such as a reduced co-pay, and not for a general benefit, such as flu shots.

The agencies have not provided any details as to what amount is so small that it does not need to be returned to the employee. (Insurers are not required to issue a rebate check to individuals if the amount is less than \$5.00.) A cash rebate is taxable income if the premium was paid with pre-tax dollars, so issuing a check that is very small after taxes should not be necessary. If an employer knows it costs \$2.00 to issue a check, issuing a rebate check for \$1.00 should not be necessary. However, an employer cannot simply keep the rebate if it determines that cash refunds are not practical – it will need to use the employee share of the rebate to provide a benefit enhancement or premium reduction.

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You should not act on this information without consulting legal counsel or other knowledgeable advisors.



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