Winter 2022 Benefits Newsletter

MORETON & COMPANY

IRS Releases 2022 Cost of Living Adjustments for Health FSAS, DCAPS, and Other Fringe Benefits

The IRS has released the 2022 cost-of-living adjustments (COLAs) for a wide variety of tax-related limits, including limits relating to health FSAs, qualified transportation fringe benefits, qualified small employer health reimbursement arrangements (QSEHRAs), adoption assistance, and DCAPs.

- **Health FSAs:** For 2022, the dollar limit on employee salary reduction contributions to health FSAs will be $2,850 (up from $2,750). If the cafeteria plan permits health FSA carryovers, the maximum amount that can be carried over to the 2023 plan year is $570 (up from $550).
- **Qualified Transportation Fringe Benefits:** For 2022, the monthly limit on the amount that may be excluded from an employee's income for qualified parking benefits will be $280 (up from $270). The combined monthly limit for transit passes and vanpooling expenses for 2022 will be $280 (up from $270).
- **QSEHRAs:** For 2022, the maximum amount of payments and reimbursements under a QSEHRA will be $5,450 for self-only coverage and $11,050 for family coverage (up from $5,300 and $10,700, respectively).
- **Adoption Assistance Exclusion and Adoption Credit:** The maximum amount that may be excluded from an employee's gross income under an employer-provided adoption assistance program for the adoption of a child will be $14,890 for 2022 (up from $14,440). In addition, the maximum adoption credit allowed to an individual for the adoption of a child will be $14,890 for 2022 (up from $14,440). Both the exclusion and the credit will begin to be phased out for individuals with modified adjusted gross incomes greater than $223,410 and will be entirely phased out for individuals with modified adjusted gross incomes of $263,410 or more.
- **DCAPs:** The maximum amount of DCAP benefits that can be excluded from income has not been adjusted for cost-of-living changes (it is a non-indexed limit). However, that amount was temporarily increased to $10,500/$5,250 for 2021 only and will return to $5,000/$2,500 for 2022 and future years unless extended or otherwise changed by Congress. Nevertheless, there are adjustments to certain general tax limits that are relevant to the federal income tax savings under a DCAP. These include the 2022 tax rate tables, earned income credit amounts, and standard deduction amounts.

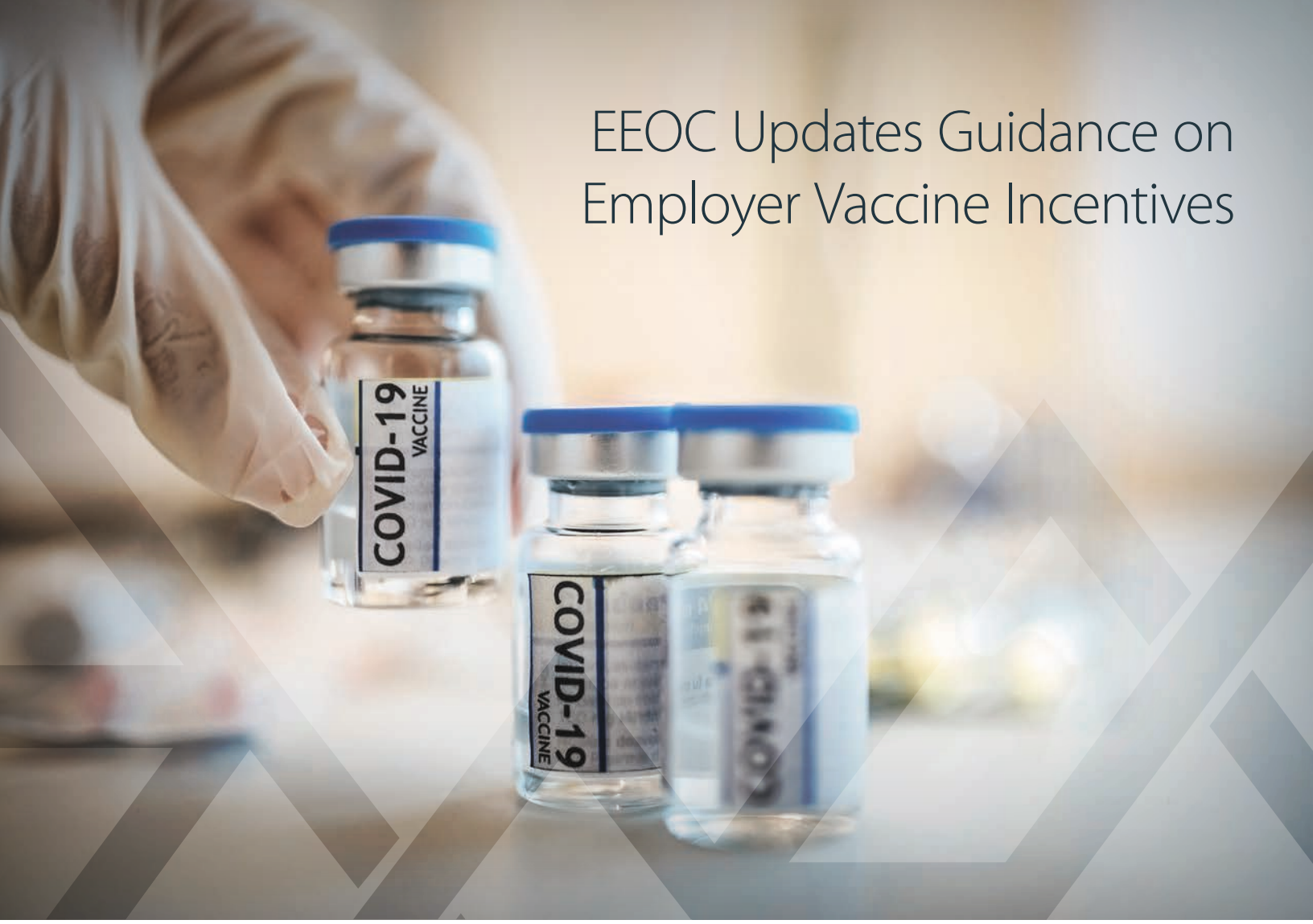
No Penalty for Delay in Providing Documents Requested by Lawyer During Litigation

A participant in a self-insured ERISA health plan, in connection with a lawsuit over a benefits denial, asked the court to award him penalties for the plan administrator's failure to furnish documents in response to a written request. (As background, a court may impose a penalty of up to $110 per day on an ERISA plan administrator that fails to furnish information within 30 days after a participant's or beneficiary's written request.) The participant's claim for penalties was based on an email from his lawyer to the plan administrator's lawyer. The requested documents were eventually made part of the administrative record for litigation purposes-but not within 30 days of the email.

For several reasons, the court declined to award penalties. First, the email from the participant's lawyer could not form the basis for a claim for penalties because the legal complaint that included the penalty claim was filed before that email was sent. And even if the email had predated the complaint, the relevant ERISA provision did not apply to requests made between attorneys during litigation. The court drew a distinction between this type of litigation-related request and a document request sent by a participant's attorney to a plan administrator (which may trigger failure-to-furnish penalties). Moreover, the court said that even if the email were "somehow actionable under ERISA," it would exercise its discretion and not impose penalties in this situation because the delay in providing the documents could be partially attributed to the COVID-19 pandemic and did not delay the legal proceedings or harm the participant's ability to bring an ERISA claim. The participant offered several earlier communications as an alternative basis for penalties, but the court found no justification for awarding penalties based on these requests.

Benefit-related lawsuits often include requests for penalties for failure to furnish documents. To avoid the potential accumulation of penalties, plan administrators should respond promptly to written requests for documents that are covered by these disclosure rules. Keep in mind that these penalties are imposed on the ERISA plan administrator -for a single employer plan, this is typically the employer/plan sponsor.

EEOC Updates Guidance on Employer Vaccine Incentives



- The EEOC has updated its previously issued guidance on COVID-19-related compliance issues under the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and other federal employment nondiscrimination laws. The updated Q&As address workplace issues related to COVID-19 vaccinations, including employer-provided vaccination incentives for employees and their family members.
- The revised language of the Q&As indicates that the ADA does not limit the incentives an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination or provide confirmation of vaccination, so long as the health care provider administering the COVID-19 vaccine is not the employer or its agent. But if the vaccination is administered by the employer or its agent, the ADA's rules on disability-related inquiries apply, and the value of the incentive may not be so substantial as to be coercive. In addition, GINA does not limit the incentives an employer may offer to employees to encourage them or their family members to receive a COVID-19 vaccine or provide confirmation of vaccination, so long as the health care provider administering the vaccine is not the employer or its agent. Previous Q&As (which are unchanged) address other GINA considerations related to vaccination incentives.
- This update does not substantively change the EEOC's prior guidance on vaccination incentives under the ADA and GINA, but the wording more clearly states that neither of these laws limits incentives when the vaccine is administered by a provider other than the employer or its agent. When the employer or its agent administers the vaccine, the EEOC continues to assert that incentives subject to the ADA cannot be "so substantial as to be coercive" but, unfortunately, still does not shed any light on the meaning of those terms. In addition, to comply with GINA, an employer cannot offer any incentives to an employee in exchange for a family member's receipt of a vaccination administered by the employer or its agent. Employers implementing incentives should continue to monitor agency guidance, including the recent tri-agency FAQs on the application of HIPAA wellness program rules to vaccine incentives.

What Should We Do if an Employee Is Inadvertently Allowed to Make Health FSA Salary Reductions That Exceed the Code's Limit?

Question: We inadvertently allowed an employee to make health FSA salary reductions that exceed the Code's limit. Will this cause our cafeteria plan to lose its tax-advantaged status?

Answer: The general rule is that a cafeteria plan will lose its tax-advantaged status if it fails to comply with the annual limit on health FSA salary reductions ($2,750 for plan years beginning in 2020 or 2021). However, the tax-advantaged status of a plan that has been timely amended to comply with the limit will not be lost solely because one or more employees are inadvertently allowed to elect salary reductions in excess of the limit, so long as all of the following requirements are met:

- The plan's terms apply uniformly to all participants (as required under IRS cafeteria plan regulations);
- The error results from a reasonable mistake by the employer or its agent (e.g., a TPA); and
- The error is timely corrected;
- For purposes of the last requirement, salary reductions in excess of the limit must be paid to the employee and reported as wages for federal income tax withholding and employment tax purposes on the employee's Form W-2. Calendar-year plans must report the excess on the Form W-2 for the year in which the correction was made; non-calendar-year plans must determine the plan year in which the correction was made and report the excess on the Form W-2 for the year in which that plan year ends.
- For example, assume that an employee elected health FSA salary reductions of $2,750 for 2020 under a calendar-year plan that was timely amended for the limit. Due to an administrative error, however, her actual salary reductions reached $2,850 after the first pay period in December 2020. The mistake was discovered at that time and was corrected by refunding the $100 excess salary reductions, less income tax withholding and employment taxes, by December 31, 2020. The excess was reported as wages for income tax withholding and employment tax purposes on the employee's Form W-2 for 2020 (issued in 2021). Under these circumstances, the excess health FSA salary reductions will not cause the cafeteria plan to lose its tax-advantaged status, assuming the other requirements of the relief are met. The same would be true if the mistake were not discovered until April 2021, provided that the excess is refunded by December 31, 2021 and reported on the employee's Form W-2 for 2021 (issued in 2022).
- Note that this relief is not available for employers whose federal tax returns are under examination with respect to cafeteria plan benefits for any cafeteria plan year in which there was a failure to comply with the limit on health FSA salary reductions. For this purpose, a tax return is treated as being under examination if the employer has received written notification from an examining agent that cites Code § 125(i) (the Code section that provides for the limit) as an issue under consideration.

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