

Final Regulations Issued on Comparable Contributions to HSAs and Excise Tax Return Requirements (T.D. 9457)

<http://edocket.access.gpo.gov/2009/pdf/E9-21225.pdf>

The IRS issued final regulations on “comparable contributions” to health savings accounts that are effective for contributions made on or after January 1, 2010. The final rule allows employer contributions for non-highly compensated employees that are larger than those for highly compensated employees; allows the employer to make the maximum contribution on behalf of mid-year eligible individuals; and prescribes the manner for reporting and paying excise taxes for the failure to make comparable contributions. *74 Federal Register 45994 (September 8, 2009)*

Highly Compensated Employees

The final regulations allow an employer to contribute to the HSAs of nonhighly compensated employees in an amount that is larger than the employer's contribution to the HSAs of the highly compensated employees with comparable coverage during a period. Contributions to highly compensated employees may not exceed employer contributions to the HSAs of nonhighly compensated employees with comparable coverage during a period.

The comparability rules will still apply with respect to contributions to HSAs for those eligible individuals who are in the same category of employees with high-deductible health plan coverage (HDHP).

The final regulations define a highly compensated employee as either (1) a 5-percent owner during the tax year or the preceding year or (2) an employee who for the preceding year has compensation from the employer in excess of \$110,000 (indexed for inflation for 2009) and, if elected by the employer, was in the group consisting of the top 20 percent of employees when ranked on compensation.

Mid-Year Eligibility

Eligible individuals may make or have made on their behalf the maximum annual HSA contribution based on their HDHP coverage during the last month of the tax year. Under the final regulations, an employer can contribute up to this maximum contribution on behalf of all employees who are eligible individuals during the last month of the tax year, including employees who become eligible after January 1 of the calendar year and eligible individuals who are hired after that date (“mid-year eligible individuals”). However, an employer who contributes more than a pro-rata amount to a mid-year eligible individual must contribute, on an equal and uniform basis, more than a pro-rata amount to the HSAs of all comparable participating employees who are mid-year eligible individuals.

A portion of the contribution is included in income and subject to an additional 10 percent tax if the individual fails to remain an eligible individual for 12 months after the last month of the taxable year (recapture rule and testing period).

Special Comparability Rules

A qualified HSA distribution is a direct distribution of an amount from a health flexible spending arrangement (health FSA) or from a health reimbursement arrangement (HRA) to an HSA. Under the final regulations, if an employer offers this type of distribution to any employee covered under any HDHP, the employer must offer qualified HSA distributions to all employees who are eligible individuals covered under any HDHP. Employers who offer qualified HSA distributions only to employees who are eligible individuals covered under the employer's HDHP are not required to offer qualified HSA distributions to employees who are eligible individuals, but who are not covered under the employer's HDHP.

Reporting and Payment of the Excise Tax

Under section 4980G, an excise tax is imposed on an employer that fails to make comparable contributions to the HSAs of its employees. Excise tax must be reported on Form 8928, "Return of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code." The tax must be paid at the time prescribed for filing the return, without extensions.

The excise tax return for noncomparable contributions under Code Sec. 4980G is due on or before the 15th day of the fourth month following the calendar year in which the noncomparable contribution was made. The final regulations also provide guidance with respect to the general requirements of excise tax returns (Reg. §54.6011-2), the time and place for filing these excise tax returns (Reg. §54.6071-1 and Reg. §54.6091-1), signing the returns (Reg. §54.6061-1) and the time and place for paying the tax shown on the returns (Reg. §54.6151-1).