

not the Code. The U.S. Department of Labor, in 29 CFR part 825, has published rules interpreting the requirements of FMLA, and the Department of Labor has jurisdiction relating to those rights or obligations. This notice of proposed rulemaking does not interpret FMLA; it provides guidance on the cafeteria plan rules that apply to an employee in circumstances to which FMLA and the Labor Regulations thereunder also apply. The Department of Labor has advised the Department of the Treasury, including the Internal Revenue Service (IRS), that the provisions of this notice of proposed rulemaking do not conflict with, and are not inconsistent with, the provisions of FMLA or the Labor Regulations thereunder.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Catherine Fuller, Office of Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and Department of the Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. Section 1.125–3 is added to read as follows:

§ 1.125–3 Effect of the Family and Medical Leave Act (FMLA) on the operation of cafeteria plans.

Q–1: *May an employee taking FMLA leave revoke an existing election of group health plan coverage under a cafeteria plan?*

A–1: Yes. An employee taking FMLA leave may revoke an existing election of group health plan coverage (including a health flexible spending arrangement (FSA)) under a cafeteria plan for the remaining portion of the coverage period. See 29 CFR 825.209(e). FMLA also requires that an employee be permitted to choose to be reinstated in the group health plan coverage (including a health FSA) provided under a cafeteria plan upon returning from FMLA leave if the employee's group health plan coverage terminated while on FMLA leave (either by revocation or nonpayment of premiums). Such an employee is entitled, under FMLA, to be reinstated on the same terms as prior to taking FMLA leave (including family or dependent coverage). See 29 CFR 825.209(e) and 825.215(d). However, the employee has no greater right to benefits for the remainder of the plan year than an employee who has been continuously working during the plan year. In addition to the rights granted under FMLA, such an employee has the right to revoke or change elections (e.g., because of changes in family status or significant cost or coverage changes imposed by a third-party provider) under the same terms and conditions as are available to employees participating in the cafeteria plan who are not on FMLA leave.

Q–2: *Who is responsible for making premium payments under a cafeteria plan when an employee on FMLA leave continues group health plan coverage?*

A–2: An employee is entitled to continue group health plan coverage (including a health FSA) during FMLA leave whether or not provided under a

health FSA or other component of a cafeteria plan. See 29 CFR 825.209(b). An employee making premium payments under a cafeteria plan who chooses to continue group health plan coverage (including a health FSA) while on FMLA leave is responsible for the share of group health premiums that the employee was paying while working, such as amounts paid pursuant to a salary reduction agreement. The employer must continue to contribute the share of the cost of the employee's coverage that the employer was paying before the employee commenced FMLA leave. See 29 CFR 825.100(b) and 825.210(a).

Q–3: *What payment options are required or permitted to be offered under a cafeteria plan to an employee who continues group health plan coverage (including a health FSA) while on unpaid FMLA leave, and what is the tax treatment of these payments?*

A–3: (a) *In general* A cafeteria plan may, on a nondiscriminatory basis, offer one or more of the following payment options (subject to the limitations described in paragraph (b) of this Q&A–3) to an employee who continues group health plan coverage (including a health FSA) while on unpaid FMLA leave. These options are referred to in this section as pre-pay, pay-as-you-go and catch-up.

(1) *Pre-pay.* (i) Under the pre-pay option, a cafeteria plan may permit an employee to pay, prior to commencement of the FMLA leave period, the amounts due for the FMLA leave period. However, the Labor Regulations under FMLA provide that under no circumstances may the employer mandate that an employee pre-pay the amounts due for the leave period. See 29 CFR 825.210(c)(3) and (4).

(ii) Contributions under the pre-pay option may be made on a pre-tax salary reduction basis from any taxable compensation (including the cashing out of unused sick days or vacation days). These contributions will not be included in the employee's gross income, provided that all cafeteria plan requirements are satisfied. For example, see Q&A–5 of this section regarding restrictions on pre-tax salary reduction contributions when an employee's FMLA leave spans two cafeteria plan years.

(iii) Contributions under the pre-pay option may also be made on an after-tax basis. See Prop. Treas. Reg. § 1.125–1, Q&A–5.¹

¹ Published as a proposed rule at 49 FR 19321 (May 7, 1984).