

(2) *Pay-as-you-go.* (i) Under the pay-as-you-go option, employees may pay their share of the premium payments on the same schedule as payments would be made if the employee were not on leave or under any other payment schedule permitted by the Labor Regulations at 29 CFR 825.210(c) (i.e., on the same schedule as payments are made under the Consolidated Omnibus Reconciliation Act of 1985, Public Law 99-272; under the employer's existing rules for payment by employees on leave without pay; or under any other system voluntarily agreed to between the employer and the employee that is not inconsistent with this section or with 29 CFR 825.210(c)).

(ii) Contributions under the pay-as-you-go option are generally made by the employee on an after-tax basis. However, contributions may be made on a pre-tax basis to the extent that the contributions are made from taxable compensation (e.g., cashing out unused sick or vacation days) that is due the employee during the leave period, and provided that all cafeteria plan requirements are satisfied.

(iii) An employer is not required to continue the health coverage of an employee who fails to make required premium payments while on FMLA leave. See 29 CFR 825.212. However, if the employer chooses to continue the health coverage of an employee who fails to make required premium payments while on FMLA leave, the employer is entitled to recoup those payments as set forth in paragraph (a)(3)(i) of this Q&A-3. See also Q&A-6 of this section regarding coverage under a health FSA when an employee fails to make the required premium payments while on FMLA leave.

(3) *Catch-up.* (i) An employer that continues providing group health coverage to an employee who does not pay premiums on FMLA leave is, to the extent provided under the Labor Regulations, permitted to utilize the catch-up option to recoup the employee's share of premium payments. See, e.g., 29 CFR 825.212(b).

(ii) Where an employee is electing to use the catch-up option, the employer and the employee must agree in advance of the coverage period that: the employee elects to continue health coverage while on unpaid FMLA leave; the employer will assume responsibility for advancing payment of the premiums on the employee's behalf during the FMLA leave; and these advance amounts must be paid by the employee when the employee returns from FMLA leave.

(iii) Contributions under the catch-up option may be made on a pre-tax salary

reduction basis when the employee returns from FMLA leave from any available taxable compensation (including the cashing out of unused sick days and vacation days). These contributions will not be included in the employee's gross income, provided that all cafeteria plan requirements are satisfied.

(iv) Contributions under the catch-up option may also be made on an after-tax basis. See Prop. Treas. Reg. § 1.125-1, Q&A-5.²

(b) *Exceptions.* Cafeteria plans may offer (pursuant to 29 CFR 825.210(c)) one or more of the payment options described in paragraph (a) of this Q&A-3, with the following exceptions:

(1) The pre-pay option cannot be the sole option offered to employees on FMLA leave. However, the cafeteria plan may include pre-payment as an option for employees on FMLA leave, even if such option is not offered to employees on non-FMLA leave-without-pay.

(2) The catch-up option can be the sole option offered to employees on FMLA leave if and only if the catch-up option is the sole option offered to employees on non-FMLA leave-without-pay.

(3) A cafeteria plan cannot offer employees on FMLA leave a choice of either the pre-pay option or the catch-up option without also offering the pay-as-you-go option, if the pay-as-you-go option is offered to employees on non-FMLA leave-without-pay.

(c) *Voluntary waiver of employee payments.* In addition to the foregoing payment options, an employer may voluntarily waive, on a nondiscriminatory basis, the requirement that employees who elect to continue health coverage while on FMLA leave pay the amounts the employees would otherwise be required to pay for the leave period.

Q-4: *Do the special FMLA requirements concerning an employee who continues group health plan coverage under a cafeteria plan apply if the employee is on paid FMLA leave?*

A-4: No. The Labor Regulations provide that, if an employee's FMLA leave is substituted paid leave as described at 29 CFR 825.207 and the employee continues group health plan coverage while on FMLA leave, the employee's share of the premiums must be paid by the method normally used during any paid leave (i.e., salary reduction). See 29 CFR 825.210(b).

Q-5: *What restrictions apply to contributions when an employee's*

FMLA leave spans two cafeteria plan years?

A-5: (a) Contributions to a cafeteria plan during FMLA leave will not be included in an employee's gross income, provided that the plan complies with all cafeteria plan requirements. Among other requirements, a plan may not operate in a manner that enables employees on FMLA leave to defer compensation from one cafeteria plan year to a subsequent cafeteria plan year. See Prop. Treas. Reg. § 1.125-2, Q&A-5.³

(b) The following example illustrates this Q&A-5:

Example. Employee A elects health coverage under a calendar year cafeteria plan maintained by Employer X. A's premium for health coverage is \$100 per month throughout the 12-month period of coverage. A takes FMLA leave for 12 weeks beginning on October 31 after making 10 months worth of premiums totalling \$1000 (10 months × \$100 = \$1000). A maintains health coverage while on FMLA leave. A utilizes the pre-pay option by cashing-out A's unused sick days in order to make the required premium payments due while A is on FMLA leave. Because A cannot defer compensation from one plan year to a subsequent plan year, A may pre-pay the premiums due in November and December (i.e., \$100 per month) on a pre-tax basis, but A cannot pre-pay the premium payment due in January on a pre-tax basis. If A participates in the cafeteria plan in the subsequent plan year, A must use another option (e.g., pay-as-you-go or catch-up) to make the premium payment due in January.

Q-6: *Are there special rules concerning employees taking FMLA leave who participate in health FSAs offered under a cafeteria plan?*

A-6: (a) *In general.* (1) A health plan that is a flexible spending arrangement (FSA) offered under a cafeteria plan must conform to the generally applicable rules in this section concerning employees who take FMLA leave. Thus, FMLA requires that an employee taking FMLA leave be permitted to—

(i) Continue coverage under a health FSA while on FMLA leave; or

(ii) Revoke an existing health FSA election under the cafeteria plan for the remainder of the coverage period. See 29 CFR 825.209(e).

(2) FMLA also requires the plan to permit the employee to be reinstated in the health FSA upon return from FMLA leave on the same terms as prior to taking FMLA leave. See 29 CFR 825.215(d) and paragraph (b)(2) of this Q&A-6. However, reinstatement is at the employee's election and under no circumstances may an employer require

² Published as a proposed rule at 49 FR 19321 (May 7, 1984).

³ Published as a proposed rule at 54 FR 9460 (March 7, 1989).