

116TH CONGRESS
2D SESSION

S. 4372

To provide for unused benefits in a dependent care FSA to be carried over from 2020 to 2021, to provide for benefits to be accessed after termination of employment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 30, 2020

Ms. SMITH introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To provide for unused benefits in a dependent care FSA to be carried over from 2020 to 2021, to provide for benefits to be accessed after termination of employment, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Dependent Care Ex-
5 pense Relief Act of 2020”.

1 **SEC. 2. CARRY OVER OF DEPENDENT CARE FSA BENEFITS**
2 **FROM 2020.**

3 (a) **IN GENERAL.**—Notwithstanding any applicable
4 rule or regulation under section 125 or 129 of the Internal
5 Revenue Code of 1986—

6 (1) a dependent care flexible spending arrange-
7 ment shall permit participants who make the certifi-
8 cation under subsection (b) to carry over any
9 amount of unused benefit or contribution (without
10 limitation) from any plan year beginning or ending
11 in 2020 to the subsequent plan year under rules
12 similar to the rules applicable to health flexible
13 spending arrangements, and

14 (2) a plan or other arrangement shall not fail
15 to be treated as a cafeteria plan or dependent care
16 flexible spending arrangement merely because such
17 plan or arrangement permits the carryover under
18 paragraph (1).

19 (b) **CERTIFICATION BY EMPLOYEE.**—In applying for
20 the carryover under subsection (a)(1), the employee shall
21 certify that the amount to be carried over is attributable
22 to a reduction in expected dependent care expenses in the
23 plan year due to a reduction in work hours, lack of avail-
24 able dependent care, or both, or other factors as deter-
25 mined by the Secretary of the Treasury (or the Secretary's

1 delegate) due to the outbreak of coronavirus disease 2019
2 (COVID–19) in the United States.

3 (c) PENALTY.—

4 (1) IN GENERAL.—There is hereby imposed a
5 tax on the failure of a covered cafeteria plan to meet
6 the requirements of subsection (a)(1) with respect to
7 any employee.

8 (2) AMOUNT OF TAX.—

9 (A) IN GENERAL.—The amount of the tax
10 imposed by paragraph (1) on any failure with
11 respect to an employee shall be \$100 for each
12 day in the noncompliance period with respect to
13 such failure.

14 (B) NONCOMPLIANCE PERIOD.—For pur-
15 poses of this subsection, the term “noncompli-
16 ance period” means, with respect to any failure,
17 the period—

18 (i) beginning on the date such failure
19 first occurs, and

20 (ii) ending on the earlier of—

21 (I) the date such failure is cor-
22 rected, or

23 (II) the date which is 6 months
24 after the date the employee terminates
25 employment with the employer.

1 (C) LIMITATIONS.—Rules similar to the
2 rules of subsections (b)(3) and (c) of section
3 4980B of the Internal Revenue Code of 1986
4 shall apply with respect to the tax under this
5 section.

6 (3) COVERED CAFETERIA PLAN.—For purposes
7 of this subsection, the term “covered cafeteria plan”
8 means a cafeteria plan under which a benefit is pro-
9 vided through employer contributions to a dependent
10 care flexible spending arrangement.

11 (4) LIABILITY FOR TAX.—Rules similar to the
12 rules of section 4980B(e) of the Internal Revenue
13 Code of 1986 shall apply for purposes of deter-
14 mining liability for the tax imposed under this sec-
15 tion.

16 (5) COLLECTION OF TAX.—The tax imposed by
17 paragraph (1) shall be collected in the same manner
18 as the tax under section 4980B of such Code.

19 (d) DEFINITIONS.—Any term used in this section
20 which is also used in section 125 of the Internal Revenue
21 Code of 1986 or the rules or regulations thereunder shall
22 have the same meaning as when used in such section or
23 regulations.

24 (e) PLAN AMENDMENTS.—A plan or arrangement
25 shall not be treated as violating the requirements of sub-

1 section (a)(1) (including for purposes of subsection (c)),
2 if—

3 (1) the plan or arrangement is amended to
4 meet such requirements on or before December 31,
5 2020,

6 (2) such amendment applies retroactively to any
7 plan year ending in 2020, and

8 (3) the plan or arrangement operates in accord-
9 ance with such requirements at all times after the
10 date of the enactment of this Act.

11 A plan or arrangement shall not be treated as failing to
12 satisfy any requirement of the Internal Revenue Code of
13 1986 merely because the plan or arrangement operates as
14 provided in subparagraph (C).

15 **SEC. 3. SPEND-DOWN OF BENEFITS IN DEPENDENT CARE**

16 **FLEXIBLE SPENDING ACCOUNTS.**

17 (a) IN GENERAL.—Chapter 43 of the Internal Rev-
18 enue Code of 1986 is amended by inserting after section
19 4980 the following new section:

20 **“SEC. 4980A. TREATMENT OF UNUSED BENEFITS IN DE-**

21 **PENDENT CARE FLEXIBLE SPENDING AR-**

22 **RANGEMENTS.**

23 “(a) GENERAL RULE.—There is hereby imposed a
24 tax on the failure of a covered cafeteria plan to meet the

1 requirements of subsection (c) with respect to any em-
2 ployee.

3 “(b) AMOUNT OF TAX.—

4 “(1) IN GENERAL.—The amount of the tax im-
5 posed by subsection (a) on any failure with respect
6 to an employee shall be \$100 for each day in the
7 noncompliance period with respect to such failure.

8 “(2) NONCOMPLIANCE PERIOD.—For purposes
9 of this section, the term ‘noncompliance period’
10 means, with respect to any failure, the period—

11 “(A) beginning on the date such failure
12 first occurs, and

13 “(B) ending on the earlier of—

14 “(i) the date such failure is corrected,
15 or

16 “(ii) the date which is 6 months after
17 the date the employee terminates employ-
18 ment with the employer.

19 “(3) LIMITATIONS.—Rules similar to the rules
20 of subsections (b)(3) and (c) of section 4980B shall
21 apply with respect to the tax under this section.

22 “(c) DISTRIBUTIONS AFTER TERMINATION OF EM-
23 PLOYMENT.—A covered cafeteria plan meets the require-
24 ments of this subsection only if the cafeteria plan provides
25 that, if an employee who is receiving benefits provided

1 through employer contributions to a dependent care flexi-
2 ble spending arrangement ceases (whether voluntarily or
3 involuntarily) to work for the employer during the plan
4 year, the employee may elect to be reimbursed from un-
5 used benefits for dependent care expenses incurred—

6 “(1) after the date the employee terminates em-
7 ployment with the employer, and

8 “(2) before the last day of such plan year (in-
9 cluding any grace period under the arrangement).

10 “(d) COVERED CAFETERIA PLAN.—For purposes of
11 this section, the term ‘covered cafeteria plan’ means a caf-
12 eteria plan under which a benefit is provided through em-
13 ployer contributions to a dependent care flexible spending
14 arrangement.

15 “(e) DEFINITIONS.—Any term used in this section
16 which is also used in section 125 of the Internal Revenue
17 Code of 1986 or the rules or regulations thereunder shall
18 have the same meaning as when used in such section or
19 regulations.

20 “(f) LIABILITY FOR TAX.—Rules similar to the rules
21 of section 4980B(e) shall apply for purposes of deter-
22 mining liability for the tax imposed under this section.”.

23 (b) CLERICAL AMENDMENT.—The table of sections
24 for chapter 43 of the Internal Revenue Code of 1986 is

1 amended by inserting after the item relating to section
2 4980 the following new item:

“Sec. 4980A. Treatment of unused benefits in dependent care flexible spending
arrangements.”.

3 (c) EFFECTIVE DATE.—

4 (1) IN GENERAL.—The amendments made by
5 this section shall apply to plan years ending after
6 the date of the enactment of this Act.

7 (2) PLAN AMENDMENTS.—A plan or arrange-
8 ment shall not be treated as violating the require-
9 ments of section 4980A(c) of the Internal Revenue
10 Code of 1986, as added by this Act (including for
11 purposes of section 4980A(a) of such Code, as so
12 added), if—

13 (A) the plan or arrangement is amended to
14 meet such requirements on or before the last
15 day of the first plan year ending after the date
16 of the enactment of this Act,

17 (B) such amendment applies retroactively
18 to such first plan year, and

19 (C) the plan or arrangement operates in
20 accordance with such requirements at all times
21 after the date of the enactment of this Act.

22 A plan or arrangement shall not be treated as failing
23 to satisfy any requirement of the Internal Revenue

1 Code of 1986 merely because the plan or arrange-
2 ment operates as provided in subparagraph (C).

3 **SEC. 4. DEPENDENT CARE EXPENSES.**

4 As soon as practicable after the date of the enactment
5 of this Act, the Secretary of the Treasury (or the Sec-
6 retary's delegate) shall issue such interim or temporary
7 rules or guidance as are necessary to expand the definition
8 of dependent care expenses eligible to be reimbursed from
9 a dependent care flexible spending arrangement, to ac-
10 count for changes in the dependent care needs of tax-
11 payers due to—

12 (1) the emergency involving Federal primary re-
13 sponsibility determined to exist by the President
14 under section 501(b) of the Robert T. Stafford Dis-
15 aster Relief and Emergency Assistance Act (42
16 U.S.C. 5191(b)) with respect to coronavirus disease
17 2019 (COVID–19), and

18 (2) the national emergency declared by the
19 President under the National Emergencies Act (50
20 U.S.C. 1601 et seq.) with respect to coronavirus dis-
21 ease 2019 (COVID–19).

22 Such rules or guidance shall remain in effect until the last
23 day of either such emergency, whichever is later.

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