

116TH CONGRESS
2D SESSION

S. 4371

To amend the Internal Revenue Code of 1986 to require employers to cash out the flexible spending accounts of employees who separate from employment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 30, 2020

Ms. SMITH (for herself and Ms. SINEMA) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to require employers to cash out the flexible spending accounts of employees who separate from 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 “Fair FSAs Act of
5 2020”.

1 **SEC. 2. CASH-OUTS OF FLEXIBLE SPENDING ACCOUNTS.**

2 (a) IN GENERAL.—Subsection (h) of section 125 of
3 the Internal Revenue Code of 1986 is amended to read
4 as follows:

5 “(h) SPECIAL RULES FOR UNUSED BENEFITS IN
6 HEALTH FLEXIBLE SPENDING ARRANGEMENTS.—

7 “(1) DISTRIBUTIONS UPON TERMINATION OF
8 EMPLOYMENT.—

9 “(A) IN GENERAL.—If a benefit is pro-
10 vided under a cafeteria plan through employer
11 contributions to a health flexible spending ar-
12 rangement—

13 “(i) such plan or arrangement shall
14 not fail to be treated as a cafeteria plan or
15 health flexible spending arrangement (and
16 shall not fail to be treated as an accident
17 or health plan) for purposes of this title
18 merely because such arrangement provides
19 for an election meeting the requirements of
20 subparagraph (B), and

21 “(ii) such benefit shall not be treated
22 as a qualified benefit for purposes of this
23 section unless such arrangement provides
24 for such election.

25 “(B) ELECTION.—The requirements of
26 this subparagraph are met if the health flexible

1 spending arrangement provides that, if the em-
2 ployee terminates employment with the em-
3 ployer (whether voluntarily or involuntarily)
4 during the plan year, the employee may elect to
5 receive in cash an amount equal to—

6 “(i) the excess, if any, of—

7 “(I) all contributions made to the
8 arrangement for such plan year as of
9 the date the employee terminates em-
10 ployment with the employer, over

11 “(II) the amount of reimburse-
12 ments received by the employee under
13 such arrangement during such plan
14 year as of the date the employee
15 ceases to be a participant in the ar-
16 rangement (including any grace pe-
17 riod), reduced by

18 “(ii) the amount of tax withheld
19 under subparagraph (C).

20 “(C) DEDUCTION OF TAX.—In paying to
21 an employee the cash payment elected under
22 subparagraph (B), the employer shall deduct
23 and withhold from the employee an amount
24 equal to—

1 “(i) the taxes which the employer
2 would have been required to deduct and
3 withhold if the employee had received the
4 equivalent amount of wages instead of hav-
5 ing made salary reduction contributions to
6 the health flexible spending arrangement,
7 and

8 “(ii) in the case of a cash payment of
9 any employer contributions to the health
10 flexible spending arrangement, the taxes
11 which the employer would have been re-
12 quired to deduct and withhold if the em-
13 ployee had received the equivalent amount
14 of wages in lieu of such contributions,
15 determined as if the employee had received such
16 wages on the date the cash payment is made.
17 The amount of tax so deducted and withheld
18 shall be remitted by the employer in the same
19 manner as amounts collected under section
20 3102.

21 “(2) QUALIFIED RESERVIST DISTRIBUTIONS.—

22 “(A) IN GENERAL.—For purposes of this
23 title, a plan or other arrangement shall not fail
24 to be treated as a cafeteria plan or health flexi-
25 ble spending arrangement (and shall not fail to

be treated as an accident or health plan) merely because such arrangement provides for qualified reservist distributions.

“(B) QUALIFIED RESERVIST DISTRIBUTION.—For purposes of this paragraph, the term ‘qualified reservist distribution’ means any distribution to an individual of all or a portion of the balance in the employee’s account under such arrangement if—

“(i) such individual was (by reason of being a member of a reserve component (as defined in section 101 of title 37, United States Code)) ordered or called to active duty for a period in excess of 179 days or for an indefinite period, and

“(ii) such distribution is made during the period beginning on the date of such order or call and ending on the last date that reimbursements could otherwise be made under such arrangement for the plan year which includes the date of such order or call.”.

(b) TREATMENT AS ACCIDENT OR HEALTH PLAN.—

Section 106 of the Internal Revenue Code of 1986 is

1 amended by adding at the end the following new sub-
2 section:

3 “(h) DISTRIBUTIONS UPON TERMINATION OF EM-
4 PLOYMENT.—A plan shall not fail to be treated as a health
5 flexible spending arrangement under this section or sec-
6 tion 105 merely because such plan provides for an election
7 meeting the requirements of section 125(h)(1)(B).”.

8 (c) EXCISE TAX ON FAILURE TO PROVIDE DIS-
9 TRIBUTIONS UPON TERMINATION OF EMPLOYMENT.—

10 (1) IN GENERAL.—Chapter 43 of the Internal
11 Revenue Code of 1986 is amended by inserting after
12 section 4980 the following new section:

13 **“SEC. 4980A. FAILURE TO PROVIDE DISTRIBUTIONS FROM**
14 **HEALTH FLEXIBLE SPENDING ARRANGE-**
15 **MENTS UPON TERMINATION OF EMPLOY-**
16 **MENT.**

17 “(a) GENERAL RULE.—There is hereby imposed a
18 tax on the failure of a covered cafeteria plan to meet the
19 requirements of section 125(h)(1) (including a failure to
20 withhold and remit any tax as required by subparagraph
21 (C) thereof) with respect to any employee.

22 “(b) AMOUNT OF TAX.—

23 “(1) IN GENERAL.—The amount of the tax im-
24 posed by subsection (a) on any failure with respect

1 to an employee shall be \$100 for each day in the
 2 noncompliance period with respect to such failure.

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

6 “(A) beginning on the date such failure
 7 first occurs, and

8 “(B) ending on the earlier of—

9 “(i) the date such failure is corrected,
 10 or

11 “(ii) the date which is 6 months after
 12 the date the employee terminates employ-
 13 ment with the employer.

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

17 “(c) COVERED CAFETERIA PLAN.—For purposes of
 18 this section, the term ‘covered cafeteria plan’ means a caf-
 19 eteria plan (as defined in section 125(d)) under which a
 20 benefit is provided through employer contributions to a
 21 health flexible spending arrangement.

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

1 (2) CLERICAL AMENDMENT.—The table of sec-
 2 tions for chapter 43 of such Code is amended by in-
 3 serting after the item relating to section 4980 the
 4 following new item:

“Sec. 4980A. Failure to provide distributions from health flexible spending ar-
 rangements upon termination of employment.”.

5 (d) EFFECTIVE DATE.—

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

9 (2) PLAN AMENDMENTS.—A plan or arrange-
 10 ment shall not be treated as violating the require-
 11 ments of section 125(h)(1) of the Internal Revenue
 12 Code of 1986, as added by this section (including for
 13 purposes of section 4980A of such Code, as so
 14 added), if—

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

19 (B) such amendment applies retroactively
 20 to the first day of such first plan year, and

21 (C) the plan or arrangement operates in
 22 accordance with such requirements as of the
 23 first day of such first plan year.

1 A plan or arrangement shall not be treated as failing
2 to satisfy any requirement of the Internal Revenue
3 Code of 1986 merely because the plan or arrange-
4 ment operates as provided in subparagraph (C).

5 **SEC. 3. EXTENSION OF TIME FOR FILING FSA CLAIMS.**

6 (a) IN GENERAL.—Notwithstanding any applicable
7 rule or regulation under section 125 of the Internal Rev-
8 enue Code of 1986, a plan or other arrangement shall not
9 fail to be treated as a cafeteria plan or health flexible
10 spending arrangement merely because such arrangement
11 permits participants who make the certification under sub-
12 section (b) to carry over any amount of unused benefit
13 or contribution (without limitation) from any plan year be-
14 ginning or ending in 2020 to the subsequent plan year.

15 (b) CERTIFICATION BY EMPLOYEE.—In applying for
16 any carryover permitted pursuant to subsection (a), the
17 employee shall certify that the amount to be carried over
18 is attributable to a reduction in expected elective health
19 care expenses in the plan year due to the outbreak of
20 coronavirus disease 2019 (COVID–19) in the United
21 States.

22 (c) DEFINITIONS.—Any term used in this section
23 which is also used in section 106 or 125 of the Internal
24 Revenue Code of 1986 or the rules or regulations there-

- 1 under shall have the same meaning as when used in such
- 2 section or regulations.

