

## IRS Expands Rules for Returning Mistaken HSA Contributions

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In Notice 2008-59, the IRS provided certain limited exceptions to its previously stated general position that employers may not recoup any portion of the employer's contribution to an HSA. Specifically, Notice 2008-59 provided that an employer may recover amounts that it contributes to an HSA account if: (i) the employee for whom the contribution was made was never eligible for an HSA contribution, provided the contribution is returned by the end of the tax year for which it was contributed, or (ii) the employer contributed an amount to the employee's HSA in excess of the maximum amount permitted under the Internal Revenue Code due to an error. The IRS has stated that employers generally cannot recover amounts from an HSA other than for the two reasons described in Notice 2008-59.

In response to a request for additional guidance relating to the ability of employer's to recover mistaken contributions to HSAs, the IRS recently released Information Letter 2018-0033.[1] The Information Letter clarifies that Notice 2008-59 was not meant to provide an exhaustive list of situations in which employers could recover contributions to an HSA that were made as a result of the employer's (or its provider's) administrative errors. Rather, if there is "clear documentary evidence" that demonstrates an administrative error, the employer may request a return of contributions under other circumstances to the extent necessary to correct the error.

In the Information Letter, the IRS provided the following examples of errors that may be corrected under this standard:

- An amount is withheld and deposited in an employee's HSA for a pay period that exceeds the amount shown on the employee's HSA salary reduction election.
- An amount received as an employer contribution to an HSA that the employer did not intend to contribute, but was transmitted because an incorrect spreadsheet was accessed or because employees with similar names were confused with each other.
- An amount received as an HSA contribution because it was incorrectly entered by a payroll administrator (whether in-house or third-party) causing the incorrect amount to be withheld and contributed.

- An amount received as a second HSA contribution because duplicate payroll files were transmitted.
- An amount received as an HSA contribution because a change in employee payroll elections was not processed timely so that amounts withheld and contributed were greater than (or less than) the employee elected.
- An amount received because an HSA contribution amount was calculated incorrectly (e.g., where an employee elects a total amount for the year that is allocated by the system over an incorrect number of pay periods).
- An amount received as an HSA contribution because the decimal position was set incorrectly resulting in a contribution greater than intended.
- Because the Information Letter list is intended to provide examples of correctable errors, there are presumably other situations where a return of contributions from an employee's HSA may be warranted if an administrative error can be clearly demonstrated. In any case, where a corrective action is to be taken, an employer should make sure to maintain documentation to support its conclusion that a mistaken contribution has occurred as the result of an administrative error.

[1] An "information letter" is used by the IRS to provide a general statement of well-defined law without applying it to a specific set of facts and is given in response to requests for general information by taxpayers or by Congress.

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