

TECH FLEX

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ISSUE X

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GUIDANCE RELEASED ON MILITARY PERSONNEL HCFSAs BALANCE DISTRIBUTION

As reported in the June 2008 Tech Flex [\[LINK\]](#) on June 17, 2008, President Bush signed into law the "Heroes Earnings Assistance and Relief Tax Act of 2008" (HEART). As a result of the enactment of this legislation, a Health Care Flexible Spending Account (HCFSAs) is now allowed (but not required) to permit certain employees who are ordered or called to active military duty for a period of at least 180 days or an indefinite period to receive a "qualified reservist distribution" (QRD) from their HCFSAs. However, the enacted legislation left many questions unanswered. On September 30, 2008, the Internal Revenue Service (IRS) released Notice 2008-82 (Notice) which provided guidance on many of the outstanding issues as discussed below.

It is important to note that the adoption of the rule by the plan to allow the distribution of unused HCFSAs balances as taxable income to military personnel meeting the requirements is an optional plan design.

IRS Notice 2008-82 provided the following guidance:

Employee Eligibility for QRD

The IRS guidance states that the following requirements need to be met in order for a taxable distribution to be made from the HCFSA:

- Employee must be a member of military reserves who is called to active duty.
- The employee must be called to active duty for a period of 180 days or more.
- Taxable distributions of unused HCFSA balances must be made between the period beginning on the date of the call up and ending on the last day that reimbursement could be made under the HCFSA plan for the year in which the call to active duty occurred.

Deadlines for Requesting and Paying a QRD

An eligible reservist must request a QRD during the period no earlier than the beginning with the date of the order or call to active duty and no later than the last day of the plan year (or any applicable grace period) during which the order or call occurred. For example, for a calendar plan year with no grace period, the QRD request would need to be made no later than December 31. If a calendar year plan had a grace period ending on March 15, the employee must request the QRD no later than the last day of the grace period.

Time for Employer to Distribute QRD

A new rule was added which requires an employer to distribute the QRD to the requesting employee within a reasonable time not to exceed 60 days after the employee requests a QRD.

Employer Must Receive Copy of Order or Call to Active Duty

The employer must receive a copy of the employee's order or call to active duty before a QRD may be paid out. The employer may rely upon the order or call to determine the period of active duty and if the order or call to duty specifies a period of 180 days or more (or an indefinite period), the employee's eligibility for a QRD will not be affected if the actual period is less than 180 days. If the period specified is less than 180 days, a QRD is not allowed, but subsequent calls or orders that increase the total period of active duty to 180 days or more will qualify an otherwise-eligible employee for a QRD.

Amount of Distribution Available

A cafeteria plan document may specify that the amount available as a QRD will be one of the following three options:

- (1) The entire amount elected for the HCFSA for the plan year, minus HCFSA reimbursements received as of the date of the QRD request (this approach takes the uniform coverage rule into account).
- (2) The amount contributed to the HCFSA as of the date of the QRD request, minus HCFSA reimbursements received as of that date.

(3) Some other amount (not exceeding the entire amount elected for the HCFA for the plan year minus reimbursements).

Plans that do not specify the amount available are deemed to have selected the second of these alternatives. While the plan must permit employees to submit claims for expenses incurred before the date of a QRD request, the plan may either allow employees to continue to submit claims incurred after that date or terminate their right to submit claims.

Taxation of Distributed Amounts

The notice confirms that a QRD is (1) included in the employee's gross income and wages, (2) subject to employment taxes, and (3) reported as wages on the employee's Form W-2 for the year in which the QRD is paid.

Nondiscrimination Requirements

QRD distributions must be uniformly available to all plan participants. In addition, QRD amounts are disregarded for purposes of the cafeteria plan nondiscrimination testing.

Cafeteria Plan Amendments

As a general rule, a QRD may not be made before the cafeteria plan is prospectively amended to provide for a QRD. However, under a special transition rule, a plan may be retroactively amended by December 31, 2009 to permit a QRD requested on or before that date, provided certain requirements are met.

For a copy of IRS Notice 2008-82, please click on the link provided below:

<http://www.irs.gov/pub/irs-drop/n-08-82.pdf>

2009 TRANSPORTATION BENEFITS LIMITS ANNOUNCED

On October 16, 2008, the Internal Revenue Service (IRS) announced, via Rev. Proc. 2008-66, the 2009 limits in relation to transportation benefits. The combined transit pass/vanpooling limit will increase from \$115 to \$120. The qualified parking limit has increased from \$220 to \$230.

For a copy of Rev. Proc. 2008-66, please click on the link below:

<http://www.irs.gov/pub/irs-drop/rp-08-66.pdf>

BICYCLE TRANSPORTATION ADDED AS QUALIFIED BENEFIT

On February 28, 2008, as reported in the March 2008 Tech Flex [\[LINK\]](#), Representative Earle Blumenauer (D-OR) introduced the Bike Commuter Act (HR 1498) in the United States House of Representatives proposing that effective with tax years beginning on or after January 1, 2009, commuting via bicycle to work be added to the list of qualified transportation benefits under Section 132(f) of the Internal Revenue Code.

On October 3, 2008, the “Bike Commuter Act” was enacted into law as Section 211 of the “Emergency Economic Stabilization Act of 2008.”

As a result, effective January 1, 2009, an employee may be eligible to receive up to \$20 per month on a tax-free basis, “for the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee’s residence and place of employment.” An employee would only be eligible for the benefit for those months where the employee “regularly uses the bicycle for a substantial portion of travel” in commuting to and from work.

Under the current rules, employers may provide transportation fringe benefits to their employees for certain costs incurred by employees in relation to commuting to work. Specifically, in 2008 employees participating in their employer’s transportation plan may receive, on a tax-free basis, up to \$220 for parking expenses and/or \$115 per month for the use of transit (i.e. subway) or vanpooling expenses.

It is important to note that an employee would NOT be eligible for the \$20 bicycle benefit in any month where he or she received any benefit under the employer’s transportation plan (e.g., pre-tax transit pass, vanpooling or parking expenses).

For a copy of the “Bike Commuter Act”, please click on the link provided below and proceed to Section 211.

<http://financialservices.house.gov/ESSABill.pdf>

HEALTH PLAN COVERAGE MUST BE EXTENDED FOR CHILD LOSING FULL-TIME STUDENT STATUS DUE TO MEDICAL LEAVE

On October 9, 2008, President Bush signed into law legislation commonly known as “Michelle’s Law.” The intent of this law is to allow seriously ill college students, who are covered dependents under health plans, to continue coverage for up to one year while on a medically necessary leave of absence. The measure was inspired by, and named after, a college student in New Hampshire who was diagnosed with cancer, but continued her studies on a full-time basis in order to avoid losing health coverage under her parents’ plan. **This law is effective for plan years beginning on or after October 9, 2009.**

The legislation applies to health plans governed by Employee Retirement Income Security Act (ERISA), the Internal Revenue Code (Code), and the Public Health Services Act (PHSA) and includes the provisions summarized below.

Medically Necessary Leave of Absence

The extension of coverage applies to a dependent child’s leave of absence from, or any other change in enrollment at, a postsecondary educational institution (including colleges and universities) on account of a serious illness or injury from which the child is suffering while covered under a health plan that would otherwise cause the child to lose dependent status for purposes of coverage.

Length of Continued Coverage

Coverage will continue until the earlier of:

- (1) one year from the start of the medically necessary leave of absence, or
- (2) the date on which such coverage would otherwise terminate under the terms of the health plan.

Definition of Dependent Child

The child must be enrolled as a dependent under a health plan and qualify for coverage on the basis of being a student at a postsecondary educational institution, immediately before the medically necessary leave of absence involved.

Certification by Physician

Written certification must be provided by a treating physician of the dependent child certifying that such individual is suffering from a serious illness or injury that would require a medically necessary leave of absence.

Required Notices

The health plan (and a health insurance issuer providing coverage in connection with a health plan) is required to provide notification, in plain language, describing the terms of the continued coverage available under this law. This description should be included with any notice regarding a requirement for certification of student status for coverage under the plan.

No Change in Benefits During Leave

A dependent child is entitled to the same level of benefits during a medically necessary leave of absence as the child had before taking the leave. Moreover, if any changes are made to the health plan during the leave, the child remains eligible for the changed coverage in the same manner as would have applied if the changed coverage had been the previous coverage, so long as the changed coverage remains available to dependent children under the plan.

For a copy of the new legislation, please click on the link provided below:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2851enr.txt.pdf

SOCIAL SECURITY WAGE BASE RISES TO \$106,800 FOR 2009

The Social Security Administration (SSA) announced on Thursday, October 16, 2008, that the 2009 Social Security wage base will be \$106,800. This is an increase of \$4,800 from the 2008 wage base of \$102,000. As in prior years, there is no limit to the wages subject to the Medicare tax. Therefore, all covered wages are still subject to the 1.45% tax.

The FICA tax rate, which is the combined Social Security tax rate of 6.2% and the Medicare tax rate of 1.45%, remains at 7.65% for 2009. The maximum Social Security tax employees and

employers will each pay in 2009 is \$6,621.60. This is an increase of \$297.60 from the 2008 maximum of \$6,324.00.

The Social Security wage base for self-employed individuals in 2009 will also be \$106,800. There is no limit on covered self-employment income that will be subject to the Medicare tax. The self-employment tax rate remains 15.3% (combined Social Security tax rate of 12.4% and Medicare tax rate of 2.9%). In 2009, the maximum Social Security tax for a self-employed individual will be \$13,243.20. This is an increase of \$595.20 from the 2008 maximum of \$12,648.00.

For a copy of the SSA Announcement, please click on the link provided below:

<http://www.ssa.gov/pressoffice/pr/2009cola-pr.htm>

IRS ANNOUNCES 2009 PENSION CONTRIBUTION LIMITS

On October 16, 2008, the Internal Revenue Service (IRS) via IR 2008-118 announced cost of living adjustments applicable to dollar limitations for pension plans and other items for Tax Year 2009.

Section 415 of the Internal Revenue Code provides for dollar limitations on benefits and contributions under qualified retirement plans. It also requires that the Commissioner annually adjust these limits for cost of living increases.

The 2009 limits in comparison to 2008 are as follows:

Plan Maximum Contribution Limits	2008	2009
Section 401(k) Plan or SAR-SEP	\$15,500	\$16,500
Section 403(b) Plan	\$15,500	\$16,500
Section 408(p)(2)(A) SIMPLE Plan Contributions	\$10,500	\$11,500
Section 457(e)(15) Limit	\$15,500	\$16,500
Section 415 Limit for: Defined Contribution Plans	\$46,000	\$49,000
Defined Benefit Plans	\$185,000	\$195,000
Highly Compensated Employees: Section 414(q)	\$105,000	\$110,000
Key Employee Section 416(i)(1)(A)(i)	\$150,000	\$160,000
Control Employee Compensation: Section 1.61-21(f)(5)(i) fringe benefit	\$90,000	\$95,000
Section 1.61-21(f)(5)(iii)	\$185,000	\$195,000
Includible Compensation – Sec. 401(a)(17)	\$230,000	\$245,000
SEP Compensation	\$230,000	\$245,000
SEP Earnings Threshold	\$500	\$550
Limited Governmental Plans (pre 7/1/93)	\$345,000	\$360,000
Employee Stock Ownership Plan - Sec. 409	\$935,000	\$985,000
Max. to lengthen 5-year distribution	\$185,000	\$195,000

The dollar limitation under Section 414(v)(2)(B)(i) for catch-up contributions to an applicable employer plan other than a plan described in Section 401(k)(11) or Section 408(p) for individuals aged 50 or over is increased from \$5,000 to \$5,500. The dollar limitation under Section 414(v)(2)(B)(ii) for catch-up contributions to an applicable employer plan described in Section 401(k)(11) or Section 408(p) for individuals aged 50 or over remains unchanged at \$2,500.

For a copy of IRS IR 2008 -118, please click on the link provided below:

<http://www.irs.gov/newsroom/article/0,,id=187833,00.html>

LOUISIANA AND TEXAS HURRICANE IKE VICTIMS QUALIFY FOR DISASTER RELIEF

On September 18, 2008, the Internal Revenue Service (IRS) announced that Louisiana and Texas who were adversely affected by Hurricane Ike qualify for tax relief from the IRS, including the postponement of tax filing and payment deadlines until January 5, 2009.

Specifically, the relief postpones certain deadlines for taxpayers who reside or have a business in the disaster area until January 5, 2009. The postponement applies to return filing, tax payment and certain other returns and payments due on or after September 7, 2008, and before January 5, 2009. The tax relief provided pertains to individual estimated tax returns and corporate tax returns that were due September 15, 2008 and extended individual returns that were due on October 15, 2008.

The relief described above was provided for residents of Louisiana parishes and Texas counties as noted below.

Louisiana Parishes:

Acadia, Beauregard, Calcasieu, Cameron, Iberia, Jefferson, Jefferson Davis, Lafourche, Plaquemines, Sabine, St. Mary, Terrebonne, Vermilion and Vernon.

Texas Counties:

Angelina, Austin, Brazoria, Chambers, Cherokee, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jasper, Jefferson, Liberty, Madison, Matagorda, Montgomery, Nacogdoches, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Waller and Washington.

The IRS in its disaster relief guidance stated the following:

If an affected taxpayer receives a penalty notice from the IRS, the taxpayer should call the telephone number on the notice to have the IRS abate any interest and any late filing or late payment penalties that would otherwise apply. Penalties or interest will be abated only for taxpayers who have an original or extended filing, payment or deposit due date, including an extended filing or payment due date, from Sept. 11, 2008, to Jan. 5, 2009.

For a copy of the Louisiana Tax Relief Notice, click on the link provided below:

<http://www.irs.gov/newsroom/article/0,,id=186875,00.html>

For a copy of the Texas Tax Relief Notice, click on the link provided below:

<http://www.irs.gov/newsroom/article/0,,id=186874,00.html>

MULTIPLE STATES INCREASE MINIMUM WAGE

A number of states have increased the minimum wage effective January 1, 2009. The latest adjustments come from Arizona, Colorado, Montana, New Mexico, Ohio, Oregon, Vermont and Washington as noted in the chart below:

State	Current Minimum Wage	Minimum Wage January 1, 2009
Arizona	\$6.90	\$7.25
Colorado	\$7.02	\$7.28
Montana	\$6.55	\$6.90
New Mexico	\$6.50	\$7.50
Ohio	\$7.00	\$7.30
Oregon	\$7.95	\$8.40
Vermont	\$7.95	\$8.40
Washington	\$8.07	\$8.55

In addition, there may be adjustment to the 2009 tipped employee minimum hourly rate in the states where such a wage exists. Employers are required to pay this amount in cash wages to a tipped employee (i.e. food server) per hour. If the employee's tips at a minimum do not bring the employee's hourly wage to the state minimum wage, the employer must pay the employee the difference. Where a tipped employee minimum hourly rate is not allowed, the employer must pay the employee at least the state minimum wage per hour.

The tipped employee minimum hourly rate in 2009 for the states listed above is as follows:

State	Current Tipped Employee Minimum Hourly Rate	2009 Tipped Employee Minimum Hourly Rate
Arizona	\$3.90	\$4.25
Colorado	\$4.00	\$4.26
Montana	State minimum wage	State minimum wage
New Mexico	\$2.13	\$2.13
Ohio	\$3.50	\$3.65
Oregon	State minimum wage	State minimum wage
Vermont	\$3.72	\$3.91
Washington	State minimum wage	State minimum wage

LEGISLATION EXPANDING FMLA COVERAGE INTRODUCED

On September 29, 2008, the “Family and Medical Leave Enhancement Act of 2008” (HR 7233) was introduced in the United States House of Representatives. Under the provisions of HR 7233, employees working for employers with at “least 25 employees” would be entitled to the protections afforded under the Family Medical and Leave Act (FMLA). Currently, employees employed by an employer with “less than 50 employees” are not entitled to FMLA rights.

In addition, should HR 7233 become law, eligible employees would be allowed to take up to four hours of unpaid leave during any 30-day period, and up to 24 hours during any 12-month period, to participate in their children's or grandchildren's educational and extracurricular activities or to meet routine family medical needs, such as medical and dental appointments or visits to nursing homes.

For a copy of HR 7233, please click on the link provided below.

<http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.7233:>

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