



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF THE CHIEF COUNSEL

September 09, 2015

Number: **2018-0033**
Release Date: 12/28/2018

CC:TEGE:EB:HW
GENIN-114623-15

UIL: 223.00-00

Dear _____ :

This letter responds to your request for information concerning mistaken contributions to a Health Savings Account (HSA). Section 223(d)(1)(E) of the Internal Revenue Code provides that the interest of an individual in the balance in an HSA is nonforfeitable. Questions and Answers 23, 24, and 25 of IRS Notice 2008-59, 2008-29 I.R.B. 123, clarified certain limited circumstances under which an employer may recoup contributions to an employee's HSA.

Question and Answer 23 states that if an employee was never an eligible individual under § 223(c), then an HSA never existed and the employer may correct the error. In particular, at the employer's option, the employer may request that the financial institution return to the employer the amounts mistakenly contributed to the employee's HSA.

Question and Answer 24 states that if an employer contributes amounts to an employee's HSA that exceed the maximum annual contribution allowed in § 223(b) due to an error, the employer may correct the error. In that case, at the employer's option, the employer may request that the financial institution return the excess amounts to the employer. However, Question and Answer 24 further provides that if the amounts contributed are less than or equal to the maximum annual contribution allowed in § 223(b), the employer may not recoup any amount from the employee's HSA even though the employer claims certain contributions were made in error.

Question and Answer 25 clarifies that notwithstanding the ability to recoup contributions if the employee was never an eligible individual or if the amount exceeds the maximum contribution allowed under § 223(b), if an employer contributes to the HSA of an employee who ceases to be an eligible individual during a year, the employer may not recoup any amounts that the employer contributed after the employee ceased to be an eligible individual.

Notice 2008-59 does not specifically address other situations in which contributions to an employee's HSA are the result of the employer's or trustee's administrative or process errors, but the notice also was not intended to provide an exclusive set of circumstances in which an employer may request the return of contributed amounts. Rather if there is clear documentary evidence demonstrating that there was an administrative or process error, an employer may request that the financial institution return the amounts to the employer, with any correction putting the parties in the same position that they would have been in had the error not occurred. Employers should maintain documentation to support their assertion that a mistaken contribution occurred.

Outside of the specific situations described in Notice 2008-59, some examples of the type of errors which may be corrected under the standard described above include:

- An amount withheld and deposited in an employee's HSA for a pay period that is greater than the amount shown on the employee's HSA salary reduction election.
- An amount that an employee receives as an employer contribution that the employer did not intend to contribute but was transmitted because an incorrect spreadsheet is accessed or because employees with similar names are confused with each other.
- An amount that an employee receives as an HSA contribution because it is incorrectly entered by a payroll administrator (whether in-house or third-party) causing the incorrect amount to be withheld and contributed.
- An amount that an employee receives as a second HSA contribution because duplicate payroll files are transmitted.
- An amount that an employee receives as an HSA contribution because a change in employee payroll elections is not processed timely so that amounts withheld and contributed are greater than (or less than) the employee elected.
- An amount that an employee receives because an HSA contribution amount is calculated incorrectly, such as a case in which an employee elects a total amount for the year that is allocated by the system over an incorrect number of pay periods.

- An amount that an employee receives as an HSA contribution because the decimal position is set incorrectly resulting in a contribution greater than intended.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2005-1, §2.04, 2005-1 IRB 7 (Jan. 3, 2005). If you have any additional questions, please contact our office at .

Sincerely,

Harry Beker
Chief, Health and Welfare Branch
Office of Associate Chief Counsel
(Tax Exempt and Government Entities)