



OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D. C. 20224

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UIL: 21.00-00

The Honorable Katie Porter
U.S. House of Representatives
Washington, DC 20515

Dear Representative Porter:

I am responding to your letter dated December 21, 2020, addressed to IRS Commissioner, Charles P. Rettig. You explain that due to the COVID-19 pandemic, childcare and summer camp providers have been offering their services online. Therefore, you ask that the IRS clarify if taxpayers may use funds from Dependent Care Flexible Savings Arrangements (DCFSA) to pay for virtual day care and related services.

The IRS appreciates your concerns about virtual day care expenses related to section 21(b)(2)'s definition of employment-related expenses. We will continue to work with Congress to consider if additional measures of COVID-19 relief are appropriate.

This letter provides general information only and does not constitute a ruling. See Rev. Proc. 2021-1, § 2.04, 2021-1 I.R.B. 1 (Jan. 4, 2021).

Section 129 of the Internal Revenue Code (IRC) defines dependent care assistance as the payment of, or provision of, those services which if paid for by the employee would be considered employment-related expenses under section 21. See IRC § 129(e)(1) and IRC § 21(b)(2) (relating to expenses for household and dependent care services necessary for gainful employment).

Section 21(b)(2) defines "employment-related expenses" to include expenses for the care of a qualifying individual.

Section 1.21-1(d) of the Income Tax Regulations provides that expenses are for the care of a qualifying individual if the primary function is to assure the individual's well-being and protection. The law specifically excludes expenses for food, lodging, clothing, or education. The law further provides:

"[i]f, however, the care is provided in such a manner that the expenses cover other goods or services that are incidental to and inseparably a part of the care, the full amount is for care."

As you noted, the IRS provided flexibility for DCFSA in Notice 2020-29, 2020-22 I.R.B.

864. Notice 2020-29 allows (but does not require) an employer to amend a section 125 cafeteria plan to give employees increased flexibility to make mid-year election changes to DCFSA during 2020. Specifically, employers may amend a section 125 cafeteria plan to allow employees to revoke an election, make a new election, or change the amount of an existing election for a DCFSA prospectively. The Notice also allows an employer to amend a section 125 cafeteria plan to extend the period for incurring claims that a DCFSA may reimburse to the end of 2020. Notice 2020-29 is available on our website at, www.irs.gov/pub/irs-drop/n-20-29.pdf.

Again, this letter provides general information only and does not constitute a ruling.

If you have any questions, please contact me or _____ of my office
at _____ .

Sincerely,

John P. Moriarty
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: The Honorable Cynthia Axne
The Honorable Linda Sánchez