

Insider

IRS issues Q&As on emergency personal expense and domestic abuse victim distributions

By Gary Chase and Stephen Douglas

In **Notice 2024-55**, the IRS recently provided Q&As on the SECURE 2.0 provisions that permit emergency personal expense distributions (EPEDs) and domestic abuse victim distributions (DAVDs) from an eligible retirement plan. Both types of distributions are exempt from the 10% early distribution penalty that applies when amounts are withdrawn from an IRA or other retirement plan before a participant reaches age 59½.

The notice confirms the following:

- EPEDs and DAVDs are optional.
- Self-certification is permitted.
- A plan that allows the distribution must allow repayment if certain requirements are satisfied.
- A participant may claim a distribution as an EPED or a DAVD on his or her individual tax return even if the distributing plan does not expressly permit them.

The guidance in the Q&As can be applied immediately. Note that although these optional provisions became effective January 1, 2024, formal plan amendments are not required until December 31, 2026, at the earliest.¹

EPED requirements overview

SECURE 2.0 established EPEDs as a distribution option that “eligible retirement plans” may offer participants.

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An eligible retirement plan includes certain defined contribution plans — such as 401(k), profit sharing, 403(b) and governmental 457(b) plans — but excludes defined benefit plans.

An EPED can be used to meet an unforeseeable or immediate financial need relating to a participant’s necessary personal or family emergency expenses. This distribution is not subject to the 10% early distribution penalty.

A plan administrator may rely on an employee’s written certification that the conditions for an EPED have been met. In its recent notice, the IRS specifically asks for comments on 1) whether the IRS should adopt regulations providing exceptions to this rule permitting self-certification for EPEDs, and 2) procedures to address cases of employee misrepresentation.

¹ See “IRS guidance on SECURE 2.0 provisions,” *Insider*, February 2024.

Only one distribution per calendar year may be treated as an EPED, and the maximum EPED may not exceed the lesser of 1) \$1,000 or 2) the amount that the participant's vested benefit as of the date of the distribution exceeds \$1,000 (if a participant's vested account is less than \$2,000). These distribution requirements are applied on a controlled group basis.

A participant may repay the EPED within three years from the day following the date that the EPED distribution was received.

If a distribution is received during a year, a participant may not receive another EPED during the following three calendar years unless the prior distribution is fully recontributed or the participant contributes elective deferrals and after-tax contributions that equal the amount of the EPED.

DAVD requirements overview

SECURE 2.0 also provides a penalty-free distribution option for victims of domestic abuse. Such distributions must be made within one year of a victim experiencing domestic abuse by a spouse or domestic partner.

Domestic abuse is defined as physical, psychological, sexual, emotional or economic abuse, including efforts to control, isolate, humiliate or intimidate the victim or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

Similar to an EPED, a DAVD may be made from certain plans such as 401(k), 403(b) and governmental 457(b) plans but are not allowed from defined benefit plans or

A plan administrator may rely on an employee's written certification that the conditions for an EPED have been met.

plans subject to the spousal consent requirements (e.g., a money purchase plan).

A plan administrator may rely on the participant's certification that the distribution meets the DAVD requirements. A domestic abuse victim is allowed to withdraw up to \$10,000 (indexed for inflation) or 50% of his or her vested account balance, whichever is less. A plan sponsor is only required to monitor distributions made to a participant from plans maintained by employers in the controlled group.

The special tax and repayment rules that apply to EPEDs also apply to DAVDs. That is, in cases where a plan does not provide for DAVDs, individuals may treat a distribution as a DAVD on their federal income tax return up to legal limits, and they may repay DAVDs within three years from the date they were received.

Going forward

Plan sponsors should review the recent guidance and decide whether they intend to offer these optional EPED and DAVD features. In addition, sponsors should consult with their plans' recordkeepers to ensure the recordkeepers are prepared to administer these provisions.

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Since you asked:

What are the different types of IRS guidance?

By Maureen Gammon and Kathleen Rosenow

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Question

The IRS issues so many different types of guidance related to the Internal Revenue Code. Can you explain the main types of IRS guidance, where each is published and whether my company may rely on the guidance?

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Typically, good faith compliance with proposed regulations is allowed.

Answer

The IRS administers and enforces the U.S. tax laws, including the Internal Revenue Code. As part of meeting that mandate, the IRS issues a wide array of types of guidance, from regulations to private letter rulings to FAQs. Some guidance is “official” — for example, published in the Federal Register or in the Internal Revenue Bulletin (IRB) — while some guidance only applies to a particular party or provides a very general overview of an issue. Nine of the more common types of guidance are discussed below.

Regulatory guidance

- **Regulations.** The IRS and the Treasury Department issue regulations to provide official guidance for new legislation or to address issues that arise regarding existing tax code sections. Regulations interpret and give directions on complying with the tax code. Typically, proposed regulations are first published in the Federal Register as a Notice of Proposed Rulemaking (NPRM). The public has a chance to provide written comments, and a public hearing may be held before a temporary or final regulation is published as a Treasury Decision (TD) in the Federal Register and codified in the *Code of Federal Regulations* (CFR).

Reliance. Taxpayers may rely on final and temporary Treasury regulations but may not rely on proposed regulations unless expressly stated. Typically, good faith compliance with proposed regulations is allowed.

Subregulatory guidance

- **Frequently Asked Questions (FAQs).** FAQs are an alternative to official published guidance, allowing

the IRS to answer commonly asked questions from the public. FAQs typically cover general questions rather than taxpayer-specific facts and may not reflect special rules or exceptions that could apply in any particular case.

Reliance. FAQs not published in the IRB cannot be relied on, used or cited as precedent by the IRS. Similarly, if an FAQ turns out to be an inaccurate statement of the law as applied to a particular taxpayer’s case, the taxpayer’s tax liability will be determined by the law, not the FAQ; however, a taxpayer’s reasonable, good faith reliance on an FAQ (even if it is later updated or modified) will be considered by the IRS when determining if penalties apply.

- **Revenue Ruling (Rev. Rul.).** A Rev. Rul. is an official interpretation by the IRS of the tax code, related statutes, tax treaties and regulations, which represents the IRS position on how the law is applied to a specific set of facts.
Reliance. A Rev. Rul. is published in the IRB, and any taxpayer whose circumstances are substantially the same as those described in the Rev. Rul. can rely on it.
- **Revenue Procedure (Rev. Proc.).** A Rev. Proc. is an official statement of a procedure that affects the rights or duties of taxpayers under the tax code, related statutes, tax treaties and regulations and that should be a matter of public knowledge. While a Rev. Rul. generally states an IRS position, a Rev. Proc. provides instructions for return filings or other procedures.
Reliance. Rev. Procs. are published in the IRB and may be relied upon by taxpayers.
- **Private Letter Ruling (PLR).** A PLR is a written statement issued by the IRS national office to a taxpayer interpreting and applying tax laws to the taxpayer’s *specific set of facts*. A PLR is issued to establish the

federal tax consequences of a particular transaction before it occurs or before the taxpayer's return is filed. Taxpayers must submit a written request for a PLR, which once issued is binding on the IRS if the transaction was fully and accurately described in the request and carried as described.

Reliance. A PLR may not be relied on as precedent by other taxpayers or IRS personnel, but it can give taxpayers an indication of how the IRS might rule in other, similar situations. PLRs are not officially published but may be found on the IRS website.

- **Technical Advice Memorandum (TAM).** A TAM is guidance furnished by the IRS national office when requested by an IRS director, in response to technical or procedural questions that develop during an IRS proceeding. TAMs are issued only on transactions that have already occurred and provide the interpretation of proper application of tax laws, tax treaties, regulations, Rev. Ruls. or other precedents.

Reliance. TAMs are similar to PLRs; however, they are issued in response to closed taxpayer transactions and cannot be relied upon by other taxpayers. Though not officially published, TAMs may be found on the IRS website.

- **Notice.** A notice is an IRS public pronouncement that may contain guidance on substantive interpretations of the tax code or other provisions of the law. Notices provide interim guidance before finalized Rev. Ruls. and regulations are available.

Reliance. Notices are published in the IRB and may be relied upon by taxpayers.

- **Announcement.** An announcement is an IRS public pronouncement that has only immediate or short-term value. Announcements may summarize the law or regulations without making any substantive interpretation to state what regulations will say when they are certain to be published in the immediate future or to notify taxpayers of the existence of an approaching deadline. Announcements may be found on the IRS website.

Reliance. Announcements cannot be relied upon by taxpayers.

A [private letter ruling] may not be relied on as precedent by other taxpayers or IRS personnel.

- **Chief Counsel Advice (CCA).** CCAs are written advice or instructions prepared by the Office of Chief Counsel and issued to field or service center employees of the IRS or Office of Chief Counsel. They convey legal interpretations or positions of the Office of Chief Counsel regarding existing or former revenue provisions. CCAs may be found on the IRS website.

Reliance. CCAs cannot be relied upon by taxpayers.

Takeaways

- The IRS issues different types of guidance in its administration of the Internal Revenue Code.
- Knowing what each type of IRS guidance is used for, whether and where the guidance is published, and whether the guidance may be relied upon by the IRS or a taxpayer is key to knowing whether the guidance can be relied upon by all, some or only one entity.
- Employers should consult with their legal counsel and/or tax advisors before taking any particular action in reliance of IRS guidance.

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DOL investment advice rule suspended

By Gary Chase and Stephen Douglas

Within a week of each other, two separate federal district courts in Texas preliminarily stayed the effective date of the Department of Labor's (DOL's) **Retirement Security Rule: Definition of an Investment Advice Fiduciary** and certain amendments to related class prohibited transaction exemptions (referred to collectively as the Investment Advice Rule). The Investment Advice Rule is the DOL's latest attempt in its highly contentious effort to update when a person is treated as an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code. The Investment Advice Rule was intended to go into effect in September, but as a result of the district courts' preliminary rulings, the Investment Advice Rule will not go into effect pending court action.

Specifically, in **Federation of Americans for Consumer Choice, Inc. v. United States Department of Labor** and **American Council of Life Insurers v. United States Department of Labor**, the courts held that the plaintiffs are likely to succeed in their claim that the Investment Advice Rule violates ERISA and exceeds the DOL's authority. As a result, the courts have agreed to suspend the Investment Advice Rule until there is a final decision in the ultimate case. The decision is significant because it shows that the district courts are likely to rule against the DOL when they decide the underlying case.

The district courts provided multiple reasons for why the plaintiffs are likely to win their case. One of the most important is that the Investment Advice Rule appears to conflict with ERISA for the same reasons as the DOL's 2016 regulatory effort, which was blocked by the Fifth Circuit in 2018. Specifically, the Fifth Circuit held that a fiduciary relationship requires a relationship of "trust and confidence." In this case, the district courts found that the Investment Advice Rule would have applied to transactions that do not satisfy this requirement and, similar to the DOL's 2016 regulations, would conflict with ERISA.

[T]he courts have agreed to suspend the Investment Advice Rule until there is a final decision in the ultimate case.

The DOL is expected to appeal the decisions, which would be heard by the Fifth Circuit; however, as this is the same court that invalidated the DOL's earlier attempt to amend the fiduciary regulation, the DOL will likely face an uphill battle in attempting to overturn the district courts' decisions.

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