



Cash-in-Lieu of Benefits Update

from VEHI and Gallagher Benefits Services

IMPORTANT

VEHI school districts offering employees a “cash-in-lieu” (CIL) of benefits option relating to health benefits must be aware of the multiple laws that apply to cafeteria plans and school districts’ legal and regulatory responsibilities. This memo has been updated in light of guidance issued in December, 2016, from the IRS that addresses, among other issues, the significance of a CIL arrangement on an employer’s **affordability calculation**.

Additionally, ongoing compliance requirements continue to apply to VEHI school districts offering cafeteria plans and CIL arrangements. It is important school districts make sure their cafeteria plan documents are up-to-date and administered based on the terms of the plan documents.

VEHI strongly urges school districts and local unions whose collective bargaining agreements include an opt-out or CIL arrangement to pay special attention to this memo.

***This memo is for general guidance purposes only—it is NOT legal advice.
It will be revised if and when other relevant guidance is issued.***

Cafeteria Plan/CIL Arrangements

In December 2016, the IRS issued final guidance associated with Cash-in-Lieu (CIL) arrangements, including when an employer can disregard the CIL payment when determining the ‘**affordability**’ of the employer’s group health coverage. Although the guidance is final, the IRS indicated further comments and possible changes to the rules in the future. This memo provides information and direction for VEHI Members currently offering or considering a CIL option.

Section 125/Cafeteria Plans

While not directly related to the IRS guidance, it is important all school districts offering a CIL option understand the option is **only** permitted if offered under a cafeteria plan. Employers must be sure the cafeteria plan document includes a specific section identifying the CIL option and providing the terms and conditions under which the payment is available. Failing to include the CIL option as a qualified benefit as part of the plan results in **additional tax liability for participants**. Please refer to model language on **pages 5 - 7**.

Compliance with the Guidance

If you are **not** subject to the safe harbor provision (see below for details), school districts and local unions whose collective bargaining agreement offers a CIL payment to employees electing to waive coverage should make the CIL payment available to the employee only when the employee provides written certification that the employee and tax-family* are **covered** under other permissible health plan coverage. By establishing the entire tax-family certification requirement, the parties do not need to address concerns about the CIL payment. For example, school districts will **not** need to:

- consider the CIL payment when determining health plan **affordability**,
- be concerned as to whether the CIL payment is ‘**incidental**’, or
- include the CIL payment in the employee’s wages for **overtime** or other benefits.

* **A tax-family** includes the employee and dependents who would be eligible for enrollment in the employer plan and who the employee reasonably expects to claim as a tax dependent for the calendar year.

Safe Harbor Provision for Collectively Bargained Plans

A CIL option that is included in a collective bargaining agreement **before** December 16, 2015 (even if CIL provision has been modified since 12/16/15) is permitted to take advantage of a safe harbor provision in federal law. Under the safe harbor, school districts only need to document certification that the **employee** is enrolled in other permissible health plan coverage to avoid including the CIL payment in the ACA health plan **affordability** determination.

The safe harbor, however, does not remove the need to consider if the CIL payment is “incidental” or include the CIL payment as a part of employee wages as it relates to overtime and other benefits. **Only the certification of the entire tax-family provides this relief.** In addition, VEHI has been advised that IRS may end the safe harbor at some point in the near future.

Therefore, **VEHI recommends** that the parties to a CIL arrangement consider requiring certification for the entire tax family, not just the employee.

Important Information/Action Steps

CIL Payment Timing

Employees waiving coverage and electing a CIL payment continue to be eligible employees under the employer health plan. This means employees (or their family members) must be allowed to enroll in their school district's group health plan if they are entitled to:

- a mid-year *Special Enrollment* opportunity, or
- a change-in-status event permitting mid-year enrollment.

The parties to a collective bargaining agreement should take this into consideration when determining the timing of CIL payments. There are two options to choose from when determining how to structure CIL payments.

1. Adopt a "pay as you go" approach to the CIL payment, prorating it over the course of the plan year. **VEHI recommends** this approach because it provides the CIL payments in a manner similar to how health benefits are paid.
2. Adopt a year-end, lump-sum payment approach. Cafeteria plan rules require the lump-sum CIL payment be issued during the plan year. School districts with a July 1 plan cafeteria plan year must make the lump-sum payment before June 30. School districts with a calendar year cafeteria plan must make the lump sum payment before December 31.

Cafeteria Plan Nondiscrimination Requirements

All Non-Union Employees

Cafeteria plans **cannot** offer benefits that discriminate in favor of highly compensated employees. When a school district determines the amount of a CIL payment for non-union employees, it should observe the following rule: the amount must be the same for all eligible employees who elect the CIL option. The value of a CIL option should not be based on the employee's position, the availability of multiple health plan options or the tier of coverage an employee would have otherwise elected. Essentially, if you make a CIL option available, keep it simple: make the amount available under the CIL option uniform for all non-union employees electing the option.

Union Employees

School districts and local unions that negotiate CIL payments are **not** affected by the nondiscrimination requirements that apply to non-union employees. In addition, school districts and local unions negotiating separate collective bargaining agreements within the same school district or Supervisory Union can negotiate different CIL payments for each distinct collective bargaining agreement.

As with non-union employees, the value of a CIL option within a CBA should **not** be based on the availability of multiple health plan options or the tier of coverage an employee would have

otherwise elected. Essentially, if you make a CIL option available in a CBA, keep it simple: make the amount available under the CIL option uniform for all union employees electing the option.

Non-discrimination Testing

Section 125 Cafeteria plan non-discrimination testing should be completed annually. The CIL payment option is included in the general cafeteria plan, non-discrimination testing. While the testing must be done at the end of the cafeteria plan year, it is recommended the test be run on a preliminary basis after open enrollment and mid-year to allow time to make any necessary corrections. This testing is particularly important if non-union employees are offered a CIL option. CIL options in a CBA are **not** considered during the non-discrimination testing.

Merging School Districts

Merging school districts are encouraged to establish a single CIL payment for non-union employees and a single CIL payment as to each collective bargaining agreement regardless of prior CIL arrangements. Because these plans are generally considered “new” plans, they are **not** subject to the December 16, 2015, safe harbor. Therefore, **VEHI recommends** the cafeteria plan include the **full tax-family** certification of other permissible health coverage. In doing so, the school district avoids dealing with the affordability concerns, “incidental” CIL payments, and overtime concerns.

If you have specific questions related to your particular circumstances, please contact Gallagher Benefits Services at vehihelp@ajg.com.

Sample Cash-in-Lieu Section 125 Plan Document Language

The language below is sample **Section 125 Plan Document** language for a permitted CIL provision in the event school districts and local unions negotiate that CIL compensation be paid out in regular paychecks over the course of the year, rather than in lump-sum payments.

While lump-sum payments are **not** generally prohibited by the new guidance, there are circumstances and procedures related to their implementation that could raise compliance issues. Distributing CIL compensation over the course of the year does not raise the same issues, because, generally speaking, that method of payment is similar to how health coverage is provided.

The most important aspect of the provision is that the employee's enrollment in other permissible health coverage is required at the time of the election and during the period the employee receives the CIL payment. Finally, at a minimum, employees must be allowed to enroll in the school's health plan during the annual open enrollment period or because of Special Enrollment or Change-in-Status events.

The intent of this document is to provide you with general information regarding the status of, and/or potential concerns related to, your organization's current employee benefits environment. It does not necessarily fully address all of your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice.

Please note - the language below includes a requirement that employees certify appropriate coverage for the entire **tax family**. The language in **green** should be removed or modified if the district is eligible for the safe harbor provision and is waiting until the end of the safe harbor period (yet to be announced) before instituting this practice. Be aware, however, that the safe harbor does **not** eliminate the need to consider whether the CIL payment is "incidental" or the need to include the CIL payment in wages for overtime and other benefits. Only tax family certification provides this relief.

Cash Payment in Lieu of Health Plan Coverage Description

(For general employee plan information)

If you **and all of your family members eligible for the Employer's health plan (if applicable)** are covered under other permissible health plan coverage (for example, your spouse's employer's plan), you may waive coverage under your Employer's health plan and instead you may elect to receive additional cash compensation, called a Cash-in-Lieu option (CIL). The amount of the CIL option will be announced during each annual open enrollment. If you elect this option, the additional payment will be prorated over the plan year and will be added to your regular paychecks. The payment is considered taxable as regular pay. If you waive Employer health coverage and later change your mind, you will have to wait until the

beginning of the next plan year to join the plan (except in certain situations discussed under “Special Enrollment” or “Change in Status”). To be eligible for the CIL payment, you are required to certify that you **and your eligible family members** are covered under another permissible health coverage. In some cases, you may be required to provide proof of the other coverage. If you waive coverage under the Employer’s group health plan, you can still participate in the Plan’s other component programs.

Other permissible health plan coverage includes:

- Employer-sponsored plans. The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is-
 - Coverage under an eligible employer-sponsored plan, including a grandfathered health plan, and/or self-insured plans;
 - A governmental plan (group health plans sponsored by public sector employers);
 - Any other plan or coverage offered in the small or large **group** market within a State. [Note: **individual** health coverage through Vermont Health Connect would **not** suffice.]

“Excepted benefits” are not treated as minimum essential coverage.

The term "minimum essential coverage" does **not** include health coverage that consists of coverage of excepted benefits (e.g., Hospital Indemnity Policies, Specific Disease Policies).

- Medicare, part A of title XVIII of the Social Security Act
- Medicaid
- CHIP
- TRICARE
- VA coverage
- Coverage for Peace Corps volunteers
- Civilian Employees of the U.S. Department of Defense

Cash Payment in Lieu of Health Plan Coverage Administration **Plan Document Model Language**

Employees otherwise eligible for the health plan who elect to waive coverage may be eligible for a cash payment in lieu of electing medical coverage. The amount of the cash payment available to the employee will be determined each year prior to the annual open enrollment period expressed as an annual payment. Employee’s waiving medical coverage under the conditions described below earn 1/12th of the annual amount for each full month of coverage waived during the period the employee was otherwise an eligible employee. Employees electing to waive medical coverage may re-enroll in the health plan during the annual open enrollment period or if the employee becomes eligible under circumstances related to Special Enrollment or Change in Status as described in **Section(s) X.XX**.

Employees must meet the following eligibility conditions to receive this payment in lieu of coverage:

- The employee must meet the definition of eligible employee under the terms of the health plan.
- At the time the employee elects to waive coverage under the health plan, the employee is covered under other permissible health plan coverage:
 - Employer-sponsored plans. The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is-
 - Coverage under an eligible employer-sponsored plan, including a grandfathered health plan, and/or self-insured plans;
 - A governmental plan (group health plans sponsored by public sector employers);
 - Any other plan or coverage offered in the small or large group market within a State. [Note: **individual** health coverage through Vermont Health Connect would **not** suffice.]
 - **“Excepted benefits” are not treated as minimum essential coverage.**
The term "minimum essential coverage" does **not** include health insurance coverage that consists of coverage of excepted benefits (e.g., Hospital Indemnity Policies, Specific Disease Policies).
 - Medicare, part A of title XVIII of the Social Security Act
 - Medicaid
 - CHIP
 - TRICARE
 - VA coverage
 - Coverage for Peace Corps volunteers
 - Civilian Employees of the U.S. Department of Defense
- The employee certifies in writing (electronic signature acceptable) in a timely manner the following:
 - the employee is covered under other permissible health plan coverage , and
 - the employee will notify the employer of the loss or cancellation of the other health plan coverage within 30 days of the loss or cancellation, and
 - the employee acknowledges that the employer reserves the right to require any employee to provide proof of other permissible health coverage as a condition of receiving the cash payment in lieu of health plan coverage.
- If the employee has dependents who would be eligible for enrollment in the employer plan and who the employee reasonably expects to claim as a tax dependent for the calendar year, the employee **must/may be asked to** certify that each dependent is covered under the other permissible health plan coverage.