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IRS Proposed Regulations Provide Initial Guidance for Employers Offering Trump Account Benefits to Employees

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KEY POINTS

- The Department of the Treasury and the IRS issued proposed regulations (REG-101355-26) on August 11, 2026, establishing the first comprehensive framework for employer contributions to Trump accounts under Internal Revenue Code section 128.
- The $2,500 annual income exclusion for section 128 employer contributions applies per employee — not per dependent child — and is indexed for inflation beginning after 2027.
- Section 128 Trump account contribution programs must satisfy three nondiscrimination tests modeled on the dependent care assistance program rules under section 129, with a special safe harbor for employer matching contributions tied to the $1,000 federal pilot program.
- Section 128 employer contributions are excluded from federal income tax but are subject to FICA and FUTA payroll taxes — a key distinction from most other cafeteria plan pre-tax benefits.
- Key operational questions remain open, including account verification procedures, the interaction between the $2,500 section 128 limit and the $5,000 annual contribution cap under section 530A, and the definition of "eligible" employees for nondiscrimination testing purposes.

WHAT DID THE IRS PROPOSE?

On August 11, 2026, the Internal Revenue Service (IRS) published a notice of proposed rulemaking (REG-101355-26) implementing new Internal Revenue Code (IRC) section 128, which governs employer contributions to Trump accounts.[1] The proposed regulations provide the first comprehensive regulatory framework for Trump account contribution programs — a key mechanism through which employers can assist employees in funding Trump accounts for their eligible children (or other eligible dependents).[2]

Section 128 was enacted as part of the One Big Beautiful Bill Act (OBBBA), signed into law on July 4, 2025.[3] That legislation added three interrelated provisions to the IRC: section 530A (establishing Trump accounts), section 128 (providing an income tax exclusion for employer contributions to Trump accounts), and section 6434 (establishing a pilot program for $1,000 federally funded seed contributions to Trump accounts for eligible children born in 2025-2028). In December 2025, the IRS issued Notice 2025-68 providing initial guidance and soliciting public comments.[4] The proposed regulations build on that notice.

The policy rationale is straightforward: Congress intended section 128 to encourage employers to contribute to employees' Trump accounts, much as employers contribute to dependent care assistance programs under section 129 or health savings accounts under section 223. The proposed regulations fill in many of the operational details that employers, payroll providers, and benefits administrators need to design and implement these programs.

In the release accompanying the proposed regulations, the IRS estimates that approximately three million employers may ultimately maintain section 128 programs, affecting as many as 73 million children in 44 million families. The regulations are proposed to apply to plan years beginning on or after publication of the final rule, with taxpayers permitted to rely on the proposed regulations for earlier plan years.

HOW DOES AN EMPLOYER SET UP A SECTION 128 PROGRAM?

A Trump account contribution program must be a “separate written plan” of the employer.[5] The written plan must, at a minimum, specify: (i) eligible employee classes; (ii) contribution rules, including contribution amounts and whether cafeteria plan salary reduction is available; (iii) account designation procedures (*i.e.*, how employees identify the Trump account(s) to receive contributions); (iv) certification, notification, and reporting procedures; (v) the plan year[6]; and (vi) error correction procedures.[7]

The employer must operate the program in accordance with its written terms — a familiar operational compliance concept from the qualified plan context. In addition, the employer must provide reasonable notification of the program’s availability and terms to all eligible employees. The proposed regulations do not prescribe a specific form for this notification, but the requirement underscores the importance of affirmative communication to employees. The employer must also furnish an annual written statement to each participating employee showing total section 128 contributions during the calendar year, reportable on Form W-2, Box 12, using Code TA.

Contributions under the section 128 program go to the Trump accounts of “dependents” of the employee. The definition of “dependent” for this purpose cross-references section 152, encompassing both “qualifying children” under section 152(c) and “qualifying relatives” under section 152(d) — notably broader than the $1,000 pilot program, which is limited to qualifying children.[8] Importantly, the standard is based on whether the employee “anticipates” dependency at the time of contribution. Contributions therefore qualify as section 128 program contributions even if, when the employee later files their tax return, the section 128 program beneficiary turns out not to be a dependent — a favorable rule from an employer compliance standpoint, as there is no need to “claw back” contributions based on after-the-fact changes in dependency status.

WHAT ARE THE CONTRIBUTION LIMITS AND MECHANICS?

The maximum annual exclusion under section 128 is $2,500 per employee — not per dependent child.[9] An employee with multiple eligible dependents may allocate contributions among them, but the aggregate exclusion is capped at $2,500 for the calendar year. The limit is indexed for inflation beginning after 2027.

Examples in the proposed regulations illustrate how this limit applies on a per-employee basis in a couple of special cases:

- *Employee works for multiple employers*. If an individual works as an employee for two unrelated employers, each of which sponsors a section 128 contribution program, the employee may receive a $2,500 contribution under each program. As long as each individual employer’s program caps contributions at $2,500, excess contributions attributable to multiple-employer overlap do not disqualify any individual employer’s program.

However, the $2,500 tax exclusion limit for the employee applies across all employers combined. As a result, contributions exceeding the $2,500 limit are included in the employee's gross income and treated as wages on the employee's tax return for the year.

- *Married employees filing jointly*. Married joint filers who are both employees of the same employer may each separately participate in the employer's section 128 contribution program up to the $2,500 limit. The same is true if the married couple, filing jointly, are employed by separate employers, each of which sponsors a section 128 contribution program. Each can participate up to the $2,500 limit, and a total of $5,000 is excluded from their jointly filed tax return.

Employers may fund contributions to the Trump account of an employee's eligible dependent by means of salary reduction under a section 125 cafeteria plan. Salary reduction elections must be prospective, and the cafeteria plan must permit prospective election changes at least monthly.[10] This monthly-change flexibility significantly differentiates section 128 contributions from other cafeteria plan elections, which generally must be made before the plan year begins and are irrevocable (subject to limited exceptions). Employers designing their cafeteria plan offerings should note this distinction, as this will likely require amendments to the cafeteria plan document.[11]

Employers may not limit contributions to Trump accounts held by a particular Trump account trustee.[12] Because only one Trump account may exist per eligible child, restricting contributions to a single trustee would effectively exclude employees whose child's account is held elsewhere. This differs from the HSA context, where multiple accounts per individual are permitted and employers commonly partner with a preferred trustee.

HOW DO THE NONDISCRIMINATION RULES WORK?

The proposed regulations adopt nondiscrimination rules modeled on section 129's dependent care assistance program framework.[13] Three tests must be satisfied. The first two focus on nondiscrimination in the design of the program, and the third focuses on nondiscrimination in the program's operation:

First, the ***contributions and benefits test*** requires that the contributions or benefits available under the program not discriminate in favor of "highly compensated employees" (HCEs) (defined by reference to section 414(q), same as with 401(k) and other qualified retirement plans). A program satisfies this test if it provides benefits on the same terms to all eligible employees. Since this test looks solely at the design of the program, differing utilization rates do not create impermissible discrimination for this test.

Second, the ***eligibility test*** requires that the classification of eligible employees be reasonable (based on objective business criteria such as job categories, salaried versus hourly status, or geographic location) and nondiscriminatory. The regulations include both a facts and circumstances test and an alternative numerical safe harbor modeled after the "nondiscriminatory classification test" in section 410(b) for qualified retirement plans. The numerical safe harbor test is based on a "safe harbor" ratio percentage of the non-excludable non-highly compensated employees (NHCEs) eligible under the program compared to the percentage of nonexcludable HCEs eligible for the program.

Third, the ***average benefits test*** requires that the average benefits provided to NHCEs be at least 55% of the average benefits provided to HCEs. The denominator includes only employees receiving benefits (greater than $0). Employers may disregard employees earning under $25,000 when testing salary reduction benefits.

Certain employees may be excluded from these tests, particularly employees under age 21 with less than one year of service and collectively bargained employees (if Trump account benefits were subject to good faith bargaining). Like nondiscrimination testing for qualified retirement plans, the tests are based on the “controlled group” of related employers and on a plan year (rather than calendar year) basis. The test is applied as of the last day of the plan year.

A special safe harbor applies for employers who include in their section 128 program an employer match for all or part of the $1,000 pilot program seed funding for eligible children of employees. These pilot program matching contributions are disregarded for the contributions and benefits test and the average benefits test and need only pass the eligibility test. This means that the pilot program matching contributions must be made available on the same terms to all nonexcluded employees. Importantly, an employer need not match the entire $1,000 pilot contribution for the safe harbor to apply — a partial match qualifies.

If a program fails nondiscrimination testing, the consequence falls on HCEs only — their income exclusion is lost. NHCEs retain their income exclusion.[14] For average benefits test failures, the employer may remediate by including excess HCE benefits in income and wages by the Form W-2 deadline (generally, January 31 of the following year) and providing a corrective notice to the Trump account trustee, effectively treating those excess amounts as additional, after-tax contributions to the Trump account that are subject to the $5,000 annual contribution limit under section 530A.[15]

WHAT ABOUT EMPLOYMENT TAXES?

While the proposed regulations exclude section 128 contributions from income taxes, there is no corresponding exclusion from Federal Insurance Contributions Act (FICA) or Federal Unemployment Tax Act (FUTA) employment taxes. Accordingly, section 128 employer contributions, including any pre-tax cafeteria plan deductions by employees, must be included as wages for FICA and FUTA taxes. This tax treatment is yet another way that section 128 cafeteria plan deductions differ from other cafeteria plan pre-tax deductions.

As a result, employers will need to ensure that their payroll systems: (1) exclude section 128 contributions from federal income tax withholding; (2) include them in calculating FICA and FUTA taxes (both the employee and employer portions); and (3) include excess contributions (above $2,500) in income subject to full withholding.

WHAT ISSUES REMAIN OPEN FOR EMPLOYERS?

Despite the significant detail in the proposed regulations, important operational questions remain unresolved:

Interaction between the $2,500 section 128 limit and the $5,000 overall contribution limit. Section 530A(c)(2) imposes a $5,000 annual limit on combined employer and individual after-tax contributions to a Trump account (excluding pilot program and certain charitable program contributions). The proposed regulations acknowledge the interplay but defer detailed ordering rules to future rulemaking. The IRS proposes that excess contributions above $5,000 be attributed first to non-section 128 contributions, but the mechanics remain unclear.

Valid account verification. Employers may rely on employee certifications regarding the dependent relationship and eligibility but must independently verify that the designated account is a valid Trump account. The IRS acknowledges this poses operational challenges and is exploring secure electronic validation methods, but no system is yet in place.

"Actual knowledge" standard uncertainties. Employers may rely on employee certifications about eligible dependents absent "actual knowledge" that the certification is incorrect. But employers with cross-system data — W-4 changes, health plan enrollment, divorce notifications — face difficult questions about when they have actual knowledge. If an employee notifies the employer of a divorce and removes a child from the health plan, does that constitute knowledge the child is no longer a dependent?

Nondiscrimination testing timing. In order to meet the timing for remediation of any average benefits test failure, employers with plan years that are the calendar year will need to complete nondiscrimination testing quickly, during January of the following year. This tight timing will require employers and their vendors to have ready access to all of the required data.

Corrective notice mechanics. When a contribution is later determined not to qualify as a section 128 contribution, the employer must provide corrective notice to the Trump account trustee within 21 days (under a safe harbor). The IRS acknowledges the operational difficulty of this requirement — particularly where the determination occurs months after the contribution — and has specifically requested comments on alternatives.

"Meaningful opportunity to receive benefits" ambiguity. For nondiscrimination testing, the proposed regulations state that an "eligible" employee is an employee with a "meaningful opportunity" to receive benefits under the section 128 program.[16] It is unclear whether "eligible" employees are therefore limited to those who presently have a dependent in the growth period, or whether it extends to any employee who could receive section 128 contributions if they had such a dependent. This significantly affects the eligibility test, especially the ratio percentage safe harbor portion of that test.

WHAT SHOULD EMPLOYERS AND ADVISORS DO NOW?

The proposed regulations mark a significant step toward making Trump account contribution programs operational. Employers and their advisors should consider the following:

Assess employee demand. Employers should gauge employee interest in a Trump account contribution program. Adopting a program has costs and will require time and effort to decide program features, draft the required legal plan documents, and ensure necessary administrative systems are in place. If cafeteria plan funding is intended, employees have competing demands for their wages, including other employee-funded benefit programs like HSAs, FSAs, 401(k), 529 plans, etc. Will the costs of the program deliver benefits perceived as valuable by employees?

Consider a staged roll-out. Many employers are already well into planning their 2027 benefit programs and getting ready for open enrollment this fall. It may be challenging to make current changes to cafeteria plans to allow for Trump account contributions by employees, especially given the unique cafeteria plan requirements for Trump account contributions (such as frequency of election changes and FICA and FUTA tax treatment). The proposed regulations make it relatively easy, however, to add a pilot program matching contribution. Some employers may consider adopting a matching contribution program first, and then later add features like cafeteria plan salary reduction contributions.

Monitor the comment period and final regulations. Written comments are due September 25, 2026 (45 days after the proposed regulations were published), and a public hearing is scheduled for October 15, 2026. Employers interested in implementing a section 128 program should monitor the comment process and look for how the IRS addresses the more challenging issues noted above.

Get to work on the plan document and administrative systems. Employers who decide to implement a section 128 program will need to coordinate with legal counsel to prepare the required written plan document that meets the minimum content requirements. Employers will also need to coordinate with their payroll vendors or other third parties to ensure that the program will meet all the operational requirements. Fortunately, the Department of Labor has concluded that Trump accounts and section 128 employer contribution programs to Trump accounts generally do not constitute benefit plans covered by ERISA, so ERISA-related compliance steps should not be required.[17]

For guidance on designing and implementing a Trump account contribution program or navigating the nondiscrimination rules under sections 128 and 129, contact Troutman Pepper Locke's Employee Benefits + Executive Compensation Practice Group.

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[1] Employer Contributions to Trump Accounts and Nondiscrimination Rules for Dependent Care Assistance Programs, 91 Fed. Reg. 51612 (Aug. 11, 2026) (to be codified at 26 C.F.R. pt. 1) (REG-101355-26) (here). For purposes of this article, all section references are to sections of the IRC, unless otherwise noted.

[2] Technically, a Trump account contribution program can also benefit an employee under age 18 who has his or her own Trump account, subject to certain special rules (e.g., the employee cannot fund his or her own account with cafeteria plan pre-tax deductions); however, given an under-18 employee will likely be a very rare fact pattern, this article focuses only on Trump account contribution programs benefitting an employee's eligible children (or other eligible dependents).

[3] One Big Beautiful Bill Act, Pub. L. No. 119-21, §70204, 139 Stat. 72 (July 4, 2025) (adding IRC §§128, 530A, and 6434).

[4] IRS Notice 2025-68, 2025-52 IRB 856.

[5] Prop. Treas. Reg. §1.128-2(b)(1).

[6] The plan year, which need not be the calendar year, governs nondiscrimination testing. The calendar year, however, always governs contribution limits—a distinction that matters for employers choosing a non-calendar plan year.

[7] Prop. Treas. Reg. §1.128-2(b)(2).

[8] IRC §152(c) (qualifying child) and §152(d) (qualifying relative).

[9] Prop. Treas. Reg. §1.128-2(d)(5).

[10] Prop. Treas. Reg. §1.128-2(d)(7).

[11] In the release accompanying the proposed regulations, the IRS notes that the section 125 regulations will be amended to reflect these special rules for cafeteria plan salary reduction contributions under section 128 programs.

[12] Prop. Treas. Reg. §1.128-2(d)(6).

[13] Prop. Treas. Reg. §1.128-3. The proposed regulations also include a set of rules under section 129, for the first time providing the details for the section 129 nondiscrimination testing requirements. The section 129 testing is similar to, but in some ways more expansive than, the section 128 nondiscrimination tests.

[14] Prop. Treas. Reg. §1.128-3(g).

[15] Prop. Treas. Reg. §1.128-3(c)(5).

[16] Prop. Treas. Reg. §1.128-3(b).

[17] Department of Labor Technical Release 2026-02 (June 17, 2026) (here).

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