

COVID-19 Relief ' Added Flexibility to 125 Cafeteria Plans

May 12, 2020

Prospective Mid-Year Election Changes IRS Notice 2020-29 allows employers to amend cafeteria plans to permit employees to make the following prospective mid-year election changes (including an initial election) for employer-sponsored health coverage, health flexible spending accounts (FSAs), and dependent care FSAs during calendar year 2020, regardless of whether the basis for the election change satisfies the "change in status" rules under Treas. Reg. 1.125-4:

- Make a new election for employer-sponsored health coverage, if the employee initially declined to elect employer-sponsored health coverage;
- Revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer (including changing enrollment from self-only coverage to family coverage);
- Revoke an existing election for employer-sponsored health coverage, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer;
- Revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA; and
- Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care FSA.

When amending plans to permit some or all of these elections, employers are permitted to place limitations on the elections that may be made by eligible employees, provided that (i) any permitted election changes are applied on a prospective basis only, and (ii) the changes to the plan's election requirements do not result in a failure to comply with the nondiscrimination rules for cafeteria plans under the Internal Revenue Code. For example, an employer may want to consider limitations on employees' permissive elections in order to curb potential adverse selection under health plans and the potential administrative burden that may be placed on the employer's personnel resources by permitting multiple election changes by an employee in a single plan year. Further, with respect to health FSAs and dependent care FSAs, employers are permitted to apply to limit mid-year elections to amounts no less than amounts already reimbursed. This relief applies to election changes with respect to self-funded and fully-insured health plans and to all health FSAs (including limited purposes health FSAs compatible with HSAs) and dependent care FSAs. Extension of Health and Dependent Care FSA Claims Period Notice 2020-29 also allows employers to amend health and dependent care FSAs to permit employees to use the amount remaining in the health or dependent care FSA as of the end of a grace period ending in 2020 (or a plan year ending in 2020 for a non-calendar year plan) to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020. For example, an employee who has an amount remaining in a health FSA at the end of the grace period ending on March 15, 2020, could use that remaining amount to reimburse medical care expenses incurred through December 31, 2020. This guidance also applies to cafeteria plans that provide for a carryover. Health FSA amounts may only be used for qualifying medical care expenses, and dependent care FSA amounts may only be used for qualifying dependent care expenses. Employers should note that an employee who (i) had an unused amount remaining at the end of the grace period or plan year

ending in 2020 and (ii) may be reimbursed for medical expenses incurred until December 31, 2020, will not be eligible to contribute to an HSA during this extension period. An employer is not required to permit this extension, but if it decides to do so, the employer should work with its FSA administrator to ensure compliance with the applicable rules. This relief applies all health FSAs, including limited purpose health FSAs compatible with HSAs and dependent care FSAs.

Amendment Requirement Any employer that wants to adopt these election changes or the extended FSA claims period must amend the applicable plan documents to reflect such changes on or before December 31, 2021. Any amendments can be made retroactive to January 1, 2020. An employer must inform all eligible employees of the changes made to the cafeteria plan. It would be preferable to adopt the required plan amendment and communicate such changes to employees as soon as administratively practicable if the employer wants to quickly permit its employees to take advantage of these changes. A copy of Notice 2020-29 can be found [here](#).