IRS Provides for a New Mid-Year Election Change Event under Cafeteria Plans

October 18, 2022

In its recent Notice 2022-41 (the "***Notice***"), the IRS has provided for a new, optional election change event, which may be adopted by Code Section 125 cafeteria plans that operate on a non-calendar year plan year. The Notice was issued in conjunction with final regulations recently promulgated by the Treasury Department under Code Section 36B ("***Final Regulations***").

Final Regulations

Pursuant to Code Section 36B, which was originally enacted under the Affordable Care Act, applicable taxpayers who enroll in a qualified health plan through a Health Insurance Exchange ("***Exchange Plan***") and are not otherwise eligible for coverage under an employer-sponsored group health plan ("***ER Plan***") that provides "minimum value" and is "affordable" are generally entitled to a premium tax credit ("***PTC***"). Under the prior regulations regarding the PTC, the "affordability" of coverage under the ER Plan for an employee, as well as for each of the employee's family members, was based on the cost of employee-only coverage under the ER Plan. The Final Regulations revised the "affordability" determination in part, such that "affordability", as applicable to the family members of an employee, is based on the amount that the employee must pay to cover himself and his family members.

The "affordability" amendments under the Final Regulations do not affect the safe harbors that an employer may use to determine "affordability" for purposes of the employer shared responsibility provisions of Code Section 4980H. The Final Regulations are effective as of December 12, 2022.

The Notice

The Notice was issued to allow employees to revoke certain ER Plan coverage of their family members under a non-calendar year cafeteria plan and thus enable them to enroll in an Exchange Plan with respect to which they may, on the basis of the new "affordability" determination under the Final Regulations, obtain a PTC.

A non-calendar year cafeteria plan may be amended to allow an employee to make a mid-year, prospective election to revoke family coverage under an ER Plan (other than a health flexible spending arrangement), provided that certain conditions are satisfied, including that the revocation corresponds to the intended enrollment of the family member in the Exchange Plan coverage that becomes effective no later than the day immediately following the last day of the revoked ER Plan coverage.

The Notice applies to elections that are effective on or after January 1, 2023. In order to adopt the new election change event, a cafeteria plan must be amended on or before the last day of the plan year in which the election changes are allowed. The amendment may be effective retroactively to the first day of that plan year, provided that the cafeteria plan operates in accordance with the Notice, and the employer-sponsor of the cafeteria plan informs participants of the amendment. The employer may also amend its cafeteria plan to adopt the new election change event for a plan year that begins in 2023 at any time on or before the last day of the plan year that begins in 2024.

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The Final Regulations are available here. The Notice is available here.

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