



COVID-19

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**Coronavirus / COVID-19
Response Team**

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**IRS Allows Unprecedented
Mid-Year Election Changes
Under Section 125 Cafeteria
Plans**

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Today's Topics

- Increased flexibility to make pre-tax election changes under Section 125 Cafeteria Plans
- Delayed deadline to incur medical and dependent care expenses for *some* Health and Dependent Care FSAs
- HDHP clarification regarding COVID-19 testing and treatment, and telehealth
- Increased carryover amount for Health FSAs to \$550 (from \$500)

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Background

- On Tuesday, May 12, 2020, the IRS issued two new IRS Notices:
 - IRS Notice 2020-29
 - Increased flexibility to make pre-tax election changes under a Section 125 Cafeteria Plan
 - Delayed deadlines for Health and Dependent Care FSAs for plan years (or grace periods) *that end in 2020*
 - Clarified coverage of COVID-19 testing and treatment, and telehealth services by HDHPs
 - IRS Notice 2020-33 – Increased Health FSA carryover to \$550 for carryovers into 2021 plan year

Mid-Year Election Changes

- Generally, under a Cafeteria Plan, the following rules apply to a participant's pre-tax elections:
 - Elections must be made before the plan year for the Cafeteria Plan begins; and
 - Those elections must be irrevocable during the plan year, unless the participant incurs a permissible mid-year change event. Examples of those events:
 - Change-in-status events
 - HIPAA special enrollment events
 - Entitlement to Medicare or Medicaid

Mid-Year Election Changes

- Under IRS Notice 2020-29, a participant can make a mid-year election change on a prospective basis during the 2020 calendar year, *regardless of whether the participant incurs a mid-year change event*. With respect to employer-sponsored health coverage, the following changes are permissible:
 - Elect to enroll in employer-sponsored coverage
 - Elect to change coverage options or tiers offered by the same employer
 - Elect to revoke coverage (if the employee attests to having coverage from another source)

Mid-Year Election Changes

- These changes are optional
- Employer considerations before allowing these optional changes:
 - Notice 2020-29 only allows a participant to change the amount of the participant's pre-tax elections under a Cafeteria Plan. It does *not* entitle the participant to make mid-year election changes with respect to benefit enrollment

Mid-Year Election Changes

- Absent a HIPAA special enrollment event, insurers are not required to permit mid-year enrollment changes. Employers should confirm with their carriers that the carrier will allow these mid-year changes
 - Generally, insurers (including stop-loss carriers) don't have any issues with dropping coverage mid-year
 - Insurers may resist allowing mid-year enrollments because of adverse selection issues (however, insurers are showing increased flexibility during the COVID-19 pandemic)

Mid-Year Election Changes

- Employers may want to limit the allowable mid-year changes with respect to employer sponsored health coverage. Notice 2020-29 gives the following examples:
 - Only allowing a change that results in increased or improved coverage (e.g., change from an HDHP to a traditional plan)
 - Only allowing a change that allows an employee to add eligible dependents to employer-sponsored coverage
 - Only allowing a change from a low-plan option (only in-network coverage) to a high-plan option (in-network and out-of-network coverage)

Mid-Year Election Changes

- Participant's may allow an employee to drop coverage mid-year, but should consider the following:
 - Participant must attest (in writing) that the employee has other comprehensive health coverage from another source (Notice 2020-29 includes sample attestation language). Employers may rely on this attestation, unless it has actual knowledge the attestation is false
 - Absent a HIPAA special enrollment event, participant may not be able to enroll in other coverage mid-year

Mid-Year Election Changes

- IRS Notice 2020-29 also permits a participant to make the following mid-year election changes on a prospective basis under a Health FSA or Dependent Care FSA, *regardless of whether the participant incurs a mid-year change event*:
 - Elect to enroll or revoke enrollment in a Health or Dependent Care FSA
 - Elect to increase or decrease participant contributions to Health or Dependent Care FSA

Mid-Year Election Changes

- Health FSAs are subject to the “uniform coverage” rule:
 - A participant is entitled to the maximum amount of reimbursement from the participant’s Health FSA at all times during the Cafeteria Plan’s plan year
 - This means a participant’s Health FSA account balance may be negative
 - As a result, employers should not allow participants to *decrease* participant contributions to a Health FSA to an amount that is less than the amount that the participant has already been reimbursed

Mid-Year Election Changes

- Health FSAs must generally be structured as an “excepted benefit” to be permissible under the ACA. A Health FSA must satisfy both of the following conditions:
 - Availability Condition - Only employees who are eligible for the employer’s major medical plan are eligible for the Health FSA
 - Maximum Benefit Condition - The maximum reimbursement (including employer contributions, if any) under a Health FSA cannot exceed the greater of: (1) \$500; or (2) two times the amount of the participant’s contributions

Mid-Year Election Changes

- It is unlikely that employer Health FSA contributions can be returned to the employer because of the uniform coverage rule and ERISA's "exclusive benefit" protections
- Employers that make employer contributions to a health FSA should not allow an employee to decrease participant contributions below an amount that the participant's Health FSA fails the Maximum Benefit Condition
- Allowing these election changes for Health and Dependent Care FSAs are optional

Mid-Year Election Changes

- Employers that want allow any of the mid-year election changes under Notice 2020-29 must formally amend their Cafeteria Plans
 - Cafeteria Plans must be amended by December 31, 2021
 - Amendments can be retroactively effective to January 1, 2020
 - Until a Cafeteria Plan is amended, it can be operated as if it is amended (as long as it is operated in accordance with Notice 2020-29)

Health and Dependent Care FSA Extensions

- Notice 2020-29 allows the deadline for a participant to *incur* eligible medical and dependent care expenses for plan years and grace periods *that occur in 2020* to be extended until December 31, 2020
 - Unused account balances under a Health or Dependent Care FSA at the end of a Cafeteria Plan's plan year are generally forfeited. Exceptions
 - 2.5 month grace period
 - Carryover (which only applies to Health FSAs)

Health and Dependent Care FSA Extensions

- For plan years and grace periods that end in 2020, participants can continue to submit claims that are incurred on or before December 31, 2020 for reimbursement from the account balance for a previous plan year
- This relief is not applicable to calendar year plans that don't offer a grace period for the Health FSA or Dependent Care FSA
- Also applies to a Health FSA with a non-calendar year plan that offers a carryforward

Health and Dependent Care FSA Extensions

- Example (with grace periods):
 - Cafeteria Plan's Plan Year: July 1 – June 30
 - 2.5 month grace period for Health and Dependent Care FSA (i.e., eligible expenses must be incurred by September 15)
 - The September 15, 2020 deadline can be extended to December 31, 2020
 - Participants can incur expenses until December 31, 2020 and be reimbursed from the Health or Dependent Care FSA for the account balance from the 2019 – 2020 plan year

Health and Dependent Care FSA Extensions

- Example (with carryover):
 - Same facts as previous example, except that instead of a 2.5 month grace period, the Health FSA offers a carryover up to \$500 of unused expenses
 - The September 15, 2020 deadline can be extended to December 31, 2020 for the Dependent Care FSA
 - The June 30, 2020 deadline can be extended to December 31, 2020 for the Health FSA. If a participant has an account balance as of Dec. 31, 2020, up to \$550 can be carried over to the 2020-2021 plan year

Increased Health FSA Carryover

- Beginning 2013, Health FSAs were allowed to offer a carryover of a participant's unused account balance to the next plan year:
 - A Health FSA could offer a carryover *or* a grace period, *but not both*
 - The maximum carryover under IRS guidance was \$500, which has not been indexed for inflation
 - Employers were permitted to impose limitations on the carryover (e.g., impose a limit of less than \$500)

Increased Health FSA Carryover

- Under Notice 2020-33, Health FSAs can now allow a carryover of up to \$550 from the 2020 plan year to the 2021 plan year
 - Employers can still set a lower limit
 - The carryover will continue to be indexed for inflation in the future.
 - The indexed amount will generally be 20% of the cap on participants' salary reduction contributions to a Health FSA (in 2020, that cap is \$2,750)
 - Since the cap on salary reduction contributions is indexed in multiples of \$50, the carryover will be indexed in multiples of \$10

Clarification of Certain Expenses Covered by HDHPs

- Generally, in order to be an HDHP, the HDHP can only pay for non-preventive care expenses once a participant incurs medical expenses in excess of minimum deductibles. In 2020, those minimum deductibles are:
 - \$1,400 for self-only coverage; and
 - \$2,800 for other-than-self-only-coverage (family coverage)

Clarification of Certain Expenses Covered by HDHPs

- In Notice 2020-15, the IRS announced that a HDHP would not fail to be a HDHP even if it reimbursed a participant's expenses for "medical care services and items purchased related to *testing for* and *treatment of* COVID-19 prior to the satisfaction of the applicable minimum [HDHP] deductibles"
- Notice 2020-15 was released on March 11, 2020

Clarification of Certain Expenses Covered by HDHPs

- It was unclear if a HDHP could reimburse testing for and treatment of COVID-19 before March 11, 2020 without the application of the minimum HDHP deductibles
- Notice 2020-29 clarified that the guidance in Notice 2020-15 applied retroactively to January 1, 2020

Clarification of Certain Expenses Covered by HDHPs

- Notice 2020-29 also clarified that the permissible COVID-19 expenses included:
 - Diagnostic testing for:
 - Influenza A and B
 - Norovirus and other coronaviruses; and
 - Respiratory Syncytial Virus (“RSV”)
 - Any other item or service required to be covered by a health plan with no participant cost-sharing under the FFCRA (as amended by the CARES Act)
 - Coverage of these items was also permissible by HDHPs retroactively back to January 1, 2020

Clarification of Certain Expenses Covered by HDHPs

- The FFCRA required testing for COVID-19 to be covered by all health plans (including HDHPs):
 - With no participant cost-sharing (including deductibles)
 - In all settings (including virtual settings, like telehealth)
- Telehealth providers couldn't determine whether a virtual visit was for telehealth or another medical care service

Clarification of Certain Expenses Covered by HDHPs

- HDHPs were left with a difficult choice:
 - Violate the FFCRA; or
 - Jeopardize a health plan's HDHP status by covering medical services that were not COVID-19 testing without participant cost-sharing (including the minimum deductible). This also jeopardizes the HSA eligibility of the participants in the HDHP
- The CARES Act allowed HDHPs to provide all virtual health services without the application of the minimum HDHP minimum deductibles

Clarification of Certain Expenses Covered by HDHPs

- The CARES Act changes were effective March 18, 2020 (which is the date the FFCRA was effective) through the last day of the health plan's first plan year that begins on or after January 1, 2022
- This left uncertainty for telehealth services provided by HDHPs before March 18, 2020
- Notice 2020-29 clarifies that HDHPs can cover all virtual health services retroactive to January 1, 2020

Questions?

Miller Johnson Back to Work Resource Center

<https://resources.millerjohnson.com/>

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Resource Center

Guidance Contact Account Log in

Welcome!

Our online **Back to Work Resource Center** provides a cost-effective one-stop shop for employers who are returning employees to work during this COVID-19 pandemic.

The **Back to Work Resource Center** regularly updates information to:

- ensure compliance with the ever-changing legal requirements
- include practical tools to effectively, safely and confidently return employees to work
- incorporate resources of best practices from outside organizations, including community partners such as Spectrum Health

Updates will be provided to all participants as the law and best practices evolve, including a weekly email of significant postings.

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