

IRS ALLOWS FOR TEMPORARY NEW CAFETERIA PLAN FLEXIBILITY

In response to the continued administrative and practical burdens faced by health and welfare plans and their plan participants due to the COVID-19 epidemic, the IRS released Notice 2020-29 to relax some of the rules under §125 to increase flexibility for pre-tax elections under an employer's cafeteria plan. Generally, election changes under Notice 2020-29 can be made regardless of whether or not the reason for the change meets the consistency requirements outlined in §125.

It is important to note that the changes to the §125 rules provided for in the Notice, and outlined below, are optional for employers. Employers may adopt all, some, or none of these permitted amendments for their §125 pre-tax plans and should ensure that any changes do not result in failure to comply with §125 nondiscrimination rules. In other words, permitted election changes adopted by the plan sponsor should not favor highly compensated participants. Further, an employer may limit the timeframe in which employees may make the permitted changes.

The following is a list of changes an employer may adopt to their §125 cafeteria plan:

1. Prospectively allow employees that previously waived coverage to make a new election for health coverage.
2. Prospectively allow employees to change their health coverage election from one coverage option to another (e.g., from a PPO to an HMO) and to change their tier of coverage (e.g., from self-only coverage to family coverage).
3. Prospectively revoke an election for health coverage provided that the employee attests in writing that they are enrolled or will immediately enroll in the health coverage of another plan sponsor (employer/individual/government).

A sample attestation is provided in the Notice:

Name: _____
(and other identifying information requested by the employer for administrative purposes)

I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan).

Signature: _____

4. Prospectively revoke, decrease, or make a new election for a health FSA or dependent care assistance program (DCAP).
 - A reduction in election for a health FSA or DCAP cannot be less than what the plan has already reimbursed.
 - Includes limited purpose health FSAs.
5. Health FSA and DCAP plans with grace periods and plan years ending in 2020 may extend a grace period for these plans through December 31, 2020, which exceeds the current maximum permitted grace period of 2-1/2 months after the close of the plan year.
 - Plans with a carryover provision for the health FSA may allow for the extended

grace period through 12/31/20 without violating previously established rules limiting plans to either a carryover or a grace period. An example of how the grace period will work with a carryover is provided in the Notice starting on page 10.

- An extended grace period will impact eligibility to contribute to an HSA. For example, if an employer 7/1 plan year amends their plan document to allow for expenses incurred after 6/30/2020 to be applied to their 7/1/19 health FSA election through 12/31/20, an individual that changes their election at open enrollment for coverage under an HSA qualified HDHP that has unused funds as of 6/30/2020 will be ineligible to contribute to an HSA through 12/31/2020.
- Changes may be applied to limited purpose health FSAs.

Dental and vision plans are not specifically contemplated in the Notice. It would appear to be consistent with the intent of the Notice to allow individuals to elect dental or vision coverage. However, unless the employee attests that they will gain dental or vision coverage elsewhere, it does not appear that employees can drop dental or vision coverage due to reduced access to dental and vision providers.

Amendments to a cafeteria plan that adopt any of the changes listed above may apply retroactively as far back as 1/1/2020. Should an employer amend their cafeteria plan accordingly, the employer must formally adopt the amendment no later than 12/31/2021.

Plan sponsors that amend their cafeteria plan to reflect any of these changes must also amend the plan documents of the underlying benefits (SPDs for plans subject to ERISA). Plan sponsors should work with their insurers or stop loss carriers to make sure they agree to any changes made to the underlying benefit.

Please be advised that any and all information, comments, analysis, and/or recommendations set forth above relative to the possible impact of COVID-19 on potential insurance coverage or other policy implications are intended solely for informational purposes and should not be relied upon as legal advice. As an insurance broker, we have no authority to make coverage decisions as that ability rests solely with the issuing carrier. Therefore, all claims should be submitted to the carrier for evaluation. The positions expressed herein are opinions only and are not to be construed as any form of guarantee or warranty. Finally, given the extremely dynamic and rapidly evolving COVID-19 situation, comments above do not take into account any applicable pending or future legislation introduced with the intent to override, alter or amend current policy language.