

May 14<sup>th</sup>, 2020

## IRS Announces COVID-19-Related Cafeteria Plan Relief

In response to the novel coronavirus (COVID-19) outbreak, the IRS has issued a notice allowing cafeteria plans to permit certain **prospective** midyear election changes. (Note that as is the case with most existing midyear election events, an employer **may** implement these changes in whole or in part; the announced rules are not mandatory.) The notice also allows cafeteria plans to provide an extended period for using amounts remaining in a health FSA or DCAP to pay or reimburse medical or dependent care expenses, and it provides clarifications regarding recent COVID-related relief for high-deductible health plans (HDHPs). Here are highlights:

- **Election Change Relief:** Cafeteria plans can be amended to allow the following prospective election changes **during calendar year 2020**:
  - 1) New elections for employer-sponsored health coverage by employees who initially declined coverage;
  - 2) elections to enroll in different health coverage sponsored by the same employer (including a change from self-only to family coverage);
  - 3) revocation of existing elections for employer-sponsored health coverage, but only with a written attestation that the employee is or immediately will be enrolled in other “comprehensive” health coverage not sponsored by the employer;
  - 4) health FSA or DCAP election changes (including revocations, increases, decreases, or new elections).

These additional election changes are permitted regardless of whether the basis for the change meets the existing requirements of the IRS election change regulations. The relief may be applied retroactively to periods between January 1, 2020 and the notice’s issue date to address plans that permitted election changes before the issue date that otherwise met the notice’s requirements. (This does not mean employers can allow employees to make retroactive changes, but simply blesses changes that employers may have allowed earlier in the year prior to the announced guidance.) Employers utilizing the relief can determine the extent to which the additional elections will be permitted (considering the potential for adverse selection), so long as any permitted changes are nondiscriminatory, and may rely on an employee’s attestation regarding other coverage absent actual knowledge to the contrary (sample language is provided).

- **Health FSA and DCAP Claims:** Plans may be amended to permit employees to use amounts remaining in a health FSA or DCAP at the end of a plan year or grace period ending in 2020 to pay or reimburse expenses incurred through December 31, 2020. (As usual, health FSAs can only reimburse medical care expenses, and DCAPs can only reimburse dependent care expenses.) Examples illustrate how this relief applies to health FSAs that provide for carryovers. The notice cautions that if the period for incurring claims is extended under a health FSA that is not (or is not amended to be) HSA compatible, an individual with unused amounts remaining at the end of a plan year or grace period ending in 2020 will not be eligible to contribute to an HSA during the extended period.

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- **Plan Amendments:** Plan amendments are needed to utilize the election change or claims relief, as well as the increase in carryover amounts permitted under IRS Notice 2020-33. Amendments for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020, so long as the plan operates in accordance with applicable requirements and all eligible employees are informed of the changes.
- **HDHP Relief:** The notice explains that recent relief allowing HDHPs to provide benefits for COVID-19 testing and treatment on a no- or low-deductible basis applies to reimbursements of expenses incurred on or after January 1, 2020 and provides clarifications regarding the items and services covered by this relief. The notice also clarifies that CARES Act relief regarding telehealth and other remote care services for plan years beginning on or before December 31, 2021 applies with respect to services provided on or after January 1, 2020.

Employers and advisors have been seeking cafeteria plan relief in connection with the COVID-19 outbreak and will appreciate being able to offer additional flexibility to employees. Those who work with cafeteria plans will want to familiarize themselves with the relief in the notice, keeping in mind that the election change and claim provisions are discretionary and will require plan amendments. Note also that key cafeteria plan principles remain in place: retroactive election changes generally are not permitted, and unused contributions must be forfeited subject to limited exceptions (e.g., for health FSA carryovers or a grace period).

Notice 2020-29 can be accessed here: <https://www.irs.gov/pub/irs-drop/n-20-29.pdf>

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