

IRS Offers Relief to Cafeteria Plan Sponsors During the Pandemic

By William S. Carter

During the pandemic, a number of scenarios have arisen under which an employee may wish to change a standing cafeteria plan election, but for which such a change was not clearly permissible under the rules governing mid-year election changes. In Notice 2020-29, the IRS relaxed the restrictions on mid-year election changes and provided relief under the use or lose rule applicable to health and dependent care flexible spending arrangements (FSAs) for the 2020 calendar year for sponsors wishing to adopt such changes. In a separate notice, Notice 2020-33, the IRS also made changes to the maximum amount that may be carried over from a health FSA plan year.

Mid-Year Election Changes

The IRS provides relief for sponsors inclined to amend their cafeteria plans to offer to participants for the 2020 calendar year mid-year changes to health coverage elections, health FSA salary reductions, and dependent care FSA salary reductions without regard to whether the changes would comply with permitted election change rules, provided such changes are made on a prospective basis. Specifically, a plan may be amended to permit employees to:

- Elect to participate in employer sponsored health coverage;
- Enroll in a different health coverage option sponsored by the same employer;
- Revoke participation in health coverage, so long as the employee attests that he or she is or will enroll in other coverage not sponsored by the employer; or
- Revoke, increase, or decrease an existing health FSA or dependent care FSA election.

The notice provides a sample attestation that employers may use to satisfy the attestation requirement with respect to revocation.

The IRS makes clear that employers are free to determine the extent to which they wish to permit these changes, and employers may limit the number of times and the time period during which an employee may make such changes.

The guidance provides relief with respect to mid-year election changes made on or after January 1, 2020, so that sponsors that may have acted to permit changes without waiting for guidance from the IRS will not be treated as having failed to comply with cafeteria plan requirements.

Relief from the Use or Lose Rule

Recognizing that the pandemic has impacted the ability of employees to access medical care such as elective procedures and dependent care, the IRS has provided a special grace period for health FSA and dependent care FSAs for incurring claims that a sponsor may choose to adopt.

Sponsors are permitted to amend a plan with a plan year ending in 2020 or a grace period ending in 2020 to extend the reimbursable period for dependent care and health FSA claims through the end of 2020. The option to amend the plan to extend the reimbursement period is available even if the plan has a carryover provision, although a calendar year plan with carryover would not be afforded any relief given that such relief only applies to plans with grace periods or plan years ending in 2020.

The extended reimbursement period following the end of the grace period or plan year is to be disregarded for purposes of whether ineligible coverage is provided under the health savings account (HSA) rules.

Increased Carryover Limit

In Notice 2020-33, the IRS has modified its prior carryover guidance to set the maximum amount of any health FSA carryover to 20% of the maximum amount permitted to be contributed to a health FSA, as indexed for inflation. Thus, for plan years beginning in 2020, the maximum amount that may be carried over in a health FSA is increased to \$550.

COVID-19 Testing and Treatment and Telemedicine under High-Deductible Plans

Notice 2020-29 also expands upon prior relief provided to sponsors of high-deductible health plans (HDHPs) providing first-dollar coverage of certain items and services related to testing and treatment of COVID-19. The notice clarifies that the prior guidance that a plan will not fail to be an eligible HDHP if it provides first dollar coverage of testing and treatment for COVID-19 applies to reimbursements and expenses incurred on or after January 1, 2020, and that testing and treatment of COVID-19 includes any testing for influenza A or B, norovirus, coronaviruses, and respiratory syncytial virus and other items and services required to be covered without cost sharing under the Families First Coronavirus Response Act, as amended by the CARES Act.

The notice also provides that telehealth services provided without cost sharing on or after January 1, 2020 but before the passage of the CARES Act will not constitute ineligible coverage for purposes of whether an individual can or could contribute to an HSA.

Plan Amendments

If a sponsor wishes to take advantage of the relief for mid-year election changes or extended FSA reimbursement periods, an amendment to the sponsor's cafeteria plan(s) is required. The IRS guidance provides that sponsors may amend a plan retroactively for 2020 any time before December 31, 2021.

To the extent a sponsor has a carryover provision and wishes to amend its plan carryover limit, an amendment should be made before the last day of the plan year from which amounts may be carried over that will be subject to the increased limit.