

Eye on Washington Regulatory Update

IRS Provides Relief for Cafeteria Plan Participants Due to COVID-19

On May 12, 2020, the Internal Revenue Service (IRS) released Notices 2020-29 and 2020-33 providing for increased flexibility in relation to Section 125 plans during calendar year 2020.

Notice 2020-29, found at <https://www.irs.gov/pub/irs-drop/n-20-29.pdf>, allows for group health plans to be amended to allow for certain mid-year elections that would otherwise not be permitted under the current mid-year election rules. Generally, cafeteria plan elections are irrevocable, and changes can only be made based in limited circumstances and if allowed in the cafeteria plan documents.

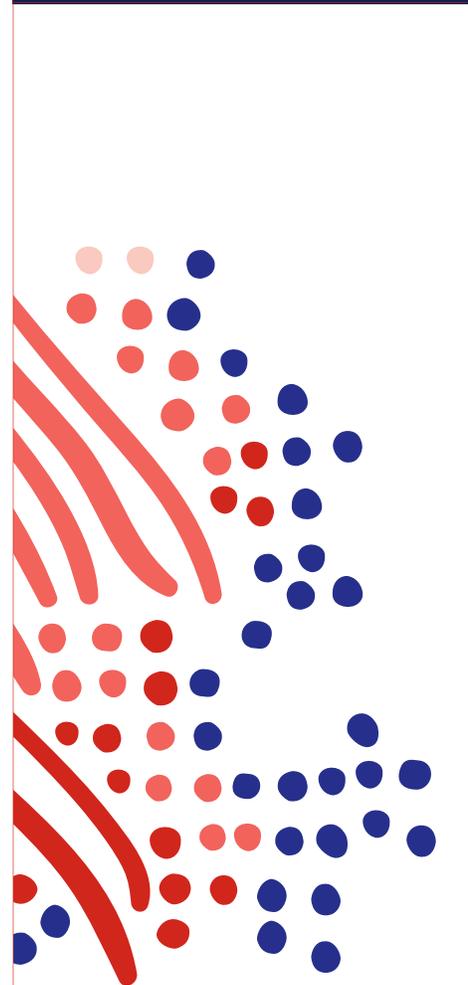
Under the relief provisions, cafeteria plans can be amended to allow for certain **prospective** mid-year changes with respect to certain elections. A cafeteria plan may choose to implement the relief provided under Notice 2020-29 but is not required to do so. Moreover, an employer can determine the extent to which such relief is made available, including limiting the time period during which such changes can be made. However, the employer will need to consider any nondiscrimination considerations as well as the potential for adverse selection of health coverage.

Notice 2020-29 breaks the relief up into four main areas: 1) employer-sponsored health coverage; 2) health-care flexible spending account (FSA) elections; 3) dependent-care FSA elections; and (4) health savings accounts.

Employer-Sponsored Health Coverage

A cafeteria plan can permit employees who are eligible for benefits to:

- Make a new prospective election, if the employee originally declined to elect employer-sponsored health coverage;
- Revoke an existing election and make a new prospective election to enroll in different employer-sponsored health coverage sponsored by the same employer;
- Revoke an existing election provided the employee attests in writing that the employee has or will immediately enroll in other health coverage;
- NOTE: The employer may rely on the written attestation provided by the employee except in cases where the employer has actual knowledge that employee is not, or will not be, enrolled in other comprehensive health coverage not sponsored by the employer. The following sample language was included in Notice 2020-29 for use by employers for purposes of the attestation:



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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: _____

Health-Care FSA / Dependent-Care FSA Coverage

Notice 2020-29 also provides relief in relation to health-care and dependent-care FSAs. First, a cafeteria plan can permit employees to revoke an election, make a new election, or increase or decrease an existing election with respect to both health-care and dependent-care FSAs. Employers are permitted to limit mid-year elections to amounts that are no less than amounts already reimbursed.

Second, with respect to a health-care FSA, a plan may extend the time during which unused amounts remaining in a health-care FSA at the end of a "grace period" or plan year ending in 2020 may be permitted to use those unused amounts to pay or reimburse medical expenses incurred through December 31, 2020. Currently, employers can adopt either a grace period or carryover rule, but not both, with respect to their health-care FSA. A grace period is an additional time (up to two-and-a-half months) following a plan year that a plan may allow a participant to utilize unused amounts to incur and be reimbursed for eligible expenses. The carryover rule allows for an employee to carry over unused amounts (up to a limit, currently \$550) into the next plan year to use for expenses incurred in the next plan year. Notice 2020-29 is intended to effectively allow employers to adopt both a grace period and a carryover for the remainder of calendar year 2020.

Health Savings Accounts (HSA)

Notice 2020-29 provides clarification regarding the impact of recently issued guidance and enacted legislation regarding eligibility under an HSA. Section 223 of the Internal Revenue Code provides that an individual may contribute to an HSA if they are covered under a high-deductible health plan (HDHP) and do not have any "impermissible coverage." Such coverage is a plan that would reimburse the participant for any expense (other than routine) prior to meeting the HDHP deductible. A full-purpose health FSA is an example of impermissible coverage.

IRS Notice 2020-15 (found at <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>) provides that a health plan that otherwise satisfies the requirement to be an HDHP will not fail to be an HDHP because the health plan provides medical care services and items purchased related to "testing for and treatment of COVID-19" prior to the HDHP deductible being met.

Notice 2020-29 stipulates that the relief in the Notice 2020-15 applies to expenses incurred on or after January 1, 2020. In addition, it was clarified that the panel of diagnostic testing for influenza A & B, norovirus and other coronaviruses, and respiratory syncytial are included in the allowable expenses.

Section 3701 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act amended Section 223 temporarily to allow HSA-eligible HDHPs to cover telehealth and other remote-care services prior to the HDHP deductible being met. In addition, the CARES Act includes telehealth and other remote-care services as categories that are disregarded for purposes of determining whether an individual who has other health-plan coverage (e.g., a full-purpose health FSA) in addition to the HDHP is eligible to make or receive tax-favored contributions to an HSA.

Consequently, an otherwise HDHP-eligible individual may also receive coverage for telehealth and other remote-care services outside the HDHP prior to meeting the HDHP deductible and remain eligible to make and receive HSA contributions in 2020.

Notice 2020-29 provides that the treatment of telehealth and other remote services applies to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021.

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Plan Amendments

In order for a plan to allow the changes permitted in Notice 2020-29, an employer must adopt an amendment to its cafeteria plan on or before January 31, 2021. This amendment may be effective retroactively to January 1, 2020, provided that the cafeteria plan operates in accordance with Notice 2020-29 or Notice 2020-33 (discussed below) or both. An employer adopting any of the available relief must also notify all employees eligible of the changes to the plan.

Notice 2020-33

Notice 2020-33 provides an update to the health-care FSA carryover limit for 2020. In October of 2013, the IRS guidance issued allowing health FSAs to offer carryovers of up to \$500 at

the end of a plan year, to be used for qualified medical expenses incurred in a subsequent plan year. Carryovers are optional and must be provided for in the plan documents. Furthermore, carryovers are an alternative to offering a health FSA grace period. Health FSAs that allow carryovers from a plan year cannot also have a grace period with respect to that year.

Notice 2020-33 (found at <https://www.irs.gov/pub/irs-drop/n-20-33.pdf>) provides for an increase of \$50.00 in the amount that remains unused at the end of a health FSA plan year that may be rolled over to the subsequent health FSA plan year. Consequently, for 2020 the carryover amount allowed is \$550.00.

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