



# Employers To The Rescue . . . Maybe! IRS Permits Additional Flexibility For Cafeteria Plan Elections And Carryovers

Insights

5.15.20

In response to the realization that many employees will have unanticipated medical and childcare challenges due to COVID-19, the IRS just provided employers with a number of optional amendments that can be made to Section 125 cafeteria plans and related health plans and flexible spending arrangements (FSAs). The agency guidance released on May 12 is significant as it allows you the option to let employees revoke, add, or change 2020 coverage elections now, instead of waiting until open enrollment, and without a qualifying status change.

The IRS has also given you the option to extend grace periods to allow additional time to incur claims for reimbursement under health and dependent care FSAs. Other relief allows you to expand telehealth coverage retroactively to January 1, 2020 without impacting health savings account (HSA) eligibility. What do you need to know about these changes?

## Key Parameters

If you elect to amend your cafeteria plan to provide for 2020 mid-year election changes, [Notice 2020-29](#) provides the following key parameters.

## *Permitted Amendments*

First, you may, in your discretion, amend your cafeteria plan, group health plan(s), health flexible spending arrangements (HFSAs) and dependent care assistance programs (DCAPs) to make some or all of the following prospective changes:

- With respect to **employer-sponsored health coverage**, allow employees to make the following changes:
  - Make a new election for employer sponsored coverage;
  - Revoke an existing election in order to enroll in another employer-sponsored coverage option; or
  - Revoke an existing election in order to enroll in other “comprehensive” health coverage not sponsored by the employer (e.g. Medicare). This option requires you to receive a written attestation from the employee certifying enrollment in the other coverage. Model language for the attestation is provided in the IRS guidance.
- With respect to a **HFSA or DCAP**, allow employees to make the following changes:

- Make a new election, revoke an election, or increase or decrease an existing election; or
- Allow an extension of time to incur expenses for reimbursement for HFSA or DCAP covered claims through December 31, 2020. To be eligible for this relief, the HFSA or DCAP must have a grace period or be a non-calendar year plan ending in 2020. Calendar year HFSAs or DCAPs without a grace period (i.e., an additional period for incurring claims ending no later than March 15<sup>th</sup> of the subsequent calendar year) are not eligible for this particular relief. If an HFSA has a plan year ending in 2020, but allows for a carryover, the IRS relief still allows you to adopt the extended grace period for claims through December 31, 2020, even though offering simultaneous carryovers and grace periods are otherwise prohibited by [Notice 2013-71](#). No similar relief is provided for HSA compatibility, and employees who are allowed extensions to incur HFSA expenses will **not** be eligible to contribute to an HSA during the extended period. You will need to evaluate the impact and consider if transitioning the HFSA to a more limited HSA-compatible HFSA as permitted by [Notice 2005-86](#) would be helpful.

### ***Employers Have Flexibility***

You have flexibility to determine the extent to which any election changes are permitted and applied. While all election coverage changes must be prospective, you are free to limit the number of election changes that can be made; specify the time period for which changes can be made; and in the case of HFSAs and DCAPs, limit elections to amounts not less than already reimbursed. You should consider the adverse selection risks in determining how expansively to amend their plans for mid-year changes.

### ***Timing Of Changes***

Election changes must be made during calendar year 2020 and be prospective. Relief may be applied retroactively (pre-Notice) to a period on or after January 1, 2020, for cafeteria plans that already permitted mid-year election changes consistent with Notice 2020-29 requirements. In other words, the IRS will not enforce cafeteria plan violations for employers who previously allowed employees to make mid-year changes after January 1, 2020 consistent with the notice as a result of the challenges faced by COVID-19.

### ***Rules Still Apply***

It is important to note that ERISA notice provisions still apply (likely requiring you to inform all eligible employees of the change), as do cafeteria plan nondiscrimination rules (plans should ensure changes will not result in failures).

### ***Miscellaneous Provisions***

Plans must be amended to provide for the 2020 mid-year election flexibility or extended carryover periods, on or before December 31, 2021.

On a practical note, if you wish to adopt mid-year election and carryover changes, you often must consult with, and obtain advanced approval from, carriers and stop-loss providers. This is because the election restrictions limiting mid-year enrollment to qualifying changes in family status or

HIPAA special enrollment are typically embedded into the terms of the group health plan or insurance policy, as well as the cafeteria plan.

### **High Deductible Health Plan Clarifications**

In addition to providing parameters for mid-year election changes, Notice 2020-29 also clarifies a few COVID-19 issues related to HSA-eligible High Deductible Health Plans (HDHPs).

First, the IRS guidance clarifies that relief provided in Notice 2020-15 (allowing coverage of COVID-19-related testing and treatment prior to satisfying the deductible) applies with respect to reimbursements of expenses incurred on or after January 1, 2020.

Next, it clarifies that “testing and treatment of COVID-19” under Notice 2020-15 includes the panel of diagnostic testing for influenza A&B, norovirus and other coronaviruses, respiratory syncytial virus (RSV), and another items or services required to be covered with no cost sharing under the FFCRA and CARES Act.

Finally, it provides that treatment of telehealth and other remote care services pursuant to Section 3701 of the CARES Act applies to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021.

### **Additional Changes Announced By The IRS**

Simultaneous to its release of Notice 2020-29, the IRS and Treasury released Notice 2020-33. The guidance in Notice 2020-33 is not COVID-19 specific, but does impact HFSA and Individual Coverage HRAs (ICHRAs) by providing several key changes.

- **HFSA:** The IRS now permits you to increase the maximum HFSA carryover amount for plan years starting in 2020 from \$500 to “20% of the maximum HFSA salary reduction contribution under §125(i) for that plan year.” This means that the maximum carryover for a 2020 plan into a 2021 plan is \$550 (20% of \$2,750). Plans may adopt an amendment relating to this 2020 plan year change, on or before December 31, 2021.
- **ICHRA:** The IRS also permits a plan to treat an expense for a premium for health insurance coverage as incurred on: (1) the first day of each month of coverage on a pro rata basis; 2) the first day of the period of coverage; or 3) the date the premium is paid. This allows an ICHRA to reimburse for health care coverage premiums paid prior to the first day of the plan year – relaxing the current rule that limits payment and reimbursements to current plan year expenses.

### **Conclusion**

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information. For further information, contact the author, your Fisher Phillips attorney, any attorney in our Employee Benefits Practice Group, or any member of our Post-

[Pandemic Strategy Group Roster](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

## ***Service Focus***

Employee Benefits and Tax