

MAY 14, 2020

SSG COMPLIANCE ADVISOR

What every HR leader should know about compliance.



Internal Revenue Service Notice 2020-29

The Internal Revenue Service (IRS) issued [IRS Notice 2020-29](#) (Notice) that provides increased flexibility for making mid-year elections or changes under a Section 125 cafeteria plan during calendar year 2020 related to employer-sponsored health coverage, health flexible spending arrangements (health FSAs), and dependent care assistance programs (DCAPs). This notice also provides increased flexibility with respect to grace periods to apply unused amounts in health FSAs to medical care expenses incurred through December 31, 2020, and unused amounts in dependent care assistance programs to dependent care expenses incurred through December 31, 2020.

Elections Under a Section 125 Cafeteria Plan

The Notice provides that an employer with insured or self-insured coverage may amend a Section 125 cafeteria plan to allow employees to:

- Make a new election for employer sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.
- Revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis (including changing enrollment from self-only coverage to family coverage).
- Revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer (the employer may rely on the written attestation provided by the employee, unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other health coverage not sponsored by the employer).
- Revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis.
- Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.

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Below is an IRS example of an acceptable written attestation from an employee revoking coverage due to the employee being enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

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: _____

An employer allowing the above permitted election changes is not required to provide unlimited election changes and may determine the extent to which such election changes are permitted. Any of the above permitted election changes must apply on a prospective basis only and must comply with the Section 125 nondiscrimination requirements. The IRS notes that employers may want to consider limiting elections to circumstances in which an employee's coverage will be increased or improved to prevent adverse selection of health coverage. Changes made to the plan by allowing new permitted election changes should comply with notice requirements that may be applicable, such as Employee Retirement Income Security Act (ERISA) notice requirements.

With respect to health FSAs, this relief applies to all health FSAs, including limited purpose health FSAs compatible with HSAs. In addition, with respect to health FSAs and DCAPs, employers are permitted to limit mid-year elections to amounts no less than amounts already reimbursed.

This relief for Section 125 cafeteria plans may be applied retroactively for the period beginning on or after January 1, 2020, to address the issue of cafeteria plans that allowed one or more of the above election changes prior to the IRS issuing the Notice.

Extended Claims Period for Health FSAs and DCAPs

The Notice provides that an employer may amend a Section 125 cafeteria plan to permit employees to apply unused amounts remaining in a health FSA or a DCAP as of the end of a grace period ending in 2020 or a plan year ending in 2020 to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020. This relief applies to all health FSAs (health FSAs with a grace period and health FSAs with a carryover), including limited purpose health FSAs compatible with health savings accounts (HSAs).

As an example, take a Section 125 cafeteria plan with a health FSA that has a calendar year plan year and has a grace period ending March 15, 2020. The employer may amend the plan to permit employees to use amounts that remain in an employee's health FSA as of March 15, 2020, to reimburse medical care expenses incurred through December 31, 2020.

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The following examples address how this relief applies for a health FSA with a July 1 plan year that allows a \$550 carryover for the 2020 plan year ([See IRS Notice 2020-33](#)).

Example 1. Employer provides a health FSA under a Section 125 cafeteria plan that allows a \$500 carryover for the 2019 plan year (July 1, 2019, to June 30, 2020). Pursuant to this notice and Notice 2020-33, Employer amends the plan to adopt a \$550 (indexed) carryover beginning with the 2020 plan year, and also amends the plan to adopt the temporary extended period for incurring claims with respect to the 2019 plan year, allowing for claims incurred prior to January 1, 2021, to be paid with respect to amounts from the 2019 plan year. Employee A has a remaining balance in his health FSA for the 2019 plan year of \$2,000 on June 30, 2020, because a scheduled non-emergency procedure was postponed. For the 2020 plan year beginning July 1, 2020, Employee A elects to contribute \$2,000 to his health FSA. Employee A is able to reschedule the procedure before December 31, 2020, and, between July 1, 2020, and December 31, 2020, incurs \$1,900 in medical care expenses. The health FSA may reimburse Employee A \$1,900 from the \$2,000 remaining in his health FSA at the end of the 2019 plan year, leaving \$100 unused from the 2019 plan year. Under the plan terms that provide for a carryover, Employee A is allowed to use the remaining \$100 in his health FSA until June 30, 2021, to reimburse claims incurred during the 2020 plan year. Employee A may be reimbursed for up to \$2,100 (\$2,000 contributed to the health FSA for the 2020 plan year plus \$100 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021, and June 30, 2021. In addition, Employee A may carry over to the 2021 plan year beginning July 1, 2021, up to \$550 of any remaining portion of that \$2,100 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

Example 2. Same facts as Example 1, except that Employee B has a remaining balance in his health FSA for the 2019 plan year of \$1,250 on June 30, 2020. For the 2020 plan year beginning July 1, 2020, Employee B elects to contribute \$1,200 to his health FSA. Between July 1, 2020, and December 31, 2020, Employee B incurs \$600 in medical care expenses. The health FSA may reimburse Employee B \$600 from the \$1,250 remaining in his health FSA at the end of the 2019 plan year, leaving \$650 unused from the 2019 plan year. Under the plan terms, Employee B is allowed to use \$500 of the \$650 unused amount from the 2019 plan year to reimburse claims incurred during the 2020 plan year, and the remaining \$150 will be forfeited. Employee B may be reimbursed for up to \$1,700 (\$1,200 contributed to the health FSA for the 2020 plan year plus \$500 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021, and June 30, 2021. In addition, Employee B may carry over to the 2021 plan year beginning July 1, 2021, up to \$550 of any remaining unused portion of that \$1,700 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

If an employer implements this extension of coverage for a general health FSA, employees with unused health FSA funds remaining during the extension period will not be eligible to contribute to an HSA during the extension period because they will have HSA disqualifying coverage. This extension relief may be applied on or after January 1, 2020, and on or before December 31, 2020, provided that elections are made on a prospective basis only.

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Plan Amendments

An employer amending its Section 125 cafeteria plan, health FSA or DCAP in accordance with this Notice must adopt a plan amendment setting forth the changes. Also, employers that are amending their health FSAs to provide for an increase in the carryover amount under IRS Notice 2020-33 for the 2020 plan year or subsequent plan years must adopt a plan amendment. An amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020.

High Deductible Health Plans

The Notice clarifies that the relief provided in [IRS Notice 2020-15](#) regarding high deductible health plans (HDHPs) and expenses related to testing for and treatment of COVID-19 applies to reimbursements of expenses incurred on or after January 1, 2020. The Notice further clarifies that the panel of diagnostic testing for influenza A and B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) and any items or services required to be covered with zero cost sharing under the Families First Coronavirus Response Act (FFCRA) as amended by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), are part of testing and treatment for COVID-19 for purposes of IRS Notice 2020-15. See our [Advisor](#) on HSAs for information on IRS Notice 2020-15 and HDHPs.

The Notice also states that the CARES Act provision providing that telehealth and other remote care services coverage will not be treated as disqualifying coverage for HSA-eligible HDHPs applies to services provided on or after January 1, 2020, for plan years beginning on or before December 31, 2021. For example, an otherwise HSA-eligible individual with coverage under an HDHP who also received coverage beginning February 15, 2020, for telehealth and other remote care services under an arrangement that is not an HDHP and before satisfying the deductible for the HDHP will not be disqualified from contributing to an HSA during 2020. See our [Advisor](#) on HSAs for information on telehealth coverage and HSA-eligible HDHPs.

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