

CORONAVIRUS INFORMATION & UPDATES

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IRS Provides COVID-19-Related Temporary Relief for Participants of Section 125 Cafeteria Plans and High Deductible Health Plans

The public health emergency caused by COVID-19 has significantly reduced the availability of certain medical and dependent care services, causing many employees to have unused account balances under their employers' health flexible spending arrangements (health FSAs) and dependent care assistance programs. In some cases, these unused balances have been substantial, which has created a desire for extensions to pay or reimburse medical expenses incurred during 2020. Separately, with many employees experiencing unanticipated changes in their need for medical treatment or dependent care assistance, some employers have sought ways to give their employees an opportunity to change their elections mid-year for employer-sponsored health coverage and/or allow them to increase or decrease amounts in their health FSAs and dependent care assistance accounts.

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In response, the Internal Revenue Service (IRS) released Notices 2020-29 and 2020-33 on May 12, 2020, which provides temporary flexibility for participants in cafeteria plans under section 125 of the Internal Revenue Code with respect to (a) the unused amounts in their health FSA and dependent care assistance program accounts and (b) certain prospective mid-year election changes for employer-sponsored health coverage, health FSAs, and dependent care assistance programs during calendar year 2020.

Notice 2020-29 allows a section 125 cafeteria plan to provide an extended period to apply unused amounts remaining in a health FSA account or dependent care assistance program account to pay or reimburse medical care expenses or dependent care expenses. Specifically, an employer is given the discretion to amend its plan(s) to permit employees to apply unused amounts remaining in a health FSA or a dependent care assistance program 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 benefits through December 31, 2020. The time extension for incurring claims is available both to section 125 cafeteria plans that have a grace period as well as plans that provide for a carryover. Notice 2020-29 provides the following example:

- If an employer sponsors a § 125 cafeteria plan with a health FSA that has a calendar year plan year and provides for a grace period ending on March 15 immediately following the end of each plan year, the employer may amend the plan to permit employees to apply unused amounts remaining in an employee's health FSA as of March 15, 2020, to reimburse the employee for medical care expenses incurred through December 31, 2020.

The notice also gives an employer the discretion to amend its section 125 cafeteria plan to allow each eligible employee to make prospective election changes (including an initial election) during calendar year 2020 regarding employer-sponsored health coverage, a health FSA, or a dependent care assistance program, regardless of whether the basis for the election meets the criteria in the section 125 regulations for mid-year changes. In particular, an employer may amend one or more of its section 125 cafeteria plans to allow employees to:

1. make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
2. 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);

CORONAVIRUS INFORMATION & UPDATES

3. 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;
4. revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis; and
5. revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.

In order to accept an employee's revocation of an existing election for employer-sponsored health coverage, the employer must receive an attestation in writing from the employee that the employee is enrolled (or immediately will enroll) in other comprehensive health coverage not sponsored by the employer. Employers that utilize this relief may limit the period during which election changes can be made, and they are also not obligated to provide unlimited election changes. Instead, employers may use their discretion to determine the extent to which such election changes are permitted and applied, so long as any election changes are applied on a prospective basis only, and the changes do not result in failure to comply with the nondiscrimination rules applicable to section 125 cafeteria plans.

An employer that decides to provide for mid-year election changes or to provide for an extended period to apply unused amounts remaining in a health FSA or a dependent care assistance program, must amend its plan(s) to do so. 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, provided the section 125 cafeteria plan operates in accordance with Notice 2020-29, and the employer informs all employees eligible to participate of the changes to the plan. Any amendment must apply only to mid-year elections made during calendar year 2020, or to an extended period to apply unused amounts incurred through December 31, 2020.

Notice 2020-29 separately clarifies earlier IRS guidance from March that high-deductible health plans (HDHPs) may provide coverage for expenses that were incurred on or after January 1, 2020 related to testing for and treatment of COVID-19 without violating the HDHP's status. Furthermore, Notice 2020-29 makes clear that HDHP participants may receive coverage for telehealth and other remote care services outside the HDHP and before satisfying the deductible of the HDHP, and still be able to contribute to a health savings account (HSA) in 2020.

The IRS also issued Notice 2020-33 on May 12, 2020, to increase the limit for unused health FSA carryover amounts from \$500, to a maximum of \$550, as adjusted annually for inflation. The notice states that a health FSA may not utilize the increased carryover amount for a plan year that begins in 2020 (or a later year) unless the plan is written in a manner that incorporates the increase by reference or the plan is timely amended (as described above) to set forth the increased amount.

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

Notice 2020-33 can be found at <https://www.irs.gov/pub/irs-drop/n-20-33.pdf>.

If you have any questions about this guidance, please reach out to a member of the Ropes & Gray [Employment, Executive Compensation and Benefits](#) group.