

IRS Allows Greater Cafeteria Plan Flexibility During COVID-19 Crisis

As a result of the COVID-19 crisis, the IRS has just issued IRS Notice 2020-29 (the notice), which permits (but does not require) employers to provide flexibility to employees to change their elections under cafeteria plans through December 31, 2020. This is welcome news for employers that have asked about the ability to allow employees to make changes to their 2020 benefit plan elections during the COVID-19 crisis.

Background

With a few exceptions, employee elections under a cafeteria plan must be irrevocable for an entire plan year and made prior to the first day of such plan year (or, in the case of a new hire, soon after an employee is first eligible to participate in the cafeteria plan). Until now, the only exceptions to this rule are events that are specifically permitted under *both* the regulations and the cafeteria plan document. These events are commonly known as “qualifying change in status events” or “qualifying events.” Only when a qualifying event occurs, could employers permit employees to revoke or change their elections mid-year.

Relief Related to Cafeteria Plan Elections

The notice now provides employers with limited flexibility to amend their cafeteria plans to allow mid-year election changes to their: (i) employer-sponsored health coverage, (ii) health flexible spending accounts, and (iii) dependent care flexible spending accounts for the remainder of calendar year 2020 even if there has not been a qualifying event. Specifically, cafeteria plans can now be amended to allow employees to make the following mid-year election changes during 2020:

- Enroll in health coverage on a prospective basis, even if the employee previously declined such coverage;
- Revoke and change the elected health coverage on a prospective basis (such as a change from enrollment in self-only coverage to family coverage);
- Revoke health coverage entirely, as long as the employee certifies in writing that he or she is enrolled in or will enroll in other coverage not sponsored by the employer;
- Revoke an election and make a new election to increase or decrease (including stopping entirely) contributions to health care flexible spending accounts on a prospective basis; and
- Revoke an election and make a new election to increase or decrease (including stopping entirely) contributions to dependent care flexible spending accounts on a prospective basis.

Employers are not required to change the terms of their cafeteria plans to allow all or some of this relief if they do not want to do so. In addition, employers that want to offer all or any portion of this relief to their employees can put limitations on the changes that they will permit as long as those limitations are applied to all employees in the same way. For instance, with respect to health care flexible spending accounts, employers are permitted to limit mid-year elections to amounts no less than the amounts already reimbursed in 2020.

At this time, this particular notice does not address, or provide any special relief for, accumulated unused flexible spending account values. Ordinarily (and in the absence of an exception allowing some limited carryover to the next plan year), unused flexible spending accounts are subject to a “use-it-or-lose-it” requirement and they cannot be repaid or reimbursed to affected employees. Unless or until there is additional IRS guidance, employers should continue to follow existing practices for any unused amounts that already are, or at plan year end happen to be, credited to flexible spending accounts.



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Plan Amendment Requirement

An employer that decides to change the administration of its cafeteria plan in a way that is consistent with what the notice permits must also formally adopt amendments to its cafeteria plan by no later than December 31, 2021. Although there is a permitted delay for adopting, the amendment can be made on a retroactive basis to the time when permitted changes under the notice are first implemented. Further, employers must timely notify all eligible employees of the changes to the cafeteria plan.
