

Publications

New Guidance Published for Cafeteria Plan Elections and High Deductible Health Plans

Related Attorneys

Jacquelyn Meng Abbott

Jennifer Bibart Dunsizer

Christine M. Poth

Dawne McKenna Parrish

Elizabeth Howard

Related Services

Employee Benefits and Executive Compensation

Labor and Employment

CLIENT ALERT | 5.22.2020

On May 12, 2020, the IRS issued Notices 2020-29 and 2020-33. Notice 2020-29 provides employers with more flexibility for mid-year changes under cafeteria plan as well as permits the extension of grace periods and carryovers of unused 2019 FSA amounts through the end of 2020. In addition, the notice extended the guidance in IRS Notice 2020-15 that clarified that HDHPs may, prior to satisfying the deductible, cover telehealth and reimburse medical care and services and items purchased related to testing and treatment of COVID-19 back to January 1, 2020. Notice 2020-33 increases the permitted health FSA carryover amount.

New Permitted Mid-Year Elections

Under IRS issued Notice 2020-29 an employer may amend their cafeteria plan to allow the following mid-year changes on a prospective basis during 2020 without requiring a change of status:

- (1) Make a new election for health coverage, 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 (including changing enrollment from self-only coverage to family coverage);
- (3) Revoke an existing election for employer-sponsored health coverage, 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; and
- (5) Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program.

With respect to health FSAs and dependent care assistance programs, employers are permitted to limit mid-year elections to amounts no less than amounts already reimbursed. The plan amendment must be adopted by the end of 2021.

Retroactive Amendments Permitted (if election changes were allowed before the Notice)

Because some employers were already allowing these mid-year changes, this relief may be applied retroactively to periods prior to the issuance of the notice and on or after January 1, 2020. This addresses a § 125 cafeteria plan that, prior to the issuance of this notice, permitted mid-year election changes for employer-sponsored health coverage, health FSAs, or dependent care assistance programs that otherwise are consistent with the requirements for the relief provided in this notice.

Remember to Coordinate with Insurers

If you are considering permitting mid-year enrollments or other mid-year changes, check with your insurer and stop loss carrier to confirm that is permitted.

New Election Upon Return from Unpaid Leave or Furlough

If the employee failed to pay premiums during a furlough and coverage was ended, this notice would allow the employer to amend the cafeteria plan to permit a new election on a prospective basis upon return to work. Many employers required reinstating the existing election if the return to work was in the same calendar year. Again, check with your insurer to confirm that this is consistent with the terms of the policy.

Extended Claims Period for Health FSAs

An employer, in its discretion, may amend its cafeteria plan to permit employees to apply unused 2019 FSA amounts remaining as of the end of a grace period ending in 2020 to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020. This would in effect extend the grace period to December 31, 2020.

The extension of the period for incurring claims that may be reimbursed by the health will impact a participant's HSA eligibility.

Health FSA Carryovers

Notice 2020-33 increased the maximum carryover of unused contributions to a health FSA from \$500 to \$550, effective for carryovers from 2020 to 2021. The employer may amend the cafeteria plan to adopt the increased carryover amount for the 2020 plan year on or before 12/31/21.

HDHPs and Medical Care Services and Items for Testing and Treatment of COVID-19

The CARES Act included a provision allowing HDHPs to remain HSA-eligible if they provide pre-deductible coverage for telehealth or other remote care services. The CARES Act provision was effective on March 27, 2020, and applies to plan years beginning on or before December 31, 2021. Notice 2020-15 provided that a health plan that otherwise satisfies the requirements to be an HDHP under § 223(c)(2)(A) will not fail to be an HDHP merely because the health plan provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible.

IRS Notice 2020-29 clarifies that the relief provided in Notice 2020-15 regarding HDHPs and expenses related to testing for and treatment of COVID-19 applies with respect to reimbursements of expenses incurred on or after January 1, 2020 through the end of plan years beginning on or before December 31, 2021. This notice further clarifies that the panel of diagnostic testing for influenza A & B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) and any items or services required to be covered with zero cost sharing under section 6001 of the Families First Coronavirus Response Act (P.L. 116-127, 134 Stat. 178 (March 18, 2020)), as amended by the CARES Act, are part of testing and treatment for COVID-19 for purposes of Notice 2020-15.

Telehealth and Remote Care Services. This notice also provides that treatment of telehealth and other remote care services under section 3701 of the CARES Act applies with respect to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021. Therefore, an otherwise eligible individual with coverage under an HDHP who also received coverage beginning January 1, 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 or 2021.

--

VORYS COVID-19 TASK FORCE

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).