

Publications

Cafeteria Plans: Reminder of Amendment Deadline in 2022 & Optional Change-in-Status Event Available in 2023

Related Attorneys

Dawne McKenna Parrish

Elizabeth Howard

Evan C. Sumner

Related Services

Employee Benefits and Executive Compensation

Labor and Employment

CLIENT ALERT | 12.16.2022

Amendment Deadline for Plan Year 2021 Temporary Changes is December 31, 2022

The Consolidated Appropriations Act, 2021 and IRS Notice 2021-15 permitted employers to make **optional, temporary** changes to cafeteria plans for the **2021** plan year, such as permitting employees to carry over their entire unused health FSA and/or dependent care FSA balances from 2021 to 2022 or extending grace periods for employees to use their unused 2021 health FSA and/or dependent care FSAs balances through December 31, 2022.

For a full description of the temporary changes permitted for the 2021 plan year, read our *client alert* "Putting It All Together – Cafeteria Plan and Flexible Spending Account Options in 2020 and 2021" [here](#).

If a cafeteria plan with a calendar plan year hasn't already been amended to reflect temporary changes adopted for the 2021 plan year, it must be amended by **December 31, 2022**.

Exchange Enrollment Event Expanded to Allow Employees to Prospectively Revoke Family Coverage Beginning in 2023

In October 2022, the IRS released Notice 2022-41, which expanded the optional cafeteria plan mid-year change-in-status events to allow an employee to **revoke prospectively an election of family coverage** under a group health plan (**not** an FSA) provided certain conditions are met.

As background, the cafeteria plan rules only allow participants to make certain mid-year changes. Notice 2022-41 provides a new, optional mid-year change to permit an employee's family member to enroll in Health Insurance Exchange (Exchange) coverage. Employers can choose to add this change-in-status event to their cafeteria plans, and the change will be effective for elections made prospectively on or after **January 1**,

2023.

Reason for Expansion

Internal Revenue Code (Code) Section 36B allows a premium tax credit (PTC) to eligible individuals who satisfy certain requirements. One of the requirements is that an individual cannot be eligible for employer-sponsored minimum essential coverage that provides minimum value and is affordable. Under the current rules, affordability is based on the employee's cost for self-only coverage for both employees and family members who enroll in a Qualified Health Plan (QHP) through an Exchange. Thus, family members are frequently ineligible for a PTC. The new final rules resolve this so-called "family glitch". Beginning in 2023, for purposes of determining eligibility for a PTC, the IRS will determine the affordability of employer-sponsored coverage for a family member (but not the employee) based on the employee's cost for family coverage.

Exchange Enrollment – First Permitted in 2014

The new change-in-status event may seem familiar. Back in 2014, the IRS issued Notice 2014-55. Under that guidance, an employee can elect to prospectively revoke an election of coverage under a group health plan (not an FSA) **if the employee is eligible** to enroll in a QHP through an Exchange as long as certain conditions are met. However, although Notice 2014-55 allows the employee to revoke coverage when the employee is eligible to enroll in Exchange coverage, it does not permit the employee to revoke a family member's coverage if the family member, and not the employee, is eligible to enroll in a QHP through an Exchange.

Expanded Exchange Enrollment – Permitted in 2023

The new, expanded Exchange enrollment event allows an employee to prospectively revoke an election of coverage under a group health plan (**not** an FSA) **if a family member of the employee is eligible** to enroll in a QHP through an Exchange. Under this expansion, an employee can prospectively (1) revoke an election for family coverage and elect single coverage or (2) revoke an election for one or more covered dependents under family coverage to permit a dependent to enroll in a QHP through an Exchange.

As long as the following conditions are satisfied, an employee may revoke coverage under the group health plan for the expanded Exchange enrollment:

- One or more of the employee's family members is eligible to enroll in Exchange coverage during a special enrollment period or during the Exchange's annual open enrollment; and
- The revocation of the family member's coverage corresponds to the intended enrollment of the family member in a QHP through an Exchange for new coverage that begins no later than the day immediately following the last day of the original coverage that is revoked. Note: if the employee does not also enroll in a QHP through an Exchange, the employee must elect self-only coverage or family coverage including one or more already-covered dependents in the group health plan.

A cafeteria plan may rely on the reasonable representation of an employee that the employee and/or the employee's family members have enrolled or intend to enroll in a QHP through the Exchange during the time period specified above.

Employer Action Item – Amendment Required

If an employer wants to add this new, optional change-in-status event to permit an employee to prospectively revoke coverage for a family member, the employer will have to amend its cafeteria plan. The deadline to adopt the amendment is the last day of the plan year in which the changes are first allowed. However, for the 2023 plan year, the employer has until the last day of the 2024 plan year to amend the plan.

Further, if an employer previously did not amend its cafeteria plan to permit an employee to prospectively revoke coverage when the employee is eligible to enroll in Exchange coverage, the employer could choose to do so now. The deadline to adopt that amendment is the last day of the plan year in which the changes are first allowed (for example, if the employer first adds the change-in-status event beginning January 1, 2023, then the amendment is due by December 31, 2023).

Contact your Vorys employee benefits attorney if you have any questions.