
Finally! Much Anticipated COVID-19 Guidance Provides Flexibility for Cafeteria Plan Elections, Additional Changes

Since the beginning of the COVID-19 pandemic, employers and employees have faced unprecedented financial strain, and employers have been looking for ways to provide flexibility with respect to cafeteria plan elections. This week, the IRS issued guidance designed to provide flexibility for employees with respect to cafeteria plan elections and expenses during the COVID-19 pandemic. Specifically, the IRS issued guidance that expands the ability for cafeteria plan participants to change their plan elections, extends the time period during which participants may use money remaining in their health Flexible Spending Account (“health FSA”) and dependent care assistance programs. Although not directly, related to the COVID-19 crisis, the IRS also released guidance increasing the maximum amount of money that can be “carried over” in a health FSA year-to-year.

New Permissible Midyear Cafeteria Plan Election Changes for 2020

Cafeteria plan elections are generally irrevocable and must be made prior to the first day of the plan year. Due to the difficult and unique financial circumstances created by the COVID-19 pandemic, the IRS issued Notice 2020-29, which permits cafeteria plans to temporarily allow mid-year election changes related to employer-sponsored health coverage, health FSAs, and dependent care assistance programs. Notably, the guidance does not address whether “employer-sponsored health coverage” includes certain benefits that are considered “health plans” for most other purposes, including dental and vision coverage. Without the benefit of clarifying guidance from the IRS, the current consensus opinion is that “employer-sponsored health coverage” applies to group health plans only.

With regard to employer-sponsored health coverage (including both self-insured and fully-insured plans), Notice 2020-29 allows a cafeteria plan to permit eligible employees to: (1) make a new, prospective election for coverage if they initially declined employer-sponsored health coverage; (2) revoke an existing election and make a new, prospective election to enroll in different employer-sponsored health coverage; and (3) revoke an existing election on a prospective basis, provided that the employee attests in writing they are or will be enrolled in other health coverage not sponsored by the employer. The IRS has provided model attestation language in [Notice 2020-29](#).

Notice 2020-29 provides additional flexibility with regard to elections under health FSAs and dependent care assistance programs. Specifically, cafeteria plans may permit employees to revoke an election, make a new election, or decrease or increase an existing election on a prospective

basis. To protect against loss, employers may limit midyear health FSA and dependent care election changes to amounts no less than amounts already reimbursed. Additionally, employers do not have to allow participants to make unlimited election changes under the new rules. For example, to protect against adverse selection, employers may limit election changes made under the new rules to elections to increase coverage. Of course, in incorporating limitations on election changes under these rules, employers should consider whether such limitations could operate to impact compliance with any other relevant rules or regulations, including cafeteria plan nondiscrimination rules.

Whether to add these permissible election change events to their cafeteria plan is optional for the employer, and these election changes are only permissible for the 2020 plan year. To implement these changes, an employer must amend its cafeteria plan by December 31, 2021. The amendments may be effective retroactively to January 1, 2020 for cafeteria plans that already permitted midyear changes if the changes were otherwise administered consistently with Notice 2020-29. Additionally, an employer should obtain written agreement from their insurers and/or stop loss carriers to ensure they will allow these changes to underlying health coverage.

Extended Health FSA & Dependent Care Claims Period

Cafeteria plans may also temporarily allow employees to use unused amounts remaining in their health FSAs (including limited-purpose health FSAs) or dependent care assistance programs as of the end of a grace period ending in 2020 or a plan year ending in 2020 to pay or reimburse medical care expenses or dependent care expenses incurred through December 31, 2020. For example, if an employer sponsors a 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 their health FSAs as of March 15, 2020, to reimburse the employee for medical care expenses incurred through December 31, 2020.

Notably, in a temporary shift away from the general rule that plans with a carryover may not allow for an extended claims period, this extension also applies to (non-calendar year) plans with a “carryover” instead of a grace period (a calendar year plan with a carryover instead of a grace period may not use the extension because its 2019 plan year does not end in 2020).

Employers that wish to extend the claims period for health FSA and dependent care assistance programs must amend their cafeteria plans on or before December 31, 2021.

Retroactive Application of Previous HDHP and Telemedicine COVID-19 Guidance

Notice 2020-29 also clarifies that certain relief previously provided to address COVID-19 may be applied retroactively to reimbursements of medical expenses incurred on or after January 1, 2020. This includes the relief provided in IRS Notice 2020-15, in which high deductible health plans (“HDHP”) may provide medical care services and items related to testing and treatment of COVID-19 prior to satisfaction of the deductible, and through the CARES Act, which allows HDHP participants to receive telehealth services before meeting the deductible without affecting their ability to contribute to their health savings account. Note that the clarification regarding the retroactive application of certain relief does not impact the COVID-19 testing coverage mandates

under the mandatory provisions of the CARES Act or Notice 2020-15, including the requirement that health plans provide first dollar coverage for COVID-19 testing services.

Increased Maximum Amount for Health FSA Carryover

Notice 2020-33 increases the amount of unused health FSAs funds that may be carried over at the end of a plan year to use for medical expenses incurred during the following plan year and provides for subsequent increases in proportion to increases in the amount employees may elect to contribute. The carryover amount will be equal to 20 percent of the maximum salary reduction contribution for the applicable plan year. For 2020, the maximum amount that may be carried over to the immediately following plan year beginning in 2021 is \$550. This change is not limited to the 2020 plan year and can be implemented for plan years beyond 2020.

Employers will need to amend their cafeteria plans to allow for the increased carryover amount. If employers want to implement this change for the 2020 plan year, employers must adopt this amendment on or before December 31, 2021. For other plan years, this amendment must be adopted on or before the last day of the plan year from which amounts may be carried over. To avoid repeat amendments, an employer may amend the plan to incorporate the maximum carryover permitted by law, as adjusted for inflation (this is the approach many plans already take with respect to changes to the maximum salary reduction contribution to a health FSA).

Clarifications for Individual Coverage HRAs

Generally, health plans, including individual coverage HRAs (“ICHRAs”), may not reimburse medical care expenses incurred before the plan year. Notice 2020-33 clarifies how ICHRAs may reimburse individual coverage premiums incurred prior to the beginning of the plan year for coverage provided during the plan year. The Notice provides that a plan is permitted to treat an expense for a health coverage premium as “incurred” on (1) the first day of each month of coverage on a pro rata basis; (2) the first day of the period of coverage; or (3) the date the premium is paid. Thus, for example, a calendar year ICHRA can reimburse premiums for individual coverage that begins on January 1 of the plan year even if the participant paid the premiums prior to the first day of the plan year.

Key Takeaways for Employers

This cafeteria plan guidance is intended to assist employers and employees navigate the financial impact of COVID-19. Employers should review their cafeteria plans to consider if any of the optional cafeteria plan changes can benefit their employees while also taking into account the potential compliance and administrative impact such changes may have on their plans. If any of these changes are adopted, employers must amend their cafeteria plans **on or before December 31, 2021**. These amendments may be effective retroactively to January 1, 2020, so long as the plan operates in accordance with requirements of Notices 2020-29 and 2020-33, as applicable, and all eligible employees are informed of the changes. While these Notices specifically require participant notification for retroactive plan changes, employers should consider providing notice to participants regarding any plan changes, including those with prospective effective dates.

Maynard Cooper's [COVID-19 Coronavirus Task Force](#) is closely monitoring all updates to pending legislation related to the Coronavirus pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the lawyers serving on the Task Force.

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