

BREAKING NEWS –
Increased Flexibility with
Respect to Midyear
Elections Under a Section
125 Cafeteria Plan During
Calendar Year 2020



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*An Employee Benefits, Retirement Planning,
Actuarial Consulting & Fiduciary Services Group*



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What: An employer may amend its §125 cafeteria plans to allow eligible employees 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 change satisfies the criteria set forth in Treasury Regulation §1.125-4 (permitted election changes).

Elections Under a 125 Cafeteria Plan

Employers may amend a cafeteria plan to allow employees to make the following changes on a prospective basis:

1) With respect to employer-sponsored health coverage:

- (a) Make a new election, if the employee initially declined to elect employer-sponsored health coverage;
- (b) Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer;
- (c) Revoke an existing election 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;
- 2) Revoke an election, make a new election, or decrease or increase an existing election applicable to a health FSA; and
 - 3) Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program.

Relief applies to all health FSAs, including limited purpose health FSAs compatible with HSAs. Additionally, plan years starting in 2020 may increase the health FSA carryover amount from \$500 to \$550 allowing this amount to be carried over to the immediately following plan year beginning in 2021. See IRS Notice 2020-33.

Employer Takeaways

Employers are not required to provide unlimited election changes but can determine the extent to which such election changes are permitted and applied, provided that:

- Any permitted election changes are applied on a prospective basis only, and
- The changes to the plan's election requirements do not result in failure to comply with the nondiscrimination rules applicable to § 125 cafeteria plans.

In determining the extent to which election changes are permitted and applied, an employer may wish to consider the potential for adverse selection of health coverage by employees. To prevent adverse selection of health coverage, an employer may limit elections to circumstances in which an employee's coverage will be increased or improved as a result of the election (for example, by electing to switch from self-only coverage to family coverage, or from a low option plan covering in-network expenses only to a high option plan covering expenses in or out of network).

Who: Applies to employers sponsoring self-insured plans and insured plans.

When: This temporary relief may be applied retroactively to periods on or after January 1, 2020.

What: Extended Claims Period for Health FSAs and Dependent Care Assistance Programs

Employers may amend the §125 cafeteria plan 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 or plan year ending in 2020 to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020.

This relief applies to all health FSAs, including limited purpose health FSAs compatible with HSAs. The extension of time for incurring claims is available both to plans that have a grace period and plans that provide for a carryover; health FSAs can either adopt a grace period or provide for a carryover amount but cannot have both.

Individuals will not be eligible to contribute to an HSA during the extended period (except in the case of an HSA-compatible health FSA, including a health FSA that is amended to be HSA-compatible).

Example 1. Employer provides a health FSA under a §125 cafeteria plan that allows a \$500 carryover for the 2019 plan year (July 1, 2019 to June 30, 2020). Pursuant to this notice and Notice 2020-33, Employer amends the plan to adopt a \$550 (indexed) carryover beginning with the 2020 plan year, and also amends the plan to adopt the temporary extended period for incurring claims with respect to the 2019 plan year, allowing for claims incurred prior to January 1, 2021, to be paid with respect to amounts from the 2019 plan year.

Employee A has a remaining balance in his health FSA for the 2019 plan year of \$2,000 on June 30, 2020, because a scheduled non-emergency procedure was postponed. For the 2020 plan year beginning July 1, 2020, Employee A elects to contribute \$2,000 to his health FSA. Employee A is able to reschedule the procedure before December 31, 2020 and, between July 1, 2020 and December 31, 2020, incurs \$1,900 in medical care expenses. The health FSA may reimburse Employee A \$1,900 from the \$2,000 remaining in his health FSA at the end of the 2019 plan year, leaving \$100 unused from the 2019 plan year. Under the plan terms that provide for a carryover, Employee A is allowed to use the remaining \$100 in his health FSA until June 30, 2021, to reimburse claims incurred during the 2020 plan year. Employee A may be reimbursed for up to \$2,100 (\$2,000 contributed to the health FSA for the 2020 plan year plus \$100 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021 and June 30, 2021. In addition, Employee A may carry over to the 2021 plan year beginning July 1, 2021 up to \$550 of any remaining portion of that \$2,100 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

When: Relief may be applied on or after January 1, 2020 and on or before December 31, 2020, provided that elections are on a prospective basis.

Employer Required Actions:

Adopt §125 Plan Amendments

- To allow temporary flexibility for §125 cafeteria plans to permit employees to make certain prospective midyear election changes for employer sponsored health coverage, health FSAs and dependent care assistance programs.
- To extend the period to apply unused health FSA amounts or dependent care assistance program amounts for the payment or reimbursement of medical care expenses or dependent care expenses incurred through December 31, 2020.
- To permit an increase in the carryover of unused health FSA amounts to the following year for the 2020 plan year or plan years thereafter.

Amendments must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020 provided the employer operates in accordance with the respective notice (s), and the

employer informs all employees eligible to participate in the §125 cafeteria plan of the changes to the plan.

- Create a written attestation form for individuals who seek to revoke an existing election to enroll in other health coverage not sponsored by the employer.
- Update Summary Plan Descriptions and Plan Documents.

Miscellaneous

HDHPs and Application of Notice 2020-15

Notice 2020-15 provides that 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. This notice clarifies:

- That the relief applies with respect to reimbursements of expenses incurred on or after January 1, 2020.
- 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 FFCRA and as amended by the CARES Act, are part of testing and treatment for COVID-19 for purposes of Notice 2020-15.

HDHPs and Application of Section 3701 of the CARES Act

Section 3701 of the CARES Act amends § 223(c) of the Code to provide a temporary safe harbor for providing coverage for telehealth and other remote care services. The amendment permits an otherwise eligible individual with coverage under an HDHP to receive coverage for telehealth and other remote care services outside the HDHP and before satisfying the deductible of the HDHP and still contribute to an HSA. The amendments are effective March 27, 2020 and apply to plan years beginning on or before December 31, 2021.

This notice provides that treatment of telehealth and other remote care services 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, for example, an otherwise eligible individual with coverage under an HDHP who also received coverage beginning February 15, 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.

Notice 2020-29 -COVID-19 Guidance Under §125 Cafeteria Plans and Related to HDHPs:

<https://www.irs.gov/pub/irs-drop/n-20-29.pdf>

Notice 2020-33 - Section 125 Cafeteria Plans - Modification of Permissive Carryover Rule for Health FSAs and Clarification Regarding Reimbursements of Premiums by Individual Coverage HRAs:

<https://www.irs.gov/pub/irs-drop/n-20-33.pdf>

Notice 2020-15 – High Deductible Health Plans and Expenses Related to COVID-19:

<https://www.irs.gov/pub/irs-drop/n-20-15.pdf>