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New IRS Guidance Expands Flexibility for Cafeteria Plans in Response to COVID-19

On May 12, 2020, the Internal Revenue Service (IRS) released new COVID-19 guidance (Notice 2020-29 and Notice 2020-33), providing both temporary and permanent flexibility to Internal Revenue Code section 125 cafeteria plans. The new guidance does the following:

Expands the situations in which participants may make midyear elections for health coverage, health FSAs, and dependent care FSAs, to reflect changes in needs as a result of the COVID-19 pandemic.

Extends claims periods to allow plan participants to apply unused amounts remaining in a health FSA or dependent care FSA for expenses incurred for those same qualified benefits through December 31, 2020.

Applies earlier relief for high deductible health plans (HDHPs) to cover COVID-19 related expenses, and a temporary exemption for telehealth services retroactively to January 1, 2020.

Increases the maximum health FSA carryover amount.

1. Midyear Election Change Relief in 2020

Generally, an employee's pre-tax health and welfare plan and FSA elections through a cafeteria plan must be made before the first day of a plan year and must be irrevocable for the plan year except under limited circumstances, such as if the employee experiences a change in status or there are significant changes in the cost of coverage. A cafeteria plan is not required to permit the midyear election changes allowed under section 125.

New rules that allow midyear changes during 2020. In response to the COVID-19 pandemic, the new guidance allows the amendment of cafeteria plans to permit an employee during the 2020 calendar year to make any of the following election changes on a prospective basis:

- A. make a new election for employer-sponsored health coverage (both self-insured and insured plans) by an employee who initially declined coverage;
- B. revoke an existing election and elect to enroll in different health coverage sponsored by the same employer (including a change from self-only to family coverage);
- C. revoke an existing election for employer-sponsored health coverage if the employee provides a written attestation that he or she is, or immediately will be, enrolled in other comprehensive health coverage not sponsored by the employer (a sample of an acceptable written attestation is provided in the IRS Notice); and
- D. revoke, increase or decrease an existing election or make a new election with respect to a health FSA (including a limited purpose health FSA) or a dependent care assistance program (DCAP).

These changes are voluntary. A cafeteria plan is not required to be amended to provide ***any or all*** of these additional permitted changes.

2. Extended Claims Period for Health FSAs in 2020

Under current law, a cafeteria plan may allow participants to carry over up to \$500 in unused amounts remaining in a health FSA as of the last day of a plan year to be used for medical care expenses incurred during the following plan year. Alternatively, a plan may provide participants with a grace period to use unused amounts (including amounts remaining in a health FSA) at the end of a plan year to pay expenses incurred for those same qualified benefits during the 2½ period following the end of the plan year. Health FSAs under a cafeteria plan may adopt the carryover or grace period, but not both.

Notice 2020-29 allows a cafeteria plan to extend a health FSA's grace period that ends in 2020 through **December 31, 2020**. This means that expenses incurred in 2020 may be reimbursed from amounts remaining in the health FSA at the end of 2019 (for a calendar year plan), which otherwise would have been forfeited as of the end of the grace period ending in 2020. Carryover health FSA amounts may be used only for medical care expenses. Cafeteria plan health FSAs with a carryover feature also may adopt a grace period for the 2020 plan year only.

However, if the claims period is extended under a health FSA that is not HSA-compatible, no contributions may be made to an HSA during the extended period if a participant has unused

amounts remaining at the end of a plan year or grace period ending in 2020. Accordingly, employers should take caution before adopting an extended grace period.

3. **Extended Claims Period for Dependent Care FSAs in 2020**

Notice 2020-29 also allows a cafeteria plan to extend through **December 31, 2020**, a dependent care FSA's grace period that otherwise ends on or before March 15, 2020 (or a later date in the case of a non-calendar year plan). This means that expenses incurred in 2020 may be reimbursed from amounts remaining in dependent care FSA at the end of 2019 (for a calendar year plan), which otherwise would have been forfeited as of the end of the grace period ending in 2020. Carryover dependent care FSA amounts may be used only for dependent care expenses.

4. **Increased Health FSA Carryover Limit**

Notice 2020-33 replaced the fixed \$500 maximum health FSA carryover amount for a plan year to 20% of the maximum health FSA salary reduction contribution for that plan year, beginning with the 2020 plan year.

For the 2020 plan year, the health FSA maximum contribution limit is \$2,750. Accordingly, the maximum health FSA carryover amount from a plan year beginning in 2020 to a new plan year beginning in 2021 is increased to \$550.

5. **Plan Amendments**

Plan amendments for any of these optional changes must be adopted by December 31, 2021, and may be retroactive to January 1, 2020, provided that plans are operated in accordance with applicable requirements and all eligible employees are notified of the changes.

6. **HDHP Relief**

As noted in a prior post, the IRS provided in earlier guidance that high deductible health plans may cover COVID-19 products relating to testing and treatment prior to the satisfaction of the applicable annual minimum deductible. Notice 2020-29 clarifies prior guidance as follows:

The relief applies to reimbursements of expenses incurred on or after January 1, 2020.

Items and services covered by the relief include 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 the Families First Act, as amended by the CARES Act.

Treatment of telehealth and other remote care services under the CARES Act applies with respect to services provided on or after January 1, 2020 for plan years beginning on or before December 31, 2021.

Contact us

If you have any further questions or require more information regarding this update, please contact Alan Kandel, Craig Kovarik, Myriem Bennani or your Husch Blackwell attorney.

COVID-19 Return-to-Work resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.