

Ch-Ch-Ch-Changes (In Elections and Grace Periods)

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The IRS released two Notices this week related to cafeteria plans and flexible spending arrangements (“FSAs”). Notice 2020-29 provides relief for cafeteria plans in response to the current COVID-19 pandemic, and Notice 2020-33 provides a permanent increase to the carryover limit for health FSAs.

Due to the COVID-19 pandemic, many employees’ reasonable expectations when they made their coverage elections for this year have significantly changed. For example, an employee may have waived health coverage for a child and now realized the child needs coverage. Or, the employee may incur much less in medical and dependent care expenses this year because doctor, dentist, eye doctors’ offices and childcare centers have been closed for months. On the other hand, an employee may have incurred much more in medical and dependent care expenses because he or she had COVID-19 or needed childcare because of school closures. Notice 2020-29 provides, among other things, some much-needed flexibility for mid-year election changes under an employer’s cafeteria plan to help account for the fallout from the pandemic. It also extends the periods after which participants must forfeit FSA balances. This is welcome news for employers that want to be able to accommodate their employees’ needs without running afoul of the cafeteria plan rules.

Unrelated to COVID-19, Notice 2020-33 provides additional welcome relief in the form of a modest increase in the carryover limit of unused amounts remaining as of the end of a plan year in a health FSA. The Notice also clarifies the ability of a health reimbursement arrangement (“HRA”) to reimburse premium expenses incurred prior to the beginning of the plan year for coverage provided during the plan year.

We summarize the provisions of the two Notices below.

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Cafeteria Plan Mid-Year Election Changes (effective January 1, 2020)

1. What does the Notice allow?

An employer can allow employees to make prospective election changes during calendar year 2020 regarding employer-sponsored health coverage, health FSAs, and dependent care FSAs, regardless of whether the basis for the election change satisfies the existing criteria in the cafeteria plan regulations (in Treas. Reg. § 1.125-4). Notice 2020-29 explicitly permits employers to limit the period during which employees may make these mid-year election changes.

In particular, Notice 2020-29 permits the following:

- **Elect Employer-Sponsored Health Coverage.** Employees may make a new election to enroll in employer-sponsored health coverage on a prospective basis if the employee initially declined to elect employer-sponsored health coverage.
- **Decline Employer-Sponsored Health Coverage.**
 - Employees may 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 on a prospective basis (including changing enrollment from self-only to family coverage).
 - Employees may revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other comprehensive health coverage not sponsored by the employer.
 - An employer may rely on an employee's written attestation, unless the employer has actual knowledge that the employee is not, or will not be, enrolled in such other comprehensive health coverage. The Notice provides an example of an acceptable written attestation
- **Changes to Health FSA Contributions.** Employees may revoke an election, make a new election, or decrease or increase an existing health FSA election on a prospective basis.
- **Changes to Dependent Care FSA Contributions.** Employees may revoke an election, make a new election, or decrease or increase an existing dependent care FSA election on a prospective basis.

GROOM INSIGHT. Some of these changes may have already been permissible under an employer's cafeteria plan. However, the ability to drop health coverage and increase or decrease health FSA elections provides additional flexibility that wasn't otherwise available under the current cafeteria plan rules. An employer can limit its potential financial

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exposure with respect to employees decreasing their FSA elections if the employer limits mid-year elections to amounts no less than amounts already reimbursed. This is specifically permitted in Notice 2020-29.

Notice 2020-29 does not define the term “employer-sponsored health coverage,” nor is the term defined in the Internal Revenue Code (“Code”). It is therefore not entirely clear whether the term includes dental and vision coverage. The Notice does make clear, however, that it only encompasses benefits that are excludable from an individual’s gross income under Code sections 105 or 106.

2. When is this change effective?

This change is effective on January 1, 2020 and lasts through December 31, 2020. However, any election changes must be prospective only.

3. Do these mid-year election changes also apply for 2021?

No, the mid-year election changes only apply during calendar year 2020.

4. Do the mid-year election changes only apply to individuals affected by COVID-19?

No, they apply to all employees eligible to participate in the cafeteria plan.

5. Does the employer need to amend its plan to allow these election changes?

Yes, if the employer would like to allow these changes, it must amend its cafeteria plan to reflect these changes on or before December 31, 2021. The employer must, however, currently inform all employees eligible to participate in the cafeteria plan of the changes it will adopt.

6. Is the employer required to adopt the election changes?

No. All of these changes are optional, so an employer could choose to continue to apply existing cafeteria plan rules pertaining to election changes rather than adding these new election change rules for 2020. Additionally, an employer could choose to implement some of the changes permitted under the Notice but not all.

Extended Claims Period for Health FSAs and DCFSA

1. What does the Notice allow?

An employer can permit employees to apply unused health and dependent care FSA amounts remaining as of the end of a grace period ending in 2020 or a plan year ending in 2020 (*i.e.*, an off calendar year plan) to pay or reimburse expenses incurred for the same type of FSA through December 31, 2020.

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This extension of time is available both to cafeteria plans that have a grace period and cafeteria plans that have a carryover, although a calendar year plan with a carryover will not gain any additional flexibility by adopting this rule, given that there is not an increase in carryover amount and that those amounts could be used through December 31, 2020 anyway.

GROOM INSIGHT. The Notice states that an individual is ineligible to contribute to a health spending account (“HSA”) during the extended claims period for a general purpose health FSA. Thus, employers that offer an HSA-compatible high deductible health plan (“HDHP”) should be mindful of this if they choose to extend the claims period. This is especially true if the grace period or plan year has already ended (e.g., for a calendar year plan with a grace period that ended on March 15, 2020) because employees may have already contributed to HSAs for those months.

Notably, this change does not permit a cash out of unused FSA balances.

2. When is this change effective?

This change is effective for grace periods and plan years that end on or after January 1, 2020.

3. Does this extended claims period also apply for 2021?

No, this only applies in 2020.

4. Does the extended claims period only apply to individuals affected by COVID-19?

No, it applies to all FSA plan participants.

5. Does the employer need to amend its plans?

Yes, the employer must amend its cafeteria plan and FSA plans to reflect these changes on or before December 31, 2021. The employer must, however, currently inform all employees eligible to participate in the cafeteria plan of the changes it will adopt.

6. Is the employer required to adopt an extended claims period?

No. This change is optional, and may be of limited utility to a calendar year FSA plan, unless the plan had a grace period and a large number of participants forfeited money when that grace period ended.

GROOM INSIGHT. Note that under final regulations DOL and Treasury issued on April 29, 2020, plans are required to suspend the deadline for submitting claims until the end of the “outbreak period.” This suspension, however, only applies to the deadline to submit the

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claim, not to incur the claim. The new Notice allows the employer to permissively extend the deadline to incur the claim.

Health FSA Carryovers

1. What does the Notice allow?

Notice 2020-33 provides a permanent increase to the maximum carryover amount for health FSAs from \$500 to an amount equal to 20% of the maximum salary reduction contribution under Code section 125(i) for that plan year (currently \$2,750). This number is rounded to the next lowest multiple \$10.

For carryovers from 2020 plan years, the maximum carryover amount is \$550.

GROOM INSIGHT. The increase in carryover amount is welcome news, although participants may be disappointed that they cannot carry over their full remaining balance at the end of the 2020 plan year.

2. When is this change effective?

This change is effective beginning with carryovers from the 2020 plan year to the 2021 plan year.

3. Does the increased carryover amount apply for 2021?

Yes, the carryover amounts will be increased each year, just like the maximum health FSA elective contribution amount.

4. Does the increased carryover amount only apply to individuals affected by COVID-19?

No, it applies to all participants with a carryover and is a permanent change.

5. Does the employer need to amend its plans?

Yes, the employer must amend its cafeteria plan and health FSA plan to reflect the increased carryover amount at any time on or before the last day of the plan year. For the 2020 plan year, the employer must adopt the amendment on or before December 31, 2021, but must currently notify participants of the increased amount.

GROOM INSIGHT. Similar to the indexed health FSA contribution amount, the amendment can include language that references the indexed amount so that the employer

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does not need to amend its cafeteria plan each year to reflect the increased carryover amount.

6. Is the employer required to adopt the increased carryover amount?

No, the employer can allow a carryover of any amount up to \$550 and can elect a lower amount if it would like. An employer also could choose to not allow any carryover and use a grace period instead.

HDHPs and Application of Notice 2020-15

1. What does the Notice allow?

Under earlier COVID-19-related relief (Notice 2020-15, released on March 11, 2020), the IRS provided that a health plan that otherwise satisfies the requirements to be an HSA-eligible HDHP will not fail to be such an HDHP merely because the 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. Notice 2020-29 clarifies that this relief applies with respect to reimbursements of expenses incurred on or after January 1, 2020.

Notice 2020-29 also clarifies what is included as testing for and treatment of COVID-19, consistent with DOL guidance. It specifies 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 the Families First Coronavirus Response Act (“FFCRA”) and the CARES Act are part of testing and treatment for COVID-19 for purposes of Notice 2020-15.

GROOM INSIGHT. There has been some confusion with respect to the scope of services that are covered by the Notice 2020-15 relief, so this clarification is welcome news for plan sponsors and insurers.

2. When is this change effective?

This change is effective on January 1, 2020.

3. Does this change also apply for 2021?

It applies until the IRS issues future guidance.

4. Does this relief only apply to individuals affected by COVID-19?

Yes, it only applies with respect to COVID-19-related testing and treatment.

5. Is the change mandatory?

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The requirement for plans to cover COVID-19 testing with no cost-sharing is mandatory, but plans can voluntarily cover COVID-19 treatment with no cost-sharing.

HDHPs and CARES Act Telehealth Provision

1. What does the Notice allow?

The CARES Act provides a temporary safe harbor that allows an HDHP to provide coverage for telehealth and other remote care services without a deductible or with a deductible below the minimum annual deductible otherwise required by the HSA rules. The safe harbor was effective beginning March 27, 2020, and applies to plan years beginning on or before December 31, 2021.

Notice 2020-29 applies the CARES Act provision retroactively to services provided on or after January 1, 2020.

GROOM INSIGHT. To limit their participants' potential exposure to COVID-19, many plans began allowing no- or low-cost telehealth services when the pandemic began, which was before March 27, 2020. This retroactive effective date to January 1, 2020 is welcome news for employers and insurers.

2. When is this change effective?

This change is effective on January 1, 2020.

3. Does this rule also apply for 2021?

Yes, it applies through the end of 2021.

Date Premium Considered Incurred for HRAs

1. What does the Notice allow?

Individual coverage HRAs may reimburse individual health insurance coverage and Medicare premiums, but only those incurred while the individual was a participant in the HRA plan. However, many individuals pay January premiums in December of the prior year. Notice 2020-29 provides that a plan may treat an expense for a premium for health insurance or Medicare coverage 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, an individual coverage HRA with a calendar year plan year may immediately reimburse a substantiated premium for health insurance coverage that begins on January 1 of that plan year, even if the covered individual paid the premium for the coverage prior to the January 1.

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2. When is this change effective?

The Notice does not specify an effective date, so it presumably is May 12, 2020 (the date the IRS issued the Notice).

GROOM INSIGHT. It is unclear whether the Notice permits an HRA to reimburse the premiums that a new participant as of January 1, 2020 paid in December 2019 for coverage beginning in January 2020.

3. Does this rule also apply for 2021?

Yes, this rule does not have an expiration date.

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