

EMPLOYEE BENEFITS ADVISORY

Another Week, Another Flurry of COVID-19-Related Employee Benefits Guidance



The IRS and Department of Labor have been busy over the last few weeks issuing guidance regarding the impact of COVID-19 on employee benefit plans. This client advisory summarizes this new guidance regarding Model COBRA Notices, cafeteria plan elections, and high-deductible health plans, and it provides some factors for employers to consider when determining how to proceed.

Updated Model COBRA Notices: The Department of Labor issued updated Model General COBRA Notices and Election Notices in early May. These updates are the first updates to the Model COBRA Notices since 2014. While the notices do not address the new extension of the COBRA payment and notice deadlines we explained in our [prior Client Advisory](#), the Model Notices have been updated to better explain the interactions between Medicare and COBRA.

Employers are not required to use the Model Notices, but if they are properly completed, use of the Model Notices can establish good-faith compliance with the notice requirements.

Cafeteria Plan Options: On May 13, 2020, the IRS issued Notice 2020-29, providing temporary guidance regarding election changes in cafeteria plans for the 2020 calendar year. All of the options for cafeteria plans discussed below will require formal amendments to the cafeteria plan documents, which are not required to be adopted until December 31, 2021, although employers who decide to utilize these new options will want to make sure that participants are aware of the changes.

New Options for Changes in Status: Under Section 125 of the Internal Revenue Code, employees must make cafeteria plan elections for qualified benefits prior to the first day of the plan year, and generally those elections cannot be changed except in specifically permitted circumstances.



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IRS Notice 2020-29 provides temporary flexibility regarding midyear election changes for 2020. These changes can be relied upon retroactively back to January 1, 2020, to the extent that an employer may have been a little more flexible in the election changes it permitted as a result of COVID-19 earlier in the year.

Although IRS Notice 2020-29 provides this flexibility in response to the public health emergency posed by COVID-19, these options are available to all participants, even to those not affected by the pandemic. Employers have the discretion to choose which options to pick, as well as to impose nondiscriminatory limits on the number and type of changes an employee may make. For example, employers may want to limit the options to circumstances where an employee's coverage will be increased or improved as a result of the election. The elections should also be adopted so as not to not violate applicable nondiscrimination rules.

The following chart shows the options an employer can choose.

Type of Qualified Benefit	New Options	Factors to Consider
Employer-sponsored health coverage	Make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.	<p>Intended to address the public health emergency and unanticipated changes in the need for medical care. It is not clear whether this option also applies to dental and vision coverage or whether the same flexibility can be extended to other benefits.</p> <p>This option is more expansive than available under a HIPAA special enrollment right. (See our earlier Client Advisory regarding extensions of election deadlines.)</p> <p>Employers will want to check with the health plan insurer or stop loss carrier before implementing this option.</p>
	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 coverage to family coverage).	Same factors as those above.

Type of Qualified Benefit	New Options	Factors to Consider
	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 health coverage not sponsored by the employer.	Intended to address the public health emergency and unanticipated changes in the need for medical care. It is not clear whether this option also applies to dental and vision coverage or whether the same flexibility can be extended to other benefits. Employer must receive a written attestation that the employee is enrolled, or immediately will enroll, in other comprehensive health coverage. Employer can rely on the attestation unless the employer has actual knowledge that the attestation is false.
Health FSA	On a prospective basis: <ul style="list-style-type: none"> • revoke an election, • make a new election, or • decrease or increase an existing election. 	Intended to address employees who may have an increase or decrease in medical expenses due to unanticipated changes in the need for medical care. Employers can limit midyear election changes to amounts no less than the amount already reimbursed.
Dependent FSA	On a prospective basis: <ul style="list-style-type: none"> • revoke an election, • make a new election, or • decrease or increase an existing election. 	Intended to address the unanticipated closure of schools and childcare providers and changes to the employee's work location or schedule.

Extended Claims Period for Flexible Spending Accounts in Non-Calendar-Year Plans: Under previous guidance, employers may extend claim periods for reimbursements from flexible spending accounts (FSAs). For example, a cafeteria plan may (but is not required to) permit a carryover of up to \$500 (now \$550 for plan years beginning in 2020) that is remaining in a health FSA as of the end of a plan year to pay or reimburse a participant for expenses incurred during the following plan year. In addition, a cafeteria plan may provide participants with a grace period in order to request reimbursement of unused amounts in either a health FSA or a dependent care FSA during a period of up to 2 1/2 months after the end of the plan year. Under previous guidance, an employer can elect either a carryover period or a grace period but not both.

In an extension that appears to apply only to non-calendar-year cafeteria plans, Notice 2020-29 allows an employer, in its discretion, to amend a cafeteria plan to provide a temporary grace period in health FSAs and dependent care FSAs through December 31, 2020. This extension is permitted for plans that have a grace period and plans that provide for a carryover. An employee who uses the grace period

for a health FSA will be unable to contribute to an HSA (except in the case of an HSA-compatible health FSA) until January 1, 2021.

Clarification of New Guidance Regarding HDHPs: IRS Notice 2020-29 also provides clarification regarding high-deductible health plans, including that:

- An HDHP will not fail to be an HDHP merely because it 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 on or after January 1, 2020.
- Testing and treatment of COVID-19 for purposes of the requirements of the Families First Coronavirus Response Act, as amended by the CARES Act, to provide items or services with zero cost-sharing will include the panel of diagnostic testing for influenza A&B, norovirus and other coronaviruses, and respiratory syncytial virus.
- An HDHP will not fail to be an HDHP if it provides telehealth and other remote care services without meeting a deductible on or after January 1, 2020, through plan years beginning on or before December 31, 2021.

Increase in Maximum Carryover Limit for Health FSAs. The IRS also issued Notice 2020-33, which provided that the maximum amount participants may carry over from one plan year to the next in a health FSA has been increased from \$500 to \$550 for plan years beginning in 2020 (with respect to carryovers into 2021). For the 2019 plan year and amounts carried over into 2020, the limit remains \$500. This limit will be subject to adjustment in future years as the health FSA contribution limit is adjusted.

QUESTIONS

For any questions about this client advisory, please contact a member of the Sherman & Howard [Employee Benefits Group](#).