



IMPORTANT COVID-19 UPDATE

ADDITIONAL FLEXIBILITY FOR CAFETERIA PLANS AND FLEXIBLE SPENDING ACCOUNTS

There have been many concerns and questions about whether employers have the ability to provide increased flexibility under cafeteria plans, health care flexible spending account (FSA) plans and dependent care FSAs due to the COVID-19 emergency. To provide employers with broader flexibility, Treasury and the IRS have just issued two notices, which provide for temporary flexibility for employers in 2020 to respond to changes in employee needs as a result of COVID-19. These are optional measures that employers could adopt but are not obligated to do so. These include:

- [Notice 2020-29](#) provides increased flexibility for cafeteria plans (and relatedly, health plans, health FSAs and dependent care FSAs) and also clarifies some COVID-19 related provisions related to HSA-eligible HDHPs. The guidance in this notice is specific to the COVID-19 crisis and is provided “to assist with the nation’s response to” COVID-19.
- [Notice 2020-33](#) modifies the permissive carryover rule for health FSAs, includes a clarification regarding reimbursements of premiums by individual coverage HRAs, and also clarifies that the prior relief regarding HDHPs and COVID-19 expenses and the relief enacted in the CARES Act allowing telehealth and other remote care services to qualify as expenses reimbursable by HDHPs, may be applied retroactively to January 1, 2020. The guidance in this notice is not specific to the COVID-19 crisis.

Cafeteria Plan Mid-Year Election Changes

Notice 2020-29 provides temporary flexibility for cafeteria plans to permit employees to make certain prospective mid-year election changes during calendar year 2020, regardless of whether they satisfy existing mid-year election change rules. Specifically, an employer, in its discretion, may amend its cafeteria plans to allow each employee who is eligible to make salary reduction contributions to make prospective election changes during calendar year 2020 as follows:

- With respect to self-insured or fully insured employer-sponsored health coverage, an employer may allow an employee (with carrier approval) to do any of the following on a prospective basis:
 - Make a new election, if the employee initially declined to elect employer-sponsored health coverage.
 - Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer (including changing from self-only to family coverage).
 - Revoke an existing election, 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. The employer must receive a written attestation from the employee (model language available) and may rely on the attestation unless the employer has actual knowledge the employee is not, or will not be, enrolled in other comprehensive coverage.
- With respect to general and limited purpose health FSAs, an employer may allow an employee to revoke an election, make a new election, or decrease or increase an existing election. Employers can choose to limit a mid-year health FSA election revocation or decrease to amounts no less than amounts already reimbursed to the employee by the health FSA in the plan year (to avoid potential experience losses from overspent accounts).
- With respect to a dependent care FSA, an employer may allow an employee to revoke an election, make a new election, or decrease or increase an existing election.

Extended Period to Incur FSA Claims in 2020

Notice 2020-29 also gives increased flexibility to allow employers to permit employees to incur reimbursable claims through the end of calendar year 2020 for any FSA plan year or grace period that ends in 2020. Note that a calendar plan year health FSA with a carryover provision will not benefit from this extended period because its plan year ends December 31, 2020. For amounts that are unused and that remain in a health FSA or a dependent care FSA as of the end of a grace period or plan year ending in 2020, a cafeteria plan may permit employees to apply those unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020.



Permitted FSA Carryover Now \$550

Notice 2020-33 allows employers to amend a health FSA to increase the carryover cap from \$500 to \$550 for carryovers from a plan year starting in 2020 to be carried over to the immediately following plan year beginning in 2021.

Employer Next Steps

The items above are optional; that is employers are not obligated to enact any of these changes. The rules are there to give employers flexibility to enact these changes to assist employees as a result of the pandemic. If an employer is considering adopting these measures, they should evaluate:

- Whether to offer new mid-year election change opportunities during calendar year 2020
- Whether to offer an extended period to incur FSA claims in calendar year 2020
- Whether to offer increased \$550 health FSA carryovers for 2020 and beyond

If any of the above changes are permitted, the employer will need to coordinate such changes with their insurance carriers, stop-loss providers and their FSA administrators as appropriate. They'll also need to inform employees of the changes and adopt official plan amendments (by December 31, 2021 for the first two bullets above and for the third bullet, by the last day of the plan year from which amounts may be carried over, i.e., by December 31, 2020 for a calendar plan year).

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