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IRS Guidance Expands Opportunities to Change Health Plan Elections for 2020

As part of its response to the coronavirus pandemic, this week the IRS issued Notice 2020-29 which lets employees make health plan coverage changes during calendar year 2020, regardless of whether they experienced an otherwise permitted event. In other words, as explained below, plans may be amended to allow eligible employees to make changes for (almost) any reason. This alert focuses on these expanded election opportunities.

Background

As a reminder, an eligible employee who participates in a health plan, health FSA or dependent care FSA is generally required to make elections as to coverage and the corresponding pre-tax premium deductions before the start of the plan year that remain irrevocable throughout the plan year.

Under longstanding rules, these cafeteria plans (the pre-tax premium vehicle sometimes referred to as a 125 plan or flexible benefit plan) can, however, allow employees to make mid-year coverage changes in limited circumstance as permitted under the law and the terms of the governing plan. A permitted election change generally must be made within a specified time period after the event. The events that can trigger a change vary depending on the type of plan, and the plan does not need to allow all permitted events (although many do).

New Relief – Election Changes for 2020

The new IRS guidance allows (but does not mandate) plan amendments that expand the ability to make mid-year coverage changes in calendar year 2020, regardless of whether they experienced an otherwise permitted event.

Specifically, an employer may amend its cafeteria plan to allow employees to:

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- make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
- 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);
- 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 (the IRS provided a sample attestation for this purpose);
- revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis; and
- revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.

This guidance is very welcome, particularly in an era of unprecedented uncertainty. When many employers have placed employees on furloughs, reduced their hours and/or reduced their pay, the “normal” rules may have NOT otherwise allowed a change in elections. Take, for example, an employee who was reduced from full-time to part-time employment or who had a pay reduction, but who was allowed to continue to participate in employer-sponsored health coverage (i.e., did not lose eligibility for that coverage). Absent Notice 2020-29, this employee’s 2020 election would remain irrevocable (even if the employee could no longer afford to pay his/her/their other bills).

Because many employees will not meet the “normal” standard for making an election change mid-year as a result of the pandemic, the IRS responded to a litany of comments by allowing employers the option to extend employees the option to change their elections mid-year. While employers have many items up in the air, they could consider (and particularly to the extent they have engaged in temporary hour reductions and/or pay reductions) whether they want to extend this flexibility to their employee populations. As part of this consideration, employers should assess any cost impacts.

Like other permitted election changes, an employer may determine whether and how to permit these changes. In addition, the employer may determine the time period that the election change is permitted (balancing administrative hassle with desired employee flexibility).

While this may run contrary to flexibility, to prevent adverse selection of health coverage, employers may choose to limit elections to circumstances in which an employee’s coverage will be increased or improved as a result of the election. Allowing changes such as these may be complicated for HDHPs/HSAs.

Note that this relief applies to both self-insured plans and fully insured plans. With respect to health FSAs, this relief applies to all health FSAs, including limited-purpose health FSAs compatible with HSAs. For health FSAs and dependent care FSAs, if an employer permits the change, it may consider limiting mid-year elections to amounts not less than already reimbursed.

Next Steps

A plan amendment will be necessary to implement any desired changes made available under the new guidance. While cafeteria plan amendments typically must be executed prior to the change, in the case of the election change relief, retroactive amendments are permitted so long as the amendment is adopted by December 31, 2021.

Once an employer is aligned on its strategy for moving forward, employers should coordinate with their vendors and insurers and communicate these important new opportunities to their participants.

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