

May 14, 2020

### IRS Relief and Guidance for Section 125 Plans and HDHPs Due to COVID-19

Over the last few months, we have received many compliance questions regarding employee benefit plans and if the government was offering any relief for participants during the COVID-19 pandemic. Two such questions we have received from employers is if employees have the option to change their benefit plan elections midyear and if employees can have additional time to file flexible spending account claims. Prior to this week, the Internal Revenue Service (“IRS”) had yet to opine on these topics and advisors had to rely on prior rules and guidance to help employers answer these questions. However, on May 12, 2020, the IRS released direct guidance to assist employers and insurance advisors in answering these and other relevant questions related to Section 125 Cafeteria Plans (“125 Plans”), High Deductible Health Plans (“HDHP”), and more.

In [Notice 2020-29](#), the IRS sets forth some welcome relief and assistance for employees related to employee benefit plans. First, the Notice allows employers, at their discretion, to amend their 125 Plans midyear to allow for temporary flexibility for participant elections during the 2020 calendar year. Employers also have discretion to set a specific window of time during which employees must make any changes. Specifically, an employer may now allow eligible employees to make certain prospective midyear election changes to employer-sponsored health coverage, a health flexible spending account (“health FSA”) or a dependent care assistance program (“DCAP”), regardless of whether the change would otherwise be allowed under prior rules (See Treas. Reg. §1.125-4). The Notice now permits an employee to do the following midyear, should his/her employer decide to allow for it:

- Make a new election for health coverage (if he/she initially declined coverage);
- Revoke a current election for health coverage and enroll in a new health plan option, including changing tiers of coverage;
- Revoke a current health plan election and drop health coverage completely (Note: The employee must attest he/she has or will enroll in other non-employer sponsored health coverage. A sample attestation is provided in the Notice.);
- Make a new a new health FSA or DCAP election amount or revoke a current election; and
- Increase or decrease the amount of a current health FSA or DCAP election amount.

Notice 2020-29 also allows an employer to provide relief to its 125 Plan participants by extending the period to apply unused amounts remaining in a health FSA or DCAP to pay or reimburse medical care and/or dependent care expenses, respectively. If an employer wishes to extend this relief to its employees, the employer must amend its 125 Plan to allow employees to apply the unused amounts remaining at the end of any grace period or plan year ending in 2020 to pay or reimburse expenses incurred for the health FSA or DCAP through December 31, 2020.

The Notice provides an example using a calendar year health FSA with a grace period ending March 15, 2020. In that case, if the employer amends its plan accordingly, the plan may reimburse employees with

unused amounts remaining in his/her health FSA on March 15, 2020 for any medical care expenses incurred through December 31, 2020. This relief applies to all health FSAs, including limited purpose health FSAs. Keep in mind that the rule regarding allowing plans to have either a carryover or a grace period still applies; however, the Notice also provides guidance on how a plan with a carryover would implement the extended claims filing period.

Finally, the Notice applies earlier relief for HDHPs set forth in [IRS Notice 2020-15](#). Notice 2020-15 states that a health plan will still be considered an HDHP if such plan otherwise meets the HDHP requirements under Code §223(c)(2)(A) and also provides medical care services and items for testing and treatment of COVID-19 prior to meeting the HDHP deductible. Additionally, the Notice clarifies that the relief previously provided under the CARES Act regarding telehealth and other similar services for plan years beginning on or before December 31, 2021 applies retroactively to January 1, 2020.

Simultaneously with issuing Notice 2020-29, the IRS also issued [Notice 2020-33](#), which responds to a 2019 Executive Order regarding increasing the allowable health FSA carryover amount. Notice 2020-33 increases the maximum \$500 carryover amount for a plan year to an amount equal to 20 percent of the maximum health FSA salary reduction contribution for the plan year (as set forth in Code §125(j)). Accordingly, this Notice permits plans to allow rollovers of up to \$550 from the plan year beginning in 2020 to the plan year beginning in 2021.

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### Important Compliance Tips

- ✓ *The relief discussed regarding 125 Plan changes is discretionary, meaning an employer does not have to allow for all or any of them.*
- ✓ *If an employer does wish to allow for any stated relief, 125 Plan amendments are required.*
- ✓ *All plan amendments to allow for any relief must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020 (so long as all eligible employees are informed of the changes).*
- ✓ *Employees must be notified of these amendments, and such notification may be via a Summary of Material Modifications (“SMM”).*
- ✓ *Prior to deciding to allow midyear election changes or initial enrollment in an employer’s health plan, it is imperative that employers’ leadership teams discuss this with the insurance carrier, stop loss provider, and/or legal counsel due to any adverse selection or other issues that may arise.*

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[Contact the experts at Patriot Growth Insurance Services and our Partner Agencies](#)

for assistance with these issues or any challenges your business may encounter due to COVID-19