

## Employer Action Required to Take Advantage of Guidance for Cafeteria Plans

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May 19, 2020

The Internal Revenue Service (“IRS”) has issued two important notices allowing employer-plan sponsors to amend their §125 cafeteria plans to provide employees with increased flexibility for elected benefits and account balances. The notices, both released on May 12, 2020, are: (1) Notice 2020-29, which provides relief in response to the COVID-19 pandemic through the provision of temporary flexibility with respect to mid-year election changes and grace periods; and (2) Notice 2020-33, which permits a permanent increase to the carryover limit for health flexible spending accounts (“Health FSAs”) and clarifies the ability of health reimbursement arrangements (“HRAs”) to reimburse individual coverage premium expenses.

### Notice 2020-29

#### *Mid-year elections*

A cafeteria plan may allow employees who are eligible to make salary reduction contributions to make certain prospective mid-year election changes during 2020 regardless of whether the basis for the election change satisfies the criteria set forth in Treasury Regulation §1.125-4. Specifically, an employer, in its discretion, may amend its cafeteria plan to permit the following mid-year election changes to be made on a prospective basis:

- *Employer-sponsored health coverage.* With respect to employer-sponsored health coverage, to: (1) make a new election if the employee initially declined to elect employer-sponsored health coverage; (2) revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer (including changing enrollment from self-only coverage to family coverage); and (3) revoke an existing election, provided that the employee attests in writing that the employee is enrolled, or will immediately enroll, in other health coverage not sponsored by the employer.
- *Health FSA.* With respect to health FSA coverage, to: (1) revoke an election; (2) make a new election; and (3) decrease or increase an existing election applicable to a Health FSA.
- *DCAP.* With respect to dependent care assistance program (“DCAP”) coverage, to: (1) revoke an election; (2) make a new election; and (3) decrease or increase an existing election applicable to a DCAP.

Employer-plan sponsors have discretion regarding whether and to what extent they will permit any or all of these mid-year election changes during 2020, provided the changes adhere to other laws such as applicable nondiscrimination and notice requirements.

#### *Extended periods for incurred claims*

This notice further increases flexibility with respect to grace periods available to apply unused amounts in health FSAs and DCAPs to expenses incurred through December 31, 2020. Specifically, an employer-plan sponsor, in its discretion, may amend its cafeteria plan to permit employees to apply unused amounts remaining in the health FSA or DCAP, as of the end of the grace period ending in 2020 or a plan year ending in 2020, to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020.

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### *High deductible health plans (“HDHPs”)*

Notice 2020-29 also provides that provisions affecting HDHPs found in the CARES Act (regarding telehealth services) and in Notice 2020-15 are retroactive to January 1, 2020. Further clarification is also provided regarding what qualifies as testing and treatment of COVID-19 for HDHPs.

### Notice 2020-33

#### *Health FSA carryovers*

Notice 2020-33 modifies Notice 2013-71 and permits a cafeteria plan to reflect indexing for inflation by permanently increasing the limit of unused amounts remaining in a health FSA, as of the end of a plan year, that may be carried over to pay or reimburse a participant for medical care expenses incurred during the following plan year. Specifically, the notice permits an employer-plan sponsor to increase the current maximum \$500 carryover amount for a plan year to an amount equal to 20 percent of the maximum salary reduction contributions under Code §125(i) for that plan year. Thus, the maximum unused amount from a plan year starting in 2020 allowed to be carried over to the immediately following plan year beginning in 2021 is \$550 (20% of \$2,750, the indexed 2020 limit under Code §125(i)).

#### *HRAs*

The notice also clarifies the ability of a health plan to reimburse individual insurance policy premium expenses incurred prior to the beginning of the plan year for coverage during the plan year. This clarification is intended to assist with the implementation of individual coverage HRAs.

Both Notice 2020-29 and 2020-33 have many details involving their application including but not limited to: (1) interactions with other laws such as notice and nondiscrimination requirements; (2) required plan amendments; and (3) retroactive effective dates. Please contact the authors or your Miller Canfield attorney for more information.

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*