



IRS to Amend Cafeteria Plan Regulations to Facilitate Enrollment in Marketplace Coverage

On Thursday, September 18, 2014, the Internal Revenue Service (“IRS”) released Notice 2014-55, which expands the cafeteria plan “change in status” rules to allow plans to offer employees an option to revoke their elections for employer-sponsored health coverage to purchase a qualified health plan through a Health Insurance Marketplace (“Marketplace”). The notice is effective immediately and will appear in IRB 2014-41, to be published Oct. 6, 2014.

The notice addresses two specific situations in which a plan could allow an employee to revoke a cafeteria plan election (other than a health FSA election): due to enrollment in the Marketplace; and due to a reduction in hours of service. This should be a welcome relief to employers that may have been struggling with how to allow employees to change coverage from under the employer’s plan to a Marketplace or other group health plan.

Revocation Due to Enrollment in the Marketplace

Under current cafeteria plan rules, an employee may not revoke an election for coverage under a group health plan solely to purchase a Marketplace plan. This is not a concern for employees who are eligible for a calendar year cafeteria plan because they may transition to a Marketplace plan during open enrollment with no gap in coverage, as both the employer plan and the Marketplace would have an open enrollment period for coverage effective January 1. However, an employee covered by a non-calendar year cafeteria plan is unable to synchronize the change – Marketplace coverage only operates on a calendar year open enrollment period. Thus, employees covered by non-calendar year cafeteria plans who wish to enroll in Marketplace coverage would experience a period where there is either dual coverage or no coverage, depending on when they are able to drop the employer-provided coverage.

A similar issue occurs when an employee experiences an event such as a birth or marriage. In these situations, it may be more advantageous for some employees to purchase a Marketplace plan for themselves and their families rather than to add family members to the employer’s group health plan. Despite the fact that birth and marriage are both special enrollment events for Marketplace coverage, the cafeteria plan rules do not allow an employee to make a mid-year revocation of coverage for employer-sponsored coverage based on a desire to enroll in Marketplace coverage.

For all of these reasons, the IRS Notice permits a cafeteria plan to allow a participating employee to revoke an election in order to obtain coverage through the Marketplace under the following conditions:

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1. The employee is seeking to enroll in Marketplace coverage during the Marketplace's annual open enrollment period or during a special enrollment period; and
2. The employee enrolls, along with any related individuals who cease coverage due to the revocation, in a Marketplace plan effective immediately following the revocation.

An employer may rely on the reasonable representation of an employee who is enrolling in Marketplace coverage that the employee and related individuals have enrolled or intend to enroll in a Marketplace plan that is effective immediately following the revocation (i.e., there is no gap in coverage). In other words, employers do not have to require employees to prove that Marketplace coverage was actually elected once they cease to participate in the employer's plan.

As a reminder, the special enrollment rules for Marketplace coverage include entry due to an individual:

- losing other health coverage;
- gaining a dependent (or becoming a dependent) through marriage, birth, or adoption;
- newly gaining status as a citizen, national or lawfully present individual;
- unintentionally or inadvertently failing to enroll due to an error on the part of the Marketplace;
- demonstrating to the Marketplace that the plan in which the individual is enrolled substantially violated a material provision of its contract in relation to the enrollee (this would permit an individual to change Marketplace plans);
- being determined newly eligible (or experiencing a change in eligibility) for subsidized coverage (regardless of whether the individual is already enrolled in Marketplace coverage);
- changing residence such that the individual gains access to new Marketplace options; or
- demonstrating that the individual meets other exceptional circumstances as the Marketplace may provide.

Revocation Due to Reduction in Hours of Service

Under the ACA's pay-or-play mandate, an employer may choose to measure an employee's hours over a period of time (called a measurement period) to determine the employee's status as either full-time or not full-time for the subsequent stability period, using a 30-hour per week average for full-time status. If an employee works full-time during the measurement period, the employee must be treated as full-time—and continue to be offered affordable coverage—during the

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subsequent stability period if an employer is attempting to avoid pay-or-play penalties.

This creates a potential problem when an employee in a stability period changes from a full-time position to a part-time position and wishes to purchase a Marketplace plan. This might happen because the reduction in hours has triggered eligibility for a premium tax credit or perhaps because the individual simply cannot afford the coverage, as a practical matter, on reduced pay. Under existing cafeteria plan rules, a cafeteria plan could not allow the employee to drop coverage mid-year because there hasn't been a loss of eligibility for coverage in the underlying group health plan.

To fix this issue, the notice provides that a cafeteria plan may allow an employee to revoke prospectively an election of coverage under a group health plan (other than a health FSA) provided the following conditions are met:

1. The employee changes from full-time status to part-time status and is reasonable expected to remain in part-time status; and
2. The employee enrolls, along with any related individuals who cease coverage due to the revocation, in another plan no later than the first day of the second full month following the revocation.

An employer may rely on the reasonable representation of an employee who is changing to part-time status that the employee and related individuals have enrolled or intend to enroll in another plan within the above timeframe.

Employer Action Steps

As with the other cafeteria plan change in status rules, these new permitted election changes are voluntary – an employer is not required to adopt them. Employers that wish to extend the new permitted election change opportunities to employees will need to amend their cafeteria plans to allow the changes. The amendment must be adopted by the last day of the plan year in which the changes are allowed, and may be effective retroactively to the first day of that plan year; however, any election changes may not have a retroactive effect. Note that for plan years beginning in 2014, the employer has until the last day of the 2015 plan year to amend the plan. The IRS intends to amend the applicable cafeteria plan regulations in the future to reflect the guidance in the notice.

Separately, if an employer chooses to use these change in status rule exceptions, the employer ought to consider other administrative issues and communication issues that can arise – employees need to be apprised of these new options and the options need to be administered consistently with other plan provisions, including any applicable COBRA provisions. As employers enter into open enrollment season, those

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employers wishing to permit these changes should consider including a discussion of the new options in enrollment materials.