IRS Notices 2020-29 & 2020-33

The Impact to Your Business

May 22, 2020

TODAY'S PRESENTERS:

Darcy L. Hitesman, Attorney

HITESMAN&WOLD P.A.

Mike Melnychuk, President

HR SIMPLIFIED
an Ascensus® company

IRS Notices 2020-29 & 2020-33

First Week of May

Extension of Certain **Timeframes** for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak, 26 CFR Part 54.

- https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected

Section 125 Cafeteria Plans – Modifications of Permissive **Carryover** Rule for Health Flexible Spending Arrangements and Clarification Regarding Reimbursements of Premiums by **Individual Coverage** Health Reimbursement Arrangements, IRS Notice 2020-33.

- https://www.irs.gov/pub/irs-drop/n-20-33.pdf

COVID-19 Guidance Under § 125 Cafeteria Plans and Related to **High Deductible** Health Plans, IRS Notice 2020-29.

- https://www.irs.gov/pub/irs-drop/n-20-29.pdf

Agenda

- Cafeteria Plan: Temporary Extension Irrevocable Election Exceptions
- Extended Claims Periods for Health FSAs and Dependent Care Assistance Programs
- Carryover
- HDHP Clarifications
- Extensions Certain Timeframes: Outbreak Period
- “Incurred” for ICHRA

Cafeteria Plan: *Temporary* Irrevocable Election Exceptions

Irrevocable Election Temporary Exceptions

- Normally, elections under a cafeteria plan are irrevocable.
  - Limited exceptions
  - Most are permissive
- Special **temporary** exceptions allow election changes during the 2020 calendar year.
- In recognition of COVID-19 unanticipated impact on employee needs not considered when plan year elections made.

Irrevocable Election Temporary Exceptions

- Five special temporary irrevocable election exceptions:
  - Make a new election for employer-sponsored health coverage, if employee initially declined to elect employer-sponsored health coverage.
    - Prospective
  - Revoke existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer.
    - Includes changing from self-only to family coverage
    - Prospective
  - Revoke existing election for employer-sponsored health coverage.
    - Requires written attestation employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer; valid unless employer has actual knowledge otherwise
    - Prospective basis

Irrevocable Election Temporary Exceptions

- The special temporary irrevocable election exceptions -- continued
  - Revoke election, make a new election, or decrease or increase an existing election under health FSA.
    - Prospective
    - Decrease/increase with respect to remainder of plan year
  - Revoke election, make a new election, or decrease or increase an existing election under dependent care assistance program.
    - Prospective
    - Decrease/increase with respect to remainder of plan year

Irrevocable Election Temporary Exceptions

- Like exceptions to the irrevocable election in rule in general, special temporary exceptions are **permissive**.
  - Employer may add all of them, some of them, or none of them.
- In addition to deciding whether or/which special temporary exceptions to adopt, employer may further limit:
  - To situations where coverage is increased.
  - Only from self coverage to family coverage (not allowing the drop of family members).
  - Low option to high option.
- Health FSAs and dependent care FSAs, may limit to no less than amounts already reimbursed.

Irrevocable Election Temporary Exceptions

CAUTION: Still subject to nondiscrimination requirements.

- May be adopted retroactively to period before notice issued if changes consistent with these changes were allowed.
  - Protects employers who allowed changes before guidance
- Exception(s) requires a plan amendment, good communication, uniform and consistent application.
  - Lots of decisions to be made now

Extended Claims Periods for Health FSAs and Dependent Care Assistance Programs

Extended Claims Periods

- **NOT A GRACE PERIOD EXTENSION**
- Extended period of time in which to apply unused amounts in health FSA or dependent care assistance program.
  - Avoids Use or Lose Rule
- Available for health FSAs with grace periods
- Available for non-calendar year health FSAs with carryover

Extended Claims Periods

- **Health FSA with grace period**
- Normally, if dollars left at end of Plan Year, grace period of up to 2.5 months to use those dollars for expenses incurred during the grace period that occurs in the second Plan Year.
  - If added, the exception(s) requires a plan amendment, good communication, uniform and consistent application.
  - Softens impact of Use or Lose Rule.

  Grace period delays HSA contribution eligibility.
  - Normally, dollars in grace period as of its normal end are forfeited.
  - Eligibility to make HSA contributions begins on the first of the next month following grace period end (e.g., April 1 for a calendar year plan with a standard 2.5 month grace period).

Extended Claims Periods

- With extended claims period following grace period end, dollars remaining at grace period end continue to be available through December 31, 2020.
  - But then ineligible for HSA contributions for entire 2020 tax year.
  - Not just until dollars used.
- Because it is permissive, an employer should be able to extend the claims period for less than the period ending December 31, 2020.
  - Ineligible for HSA contributions until first of the month following the end of the extended claims period.

Extended Claims Periods

- **Not just for health FSAs with grace periods**
- "as of the close of the grace period ending in 2020/**or plan year ending in 2020** to all payment/reimbursement of expenses incurred through December 31, 2020."
- Non-calendar plan year ending in 2020 with a carryover can take advantage of the extended claims period.
- Extended claims period operates separately from the carryover. It is not considered a grace period. *See Example 1 from Notice 2020-29.*

Extended Claims Periods

- **Example**, non-calendar year plan, employee has $2000 left at plan year end because procedure postponed. Normally, could only carryover $500.
- Extended claims period allows employee access to entire $2000 for use in portion of second non-calendar plan year that occurs in 2020 (i.e., through December 31, 2020).
- Can undergo procedure any time in 2020 portion of second non-calendar plan year and use $2000 from non-calendar plan year beginning in 2019/ending in 2020 to pay for it.
- The entire amount left at end of non-calendar plan year ending in 2020 is available through December 31, 2020 instead of the carryover amount (max. $500).

Note: Could be particularly helpful for school districts operating on non-calendar plan year.

Extended Claims Periods

- Requires a plan amendment.
- Employer must decide what to do, communicate it, operate it, and ultimately reflect in plan amendment.
- Adopted on or before December 31, 2021.
- Stacking possibility: Combined with ability to change health FSA election under irrevocable election temporary exceptions, could increase salary reduction to health FSA in non-calendar plan year ending in 2020 and then because of extended claims period have increased amount available through December 31, 2020.

Carryover

Determination of Carryover

- **Up until now**, a carryover has been allowed in an amount of $500 set by Notice 2013-17.
- The amount that can be carried over to the following plan year is the lesser of (1) the health FSA account balance, or (2) $500 (or lower amount specified in the plan).
- Notice 2020-33 changes this formula.
- **Now**, $500 indexed for inflation.
- The amount that can be carried over to the following plan year is the lesser of (1) the health FSA account balance, or (2) $500, as indexed (or lower amount specified in the plan).

Determination of Carryover

- The maximum carryover is now defined as 20% of the maximum salary reduction for the year allowed under Section 125(i) of the Code.
- Being tied to 125(i) that sets the maximum salary reduction as $2,500 indexed for inflation means that the carryover maximum now indexed for inflation.
- Maximum amount from 2020 that can be carried over to 2021 is $550.
- Employer may have a lower maximum; needs to be specified in the plan.
- Other rules remain unchanged including no grace period if have carryover.
- Need to review plan document for language. In most cases, will require an amendment.

Determination of Carryover

- Change in carryover determination does not permit a change in the health FSA election for 2020.
  - However, if employer is using the other special temporary exceptions to the irrevocable election rule, that would reach the same result.

HDHP Clarifications Regarding Notice 2020-15 and Families First Coronavirus Response Act

COVID-19 Testing

- Normally, HDHP very limited with what it can pay prior to satisfaction of deductible.
- If HDHP impermissibly provides benefit before satisfaction of the deductible, HDHP not an HDHP.
- To be eligible to make HSA contributions, the person must be covered by HDHP.
- Notice 2020-15 provides a health plan that otherwise satisfies the requirements of an HDHP does not cease to be an HDHP merely because the HDHP provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to satisfaction of the deductible.
- Notice 2020-15 clarifies that
  - The change reaches back to expenses incurred on or after January 1, 2020.
  - The scope of the provision includes the panel of diagnostic testing for influenza A & B, norovirus and other coronaviruses, and RSV.

Telehealth and Remote Care Services

- Normally, HDHP very limited with what it can pay prior to satisfaction of deductible.
- If HDHP impermissibly provides benefit before satisfaction of the deductible, HDHP not an HDHP.
- To be eligible to make HSA contributions, the person must be covered by HDHP.
- Normally, telehealth would include providing benefits and services before the deductible of a HDHP had been met.
- That would make people ineligible to make HSA contributions.

Telehealth and Remote Care Services

- Notice provides temporary safe harbor for telehealth and remote care services.
- Under temporary safe harbor, telehealth and remote care services disregarded in determining whether health plan is HDHP.
- **Note**: Telehealth and remote care can be provided within the HDHP or from outside the HDHP but ERISA and PPACA requirements still apply.
- Services provided on or after January 1, 2020 with respect to plan years beginning on or before December 31, 2021.
- Calendar plan years have two full plan years under the temporary safe harbor.

Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak

General Comment: Not just for major medical coverage.

Temporary Timeframe Extensions

- **Not all time frames.**
- Focused on HIPAA Special Enrollment, COBRA, Claims Procedures, External Review.
  - EBSA Notice 2020-01 addresses other time frames (e.g., SPD, SMM, adverse claim determination)
- Concerns for participants and beneficiaries – may have difficulty exercising their rights or filing or perfecting benefit claims.
- Concerns for group health plans – may have difficulty complying with notice requirements.

Temporary Timeframe Extensions

- New term – “Outbreak Period”
- Begins March 1, 2020; ends 60 days after the announcement that the National Emergency has ended, or other date announced by the Agencies.
- In general, the Outbreak Period suspends running of timeframes.
- **Example**: If the time frame is thirty days to pay (e.g., grace period for COBRA premium payment), that thirty-day period to pay runs from the end of the Outbreak Period.

Temporary Timeframe Extensions

- Issues are many, including:
  - Uncertainty of when the Outbreak Period is going to end.
    - National Emergency end
    - Could be shorter time frames based on regional decisions or because the Agencies decide
  - Don’t know what happens between what would have been the normal end of the timeframe and the end of the timeframe as extended by the Outbreak Period.
    - Disconnect between payment and coverage that relates to payment
  - Although appears to impact the plan to covered person relationship, actually goes much deeper.
    - Lots of “players” impacted

HIPAA Special Enrollment

- Impacts group health plans not HIPAA excepted and cafeteria plans with exception to irrevocable election for HIPAA special enrollment.
- Normally at least 30 days or at least 60 days.
  - Look at plan language to determine actual timeframe.
- Now runs from end of Outbreak Period.
  - Coverage provided retroactively to date that would have applied under the normal timeframe.
  - Could be really long time before HIPAA Special Enrollment period ends.
  - If elect, do have to pay.

HIPAA Special Enrollment

- Could stretch over multiple plan years of cafeteria plan so would not be able to pay it all pre-tax.
- **If insured**, usually have a period of time after which carrier will not adjust eligibility. That will have to change.
- What if change insurance carrier in interim. Not getting coverage would have gotten if normal election period applied.
- **If self-insured**, disrupts cash flow, uncertainty into projections; look at stop loss contract carefully, claims made policy,
- **Both** -- recalculation of deductibles (point at which reached) and out of pocket maximums, impact on integrated HRA, health FSA, ability to pay pre-tax, etc.
- Longer the Outbreak Period, more likely stacking occurs -- COBRA, married/divorced; change from fully insured to self-insured.

Claims Procedure Timeframes

- Not limited to medical claims under group health plan
  - Example 6 is disability plan; Example 7 is pension plan
- Date by which must file a claim
  - Refer to claims procedure under the plan; submitted within 365 days (Example 6)
  - Health FSA -- look at plan language (claims run out period)
  - Now runs from end of Outbreak Period
- Date by which must file an appeal of an adverse determination
  - Refer to claims procedure under the plan; 180 days for group health
  - Now runs from end of Outbreak Period

Claims Procedure Timeframes

- Lots of problems, including:
  - Tracking
  - Systems adjustments
  - Providers not getting paid timely
  - Recalculation of deductibles, out of pocket maximums, etc.
- If self-insured:
  - Stop loss contract
  - Claims made
  - Change in stop loss carriers

External Review Timeframes

- Date by which must request external review.
  - Depends upon review process used.
  - Under Federal external review process, must provide at least four months to request.
  - Runs from end of Outbreak Period.
- Date by which must perfect incomplete claim.
  - Depends upon review process used.
  - Federal process has preliminary review; if incomplete, can perfect within the 4 month filing period or if later, 48 hours of notice.

COBRA Timeframes

- Timeframes **to provide notice.**
  - Qualified beneficiaries to notify plan
  - Plan to notify qualified beneficiaries
- Timeframe runs from end of the Outbreak Period.

Note: Can still provide notices before end of extension.

COBRA Timeframes

- COBRA includes timeframes **to elect coverage** and timeframes **to pay** for coverage.
- At least 60 days to elect.
  - “At least” – what does group health plan/COBRA procedures say?
  - Election period begins at end of Outbreak Period
- Time to pay initial applicable premiums.
  - 45 days to pay from election
  - Bring up to date
  - 45 days begins at end of Outbreak Period
  - Stacking
- Time to pay monthly applicable premium.
  - 30 days
  - 30 days begins at end of Outbreak Period
  - Could have multiple months of unpaid premiums

COBRA Timeframes

- What happens to coverage during the interim?
- Normally, if you do not elect within the timeframe, you do not have coverage.
- Normally, if you do not pay within the timeframe, you do not have coverage (either it never begins, or it terminates).
- With extension, the interim timeframe could be many months long.

COBRA Timeframes

- Typical group health plan approach: from point at which eligibility is lost (e.g., qualifying event), coverage under group health plan stops/suspended until both elect and pay.
- With extension:
  - Could be a long time before elects and pays.
  - Could have some qualified beneficiaries elect at different times.
  - Could be a lot of money in order to elect – catch up past premiums due.

Note: Can still elect, can still pay, can still elect and pay any time prior to the end of the extension.

COBRA Timeframes

- In general, COBRA beneficiary initially entitled to same coverage had before qualifying event; later entitled to same coverage as others similarly situated.
- The longer the Outbreak Period, the more difficult to follow the rule regarding initial entitlement.
- Coverage changes.
- Plan terminates, plan changes from insured to self-insured, plan changes from self-insured to insured – may not be able to go back
  - Changes networks or formularies
  - Changes in cost sharing (deductible, copays, co-insurance)
  - Changes in structure (insured to self-insured; self-insured to fully insured)
  - Changes in applicable premium
- The longer the Outbreak Period, the more likely stacked events.

COBRA Timeframes

- How do you count the months? If eventually elected, do all of the months count to reduce COBRA period? What if extended past the months of available COBRA?

Remember: COBRA premiums can be paid by third party.

Note: Nothing limits application to just traditional group health coverage (e.g., major medical); all group health plans subject to COBRA; also situations where not necessarily done well now (e.g., dental, vision, hearing, wellness, EAP, on-site medical clinic, etc.).

- How do you handle health FSAs?
- How do you handle group health plan with integrated HRAs?

Relaxation of “Incurred” for Individual Coverage HRAs (“ICHRAs”)

Special Definitions of Incurred

- Normally, an expense cannot be paid/reimbursed until it has been "incurred."
- "Incurred" has been defined as when the care giving rise to the expense has been received, not when billed or paid.
- For ICHRAs, this is a problem because the premium for the individual policy is typically required to be paid the month prior to the month in which the care (the coverage under the policy) is provided.

Special Definition of Incurred

- People newly entering an ICHRA.
  - Cannot pay for coverage before becoming a participant in the plan; plan is the ICHRA, not the policy.
- People already participating in an ICHRA.
  - The coverage has not been provided until the end of the month.
  - Lag period – similar to dependent care assistance.

Special Definition of Incurred

- Definition of “incurred” relaxed to allow premium to be considered “incurred” on:
  - The first day of each month of coverage on a pro-rata basis;
  - The first day of the period of coverage; or
  - The date the premium is paid.
- Follows Notice 2017-67 regarding the same issue with respect to QSEHRAs.

Questions

HR Simplified
5320 West 23rd Street
Suite 350
Minneapolis, MN 55416

Please direct inquiries to
sales@hrsimplified.com

Darcy L. Hitesman, Esq.
HITESMAN&WOLD P.A.
11238 – 86th Avenue North
Maple Grove, MN 55369
Phone: 763-503-6620
Email: darcy@hitesmanlaw.com