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## 'The IRS Announces New Elections in 2020 – No, not those elections; these new elections are beneficial and timely.'

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### Why the IRS Acted Now

In Notice 2020-29, the IRS announced welcome relief for employees participating in a group health plan (including medical, dental, and vision coverage), paired with an Internal Revenue Code Section 125 cafeteria plan. Generally, a cafeteria plan requires that the employee's election to participate in the group health plan (by paying premiums on a pre-tax basis through the cafeteria plan) must be made before the first day of the plan year and can't be changed during the plan year. Although Code Section 125 describes limited circumstances when an election may be revoked mid-year, many health coverage issues created by the COVID-19 pandemic do not create a qualifying exception. As a result, an employee whose need for individual or family health coverage is changed by the current economic crisis may be unable to change the health plan coverage election made months before the pandemic began.

### The New Flexibility in Elections for Health Plan Coverages

Under Notice 2020-29, employers now may (but are not required to) amend their cafeteria plan to allow certain prospective mid-year election changes for health coverage, health flexible spending accounts ("FSAs") and dependent care assistance programs ("DCAPs"), during calendar year 2020. If the employer permits these mid-year elections, it will need to adopt an amendment to the plan document by December 31, 2021 (retroactively effective to January 1, 2020). Specifically, an employer may amend its cafeteria plan to allow each employee who is eligible to make salary reduction contributions to make prospective election changes (even if no election was made previously) during calendar year 2020 regarding contributions towards pre-tax premiums, an FSA, or a dependent care assistance program, even though the basis for the election change does not satisfy the current Treasury Regulations.

Specifically, an employer may allow employees to: (1) make a new election to enroll in health coverage if the employee initially declined to elect health coverage; (2) revoke an existing election for health coverage and make a new election to enroll in different health coverage sponsored by the same employer (including changing enrollment from employee-only coverage to family coverage); (3) revoke an existing election to participate in the employer's health coverage, but only if the employee attests in writing that the employee is enrolled, or immediately will enroll in other health coverage not sponsored by the employer; (4) revoke an election, make a new election, or decrease or increase an existing election to contribute to an FSA; and (5) revoke an election, make a new election, or decrease or increase an existing election to contribute to a DCAP. These changes can only be made on a prospective basis.

To completely revoke an existing election to participate in the employer's health coverage, the employee must state in writing that the employee is enrolled, or immediately will enroll, in other comprehensive health coverage not sponsored by the employer. The employer may rely on this written attestation unless the employer has actual knowledge that this is untrue.

An employer using this relief under the Notice 2020-29 is not required to offer unlimited election changes or unlimited time to make changes, but may determine when and for how long election changes are permitted and applied, as long as the new elections are applied prospectively only, and the changes to the plan's election requirements comply with the nondiscrimination rules applicable to cafeteria plans. An employer should consider the potential for adverse selection of health coverage by employees. To prevent adverse selection of health coverage, an employer may limit elections to circumstances in which an employee's coverage will be increased or improved as a result of the election (for example, by electing to switch from self-only coverage to family coverage, or from a low option plan covering in-network expenses only to a high option plan covering expenses in or out-of-network).

This mid-year election relief applies to both employers sponsoring self-insured plans and employers sponsoring insured plans. With respect to FSAs, this relief applies to all health FSAs, including limited purpose FSAs compatible with high deductible health plans and health savings accounts. In addition, with respect to health FSAs and DCAPs, employers are permitted to require that any change made by the employee must result in deductions sufficient to cover eligible expenses that have already been reimbursed.

Notice 2020-29 also permits an employer to amend an FSA or DCAP to extend, until December 31, 2020, the period for using contributions for any plan year, or grace period relating to a prior plan year, ending in 2020. Therefore, an FSA or DCAP with a calendar plan year may use 2019 contributions to cover expenses incurred through December 31, 2020.

### **What Should an Employer Do Next?**

Contact your record keeper and employee benefits advisors to determine if amending the cafeteria plan makes sense for you and would be beneficial to employees. These elections now available in 2020 can offer welcomed flexibility to employees with minimal effort from the employer. If you do decide to implement any of these changes, the applicable plan documents must be amended, and those amendments should be communicated to plan participants as soon as possible so that they can take advantage of these additional election opportunities. Shumaker's Employee Benefits team can help guide you through the process.