

NOTICE 2020-29

Frequently Asked Questions (FAQ)

1. To what types of plans is Notice 2020-29 applicable?

Notice 2020-29 provides temporary flexibility in allowing mid-year elections with respect to health care plans (self-insured and fully insured), health flexible spending arrangements (health FSAs), and dependent care assistance programs (DCAPs) offered under Section 125 cafeteria plans.

Notice 2020-29 also provides temporary flexibility to health FSAs or DCAPs offered under a Section 125 cafeteria plan. Employers may now allow an extended period to apply unused amounts remaining after the close of a plan year or a grace period in 2020.

Finally, Notice 2020-29 clarifies the application of **Notice 2020-15** and Section 3701 of the **CARES Act** to high deductible health care plans (HDHPs).

2. How does Notice 2020-29 modify mid-year election changes?

Sponsors of Section 125 cafeteria plans may amend their plans to allow mid-year election changes—disregarding restrictions under Treas. Reg. 1.125-4 during the 2020 plan year. Specifically, plans may be amended to incorporate the following mid-year elections changes.

- Make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.
- Revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis (including changing enrollment from self-only coverage to family coverage).
- Revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that she is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.
- Revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis.
- Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.

3. What type of attestation must the participant provide in order to revoke an existing election for employer-sponsored health coverage on a prospective basis without enrolling in another health care plan of the employer?

If the participant wants to prospectively revoke an election for employer-sponsored health coverage without electing coverage under another health care plan sponsored by the employer, the employee must provide a written attestation that he is enrolled, or immediately will enroll, in other comprehensive health coverage not sponsored by the employer.

Notice 2020-29 includes a model attestation that can be used by participants and employers.

Name: _____ (and other identifying information requested by the employer for administrative purposes). I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan). Signature: _____

4. Are Section 125 cafeteria plans sponsors required to adopt the temporary flexibility in allowing mid-year election changes under Notice 2020-29?

No, sponsors are not required to implement the temporary flexibility to mid-year election changes under Notice 2020-29. But if a sponsor does choose to implement the temporary flexibility to mid-year elections, the sponsor must amend the plan to reflect the corresponding changes. The plan must be amended by December 31, 2021; plans may operate immediately in accordance with this new guidance and amend later.

5. Are sponsors required to adopt all reasons for mid-year election changes, or may they select specific reasons and reject others?

Sponsors of Section 125 cafeteria plans are not required to provide election changes for every allowable reason. But they may determine the extent to which such election changes are permitted and applied, provided that any permitted election changes are applied on a prospective basis only. In other words, a sponsor may amend its plan to allow health FSA plan participants (but not DCAP participants) to prospectively revoke an election, make a new election, or decrease or increase an existing election. By the same token, sponsors may amend their plans to allow DCAP plan participants to only revoke elections, or to decrease an existing election.

6. If a sponsor amends the plan to allow mid-year election changes, can the sponsor adopt special limitations to the participants' ability to make the election changes?

Yes. For example, with respect to health FSAs and DCAPs, sponsors may limit mid-year reductions to an amount that equals the amount that has already been reimbursed.

Example: Participant A made an election to contribute \$100 each month to the health FSA component of a Section 125 cafeteria plan for the 2020 calendar plan year. As of April 30, 2020, Participant A had already spent \$1,200 in his health FSA. The sponsor may limit the participant's ability to revoke or reduce his election in order to ensure the participant contributes at least \$1,200 during 2020.

7. Is this temporary flexibility applicable to all types of flexible spending arrangements?

Yes, the temporary flexibility to mid-year election changes apply to general purpose health FSAs, and to limited health FSAs that are compatible with HSAs and DCAPs.

8. Are sponsors allowed to implement mid-year election changes under Notice 2020-29 to future plan years?

No. The temporary flexibility to mid-year election changes in Section 125 cafeteria plans are allowed only for the 2020 calendar year. Therefore, if sponsors decide to amend their plans accordingly, such amendments would allow the relaxed mid-year election changes rules to operate until December 31, 2020.

9. What guidance does Notice 2020-29 provide regarding unused amounts in health FSAs and DCAPs?

Under Notice 2020-29, sponsors may amend their Section 125 cafeteria plans to permit employees to spend unused amounts remaining in a health FSA or DCAP as of the end of a grace period ending in 2020 or at the end of a plan year ending in 2020. This would allow employees to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020.

In other words, if a grace period expires in 2020, this relief allows the sponsor to amend the plan in order to extend the grace period to December 31, 2020.

Example 1: A Section 125 cafeteria plan with a plan year ending March 31, 2020, has a 2½ month grace period that expires on June 15, 2020. During the grace period, participants may spend unused funds on eligible medical expenses incurred on or before June 15, 2020. The sponsor may amend the plan to extend the grace period from June 15, 2020, to any date on or before December 31, 2020. In this case, a participant that would normally have to forfeit unused 2019 plan year funds as of June 15, 2020, will now have until the new extended grace period (which cannot exceed December 31, 2020) to spend unused 2019 funds.

Relief also applies to Section 125 cafeteria plans that do not have a grace period feature but do have a plan year ending during 2020. Sponsors can amend these plans in order to give participants until December 31, 2020, to spend unused 2019 funds.

Example 2: A Section 125 cafeteria plan with a plan year ending on March 31, 2020, does not include a grace period feature. Unused 2019 plan funds are forfeited as of March 31, 2020. The sponsor may amend the plan to allow participants to spend unused 2019 funds on expenses incurred on or before December 31, 2020. A participant that would normally have his unused 2019 plan year funds forfeited as of March 31, 2020, will now have until the new extended date (which cannot exceed December 31, 2020) to spend unused 2019 funds.

10. A health FSA cannot include both a grace period and a carryover feature. How does Notice 2020-29 change this?

Notice 2013-71, which states that health FSAs can either adopt a grace period or provide for a carryover amount but cannot have both, remains in full effect. However, health FSAs that include a carryover feature and that operate under a plan year that ends in 2020 may be amended to grant an extended time (up to December 31, 2020) to spend unused 2019 amounts. In this case, unused 2019 funds may be spent on eligible medical expenses incurred up to a deadline determined by the sponsor. (The deadline cannot extend beyond December 31, 2020.) The following examples were included in Notice 2020-29.

Example 1: Employer provides a health FSA under a Section 125 cafeteria plan that allows a \$500 carryover for the 2019 plan year (July 1, 2019 to June 30, 2020). Pursuant to this notice and Notice 2020-33, Employer amends the plan to adopt a \$550 (indexed) carryover beginning with the 2020 plan year, and also amends the plan to adopt the temporary extended period for incurring claims with respect to the 2019 plan year, allowing for claims incurred prior to January 1, 2021, to be paid with respect to amounts from the 2019 plan year.

Employee A has a remaining balance in his health FSA for the 2019 plan year of \$2,000 on June 30, 2020, because a scheduled non-emergency procedure was postponed. For the 2020 plan year beginning July 1, 2020, Employee A elects to contribute \$2,000 to his health FSA. Employee A is able to reschedule the procedure before December 31, 2020 and, between July 1, 2020 and December 31, 2020, incurs \$1,900 in medical care expenses. The health FSA may reimburse Employee A \$1,900 from the \$2,000 remaining in his health FSA at the end of the 2019 plan year, leaving \$100 unused from the 2019 plan year. Under the plan terms that provide for a carryover, Employee A is allowed to use the remaining \$100 in his health FSA until June 30, 2021, to reimburse claims incurred during the 2020 plan year. Employee A may be reimbursed for up to \$2,100 (\$2,000 contributed to the health FSA for the 2020 plan year plus \$100 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021 and June 30, 2021. In addition, Employee A may carry over to the 2021 plan year beginning July 1, 2021 up to \$550 of any remaining portion of that \$2,100 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

Example 2: Same facts as Example 1, except that Employee B has a remaining balance in his health FSA for the 2019 plan year of \$1,250 on June 30, 2020. For the 2020 plan year beginning July 1, 2020, Employee B elects to contribute \$1,200 to his health FSA. Between July 1, 2020 and December 31, 2020, Employee B incurs \$600 in medical care expenses. The health FSA may reimburse Employee B \$600 from the \$1,250 remaining in his health FSA at the end of the 2019 plan year, leaving \$650 unused from the 2019 plan year. Under the plan terms, Employee B is allowed to use \$500 of the \$650 unused amount from the 2019 plan year to reimburse claims incurred during the 2020 plan year, and the remaining \$150 will be forfeited. Employee B may be reimbursed for up to \$1,700 (\$1,200 contributed to the health FSA for the 2020 plan year plus \$500 carryover from the 2019 plan year) for medical care expenses incurred between January 1, 2021 and June 30, 2021. In addition, Employee B may carry over to the 2021 plan year beginning July 1, 2021 up to \$550 of any remaining unused portion of that \$1,700 after claims are processed for the 2020 plan year that began July 1, 2020. A grace period is not available for the plan year ending June 30, 2021.

11. Does the temporary extension of deadlines to spend unused 2019 health FSA funds allow otherwise HSA eligible individuals to contribute to an HSA?

No. Individuals that have unused amounts in a plan that is amended to allow an extended period are not eligible to contribute to an HSA during the extended period. Notice 2020-29 specifically states the following.

Thus, an individual who had unused amounts remaining at the end of a plan year or grace period ending in 2020 and who is allowed an extended period to incur expenses under a health FSA pursuant to a plan amended in accordance with this notice will not be eligible to contribute to an HSA during the extended period (except in the case of an HSA-compatible health FSA, including a health FSA that is amended to be HSA-compatible).

Notice 2020-29 does not indicate how to correct this issue for participants who had their health FSA balance forfeited before they enrolled in an HSA and then had it re-established retroactively by amendment under this Notice. In the absence of additional guidance, the HSA contributions that were made while covered under the FSA must now be considered excess contributions, and the HSA owner should take appropriate action to remove any excess amounts before his 2020 tax return due date (including extensions).

Example: A Section 125 cafeteria plan with a plan year ending on March 31, 2020, does not have carryover or grace period features. Participant A elected to contribute to the regular health FSA during the 2019 plan year but elected to drop the regular health FSA for the 2020 plan year in order to be an HSA eligible individual. The sponsor decides to amend the plan and extend the deadline to use 2019 regular FSA funds until December 31, 2020. In this case, if Participant A had unused 2019 regular FSA funds as of March 31, 2020, he is not an HSA eligible individual for the 2020 plan year because he still has regular FSA funds available for use during the period ending on December 31, 2020. Participant A would become an HSA eligible individual as of January 1, 2021.

12. Are sponsors required to adopt the temporary extension of deadlines to spend unused 2019 health FSA and/or DCAP funds?

Sponsors of Section 125 cafeteria plans are not required to adopt the temporary extension of deadlines to spend unused 2019 health FSA and DCAP funds. However, if sponsors adopt the temporary extension of deadlines to spend unused 2019 health FSA and DCAP funds, then they must adopt the corresponding plan amendment.

13. When is the last day to adopt a plan amendment in order to add the extended deadline for spending unused 2019 health FSA and DAP funds and to allow mid-year election changes?

An amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020, provided that the plan amendment conforms to the requirements contained in Notice 2020-29. The employer must also inform all employees eligible to participate in the Section 125 cafeteria plan of the changes to the plan.