

# *NOTICE 2020-33*

## *Frequently Asked Questions (FAQ)*

### **1. What are the key points in Notice 2020-33?**

**Notice 2020-33** increases the maximum carryover amounts in health flexible spending arrangements (health FSAs) within a section 125 cafeteria plan. Notice 2020-33 also confirms that health plans—including a premium reimbursement plan in a section 125 cafeteria plan or an individual coverage health reimbursement arrangement (ICHRA)—cannot reimburse medical expenses incurred before the start of the plan year. But the notice also clarifies that expenses in the form of premiums for health insurance coverage may be paid before the first day of the plan year as long as the payment is for coverage during the plan year.

### **2. How does Notice 2020-33 modify the carryover limit applicable to health FSAs within a section 125 cafeteria plan?**

Starting in 2013, salary reduction contributions to a health FSA within a section 125 cafeteria plan were limited to \$2,500 (as indexed for cost-of-living adjustments) per taxable year, starting in 2013. Through the years, salary reduction contributions to a health FSA within a section 125 cafeteria plan have increased to \$2,750 (applicable for the 2020 taxable year).

**Notice 2013-71** permitted section 125 cafeteria plans to allow up to \$500 of any unused amount in a participant's health FSA as of the end of a plan year to be paid or reimbursed to the participant for medical care expenses incurred in the immediately following plan year (the "permissive carryover" rule). At that time, the permissive carryover limit was computed to be \$500.

The permissive carryover limit was not set to be indexed for cost-of-living adjustments. As a result, salary reduction contributions to a health FSA within a section 125 cafeteria plan had increased through the years to \$2,750, but the maximum permissive carryover amount remained at \$500.

**Executive Order 13877** mandated an increase to the amount of FSA funds that can carry over without penalty at the end of the year. In response to the Executive Order, Notice 2020-33 increases the maximum \$500 carryover amount for a plan year to an amount equal to 20 percent of the maximum salary reduction contribution under Internal Revenue Code Section 125(i) for that plan year.

### **3. Does the increase to the permissible carryover limit in a health FSA within a section 125 cafeteria plan apply automatically to all health FSAs?**

No. The increase to the permissible carryover limit in a health FSA within a section 125 cafeteria plan does not apply automatically to all health FSAs.

- If a section 125 cafeteria plan does not include the carryover feature, Notice 2020-33 does not make the carryover feature applicable to that plan.

- If a section 125 cafeteria plan is written in a manner that incorporates the carryover limit by reference, then the carryover increase applies automatically to the 2020 plan year.
- If a section 125 cafeteria plan specifically limits the carryover amount to \$500, then the carryover increase does not apply automatically to the 2020 plan year. In this case, the sponsor must amend the plan in order to adopt the carryover increase.

#### **4. What is the deadline to adopt a plan amendment to incorporate the increased carryover amount into a health FSA within a section 125 cafeteria plan?**

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 employer informs all individuals eligible to participate in the section 125 cafeteria plan of the changes to the plan.

For all future plan years, a section 125 cafeteria plan may be amended to adopt the increased carryover amount for a plan year at any time on or before the last day of that plan year.

#### **5. Are participants allowed to revoke elections mid-year and make new prospective elections as a result of amending a section 125 cafeteria plan to add carryover increases?**

Generally, no. Notice 2020-33 states the following.

*“The ability to amend a plan to increase the carryover limit does not include the ability to allow employees to make new elections under the plan...”*

However, Notice 2020-33 does indicate that individuals who, during 2020, wish to increase their health FSA contributions, or begin making health FSA contributions, as a result of the increased carryover amount may do so in accordance with **Notice 2020-29**. Under Notice 2020-29, an employer may amend one or more of its section 125 cafeteria plans (including limiting the period during which election changes may be made) in order to allow eligible health FSA participants to make prospective election changes (including an initial election) during calendar year 2020—regardless of whether the basis for the election change satisfies the criteria contained in Treas. Reg. 1.125-4.

Therefore, if a section 125 cafeteria plan is amended to add the carryover increase and to allow 2020 mid-year change of elections, then employees would generally be allowed to make new prospective elections under the plan as a result of the carryover increase. This would apply only in 2020.

#### **6. What guidance is provided in Notice 2020-33 with respect to premium reimbursements?**

Notice 2020-33 also confirms that health plans, including a premium reimbursement plan in a section 125 cafeteria plan or an ICHRA cannot reimburse medical expenses incurred before the start of the plan year. However, Notice 2020-33 clarifies that expenses in the form of premiums for health insurance coverage are deemed as incurred on (1) the first day of each month of coverage on a pro rata basis, (2) the first day of the period of coverage, or (3) the date the premium is paid.

## **7. What plans are affected by the premium reimbursement guidance of Notice 2020-33?**

All health care plans that provide premium reimbursements, including section 125 cafeteria plans and ICHRAs.

## **8. How does the premium reimbursement guidance affect these plans?**

Health plans, including a premium reimbursement plan in a section 125 cafeteria plan or an ICHRA, may not reimburse medical care expenses incurred before the beginning of the plan year and qualify for exclusion from income and wages under Internal Revenue Code Sections 105 and 106. However, Proposed Treasury Regulation 1.125-1(p)(5)(i) clarifies that amounts contributed by salary reduction from the last month of one plan year may be carried over to pay accident and health insurance premiums during the first month of the immediately following plan year, if done on a uniform and consistent basis with respect to all participants.

A similar inconvenience occurs when an ICHRA participant must pay, before the first day of a plan year, all or part of the premiums for individual health insurance coverage or Medicare during that plan year. To solve this issue and to further expand premium reimbursement section 125 cafeteria plans, Notice 2020-33 provides that insurance premiums that are paid before the plan year begins are deemed as incurred after the beginning of the plan year and qualify for exclusion from income and wages under Internal Revenue Code Sections 105 and 106.

## **9. Is a plan amendment required in order to implement the premium reimbursement guidance of Notice 2020-33?**

No. The premium reimbursement guidance in Notice 2020-33 applies *ex proprio vigore* (by operation of law) to all premium reimbursement plans.