



CAN WE PERMIT EMPLOYEES TO MAKE CHANGES TO THEIR SECTION 125 CAFETERIA PLAN ELECTIONS IN LIGHT OF A CHANGE IN CIRCUMSTANCE DUE TO COVID-19?

THE GENERAL RULES FOR SECTION 125 PLANS REMAIN UNCHANGED BY COVID-19

The general rule for Section 125 Plans, including insurance premiums, Medical/Limited Medical FSA and Dependent Care FSA for active enrolled employees is that all elections, including the election not to participate, must be made prior to the beginning of the plan year and is irrevocable for the duration of the plan year unless the employee experiences a permitted election change event. If an employer permits a change mid-year that is not within the permitted changes, the plan and employees could lose the tax-advantaged status if audited. Permitted changes are provided in Section 1.125-4 and paragraph (a) in Section 1.125-2 and include some common changes such as marriage, divorce, birth of a child, adoption, change in employment and spouse's open enrollment.

Some insurance carriers are offering special enrollment periods that are designed to allow employees that may have previously declined coverage to have an opportunity to elect coverage. These special enrollments are not Section 125 permitted and if elected will require the deduction to be payroll deducted post-tax.

The most common requested change relating to COVID-19 is a change to the Dependent Care FSA. As many employees are now at home with their children, they are experiencing that their daycare, pre-school and before/after school programs are now closed due to COVID-19. This event is a permitted election change that allows employees to revoke their Dependent Care FSA election on a prospective basis. This means the election change will stop all future contributions for Dependent Care FSA. Any funds remaining in the Dependent Care FSA will remain available only for dependent care expenses and are not transferrable to another FSA.

A change in the use or cost of childcare expenses is also a permitted event to change the election. The only exception to a change related to costs is that it does not apply to a cost change imposed by a daycare provider that is related to the employee.

A change in provider is also a permitted election change and may become a common event as some employees find alternative childcare providers due to COVID-19. This could be a cost increase or decrease as the circumstances allow.

In the event an employee is contributing to a Dependent Care FSA to cover only a summer childcare program, it may be important to stop those deductions now, anticipating the program may be canceled. If summer programs are canceled and funds cannot be used, the funds will be forfeited.

There is no requirement under Section 125 rules for employers to require specific documentation beyond the employee's certification of the event. Employers should keep a record of the employee's certification for a Dependent Care FSA election change.