

## With New Guidance, IRS Extends Cafeteria Plan Election Flexibility Into 2021

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The Internal Revenue Service (IRS) recently issued Notice 2021-15 to clarify certain aspects of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (the Act), and to extend cafeteria plan election flexibility in 2021 that was allowed in 2020.

As we previously reported at the end of 2020, the Act provided employers with the option to amend their cafeteria plans to provide greater flexibility for participants to carryover any unused amounts in a health care flexible spending account or a dependent care assistance program from 2020 or 2021 into the following year. Additionally, the Act also allowed employers to extend the grace period for a plan year ending in 2020 or 2021 up to 12 months. Consistent with prior guidance, employers may choose to adopt the extended carryover or grace period, but not both.

The IRS also clarified that for plan years ending in 2021 regarding a health flexible spending account or dependent care assistance program, employees may, on a prospective basis, revoke an election, make one or more elections, or increase or decrease an existing election without incurring a mid-year change event.

Just like the guidance issued in 2020, the IRS extended this election flexibility to group health plan elections in 2021. Specifically, an employer may amend its cafeteria plans to allow employees to: (1) make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health

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coverage (e.g., medical, dental or vision coverage); (2) 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; or (3) revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer. None of these elections require a specific election change event.

To accept an employee's revocation of an existing election for employer-sponsored health coverage when the employee does not make a new election to enroll in different health coverage sponsored by the employer, the employer must receive from the employee an attestation 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 the written attestation provided by the employee, unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other comprehensive health coverage not sponsored by the employer.

All of the above cafeteria plan changes are optional. Additionally, employers have flexibility when implementing such changes and may impose limits and deadlines on the number or frequency of election changes employees may make.

However, if the employer chooses to implement any of the above changes, an amendment to the cafeteria plan will need to be adopted (which may be retroactive) not later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, and the plan or arrangement is operated consistent with the terms of the amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted. For calendar year plans, this means that changes in 2020 or 2021 will need to be adopted by plan amendment by December 31, 2021, or December 31, 2022, respectively. Non-calendar year plans that end in 2021 may adopt any changes by December 31, 2022.