



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 18, 2015

Deadline Approaches to Execute a Cafeteria Plan Amendment for IRS Notice 2014-55

This is a re-issued advisory reminding health plan sponsors that if you have administered your cafeteria plan in accordance with this guidance, make sure to execute a formal plan amendment by the end of the 2015 plan year (December 31, 2015, for calendar year plans). Contact your Alston & Bird attorney if you would like any assistance with this amendment.

On September 18, 2014, the IRS issued several pieces of guidance on pressing Affordable Care Act issues, including Notice 2014-55. Notice 2014-55 provides for two new permissible, mid-year cafeteria plan election changes. The first change is intended to allow employees who were expected to average 30 hours of service per week to revoke their election and elect other minimum essential coverage if they experience a change in employment status after which they are not expected to average 30 hours of service, *even if they do not lose eligibility under the plan*. The second change is designed to allow employees enrolled in a group health plan and eligible to enroll in the Marketplace to elect Marketplace coverage, either during a special enrollment period or during the Marketplace's annual enrollment period (e.g., when the group health plan year is not the calendar year). Employers may immediately rely on this guidance.

Reduction in Hours of Service

The first of the two new election changes applies to an employee who is originally expected to average at least 30 hours of service per week but experiences a change in employment status such that the employee is no longer expected to average 30 hours of service per week *AND does not lose eligibility under the plan as a result of the status change* (e.g., if the status change occurs during a month in a stability period during which the employee qualified as full-time).

Practice Pointer: Generally, losing eligibility under the plan is a cornerstone requirement of the election change rules applicable to change-in-status events. However, if this event occurs and the additional elements described below are satisfied, this new guidance will allow an election change in this particular situation *even though eligibility under the plan has not been lost*.

If such an event occurs, the employee will be permitted to prospectively revoke his or her election under the plan so long as the election change corresponds to the employee's (and related individuals') intended enrollment *in another*

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plan that provides minimum essential coverage that is effective no later than the first day of the second month following the date the coverage is revoked (e.g., if the coverage is revoked in June, coverage under the new plan must begin on August 1).

Practice Pointer: Minimum essential coverage is broadly defined and includes coverage in an “eligible employer sponsored plan” (i.e., a group health plan that provides other than excepted benefits) and a qualified health plan in the Marketplace. That being said, there are limited opportunities to enroll in the Marketplace following a change in employment status that does not cause a loss of coverage under the plan.

Enrollment in a Marketplace QHP

The second new election change applies to an employee who qualifies for either a special or annual enrollment period in the Marketplace. If this occurs, the employee will be permitted to prospectively revoke his or her election under the plan to enroll in the Marketplace, so long as the election change corresponds to the intended enrollment of the employee (and related individuals) in Marketplace coverage that is effective *no later than* the day following the last day of the original plan coverage.

Under both options, the plan may rely on the “reasonable representation” of the employee that the relevant criteria are met.

Implementing the Guidance

This new guidance was effective immediately upon publication, and the IRS intends to amend the cafeteria plan regulations under Treas. Reg. § 1.125-4 to reflect these changes. Like other cafeteria plan election changes under Treas. Reg. § 1.125-4, these changes are permissible, not required. **To take advantage of this guidance, the cafeteria plan must be amended on or before the last day of the plan year in which elections are allowed (although it may be amended for a 2014 plan year any time on or before the last day of the 2015 plan year).** The amendment can be effective retroactively to the first day of the plan year if the plan operates in accordance with this guidance and the employer informs participants of the change. However, plans may not allow retroactive revocations of coverage elections.

Practice Pointer: While the plan amendment may be made before the end of the 2015 plan year, it is important to communicate this change to employees and record the date in your files if you intend to incorporate these changes into your plan.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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