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Welcome

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Please remember, employment and benefits law compliance depends on multiple factors – particularly those unique to each employer's circumstances. Numerous laws, regulations, interpretations, administrative rulings, court decisions, and other authorities must be specifically evaluated in applying the topics covered by this webinar. The webinar is intended for general-information purposes only. It is not a comprehensive or all-inclusive explanation of the topics or concepts covered by the webinar.

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Shedding Light on Qualifying Events and Special Enrollment Periods

Agenda

- Learn how, when, and why the Internal Revenue Service (IRS) allows an employee to make midyear benefit election changes.
- Gain insights into:
  - Section 125 irrevocable plan elections
  - Which family members are affected by permitted changes, and the "family glitch"
  - Common errors and oversights
- Be able to answer these questions:
  - When can (and can't) employees make a change outside of open enrollment?
  - How are tax-favored accounts impacted by permitted changes?
  - What applicable plan documents should an employer have, and what are the penalties for non-compliance?

Cafeteria Plans

What is a Cafeteria Plan?

- A cafeteria plan is a separate written plan maintained by an employer for employees that meets the specific requirements of section 125 of the Internal Revenue Code (IRC) and related regulations. It provides participants an opportunity to receive certain benefits on a pre-tax basis
- The IRC rules are detailed and complex with many exceptions and nuances
- Serious legal and tax consequences for non-compliance

- Who Can Sponsor a Cafeteria Plan?
  - Any employer – may pay part of insurance premium or contribute to Health Flexible Spending Account (Health FSA) or Dependent Care Assistance Plan (DCAP)
- Who Can Participate in a Cafeteria Plan?
  - Employees – current and former common law employees, but no self-employed individuals, partners or > 2% S corp shareholders

- How is a Cafeteria Plan Funded?
  - Salary reductions (most common)
  - Non-elective employer contributions
  - Flex credits, seed contributions, matching contributions and contingent contributions
- How Does an Employer Set Up a Cafeteria Plan?
  - Plan design – eligibility, benefit options
  - Plan adoption and document
  - Communicate to employees and obtain elections
  - Deduct premium pre-tax and pay adjusted salaries

- Coverages for Spouses and Dependents
  - Spouses
  - Internal Revenue Code dependent
  - Children under 27
  - Court order
  - Domestic partners
    - Imputed tax income

Qualified Benefits

- What Benefits Can Be Offered Under a Cafeteria plan?
  - Medical (health, dental, vision and accident – but not individual or Marketplace coverage)
  - Accidental death & disability (AD&D)
  - Adoption assistance
  - COBRA
  - Health Savings Account (HSA)
  - Health FSA contributions
  - DCAP
  - Group term life insurance (on employee's life)
  - Short-term and long-term disability policies
  - Dependent Care Assistance Programs (DCAPs)

- What Benefits Cannot Be Offered Under a Cafeteria Plan?
  - Scholarships
  - Educational assistance programs
  - Transportation and certain other fringe benefits
  - Spousal or dependent life insurance
  - Archer MSAs
  - Health Reimbursement Arrangements (HRAs)
  - Long-term care insurance
  - Employer-provided meals and lodging
  - 403(b) retirement arrangements
  - Exchange-related coverage
  - Individual health insurance premiums
  - Marketplace coverage
  - Pet insurance

- How Does an Employee Make an Election?
  - Initial eligibility
  - Annual open enrollment
  - Change in status
    - Cafeteria plan may permit mid-year election changes as provided by IRS regulations or other guidance
      - Cafeteria plan document controls which changes are allowed – may limit to less but cannot permit more than IRS specifically allows
    - Other changes required under HIPAA special enrollment or the ACA

General Rules

- Timing
  - Elections must be made in advance on a prospective (not retroactive) basis
  - Annual open enrollment period
  - Mid-year enrollment window for new hires or permitted mid-year election changes
  - Narrow exception for certain HIPAA special enrollment events (e.g., birth, adoption, placement for adoption)

- Voluntary
  - Elections must be voluntary
  - Must be a choice between taxable benefit and qualified benefits
  - Some employers offer choice between pre-tax and after-tax benefits

- For an employee to be eligible to change his or her election during a plan year:
  - Employee must experience a mid-year election change recognized by the IRS
  - Cafeteria plan must be written to permit mid-year election change
  - For change in status events, the requested election change must be consistent with the change in status event
    - To be consistent, the change must be on account of and correspond with the event
    - Only consistent changes can be made

Irrevocable Elections

- Participants' elections are irrevocable during the plan year
  - Election must be irrevocable during coverage period (typically a 12-month plan year)
- Subject to certain limited exceptions
  - IRS recognizes certain circumstances that permit mid-year election changes
  - Plan design option – not required to allow participants to change elections
- What is Irrevocable?
  - Salary reduction election and any flex credit/cash-out election (flex credits)
  - Type of benefit elected

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HIPAA Special Enrollment

IRS Allowed Exceptions

ACA

Mid-Year Election Changes

- IRS recognizes three categories of mid-year election changes
  - Change in status
    - Major life events (e.g., marriage, birth, adoption, employment changes)
  - Cost or coverage changes
    - Certain changes to qualified benefits under 125 plan
  - Other laws or court orders
    - Coordinate cafeteria plan rules with other laws (e.g., HIPAA, COBRA and ACA)

- Basic Concepts to Consider When Deciding if the Mid-Year Election Change is Permissible
  - Do IRS regulations, HIPAA special enrollment, or other guidance recognize the event for the benefits in question?
  - Is the requested change consistent with the event?
  - Does the cafeteria plan document permit the change?
  - Does the underlying benefit plan permit the change?

- Change in status*
- Cost changes
- Decrease in coverage
- Addition or significant improvement of benefits
- Change in coverage under other employer plan
- Loss of government sponsored or educational institution group health coverage
- 401(k) election changes
- COBRA qualifying events*
- Judgments, decrees, or orders*
- Medicare or Medicaid entitlement*
- FMLA leaves of absence*
- Pre-tax HSA election changes
- Reduction of hours
- Exchange enrollment
- HIPAA special enrollment rights*

*Includes changes to health FSA

- Change in Status – Cafeteria Plan Regulations
  - Change in employee's legal marital status
  - Change in number of employee's dependents
  - Change in employment status of employee, spouse, or dependent, if it affects eligibility for cafeteria plan or underlying benefit
  - Dependent's eligibility – satisfies or ceases to satisfy eligibility requirements
  - Change in residence of employee, spouse or dependent that affects eligibility for cafeteria plan or underlying benefit
  - Commencement or termination of adoption proceedings, if cafeteria plan includes adoption assistance benefits

Change in Cost or Coverage Events

- Cost Changes - Automatic
  - May automatically increase or decrease employees' contributions if:
    - The cost of a benefit changes during a period of coverage; and
    - Employees are required to make a corresponding change in their payments
  - Significant Cost Changes- Employee Election
    - May permit mid-year election change if the cost charged to an employee for a qualified benefit significantly increases or decreases during a period of coverage
  - Coverage Changes
    - Significant curtailment of coverage
    - Addition or improvement of benefit package option
    - Change in coverage under another employer plan
    - Loss of certain other group health coverage (including CHIP coverage)

- Other Laws/Court Orders
  - Event
    - HIPAA special enrollment events
    - COBRA qualifying events
    - Judgments, decrees, or orders (e.g., QMCSOs)
    - Medicare or Medicaid Entitlement
    - FMLA leave
    - Pre-tax HSA contributions

HIPAA Special Enrollment

- HIPAA Special Enrollment – Mandatory
  - Loss of other coverage
  - New dependent through marriage, birth, adoption, placement for adoption
  - Loss of eligibility for Medicaid or coverage under a state Children's Health Insurance Program (CHIP)
  - Eligibility for a premium assistance subsidy under the plan from Medicaid or CHIP
  - The election change under the cafeteria plan should correspond with the event

- HIPAA Special Enrollment
  - Who can be enrolled?
  - Changing plans – may change benefit options
    - All benefit packages must be available at special enrollment
  - IRS Tag-along rule - when a new dependent is acquired, may allow other dependents to "tag-along" (but not all other dependents)

Tag-Along Rule and HIPAA Special Enrollment Rights

- HIPAA rules provide that upon acquisition of a new dependent, the employee add himself (if not previously enrolled), spouse, and/or newly acquired dependent, but the rules do not require letting the employee add any other children at the same time as the new dependent
- However, most plans also are cafeteria plans which may offer enrollment opportunities that are more liberal than the HIPAA rules and allow pre-existing dependents onto the plan when only one is in a Special Enrollment period
- The IRS rules for cafeteria plans allow letting the employee add other eligible children along with the new dependent and/or spouse if the employer's cafeteria plan has adopted this provision. This is called the "tag-along" provision for cafeteria plans.

- The following individuals may enroll upon the acquisition of a new dependent through birth, marriage, adoption, or placement for adoption:
  - a current employee who is eligible but not enrolled;
  - a current employee who is eligible but not enrolled, and the spouse of such employee;
  - a current employee who is eligible but not enrolled, and the newly acquired dependent of such employee;
  - the spouse of an employee who is a participant;
  - a current employee who is eligible but not enrolled, and the spouse and newly acquired dependent; and
  - a newly acquired dependent of an employee who is a participant

- Tag-Along Rule vs. HIPAA Special Enrollment Rights
  - HIPAA provides that upon the acquisition of a new dependent the employee, spouse and newly acquired dependent have special enrollment rights
    - Pre-existing dependents other than a spouse are not entitled to HIPAA special enrollment rights when a new dependent is acquired, but can be permitted
  - In contrast, under the permitted election change regulations, a cafeteria plan may, but is not required to, allow an employee to make an election change to pay for coverage for pre-existing dependent where changes correspond with a HIPAA special enrollment right

- The Consistency Rule
  - Is the requested change consistent with the event?
  - Even if the event is listed in the regulations, the requested change must be consistent with the event
    - To be consistent, the change must be on account of and correspond with the event
    - Only consistent changes can be made
  - What is “consistent” depends on the event

- Informally Recognized Events that Might Permit Election Changes
  - Mistakes
    - Informal IRS comments that election may be corrected when clear and convincing evidence of mistake. If so, by individual or employer, election can be undone -- even retroactively.
    - For employee mistakes, must look at facts and circumstances. Example: single person chooses DCAP instead of health FSA.
  - Mid-year open enrollment
  - Absence for uniformed service under USERRA
  - Failure of nondiscrimination testing

- Status Change Timeframes
  - Cafeteria plan rules do not specify timeframe – many plans use 30 or 31 days
  - HIPAA special enrollment rules do specify timeframe
    - For example, adding new dependent through birth or adoption - 30 days
  - Why offer additional time for HIPAA special enrollment?
    - Helps avoid bad situations for typically sympathetic participants (e.g., maternity leaves), and can cuts down on eligibility appeals
    - Plan documents should clearly describe timeframes allowed by plan
  - What are the consequences of missing enrollment deadlines?
  - What is the flexibility for allowing exceptions?

- Permitted by Cafeteria Plan Document
  - (Not required unless HIPAA special enrollment right)
  - Can be designed to allow all, some, or no permitted election changes
  - Even if regulations permit it, the cafeteria plan document must also permit it
  - Note the exception for HSA contributions-changes must be allowed at least monthly and when HSA eligibility is lost
  - Cafeteria plan should also address when election changes must be requested after a permitted election change event
  - Changes should be timely and consistent

- Do You Have a Cafeteria Plan Document?
  - Is it signed?
  - Do you know where it is?
  - Is it current?
  - Must enumerate allowed changes
  - Underlying benefit must allow changes
    - Check insurance booklet.
    - Coordinate HIPAA special enrollment rights
  - Typically prospective changes only
    - Exception: birth, adoption, placement for adoption
    - Exception: New hires
    - Cafeteria plan may cover cost of retroactive coverage pre-tax
    - Other retroactive changes should be post-tax

- Documentation
  - Election change forms (paper or electronic)
  - Adequate information in support of requests
  - Copies of request, information and decision taken
  - All should be date-stamped
  - Record retention – Safe approach is eight years for ERISA plan-related documents

ACA Changes

- Reduction in Hours
  - Hours of service reduced below 30 hours of service per week due to "change in employment status"
  - Eligibility in group health plan (GHP) coverage may, but need not, be lost
    - Example: Marketplace coverage, if Marketplace special enrollment available
- Marketplace Enrollment
  - Mid-year enrollment in Marketplace coverage
  - Employee may drop GHP coverage if corresponds to intended enrollment in Marketplace coverage

- Family Glitch Fix
  - Family members can drop GHP and enroll in Marketplace coverage
  - Plan must be amended by end of 2024 if plan chooses to permit this change during year beginning in 2023
- Marketplace Enrollment
  - Mid-year enrollment in Marketplace coverage or annual enrollment
  - Family member may drop GHP coverage prospectively if corresponds to intended enrollment in Marketplace coverage
  - Employers may rely on reasonable representation from family member

Informally Recognized Events that Might Permit Election Changes

- Mistakes
  - Informal IRS comments that election may be corrected – even retroactively -- when clear and convincing evidence of a mistake by individual or employer, election can be undone.
  - For employee mistakes, must look at facts and circumstances. Example: Individual with no children elects DCAP instead of Health FSA.
- Mid-year open enrollment
- Absence for uniformed service under USERRA
- Failure of nondiscrimination testing

Scenario 1: Marriage

- Example: Goodco employee Jeff marries Kerri on 8/16 and requests enrollment of new spouse Kerri on 8/17. Cafeteria plan document allows for election changes due to family status changes. ERISA plan documents indicate coverage is effective the first of the month following request for enrollment. Employee Jeff has traditionally enrolled in the self-only tier of Goodco's least expensive group health plan and would like to change to a more expensive plan now that he is married
- Q: What change should be allowed and when is the coverage effective?
- A: Jeff can elect coverage for himself and Kerri under any group health plan offered by Goodco; coverage will be prospective only

Scenario 2: New Dependent

- Example: Jerry is an employee who is enrolled in single coverage under Big-Box Superstar's group health plan. Jerry and spouse Alex have two children. Alex and the two children are not enrolled in coverage. Jerry and Alex have another child on January 5th and Jerry requests to add the new baby, spouse Alex and the two other children to the Big-Box Superstar group health plan on January 6th. At the same time, Jerry wants to change plans to cover his growing family. Big-Box Superstar's cafeteria plan allows for mid-year election changes and recognizes the tag-along rule
- What coverage change should be allowed?
- Who is allowed to join the plan and when?
- Remember the tag-along rule!

Scenario 3: Loss of Other Coverage

- Example: Employee Susie requests to add herself and her spouse Ron to the Goodco group health plan because Ron has lost coverage under his employer's plan due to his employer eliminating his job. Susie produces evidence that indicates she had other coverage when she declined to enroll in the Goodco group health plan
- Q: Is Susie allowed to join the plan?
- A: Yes, Susie may join the Goodco plan and elect coverage for herself and Ron.

Scenario 4: FMLA (Leave of Absence)

- Example: Employee takes authorized FMLA leave of absence to care for sick spouse. They want to continue their health coverage and make-up their contributions when they return to work.
  - Cafeteria plan regulations permit revocation of health plan elections and making other elections as provided under the FMLA
  - Employer has 2 options for unpaid FMLA leave:
    - Allow employee on FMLA leave to revoke or continue health coverage, or
    - Require continuation of health coverage if employee is allowed to discontinue contributions (may recover employee's share of premiums when employee returns)
  - Employees continuing health coverage during unpaid FMLA leave may pre-pay, pay-as-you-go, or catch-up
  - Special rules for administering health FSA coverage during and after unpaid FMLA leave, and for paid FMLA leaves

Scenario 5: Mistake

- Example: Badco switches benefits administration software right before open enrollment. Employee Dan enrolls in the California HMO and the flexible spending account (FSA). After receiving his first paycheck, Dan realizes he has mistakenly been enrolled in the much more expensive PPO and the Dependent Care coverage (DCAP). Dan is single and has no children. He printed and saved his enrollment confirmation. Dan requests to have his benefits changed.
- Q: What changes are allowed?
- A: Dan Can switch from DCAP to FSA, since his DCAP election was "impossible." Also, Dan can switch to the HMO since there is clear evidence of administrative error.

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Scenario 6: Special Circumstances

- Example: Employer WellBeing Care Plus is a very large employer with 30,000 employees nationwide. Historically, they have passive open enrollment which allows ongoing employees to either make changes or just allow their elections to continue without taking any action. WellBeing makes major plan design changes and eliminates numerous plan options including the PPO option. Employees who take no action during open enrollment are defaulted into the basic high-deductible HSA plan option. WellBeing communicates these changes but not very well. In January, they receive over 600 eligibility appeals from employees who are outraged when they realize they are now in a HDHP with an HSA instead of their beloved PPO
- WellBeing reviews their cafeteria 125 plan document which does allow for mid-year election changes.
  - What options are available to WellBeing under the Cafeteria 125 rules?

Scenario 7: Special Circumstances

- Example: The U.S. Supreme Court issued rulings in United States v. Windsor and Obergefell v. Hodges that legalize same-sex marriage. Georgia-based Goodco would like to immediately change its ERISA group health plan and allow existing same-sex couples to elect coverage for their existing spouses. They do not want to wait for open enrollment.
- Goodco reviews its cafeteria plan document which does allow for mid-year election changes.
- Q: Under these special circumstances may they allow mid-year election changes?
- A: Yes, Goodco could amend its plan and allow for the change created by the rulings.

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Scenario 8: Loss of Other Coverage and Significant Cost Increase

- Example: Hometown Hardware employs 150 employees in a small Alabama town. Hometown offers a group health plan to its employees. Many of their employees did not elect coverage because they receive benefits through their spouses' employer, Jumbo Manufacturing Company, a big employer in the small town. During a recession, Jumbo lays off a large amount of employees and significantly curtails plan coverage and increases the employee contribution for remaining employees. Several employees who have lost coverage with Jumbo due to the layoff request to be added to Hometown's plan. Other employees ask to be added to Hometown's plan because of the curtailment and significant increase in cost. Hometown searches for their cafeteria plan document and finds an old unsigned copy dated 1992. Hometown reviews their cafeteria plan document and it is silent or does not allow mid-year election changes
    - May Hometown allow the employees to elect coverage mid-year?

- Verify you have a cafeteria plan document that is adopted and signed
- Review Cafeteria Plan document for enumerated allowed changes and decide if the enumerated changes reflect employer's desired plan design
- Review underlying plan benefits to verify if insurers and benefit recognize cafeteria plan exception
- Mid-year plan changes should be prospective except for limited circumstances
- Changes should be consistent with the event
- Document allowed changes with election forms, adequate information, copies of request, information and decision – retain documents
- When a request to change elections is received verify that IRS regulations, HIPAA special enrollment, or other guidance recognize the event for the benefits in question

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