



Q&A: CAFETERIA PLANS | WEDNESDAY, OCT. 4, 2017

Your questions answered by Pete Iverson, Esq., our in-house ERISA counsel

Q: Can you talk about Dependent Care FSA re: disabled adult and when that applies? Can a Dependent Care FSA be used for elder care?

A: Unfortunately, since Dependent Care FSAs are not a health plan, the dashboard does not cover this information. We listed it only as a type of benefit that can be offered through a cafeteria plan. For more information, check out this IRS link: <https://www.irs.gov/pub/irs-pdf/p503.pdf>.

Q: What are your thoughts on passive elections to a Premium Only Plan (i.e. have to opt out)?

A: We are not a legal advisor and cannot provide legal opinions. This is, however, an option under a properly constructed plan.

Q: Can an employee drop coverage on a health plan if they realize they had Medicare for several months and are just now telling HR?

A: Cafeteria Plans can allow mid-year election changes for the **reasons listed below**. (Reminder: Cafeteria Plans are not required to allow these changes, so you would need to check your Cafeteria Plan document to see what specific changes are allowed. Remember to also check your health plan document; it may or may not allow a change such as this and should detail what timeframe an employee needs to meet when notifying HR of a needed change. An employee realizing they have coverage elsewhere does not appear to fit one of the Cafeteria Plan change exceptions listed below. I would recommend you check with your legal adviser.

1. Change in Status/Life Event changes such as a

- » Marriage
- » Birth or adoption of a child
- » Change in employment status

2. Cost or Coverage Changes

- » Typically these aren't necessary if the benefit plan year and cafeteria plan year are the same. But, if these plan years are different and the employer adds a benefit option midyear or the cost changes, then it might come up.

3. "Other Laws or Court Orders"

- » These types of changes coordinate cafeteria plan election changes with requirements under non-cafeteria plan laws such as 401(k) rules, HSA rules HIPAA, COBRA and health care reform.
- » Cafeteria Plans Generally Do Not Have to Allow Participants to Change Their Elections. In other words, you may design a plan to prohibit all midyear election changes.
- » Keep in mind, HIPAA special enrollment rights under a plan must be allowed. We are not discussing HIPAA Special Enrollment rights today. If you'd like to read up on those, there is a dashboard activity under the HIPAA category called "Special Enrollment" that goes over these rights.

Q: Does every employee have to sign a salary reduction agreement on an annual basis?

A: The IRS has approved plan designs that provide for default elections, as well as evergreen elections where an election is automatically continued from year to year unless it is changed. Whether an employee needs to sign an agreement permitting the salary reduction is a question of state law.

Q: Who is liable if a self funded health plan is ignoring their Cafeteria Plan rules and allowing employees to drop coverage: the employer or the TPA who allowed them to make the enrollment change?

A: The consequence of maintaining a Cafeteria Plan that does not observe plan rules is that the IRS will not consider the plan to be a Cafeteria Plan. This will result in all the pre-tax salary contributions being taxable, which will impact both employees and employers who will now owe taxes. Whether the employer has any recourse against a TPA who administers the plan would depend on the agreement between the employer and the TPA.

Q: If we have a Wrap Document do we still need the Section 125 document?

A: If the wrap document includes the required Section 125 provisions, then no additional document is needed. Some employers prefer to maintain the Cafeteria Plan separately from their health plans simply because the plans are so different; e.g., The Cafeteria Plan is a funding mechanism rather than a health plan. The former is a creature of the Internal Revenue Code, the latter a creature of ERISA.

Q: If I am both an employee and self employed, am I not eligible for a Cafeteria Plan?

A: If you are an employee for an entity, and you are not a partner in this entity, and this entity is not a Sub-S Corporation in which you are more than a 2% shareholder, then you can participate in this entity's Cafeteria Plan.

Q: Did I hear correctly, that Subchapter S Corporations can not have Section 125 plans?

A: Subchapter S Corporations can have Section 125 plans, but individuals that are more than a 2% shareholder in the Subchapter S Corporation cannot participate in the Cafeteria Plan/Section 125 plan.

Q: If HSA contributions are going through the Cafeteria Plan, does that mean employees can't make changes (increase or decrease) to the amount they contribute during the year?

A: HSA elections can be changed whenever an employee wishes, in accordance with their payroll/accounting department process.

Q: Does a Cafeteria Plan get a plan document number like health plans (ex. 501, etc.)?

A: The Cafeteria Plan document does not have a document number requirement. However, Health FSAs (which are a kind of Cafeteria Plan) can also be considered a health plan, which can be subject to ERISA and will have a separate plan document for ERISA purposes, which will include a plan number. There would be two plan documents, one required by Section 125 governing the cafeteria plan and another for ERISA purposes.

Have more questions? Contact us at admin@compliancedashboard.net.