



COVID-19 National Emergency Health Plan and FSA Deadline Flexibility for Participants

July 1, 2020

Relief Allows Participants Longer Timeframes for Health Plan Enrollment and Allows Plans to Make It Easier for Participants to Make Mid-Year Changes

The following table summarizes existing health plan enrollment-related rules and flexibility provided by IRS and DOL guidance released 4/29/2020 and 5/12/2020.* As indicated in the table, benefit plans MUST allow some of this flexibility. Employers should work with their vendors to ensure compliance. In other cases, plans are permitted, but NOT required, to offer the flexibility. We have included FAQs below the table. Please reach out to us with any questions you would like added to the list.

Type of Plan Activity	Participant Action	Ordinary Rule	COVID-19 Relief	Required of or Optional for Employers
Health Plans: New Hire Enrollment	Enrollment upon hire date	Pre-tax only if election is made within 30 days of hire	Late enrollment in 2020 can be treated as a mid-year enrollment, with (prospective) pre-tax contributions	Optional
Health Plans: Mid-Year Special Enrollment Rights	Enrollment upon birth or adoption	Plan must allow at least 30 days for employee to request enrollment; coverage must begin on date of birth or adoption	In determining the deadline, ignore the period from March 1, 2020 to 60 days after the end of the declared emergency (or other date provided in future guidance)	Required
	Enrollment upon marriage	Plan must allow at least 30 days for employee to request enrollment; coverage must begin no later than first day of month following receipt of request		
	Enrollment upon employee's or dependent's loss of other coverage other than under Medicaid or the State Children's Health Insurance Program (CHIP), termination of employer contributions to other coverage, or exhaustion of COBRA period			
	Enrollment upon loss of eligibility for Medicaid or CHIP	Plan must allow at least 60 days for employee to request enrollment; coverage must begin no later than first day of month following receipt of request	In determining the deadline, ignore the period from March 1, 2020 to 60 days after the end of the declared emergency (or other date provided in future guidance)	Required

* DOL/IRS COVID-19 Final Rule, 85 Fed. Reg. 26,351 (May 4, 2020). IRS Notice 2020-29. IRS Notice 2020-33. The DOL/IRS Final Rule also mandates extended deadlines for participants to bring claims and appeals in all ERISA plans (retirement as well as health and welfare).

Type of Plan Activity	Participant Action	Ordinary Rule	COVID-19 Relief	Required of or Optional for Employers
Health Plans: Mid-Year Changes	Mid-year enrollment	Plan may allow, but only on an after-tax basis, unless participant has a special enrollment right or change in status	Plan may allow, with corresponding (prospective-only) adjustment to pre-tax premiums at any time during 2020, regardless of whether there was a special enrollment right or change in status	Optional
	Mid-year change in coverage level (e.g., between self-only, self plus dependent, family)	Plan may allow, but pre-tax premiums may not increase or decrease, unless participant has a special enrollment right or change in status (e.g. new dependent, change in cost of coverage)		
	Mid-year change in plan option (e.g., between HMO, PPO, HDHP, different insurers)			
	Mid-year revocation of coverage	Plan may allow, but pre-tax premiums may not increase or decrease unless participant has change in status	Plan may allow, with corresponding (prospective-only) adjustment to pre-tax premiums at any time during 2020, as long as employee attests to enrolling in other coverage	Optional
Health FSAs: Mid-Year Changes	New election, revoke or change an existing election	Not permitted unless participant has change in status	Plan may allow, with corresponding (prospective-only) adjustment to pre-tax contributions at any time during 2020, regardless of whether there was a special enrollment right or change in status. But see FAQ-3 below regarding administration complications that arise.	Optional
Dependent Care FSA: Mid-Year Changes	New election, revoke or change an existing election	Not permitted unless participant has change in status (special enrollment rights don't apply)	Plan may allow, with corresponding (prospective-only) adjustment to pre-tax contributions at any time during 2020, regardless of whether there was a special enrollment right or change in status	Optional
FSAs: Runout Deadline	Deadline for submitting claims for reimbursement	Plans often allow a runout period that extends to early in the next plan year, during which participants can submit reimbursements for the prior year	In determining the deadline, ignore the period from March 1, 2020 to 60 days after the end of the declared emergency (or other date provided in future guidance)	Required for ERISA plans (Health FSAs, generally not Dependent care FSAs)

Type of Plan Activity	Participant Action	Ordinary Rule	COVID-19 Relief	Required of or Optional for Employers
FSA: Use-It-Or-Lose-It Rule	Forfeiture of unused amounts, subject to a grace period	Unused amounts are forfeited at the end of the plan year or, if the plan permits it, at the end of a grace period of up to 2.5 months into the following plan year	For calendar year 2020 only, plan may allow any amount that would otherwise be forfeited before December 31, 2020 (because of a non-calendar plan year or a grace period) to be used for expenses incurred as late as December 31, 2020	Optional
	Carryover of unused amounts [†]	Unused amounts are forfeited at the end of the plan year except, if the plan permits a carryover, up to \$500 may be carried over to the following plan year	No COVID-19 specific changes, but IRS separately has expanded the maximum carryover to be 20% of the FSA contribution limit; for plan years beginning in 2020, that amount is \$550	Optional
Health Plans: Continuation Coverage	Obligation to notify plan of certain qualifying events such as divorce or loss of dependent eligibility	Participant must provide plan notice within 60 days of event	In determining the deadline, ignore the period from March 1, 2020 to 60 days after the end of the declared emergency (or other date provided in future guidance)	Required
	Obligation to notify plan of qualified beneficiary's disability	Participant must provide plan notice within 60 days of disability and within 30 days of determination that no longer disabled		
	Enrollment in COBRA continuation coverage	Allowed for at least 60 days following COBRA qualifying event or participant's receipt of COBRA notice		
	Payment of COBRA continuation coverage premiums	Participant must be allowed to make payment up to 45 days after initial election and, for subsequent months, up to 30 days after due date		

FREQUENTLY ASKED QUESTIONS:

Q1 - Can I rely on my vendor to implement these changes?

A1 - Work closely with your vendors but do not assume that your vendor's default proposed approach is right for your employer and your plan, or that your vendor's proposed approach is necessarily compliant. We have seen at least one major vendor propose a default approach that is more generous than what the relief allows. This could introduce additional costs to the employer and plan, and it could raise compliance concerns.

[†] Plans that permit a carryover cannot allow a grace period.

Q2 - Is there added cost to making these changes?

A2 - Likely yes. The required extended COBRA and special enrollment rights could lead more individuals to enroll in the plan, including retroactively in some circumstances. Plans therefore may experience adverse selection: in other words, participants may elect to increase or reduce coverage based on new information about their medical needs that they did not have during open enrollment, resulting in those with higher health needs more likely to enroll retroactively. The same issue can arise with mid-year election changes, if an employer elects to extend that to employees. Employers may weigh these costs against the benefits of each change when deciding whether to adopt the optional changes.

Q3 - What choices does an employer have in making these changes?

A3 - The COBRA and special enrollment rights deadline extensions are mandatory, although vendors might propose implementing them in various manners. See FAQ 1.

Because the mid-year enrollment and FSA changes are optional, employers can choose to offer them or not. In addition, employers could have a one-time mid-year change window, several windows, or allow changes continuously. Employers may want to allow only certain changes (e.g., changing from HMO to PPO, adding dependents).

With respect to Health FSAs, it is critical that employers exercise their discretion to reduce game-playing by participants. At a minimum, employers should disallow mid-year elections that would reduce a participant's total contribution to less than the amount reimbursed to date. In addition, employers should consider how a mid-year election change affects the coverage period. The "uniform coverage rule" under Treas. Reg. section 1.125-5(d)(1) requires that the maximum amount of reimbursement be available to participants at all times during the period of coverage, regardless of the amount contributed to date. As a result, a participant who reduces an election amount mid-year could still submit a claim for expenses incurred earlier in the year, when the original total was in effect. Consider the following scenario:

- For the 2020 plan year, Lucy elected to contribute \$1,200 to a health FSA, or \$100 per month. She has contributed \$600 for Jan-June 2020.
- On July 1st, Lucy reduces her 2020 election to \$10 per month for the remainder of the plan year. She expects to contribute \$60 for July-Dec 2020 (\$660 in total).
- The employer can limit Lucy's ability to reduce her annual election if she had received more than \$660 in total reimbursements before July 1, under Notice 2020-29.
- But the uniform coverage rule in the section 125 regulations arguably still allows Lucy to submit a claim for \$1,200 if it was incurred before July 1, 2020. The employer could head off this issue by carefully defining the period of coverage for 2020.

Q4 - Do participants need to be notified of these changes?

A4 - Yes. Participants should be informed of changes to the plan. Affected notices may include COBRA continuation coverage notices, special enrollment notices, and attestations of other coverage. The relief did not extend employers' deadlines for providing COBRA or other required notices. Accordingly, employers should review these notices and ensure that they are continuing to be provided timely. This is particularly true in light of aggressive enforcement of COBRA penalties in various recent class action lawsuits on behalf of participants.

Q5 - Is a plan amendment required to incorporate these changes?

A5 - Maybe, for the extended COBRA and special enrollment rights. (It is possible that the plan already incorporates those deadlines as required by law). Yes, for the optional mid-year election changes and FSA changes; the IRS guidance provides that the amendment must be adopted by December 31, 2021 and may be retroactive effective January 1, 2020.

Q6 - When will the mandatory deadline extensions (for COBRA, special enrollment, and claims/appeals) end?

A6 - The mandatory deadline extensions currently are indefinite. The DOL/IRS said that plans must disregard the period between March 1 and 60 days after the end of the declared emergency (or other date provided by the DOL and IRS in future guidance). The DOL/IRS defined this as the "Outbreak Period," but it is not clear that they intend to stop the extension if new COVID-19 cases start to wane. The emergency declaration could be removed in certain places and not others, which technically could trigger the end of the extension in some locations but not others. We are hopeful that the DOL and IRS will use their discretion to ensure that plans have a uniform period.

Note also that this deadline extension "tolls" deadlines. If a participant deadline was otherwise April 1 (30 days into the start of the required tolling period), the participant will still have 30 days after the end of the tolling period - i.e., 90 days after the end of the declared emergency.

For questions, please contact a member of our [Benefits Team](#). For more information on benefits issues related to the pandemic, please visit our [COVID-19 Resources Page](#).