

New Mid-Year Section 125 Permitted Election Changes Help Facilitate ACA Marketplace Enrollment

TIFFANY N. SANTOS

On September 18, 2014, the Internal Revenue Service ("IRS") issued [Notice 2014-55](#), which allows an employee to revoke an election for employer-sponsored health plan coverage under a Section 125 cafeteria plan (but not a health flexible spending account ("FSA")) on a prospective basis in the following circumstances:

- Following a reduction in hours of service, an employee whose "full-time employee" status and eligibility for health plan coverage are "locked" during a stability period (for purposes of the look-back measurement period under Section 4980H of the Internal Revenue Code ("IRC")) wishes to enroll in individual Marketplace/Exchange coverage; and
- An employee who is eligible for a special enrollment period to enroll in individual Marketplace/Exchange coverage has enrolled or wishes to enroll in such coverage.

To allow these permitted election changes, the Section 125 plan must be amended on or before the last day of the plan year in which the elections are allowed (for example, December 31, 2015 for elections made in 2015 for a calendar-year plan). For election changes made during the 2014 plan year, the plan must be amended no later than the last day of the plan year that begins in 2015. The amendment may take effect retroactively if the Section 125 plan is operated in accordance with [Notice 2014-55](#) and the plan sponsor informs participants of the amendment.

Mid-Year Election Changes Background

Elections under a Section 125 plan are irrevocable, except to the extent that the Section 125 plan incorporates the mid-year election change events permitted by Treasury Regulations Section 1.125-4. Under Treasury Regulations Section 1.125-4(c), a plan may allow an employee to revoke an election for coverage under a health plan if:

- (i) a change in status occurs (for example, a change in employment status); and
- (ii) the election change is consistent with the change in status (for example, if the employee loses eligibility for coverage under a group health plan, only then can she revoke her election and drop coverage).

Furthermore, for a change in employment status, the current regulations permit a mid-year election

change only if the change causes the employee to gain or lose eligibility for coverage under the health plan. If the change in employment status does not affect an employee's eligibility for health plan coverage, the employee may not change her Section 125 plan election.

Interaction with Section 4980H Look-Back Measurement Method: To comply with the "offer of coverage" requirement and minimize the assessable payment under Section 4980H of the IRC, an applicable large employer may use the look-back measurement period method to determine an employee's "full-time" status and then "lock" that status and eligibility for health plan coverage during a subsequent stability period. Under this method, an employee could experience a reduction in hours (for example, go from full-time hours of 30 hours per week to part-time hours) during a stability period but not lose status as a "full-time employee" and maintain eligibility for health plan coverage. Because such an employee may qualify for a premium tax credit to purchase Marketplace/Exchange coverage, [Notice 2014-55](#) relaxes the "loss of eligibility" requirement for a change in employment status event. Under the guidance, a Section 125 plan may allow an employee to prospectively revoke an election of coverage under a health plan (but not a health FSA) if:

- the employee who was reasonably expected to work an average of at least 30 hours per week experiences a reduction in hours so that she is reasonably expected to average less than 30 hours per week, even if the reduction does not cause the employee to lose eligibility under the health plan; and
- the employee intends to enroll herself and any related individuals in another plan providing minimum essential coverage with the new coverage effective no later than the first day of the second month following the month in which the original coverage is revoked.

Marketplace Special Enrollment: In circumstances where it may be more advantageous for an individual to enroll in Marketplace/Exchange coverage instead of the employer's health plan, Notice 2014-55 allows a Section 125 plan to permit an employee to revoke her health plan coverage election to facilitate the employee's enrollment in such coverage during a special enrollment period under Section 9801(f) of the IRC (for example, following a birth or marriage). The guidance allows a Section 125 plan to rely on the reasonable representation of an employee who has a Marketplace enrollment opportunity of her enrollment (or intent to enroll) in such coverage with an effective date that is no later than the date immediately following the last day of the revoked coverage.

While the above-referenced mid-year election change events are not required, an employer may wish to amend its Section 125 plan accordingly to give employees flexibility to drop their coverage when Marketplace coverage may make more financial sense to the employee's family than the employer-sponsored plan coverage. Contact the author of this article or the attorney with whom you normally work for questions or for assistance amending your Section 125 plan.

SEPTEMBER 2014