WHEN CAN EMPLOYEES CHANGE THEIR BENEFIT ELECTIONS DURING A PLAN YEAR?

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- **Slides will be archived on nahu.org under the Compliance Corner tab**
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- ***Compliance discussions and responses offer NAHU's interpretation and research regarding application of the provisions of the Patient Protection and Affordable Care Act (PPACA). NAHU is providing this guidance as an informational resource for NAHU members. This general information is not a substitute for legal or tax advice.***

ABOUT YOUR PRESENTERS

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MID-YEAR ELECTION CHANGE CORE CONCEPTS

- Section 125 Irrevocable Election Rule
- Compulsory vs. Permissive Election Changes
- Change of Election Events
- New Marketplace Related Change Events
- Consistency Rule
- Timing Requirements
- Documentation Requirements
- Correcting Election Mistakes

THE IRREVOCABLE ELECTION RULE

- **Internal Revenue Code Section 125 Provides Exclusion From Constructive Receipt Doctrine**
- **Regulations issued under Section 125 require employee elections to be irrevocable for the remainder of a Plan Year**
- **Failure to enforce the irrevocable election rule causes Plan to have "operational failure" which means elections do not receive 125 exemption**
- **Exceptions found in Treas. Reg. Section 1.125-4**

“PERMISSIVE” ELECTION CHANGES

- **Election changes authorized by federal regulation are not compulsory on Section 125 Plans**
- **Even if an election change is authorized by regulation, the plan must also authorize the change (in the plan document)**
- **Most authorized election changes are also not compulsory for insurance carriers**
  - HIPAA special enrollment rights are the exception
- **For fully insured plans, approval must come from both the insurer and the employer plan sponsor**

HIPAA SPECIAL ENROLLMENT RIGHTS

- **HIPAA requires group health plans to give special enrollment opportunities to certain employees, dependents and COBRA qualified beneficiaries.**
- **A "special enrollee" is allowed to enroll or change his or her existing plan option in the plan after:**
  - a loss of eligibility for group health coverage, health insurance coverage, (30 days) CHIP or Medicaid; (60 days)
  - becoming eligible for state premium assistance, Medicaid CHIP subsidies; and (60 days)
  - the acquisition of a new spouse or dependent by marriage, birth, adoption or placement for adoption. (30 days)

HIPAA SPECIAL ENROLLMENT RIGHTS

- ✓ **Special enrollment rights typically apply with respect to:**
  - the employee,
  - dependents of the employee and
  - the spouse of the employee.
- ✓ **In other words, existing family members who may have previously declined coverage have another opportunity to enroll**
- ✓ **Additionally, the participant has the opportunity to choose from "any benefit package available under the plan"**

HIPAA SPECIAL ENROLLMENT RIGHTS

- **Example 1: An employee's spouse has recently exhausted her 18 months of available COBRA coverage, and has not yet found other coverage. The employee may enroll the spouse as a "special enrollee" since the COBRA coverage has been exhausted. Special enrollment rights would not be applicable if the spouse simply stopped paying the COBRA premium before exhausting coverage.**

- **Example 2: An employee qualifies for premium assistance from the state. The employee notifies the employer and takes advantage of a special enrollment period due to not previously participating in the employer-sponsored coverage.**

HIPAA SPECIAL ENROLLMENT RIGHTS

What coverage is affected?

- Major medical
- Major medical integrated with dental/vision

No pretax change permitted:

- Dependent care
- HIPAA-excepted health FSA
- Stand-alone dental
- Stand-alone vision
- Group term life
- AD&D
- Disability

CHANGE IN STATUS

Applies to:

- change in marital status (marriage, divorce or legal separation as defined by the state),
- number of dependents (includes birth, adoption, placement for adoption and death),
- employment status, (when eligibility is affected)
- dependent satisfies or ceases to satisfy eligibility requirements, (rarely used anymore)
- change in residence
- **NEW-** Revocation Due to Reduction in Hours of Service
- **NEW-** Revocation Due to Enrollment in a Qualified Health Plan

CHANGE IN STATUS

- **Example 1: A part-time employee previously ineligible under the terms of the plan is now full-time and satisfies eligibility. The employee would be given the opportunity to enroll self, spouse or dependents. If a full-time employee is now part-time and this results in a loss of eligibility, the employee is allowed to revoke elections.**

- **Example 2: An employee is terminated and rehired within 30 days. Prior elections at termination are reinstated unless another event has occurred. A termination and rehire after 30 days entitles an employee to make new elections under all benefit options under the plan.**

CHANGE IN STATUS

What coverage is affected?

- Major medical
- Major medical integrated with dental/vision
- HIPAA-excepted health FSA
- Dependent care
- Stand-alone dental
- Stand-alone vision
- Group term life
- AD&D
- Disability

CHANGES IN COST

- **2 factors determine election changes that can be made based on a cost change**
  - Whether the change is “significant” or not
  - Whether the change is a cost increase or decrease
- **There is no guidance defining “significant”**
  - This is a “facts and circumstances” issue
  - Employers should have reasonable flexibility here
- **Never authorizes a mid-year Health FSA change**

CHANGE IN COST (NOT SIGNIFICANT)

- The employer may automatically increase or decrease the employee's elections to cover the cost change
- Employees can not drop or add coverage
- Prior to 2007, the cost change had to be initiated by a third party (the carrier)
- Under the new rules, the employer can initiate the cost change

SIGNIFICANT CHANGE IN COST

Employees can choose between accepting the change or changing their election

For cost increases, enrolled employees can also change or reduce coverage

- If similar coverage is offered, employees can't drop coverage completely
- They can only switch to the other coverage even if it is more expensive
- Similar coverage is basically any coverage of the same line
- Other coverage may be through another employer (i.e., the spouse's employer) if the plan allows

For significant cost decreases, non-enrolled employees can add coverage or switch coverage to a similar plan

CHANGES IN COVERAGE

- **2 factors determine election changes that can be made based on a coverage change**
  1. Whether the coverage change is a curtailment or improvement
  2. Whether a "curtailment" change results in a loss of coverage or not
- **Coverage changes must be "significant" to justify an election change.**
  - Significant" curtailment means an overall reduction in coverage provided under the plan so as to constitute reduced coverage generally.
  - Not merely a physician dropping out of a network
- **Never authorizes a mid-year Health FSA change**

CHANGE IN COVERAGE - CURTAILMENT

- **If the curtailment <u>does not</u> result in a loss of coverage only allows employees to elect coverage under a similar plan**
- **If the curtailment <u>does</u> result in a loss of coverage, the employee can elect coverage under a similar plan or possibly drop coverage**
  - Coverage can only be dropped if there is no similar plan (same standards as the cost change rules)

CHANGE IN COVERAGE - IMPROVEMENT

- **Employee can drop current election and switch to a newly added benefit option**
- **"Significant Improvement" is not defined but a reduction in the co-payments or deductibles is sufficient according to regulatory examples**
- **This provision can be used to change a DCAP election in a wide variety of child care scenarios**
  - **Electing a newly available provider or an incumbent provider, etc.**

CHANGE IN COVERAGE UNDER ANOTHER EMPLOYER'S PLAN

- **Other employer's plan can be sponsored by same employer or employer of spouse or dependent (or other employer of employee)**
- **Enables employees to increase or decrease coverage consistent with changes in other employer's offering**
- **Also prevents "election-lock" for spouses with different open enrollments**
- **Never authorizes a mid-year Health FSA change**

LOSS OF GROUP COVERAGE UNDER A GOVERNMENTAL OR EDUCATIONAL INSTITUTION

- **Allows adding coverage under a cafeteria plan for the employee, spouse or dependent if the employee, spouse or dependent loses coverage under any group health coverage sponsored by a governmental or educational institution.**

- **Includes: state CHIP, coverage through an Indian tribe and a state risk pool.**

LOSS OF GROUP COVERAGE UNDER A GOVERNMENTAL OR EDUCATIONAL INSTITUTION

- **Example 1: An employee has employee-only coverage under the employer plan, and her three children are covered under the state's CHIP plan. Mid-year, the employee is promoted and her new salary makes her children ineligible for the CHIP coverage. Since the plan includes this provision, the employee adds her dependents to her employer-provided coverage. A loss of coverage under a state CHIP plan may also trigger HIPAA special enrollment rights.**

- **Example 2: An employee's daughter goes to college and is provided insurance through the school as part of her tuition. This does not entitle the employee to remove the daughter from employer-sponsored coverage. This change would be made at open enrollment. However, the daughter struggles in school and moves home, losing her coverage. The employee may now add the daughter back onto her employer sponsored coverage under this provision.**

JUDGMENTS, ORDERS OR DECREES

- **Applies to a judgment, decree or order resulting from a divorce, legal separation, annulment, changes in legal custody or qualified medical child support order (QMCSO).**
- **It is important to note that ERISA requires a plan to honor qualified medical child support orders, and including this provision in the plan document allows coverage through a QMCSO to be paid pretax.**

JUDGMENTS, ORDERS OR DECREES

- **Example: An employer is provided a court order which requires that the employee cover the dependent child on all available medical, dental and vision coverage available. The child does not live with the employee, and the employee is not currently enrolled in any benefit offerings through the employer, although they are eligible for it. The policies all require employees who cover dependents to be enrolled on the plan.**

- **The employer should enroll the employee and dependent on all plans, to comply with the court order.**

MEDICARE OR MEDICAID ENTITLEMENT

- **If an employee, spouse or dependent becomes enrolled in coverage under Part A or Part B of Medicare, or Medicaid or loses coverage under these, a cafeteria plan may permit the employee to make an election change to increase, change or revoke coverage of that employee, spouse or dependent under the plan.**

- **This category does not include state CHIP, VA Benefits or TRICARE.**

MEDICARE OR MEDICAID ENTITLEMENT

- **Example: An employee becomes eligible for Medicare because of End Stage Renal Disease (ESRD), and requests to revoke his group medical plan election since the plan contains this provision.**
- **Later, this same employee receives a kidney transplant and exhausts his coverage from Medicare.**
- **The employee is now able to request to be re-enrolled on the group plan under this same provision.**

FMLA

- **An employee taking FMLA may revoke their election for medical, dental and vision and choose another option for the remaining period of leave.**

- **Example: An employee qualifies for unpaid FMLA and does not have enough paid time accrued to earn a full salary during the full 12 weeks of leave. The employee requests to revoke coverage during his leave. This is permitted under this Section 125 provision. Upon return, the employee has the right to be reinstated to the coverage in effect prior to the leave.**

NEW MARKETPLACE RELATED CHANGE EVENTS

- **Two new events due to health care reform**
- **Optional (same as other Section 125 events)**
- **No health FSA changes allowed!**
- **No retroactive employee election requests**

NEW MARKETPLACE RELATED CHANGE EVENTS

- **Employers can begin allowing these changes immediately (Sept. 18, 2014) but see schedule for plan effective date and amendment required:**

Effective Date	Amendment Required
Retroactive to first day of 2014 Plan Year (ex: Jan. 1, 2014)	On or before last day of plan year beginning in 2015 (ex: Dec. 31, 2015)
2015 or subsequent plan years (ex: Jan. 1, 2015)	On or before last day of 2015 plan year (ex: Dec. 31, 2015)

EVENT #1: "REVOCATION DUE TO REDUCTION IN HOURS OF SERVICE"

- **Employee is expected to average less than 30 hours of service per week due to a reduction in hours, yet eligibility for coverage under the employer's group health plan is *not affected*.**
- **In this case, the employee may revoke their election *even if they continue to be eligible for group health coverage* (such as when a look-back measurement period is being utilized), and enroll in another plan that provides minimum essential coverage (MEC).**
- **Employers may rely on a representation from the employee that they *have enrolled* or *intend to enroll* in new coverage.**
- **The employee does not actually have to provide proof of enrollment to drop coverage.**

EVENT #1: "REVOCATION DUE TO REDUCTION IN HOURS OF SERVICE"

When might this event be useful?

- **Employer offers:**
  - MEC coverage to part-time employees (those working fewer than 30 hours of service a week)- unaffordable, not MV.
  - Affordable, MV coverage to full-time employees

- **John is full-time, but his hours drop below 30 hours of service per week.**
- **He may choose to revoke coverage in the Affordable, MV coverage and voluntarily move to the MEC coverage offered by that employer (or available elsewhere).**
- **This is true even if he is in a stability period and eligibility in the full-time plan is not affected.**

EVENT #2: "REVOCATION DUE TO ENROLLMENT IN A QUALIFIED HEALTH PLAN"

- **Applies when an employee has experienced a midyear special enrollment period (SEP) event such as:**
  - Marriage,
  - Birth or
  - Adoption
- **Employee is now eligible to enroll in a qualified health plan (QHP) available in a state health insurance exchange.**
- **ALSO: applies during the *exchange's annual open enrollment period*,**
  - Useful to employers sponsoring non-calendar-year plans.

EVENT #2: "REVOCATION DUE TO ENROLLMENT IN A QUALIFIED HEALTH PLAN"

- **The employee may revoke their election in the employer's plan midyear and jump over to the exchange**
  - Open enrollment closes March 15 for April 1 coverage effective date.
- **Employers may rely on a representation from the employee that they *have enrolled* or *intend to enroll* in new coverage.**
- **The employee does not actually have to provide proof of enrollment to drop coverage.**

EVENT #2: "REVOCATION DUE TO ENROLLMENT IN A QUALIFIED HEALTH PLAN"

When might this event be useful?

- **Previously no qualifying event recognizing SEPs in the exchange**
- **Employees could not enroll during exchange open enrollment and drop coverage in a non-calendar year employer-sponsored plan**
- **Resolves the "election-lock" problem**
- **John's employer's open enrollment is from Nov. 1-Nov. 15 for a Dec. 1 plan year.**
- **John enrolls in coverage through his employer**
- **During marketplace open enrollment, John expresses interest in enrolling in individual coverage to his employer.**
- **The employer may permit John to drop his employer-sponsored coverage based on his intent to enroll.**

THE CONSISTENCY RULE

- Election changes based on “Change of Status” events that are not consistent with the change of status event are not permitted
- The general consistency rule is that a change must be both “on account of” and “correspond with” the change of status event
- The event must affect eligibility under the employer’s plan

EXAMPLE APPLICATIONS OF THE GENERAL CONSISTENCY RULE

- **When a child is born, you can't drop coverage for the mother.**
- **When a child dies, you can't add coverage for a spouse.**
- **When a premium increases significantly, you can't add coverage.**
- **When a coverage improves significantly, you can't drop coverage.**

SPECIAL CONSISTENCY RULES

- **In a divorce, death or dependent age out situation, coverage may only be dropped for the applicable individual – no one else**
- **When eligibility for coverage under another family member's employer's plan occurs, the employee's coverage may only be reduced if the other coverage is actually taken.**
- **Relaxed consistency rules for GTL, Dismemberment and Disability coverages**
- **Relaxed rules when DCAP expenses are affected**

TIMING OF CHANGE REQUESTS

- There is no regulatory limit on how long Section 125 Plans can give participants to submit election change requests.
- Insurance contracts will typically have limits
- Section 125 Plans should also have reasonable limits as allowing open ended changes could be viewed as not “consistent” with the change event
- Easiest if the Section 125 Plan limit matches HIPAA special enrollment rights time limits
- Except for newborns, changes can only be prospective

DOCUMENTING CHANGE REQUESTS

- **Every change should be documented**
- **Documentation via electronic media is authorized**
- **Employers can rely on an employee's certification of the change of status event or that other coverage has or will be obtained**
  - Unless the employer has reason to believe otherwise
- **Records related to ERISA plans should be kept for 8 years**

CORRECTING ELECTION MISTAKES

- **Employer's Administrative Mistakes**
- **Employee Mistakes: Impossibility Doctrine**
  - To determine whether there is clear and convincing evidence of an employee mistake
  - Impossibility: correction is only allowed if it can be established that it was impossible for the employee to benefit from mistaken election.
  - Facts and Circumstances: plan administrator can reasonably ascertain that a mistake has actually occurred.

CORRECTING ELECTION MISTAKES

"Clear and convincing evidence"

- **Is the claim of a mistake a pretext for evading irrevocability rule?**
- **Was there a clear employer mistake, like a clerical error?**
- **General rule: put the participant in the place as if the mistake had not occurred.**

CORRECTING ELECTION MISTAKES

General guidelines are that clear and convincing evidence can include:

- Employee's past elections and benefit usage;
- Plausible evidence of a clerical mistake (e.g., $5,000 input on the system could have been $500 or $50, but not likely $1,390);
- Assessment of the employee's truthfulness;
- Time elapsed since the first payroll date after the election was in force;
- Changed circumstances experienced by the employee that might be evidence of reconsideration rather than clerical mistake;
- Other extrinsic evidence of a mistake.

These factors should be applied on a consistent and nondiscriminatory basis.

CORRECTING ELECTION MISTAKES

Example 1:

- Robert and Sally have no children. When making his election for 2015, Robert elected to contribute $2,550 to the dependent care FSA. Later, he learns he is ineligible for this plan.
- Can the employer undo this mistake?

CORRECTING ELECTION MISTAKES

Example 1:

- When there are no eligible dependents, there is ***clear and convincing evidence*** that the individual made a mistake.
- The election can be undone, retroactively.
- No real change is involved- the election was bad from the start.

CORRECTING ELECTION MISTAKES

Example 2:

- John has covered his wife every year since his employment began. The employer rolled out a new online enrollment system for 2015. John reported trouble enrolling his wife but spoke to his manager about the desire to continue coverage for his wife.
- His first paycheck for 2015 showed employee-only coverage. John disputes this with HR.
- Can the employer undo this mistake?

CORRECTING ELECTION MISTAKES

Example 2:

- Is there clear and convincing evidence?
- In John's defense:
  - He reported the issue quickly, upon review of his first paycheck in 2015
  - He has a long history of covering his wife
  - He spoke to his manager about difficulties
  - The company rolled out a new system

CORRECTING ELECTION MISTAKES

Example 3:

- Sue elected $2,550 for her health FSA in 2015
- Upon review of her annual budget, she determines she made a mistake and cannot afford this payroll deduction.
- Sue asks to reduce it to half ($1,275).
- Can the employer undo this mistake, even if it's just to reduce the election?

CORRECTING ELECTION MISTAKES

Example 3:

- Is there clear and convincing evidence?
- NO
- Financial hardship is not a mistake.

CORRECTING ELECTION MISTAKES

Example 4:

- Tom has always been enrolled in the PPO/health FSA, but decided to switch to the HDHP/HSA in 2015
- Tom did not have a zero balance in his health FSA as of Dec. 31, and is ineligible to make contributions to his HSA until April 1, 2015
- Tom claims he did not understand this, but the employer has proof this was communicated to its participants.
- Tom is requesting to switch his election back to the PPO/health FSA.

CORRECTING ELECTION MISTAKES

Example 4:

- Tom does have evidence of past benefit usage to support his request
- But not understanding the communications is not a mistake
- *What if* the employer did not communicate that he would be ineligible to use the HSA until April 1 unless his health FSA had a zero balance? Does this change the answer?

THANK YOU FOR ATTENDING!

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