Compliance Corner Webinar:

Understanding the Essentials of FSA Compliance

April 19, 2018

During the live event a question arose which may have been misinterpreted. This Q&A clarifies the point:

Q: If a group has a cafeteria plan/ POP plan that renews on a calendar year basis with the group coverage renewing on a non-calendar year basis, is the open enrollment for the group coverage a midyear election change event?
A: In many cases no. No group or voluntary insurance open enrollment, in and of itself, is a qualifying midyear election change event. There may, on a case-by-case basis, be a significant premium or coverage change which would allow a midyear election change.

Q: Can the Dependent Care FSA be used for elder care of a parent?
A: As long as the parent is a Qualifying Individual. I would suggest an employee check w/their employer for further definition of Code 152 – Qualifying Individual and what their plan allows.
Who Is a Dependent? Qualifying individuals are defined in part by reference to **Code §152,** which in turn categorizes dependents as being either qualifying children or qualifying relatives.*
A *qualifying child* is an individual who (1) bears a specified relationship to the employee (relationship test); (2) has the same principal place of abode as the employee for more than half of the year (residency test); (3) meets certain age requirements (age test); (4) has not provided more than half of his or her own support for the year (limited self-support test); and (5) has not filed a joint tax return (other than only for claim of refund) with his or her spouse for the year (marital/tax filing status test).
A *qualifying relative* is an individual (1) who bears a specified relationship to the employee (relationship test); (2) whose gross income is less than the exemption amount in **Code §151(d)** (income test); (3) with respect to whom the employee provides over half of the individual's support (support test); and (4) who is not a qualifying child of anyone else.
*Individuals Who Generally Are Ineligible Under **Code §152.*** In general, a person who otherwise is a qualifying child or qualifying relative cannot be an employee's dependent if any of the following apply: (1) the employee (or the employee's spouse, if filing jointly) is a dependent of another person; (2) the person filed a joint tax return for the year with the person's spouse; or (3) the person is not a citizen, national, or resident of the U.S. or a resident of Canada or Mexico (see **subsection G.3).**
Special Rules for DCAPs. When determining whether a person who is incapable of self-care is a qualifying individual, status as a dependent is determined without regard to the income test for being a qualifying relative. In addition, a person may be able to qualify as a dependent for this purpose even if he or she filed a joint tax return for the year with a spouse, or the employee (or the employee's spouse, if filing jointly) is a dependent of another person.

Q: Can you provide an example of post deductible FSA - why would someone have it? Can employers exclude non participating group health plan employees as part of just their company policies - internal policy?
A: Post Deductible FSA: An employee may have a Limited Purpose FSA (LPFSA) along-side a HSA. The LPFSA may be used for dental and vision. Once the employee meets the IRS minimum High Deductible Health Plan Deductible ($1350 Single/$2700 Family in 2018), the LPFSA may be moved to a General Purpose FSA (GPFSA). To do so, the Explanation of Benefits (EOB) must be submitted and a request to change from the LPFSA to a GPFSA.

Why? I may be trying to preserve my HSA Funds. I am planning for surgery in April. Once I have the surgery, and my

EOB states I've met the IRS minimum deductible, I move my LPFSA to a GPFSA. This allows me to use the GPFSA funds to pay for surgery expenses and preserve my HSA dollars.

I would want further discussion on excluding non-participating employees in the group health plan to understand the particular instance of why you want to exclude. Generally speaking, everybody *eligible* for the group health plan would be *eligible* for the FSA. To exclude them may cause discrimination issues.

Q: Is Dependent care available for home care also?
A: It depends. I assume by home care you are asking if dependent care may be provided by a neighbor, relative, somebody providing care within their home. If so, yes – as long as the individual providing care claims the care on their taxes. For additional info, review IRS Publication 503 (tax publication, however FSA Dependent Care follows the same provider eligibility).

Q: Can the employer put in $2,000 and the employee $500?
A: Yes – however you must follow the employer contribution rules. Snapshot:

1) Contribute less than $500.
   This may be above the IRS annual limit ($2650 in 2018).
2) Make a dollar-for-dollar match.
   This may be above the IRS annual limit ($2650 in 2018).
3) If neither of these, the employer must give the employee a cash out option (cash in lieu of the benefit). This would be taxable income for the employee.

Q: Can an individual contribute to a DCAP without the employer contributing?
A: Yes. In fact, we don't often see an employer contribution to the Plan.

Q: On the Cash in Lieu of employer FSA contribution - in the case of $700. The employer can offer $700 ER contribution to the FSA (above $500)? That seems contradictory. What is someone just wanted to take the $700 ER FSA contribution then?
A: Snapshot:

1) Contribute less than $500.
   This may be above the IRS annual limit ($2650 in 2018).
2) Make a dollar-for-dollar match.
   This may be above the IRS annual limit ($2650 in 2018).
3) If neither of these, the employer must give the employee a cash out option (cash in lieu of the benefit). This would be taxable income for the employee.

An employee may take the Employer contribution only and not make an employee contribution if they wish.

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Q: Please cover the rules about updating a POP or FSA when the medical plan anniversary dates changes. Do the POP and FSA need to change dates as well?
A: Compliance wise, you do not have to have the POP/FSA match the group health plan renewal. However, by doing so, you make it easier for an employee to make a group health plan change, or change their Health FSA election to line up w/a possible new group health plan.

Upon renewal of a POP or FSA, renew w/a short plan year so the Plan lines up w/the medical plan.

Q: Is a discrimination test required for any size group? Or, are there minimum participant levels?
A: YES, all groups no matter size must complete the discrimination testing annually.

Q: On the POP Discrimination Testing, if all employees are eligible to participate, then it is my understanding that the employer auto passes. Is that both full-time and part-time employees?
A: I disagree (though it's logical). You must have the actual discrimination testing performed and have the results of the testing. Whomever is *eligible* would be included in the test. Generally, the Third Party Administrator providing the service would give instructions on who to include, how to provide the correct numbers, etc.

Q: Is the discrimination testing filed with any government entity or is the testing just to protect the plan in the event of a DOL/IRS audit?
A: Testing is not filed, but rather held by the employer.

Q: Please repeat comment about $500 carry over is a one-time event. Meaning not available each plan year?
A: Yes, the $500 Carry Over is available each year. You may not carry over more than $500.
EXAMPLE: 2018 employee elects $2000. Has $500 remaining from 2017. Total available balance in 2018 - $2500.
2019 employee elects $2000. Has $600 remaining from 2018. Total available balance in 2019 is $2500 – employee forfeits $100.

Q: Do cafeteria plans allow any management carve out? Can an employer pay for full family benefits for the president but only employee only coverage for all other employees?
A: No. Offering to management only would be discrimination.
No, you may not offer the highly comped employees a better benefit than the non-highly comped.
With that being said, sometimes Testing is not logical. I would suggest submitting the information for Testing and view results, making changes if necessary.

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Q: Please describe the timing and the most effective method to distribute the SPD. Also, is it required to distribute the SPD every plan year and does this include POP and Full Flex plans? Thank you.
A: A new participant is required to receive a summary plan description (SPD) within 90 days after becoming a participant. In the case of a participant's death, the spouse and/or designated beneficiary is required to receive an SPD within 90 days after they receive benefits.
However:
(a) For a new plan, the last date for distribution of an SPD is 120 days after the plan effective date.
(b) For an amended plan, the Summary of Material Modifications (SMM) or an amended SPD is 210 days after the end of the plan year during which the amended or restated plan is effective. However, some are of the opinion that the SMM or SPD should be provided no later than 60 days after the effective date of the amendment.

Q: Is a group medical renewal considered a qualified plan change exception?
A: A group medical plan renewal allows an employee to increase, decrease and/or sometimes drop the plan. Check your SPD (Summary Plan Description) for further guidance.

Q: POP Plan, the plan year for the group's voluntary work products anniversary date is 10/01 and the medical is 12/01. How do you handle the POP in this situation?
A: The POP would renew whenever the POP Plan renews. By having two renewal dates, employees would be limited to making changes (add/change/drop coverage). Check your Summary Plan Description to see what qualifying events are allowed.

Q: FSA COBRA - Can you please re-state what you said with the example with what would be an FSA COBRA event (if reimbursed more than you elect?).
A: The Health FSA is a COBRA qualifying benefit.
Offer HFSA COBRA if the *contributions* are more than the amount reimbursed.

EXAMPLE:
Employees annual election is $2000.
Employee terminates, and has contributed $1000 year-to-date.
Employee has been reimbursed $500 year-to-date.
Offer HFSA COBRA as the employee has contributed more than they have used.

Q: Does that mean in 2019 employee will have carryover of $500 x 2 = $1,000 plus the $2,650 elected?
A: No. The Carry Over maximum is $500.

EXAMPLE: 2018 employee elects $2000. Has $500 remaining from 2017. Total available balance in 2018 - $2500. 2019 employee elects $2000. Has $600 remaining from 2018. Total available balance in 2019 is $2500 – employee

forfeits $100.

Q: Does the group have to pass all discrimination testing or just 1?
A: Yes, the group must pass testing. Testing may vary by Third Party Administrator (TPA). Follow the directions the TPA shares re:completion and if the Plan fails, how to take corrective action.

Q: Can you use dollar thresholds or increments for auto-adjudication of debit card transactions?
A: The IRS allows three types of auto-adjudication.

1) Co-pays in amounts of five.
2) Inventory Information Approval System (IIAS).
   This is the system pharmacies have in place for Over the Counter (OTC) items such as contact lens solution.
3) Recurring claims.
   EXAMPLE:
   Employee has physical therapy (PT) January 15 at ABC Clinic for $150.00.
   Employee uses debit card to pay for the services.
   Third Party Administrator (TPA) requests debit card substantiation.
   Employee submits Explanation of Benefits (EOB) as substantiation.
   Employee has PT March 15 at ABC Clinic for $150.00.
   The system recognizes the provider and dollar amount are the same as a previously incurred and substantiated claim. No substantiation will be requested for the remainder of the Plan Year.

   Each Third Party Administrator may allow all or a mix of these methods for auto-adjudication.

Q: Employees who are married but filing separately can only use $2500 of dependent care benefit, right?
A: Correct.

Q: Some voluntary carriers are communicating that their POP plans are evergreen, how do you confirm that the plan is set up correctly? I have reviewed their plan document and I don't see that language.
A: section 125 Plan elections may be evergreen. However, you must give the employee the opportunity to opt out if they wish to do so. I cannot answer specific SPD questions, you'll have to ask whomever is administering the section 125 Plan re:the verbiage on the evergreen elections.