Advanced Cafeteria Plans Q&A – the following questions were asked during the two webinar sessions in March, 2016

Q: Regarding "voluntary plans", what if these voluntary plans show that some premiums are pre-tax deductions? Are those deductions subject to testing?

A. Any pre-tax deductions taken under your Cafeteria Plan will be subject to the Section 125 nondiscrimination tests.

Q: Can you expand briefly on the connection between "voluntary plans" and ERISA?

A: In general, ERISA applies to any plan, fund, or program offered by a covered employer (i.e. excluding governmental and some church employers) for the benefit of its employees, if it is not otherwise excluded by the Department of Labor (DOL) or IRS. Truly voluntary plans that are not established or maintained by an employer are therefore not ERISA plans. However, "established" and "maintained" are broad words that could have multiple interpretations. The DOL has exempted from ERISA voluntary group-type insurance programs offered by an insurer plans where:

- No contributions are made by an employer or employee organization;
- participation in the program is completely voluntary for employees and members;
- the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
- the employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

Courts have been inconsistent in viewing pre-tax payment of otherwise voluntary insurance premiums through an employer's Cafeteria Plan as employer "endorsement" of such plans. Typically, it has been one factor of many that courts have considered, so each case would need review on its own. If a voluntary plan is an ERISA plan, an employer has further

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
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obligations for annual reporting, fiduciary duties, notifications (SPDs), and claims procedures, all of which can be more difficult if the employer does not intend to truly administer the plan.

Q: For the HSA Maximum Out of Pocket - is that in network or out of network?

A: HSA-Compatible High Deductible Health Plan designs are required for in-network benefits; plans can have a higher deductible/out-of-pocket maximums for out of network benefits.

Q: If both spouses of a married couple are employed at the same organization, can both elect the maximum FSA contribution for a plan year?

A: For a Health Care FSA, each individual is able to elect the maximum contribution per year ($2,550 in 2016). However the Dependent Care FSA (DCAP) applies a $5,000 per married couple limitation per year (or limits the contribution by the earned income of either spouse, if lower than $5,000).

Q: Doesn't the ACA also impact Cash-in-lieu with regards to affordability?

A: Yes, offering flex credits or cash-in-lieu of benefits can affect an Applicable Large Employer's affordability calculation for the shared responsibility provisions of the Affordable Care Act. If an employer offers flex credits that are not cashable, can be used for the major medical plan, and can only be used for medical expenses (in other words, the credits are separated for medical and non-medical plans), then the employer can count the amount of such qualifying flex credit as an "employer contribution" for the affordability calculation. If these requirements don't apply, then flex credits cannot be taken account for the affordability calculation. If an employer offers cash-in-lieu of taking the major medical coverage, than an employer has to add the amount of the cash-in-lieu benefit to the amount the employee would normally have to pay for coverage to get the "employee contribution" for the purposes of the affordability calculation. For example, if ABC Company requires an employee to contribute $200 per month to health coverage, but an employee can receive $100 per month in additional taxable pay if he waives health coverage, ABC Company would need to calculate affordability using $300 per month as the employee contribution amount.

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Q. As a small employer subject only to state continuation (not Federal COBRA), do we ever have to offer continuation for our flex plan?

A. Typically, state continuation laws apply only to insured plans, so if you have fewer than 20 employees making you not subject to Federal COBRA law, you would not have to offer continuation on your Health Care FSA.

Q. When should the last deduction be taken for FSA for a terminating employee? Their last paycheck reflecting hours worked? Their last paycheck reflecting payout of paid time off?

A. Employers should not continue to take payroll deductions for the FSA when an employee ends participation at termination of employment, regardless of whether a paycheck is owed. In that case, once an employee is terminated, FSA deductions end, FSA participation ceases, and claims cannot be reimbursed for expenses incurred after that date. Some employers, for ease of payroll administration, end up waiting to terminate an employee's Health Care FSA until the end of the month since payroll deductions have already been taken. While this does not usually cause problems, it can be an issue for employers that allow rollover in their plans, as it is technically a continuation of coverage through the end of the month in a post-employment (e.g. COBRA) status that is fully paid-up. Therefore, if it is done during the last month of the plan year, any funds that remain in the account are able to be rolled over to the next year, and could affect COBRA rights and trigger administrative fees for the entire following plan year.

Q. Can you charge an FSA COBRA participant the additional 2% COBRA admin charge and/or the cost of the FSA Admin PEPM fee?

A. You can apply an additional 2% fee to COBRA premiums just as you do for other group health premiums. If the administrative fees were less than the 2% fees, you could charge that amount instead. You cannot charge a COBRA participant more than 102% of the premium in total.

Q: If a Health Care FSA is not set up to qualify for a limited COBRA offering, does the employer have to offer the Health Care FSA as COBRA benefit to all employees, even if not on the plan?

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A: No, COBRA would only need to be offered to qualified beneficiaries who were participating in the Health Care FSA on the day of the qualifying event (even if the account balance was exhausted at that point), and it would need to be offered for the full duration of the applicable COBRA period.

Q. If an employee not on the medical plan elects COBRA for their Health Care FSA contributions, the employer is only at risk for the FSA election, amount, correct, maximum of $2,550 (2016 limit)?

A. Yes, an employer is only at risk for any amounts remaining in the employee's FSA (up to the employee's maximum election) for which premiums (payroll deductions) have not paid for prior to the qualifying event. If an employer's plan does not qualify for a limited COBRA offering, however, the qualified beneficiary would have the right to make a new FSA election for a new plan year (because active employees are able to do so) to use during the remainder of that qualified beneficiary's COBRA period (18, 29, or 36 months) – that is one reason employers are strongly encouraged to design their plans to qualify for a limited COBRA offering.

Q. Do you have to wait until the end of the run-out period in order to rollover funds?

A. In order to accurately calculate the amount rolled over into a new plan year, all run-out claims need to be subtracted from the prior plan year. During the run-out period, the IRS permits plans to pay new year claims out of the new plan year prior to using any rollover funds, in order to ensure claims from the prior year submitted during run-out are processed correctly. However, if funds are not available in the new year to pay new year claims during run-out, rollover funds would be used to pay them.

Q. Can an employee enroll in their employer's HSA deduction when they are covered in their spouse's HDHP with another employer?

A. Usually, yes. If an employee is otherwise eligible to contribute to his own HSA by having HDHP coverage and no other disqualifying coverage, it doesn't matter whether the HDHP is sponsored by his employer or his spouse's employer. However, an employer's Cafeteria Plan may limit pre-tax HSA contributions to only employees who are covered by the employer's HDHP, so it's important to check the plan documents. And, if the plan does allow for

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employees not covered by the employer's HDHP to make pre-tax HSA contributions, those contributions have to be made to the employee's HSA account, not to the spouse's account.

Q. Please repeat compensation amount for the Key Employee under the 25% Concentration Test – was $170,000 is the highly compensated threshold for 2016?

A. There are different definitions of "highly compensated employees", "highly compensated individuals", "highly compensated participants" and "key employees", and all of these different definitions are used differently depending on the plan and test that is to be performed. The 25% Concentration Test, also called the Key Employee Test, is performed for the Cafeteria Plan as a whole, and measures the extent to which "Key Employees" participate in a Cafeteria Plan. A "Key Employee" is any officer who earns more than $170,000 (2016 – this is an indexed amount) in annual income, any more-than-5% owner, or any more-than-1% owner who earns more than $150,000 (non-indexed).

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