

Cafeteria Plan Basics Q&A – the following questions were asked during the two webinar sessions in (February, 2016)

Q: Is there any difference between a "Cafeteria Plan" and "FSA" or is an FSA just another name for a Cafeteria Plan?

A: A Flexible Spending Account (FSA) is a type of benefit that can be offered through a Cafeteria Plan. It is not the same as the Cafeteria Plan.

The Cafeteria Plan is the funding vehicle that allows the employee's to deduct any FSA contributions pre-tax.

However, an employer does not need to offer FSAs. An employer could simply have a Cafeteria Plan to allow other benefits (health insurance, dental insurance, etc.) to be funded through employee pre-tax payroll deductions.

Q: Are Cafeteria Plans also referred to as Wrap Plans? Can you elaborate on the difference between these two terms please?

A: A Cafeteria Plan is a plan that gives the employee a choice between a tax-free benefit and taxable compensation. The Cafeteria Plan is simply the funding vehicle for the benefits.

A Wrap Plan Document is used by employers to comply with the Plan Document provision of ERISA. ERISA benefits may be funded through the Cafeteria Plan, but the benefits themselves require a Plan Document. A Wrap Plan Document ensures that all ERISA benefit plans contained in the Wrap Plan have an ERISA compliant Plan Document.

Q: If I have a company that only takes their premiums pre-tax, we don't need to have you guys in order to be in compliant with the law?

A: There is no requirement that a company contract with a Third-Party Administrator in order to have a Cafeteria Plan. However, a lot of companies will to ensure that they are abiding by all the rules and regulations and to ensure that they have a compliant Plan Document and SPD as required.

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Q: Is there any reason NOT to offer an opt-out premium? At one point, I was advised these were problematic – that incentivizing employees not to enroll in your health plan was not a good idea.

A: The only time that offering an opt-out premium is discouraged is when it is specifically based on health factors or Medicare eligibility. If the offer is contingent on another basis, it may be problematic depending on the state.

As long as it is offered to all employees, then this would not be an issue. It is only a problem when it is contingent upon some sort of other requirement that is not benefit eligibility.

Q: If our plans and rates have not changed since the last plan year, do we still need to have employees re-sign an enrollment document for their health plan?

A: This depends on what the communication is to the employees. As long as the employees are notified that their health plan will remain the same for the following year if they do not communicate that they would like to change their health plan, it is fine to not require them to re-sign a document regardless of whether or not the rates have changed.

The only time this would be required is if the plan that individual was enrolled in is no longer available in the new plan year.

Q: Does the exclusion for spouse or dependent group term life include voluntary dependent life?

A: The only type of life policy eligible to be part of a Cafeteria Plan is group term life insurance for the employee up to \$50,000.

Any other type of life policy cannot be part of the Cafeteria Plan, including voluntary dependent life.

Q: How are individual policies treated as pre-tax payroll deduction?

A: If the individual policy is for a benefit (excluding major medical) that is eligible through the Cafeteria Plan, then the premiums can be deducted pre-tax and sent directly to the carrier by

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the employer or an employer could sponsor an Individual Premium FSA for the employees where the employees pay the carrier (excluding major medical) and the employer reimburses the employees for the corresponding cost.

For an employer who is subject to ERISA, the employer may want to consult with a legal advisor to fully understand the potential ERISA implications of allowing pre-tax payroll deductions where the employer sends the funds directly to the carriers.

Q: If someone learns that they are eligible to continue on 'Badgercare' - are you saying that we cannot reimburse the pre-tax health premium?

A: "Badgercare" is medical insurance for those with low incomes. Under the Affordable Care Act (ACA) employers are not allowed to reimburse individual insurance premiums on a pre-tax basis. Badgercare or any other Medicaid program would be considered an individual insurance premium.

However, if you mean that the employee or dependents remain on your plan and the state subsidizes some of their premium, the employee's share of the total premium can still be pre-tax.

Q: Can an employer contribute to an employee's HSA if there is no employer-sponsored group health plan, but the employee has their own HSA eligible health plan?

A: Yes, the employer can do this so long as they ensure that the employee has no disqualifying coverage through the employer such as a standard Health Care FSA.

Some employers even go so far as to have the employee sign an attestation statement indicating that they are covered by a high deductible health plan (HDHP) elsewhere to ensure that the employee is eligible to make or receive HSA contributions.

Q: If I have an employee's spouse who has a HDHP, can the employee take out HSA dollars if the spouse carries the insurance?

A: As long as the employee is covered under that spouse's HDHP and the employee does not have any employer-sponsored disqualifying coverage such as a standard Health Care FSA, the

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employer can take HSA contributions pre-tax from the employee's paycheck and deposit them into an HSA in the employee's name.

The employer cannot take HSA contributions pre-tax from the employee's paycheck and deposit them into an HSA in the employee's spouse's name.

However, the employer can take HSA contributions post-tax from the employee's paycheck and deposit them into an HSA in the employee's spouse's name just like any other bank account.

Q: Does a current Cafeteria Plan allow for the taxable extra pay for waiving certain benefits or will a current Cafeteria Plan need to be amended to allow this?

A: The Summary Plan Description (SPD) for the Cafeteria Plan must indicate that this is an option in order for this to be accomplished. If the current SPD does not indicate this, then it would have to be amended prior to the implementation of this type of benefit in order to support the practice.

Q: We offer date of hire coverage for our medical, dental and vision (eyewear) for our employees. In regard to the signature date, does this mean employees must sign up the first day?

A: If employees are eligible for coverage on the date of hire, then employees are given up to an extra 30 days to complete and sign their paperwork – for the plans and, if separately elected, the Cafeteria Plan.

The coverage would then be retroactive to the hire date and deductions to pay the premiums can be taken pre-tax.

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Q: If a new hire fails to return medical enrollment forms before the first date of eligibility, then what? They can't enroll in medical plan or they can't pay premiums pre-tax? (For example, date of hire 1/31, eligible 2/1.)

A: If the new hire signed the forms on or before 2/1, then the pre-tax premiums and the medical plan enrollment are eligible.

If the new hire signed the forms after 2/1, the medical plan may still allow them to be retroactively enrolled in the plan, but their deductions cannot be taken pre-tax.

Q: Can someone who uses pre-tax on HSA change the contribution amount?

A: HSA contributions are not subject to the Permitted Election Change rules. The HSA election can be changed at any time as long as it is prospective. In other words, the change can apply to future payrolls, but cannot be retroactive.

Q: What happens if an employer stops taking the premiums from the employee's payroll when the employee changes the medical enrollment without a qualifying event? What are the consequences to the employer and employee and when do those consequences occur?

A: As this is a violation of the Cafeteria Plan regulations, this could make the entire plan subject to taxation if an auditor were to discover this. All employees who had pre-tax payroll deductions taken during the plan year could have their deductions reclassified as post-tax and would have to refile their taxes. The employer would have to amend its tax filings as well to pay additional FICA and FUTA taxes.

Q: What about someone who in the middle of the year doesn't want to continue paying for the medical insurance premium? That person might not be able to get into the Marketplace because there's no qualifying event but that person does voluntarily drop.

A: If an employee does not have a qualifying event, then the employee would have to continue to have their deductions taken pre-tax through the end of the plan year even though they have no coverage.

Therefore, it is best practice to not permit employees who have their deductions taken pre-

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tax to drop coverage without a qualifying event.

There are separate qualifying events that allow an individual to be able to sign up for Marketplace coverage outside of open enrollment. Usually if an employee does not have a qualifying event that allows them to stop their pre-tax medical insurance premium, they probably did not have a Marketplace Special Enrollment event.

There is a Permitted Election Change event for off-calendar Cafeteria Plans that allows employees to drop their group medical insurance (and stop the pre-tax premiums for that medical insurance) to enroll in Marketplace coverage during the Marketplace open enrollment. The Plan Document would have to be written to allow this Permitted Election Change event for this to apply.

Q: Does the company have to pay the employer portion of the premium for someone who drops insurance without a qualifying event in the middle of the year?

A: If the employee actually drops the insurance even though they are still responsible for paying their portion pre-tax, then there would no longer be any insurance premium owed to the insurance carrier and the employer portion would no longer be necessary.

Q: We are an S-corp. Do I understand the owner/descendants cannot contribute to the 401(k) plan pre-tax?

A: Over 2% shareholders, their spouses, their ascendants and their descendants cannot participate in a Cafeteria Plan. They could contribute to a 401(k), but not pre-tax through a Cafeteria Plan.

Q: Can you briefly go over how an FSA would work for an owner for the company and what we need to look out for?

A: This depends on how the company is filing its taxes.

If the company files its taxes as a Partnership or a Sole Proprietorship, then the owner cannot participate in any FSAs.

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If the company files its taxes as a Subchapter S Corporation, then any owners who own more than 2% of shares, their spouses, ascendants and descendants cannot participate in FSAs.

If the company uses any other status when filing taxes, the owner of the company can have an FSA and it would work just like any other employee's FSA.

Q: When you say "FMLA applies" to the Health Care FSA, can you elaborate?

A: FMLA applies to the Health Care FSA as it would for any other health plan. What we mean is that this is a protected benefit under the law. If the employer is subject to FMLA laws and the employee is eligible for FMLA, then the employee would have to be offered the ability to continue the Health Care FSA while out on FMLA leave and would have to be offered the ability to resume their Health Care FSA upon return from leave.

Q: Does "dependent" include a disabled parent that a participant claims as a dependent on his/her taxes?

A: Yes, when we refer to dependent in the slides, we are always referring to anyone who can be claimed as a dependent on the individual's taxes.

The term Eligible Child is used to encompass children who are not dependents and who will not attain age 27 during the current tax year.

Q: Can a terminated employee file a claim for expenses incurred prior to termination once they are no longer working?

A: The employee is allowed to continue filing claims according to the terms of the Plan Document. Some plans give terminated employees a runout period from their date of termination to submit expenses that were incurred prior to termination. Other plans do not.

Q: If a new employee is hired mid-year, is the Health Care FSA election pro-rated also?

A: No, there is no pro-ration for mid-year hires. The Health Care FSA maximum of \$2,550 per 12 month plan year only gets pro-rated if the employer is sponsoring a plan that is less than 12

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months.

Someone hired in July can still elect the full \$2,550 for a Health Care FSA that runs from January 1 to December 31.

Q: If I have 3 different jobs all in one plan year, all different employers and none are part of a control group, I can elect \$2,550 for each employer?

A: Yes, an individual with three separate jobs through three unrelated employers can elect \$2,550 for the Health Care FSA from each employer without violating the IRS maximum.

Q: When you have employees working for 2 employers, can they elect the maximum FSA amount for both employers or does the employee have to monitor how much they contribute?

A: This depends on whether we are talking about the Health Care FSA or Dependent Care FSA. For the Health Care FSA, please refer to the previous question.

For the Dependent Care FSA, the employee would have to monitor how much they are electing from each employer to ensure that they do not exceed their maximum for the tax year. If they elect an incorrect amount through the Dependent Care FSA, they should end up paying back taxes associated with the mistake when they file their income tax returns at the end of that tax year.

Q: The Health Care FSA is Excepted so as long as the FSA is offered to the same folks that are offered medical? What if someone offers the FSA down to 20 hours but the medical to 30 or more?

A: An employer who offers the medical insurance to individuals who work 30 hours a week or more should not offer the Health Care FSA to employees who work less than 30 hours per week. This would violate the ACA Preventative Services regulation.

Violating the ACA Preventative Services regulation can result in a penalty of \$100 per day per

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employee enrolled in the Health Care FSA who was not eligible for the employer-sponsored group medical insurance – up to \$36,500 per employee per plan year.

Q: If our employer is not contributing to the Health Care FSA and all EEs who are offered medical are offered FSA, is our plan Excepted or non-Excepted or neither?

A: A Health Care FSA is Excepted if an employer does not contribute to the Health Care FSA and offers the Health Care FSA only to those who are eligible for the employer-sponsored group medical insurance.

So long as there are no employees offered the FSA who are not offered the medical insurance, your Health Care FSA is Excepted.

A Health Care FSA is always either Excepted or non-Excepted.

Q: We contribute to an HSA not an FSA but it is over \$500 for Employee + 1 and Family. Are we ACA compliant or Non-Excepted Health Care FSA?

A: Contributions to an HSA do not affect the Excepted status of the Health Care FSA.

Q: Is the eligibility of the Dependent Care FSA an employer responsibility to verify?

A: No, the participant is responsible to verify whether or not they are eligible to claim Dependent Care FSA expenses and how much they are eligible to claim for the tax year.

If they elect an incorrect amount through the Dependent Care FSA, they should end up paying back taxes associated with the mistake when they file their income tax return at the end of that tax year.

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