

# COMPLIANCE OVERVIEW

Provided by Rose Street Advisors

## Cafeteria Plans: Midyear Election Changes

Participant elections under an Internal Revenue Code (Code) Section 125 cafeteria plan must be made before the first day of the plan year or the date taxable benefits would currently be available, whichever comes first. Participant elections generally must be irrevocable until the beginning of the next plan year. This means that participants ordinarily cannot make changes to their cafeteria plan elections during a plan year.

Employers do not have to permit any exceptions to the election irrevocability rule for cafeteria plans. However, Internal Revenue Service (IRS) regulations permit employers to design their cafeteria plans to allow employees to change their elections during the plan year, if certain conditions are met.

Regulations issued by the IRS list the permitted events that may be cause for a midyear election change. Also, the IRS expanded the midyear election change rules in response to certain Affordable Care Act (ACA) provisions.

### LINKS AND RESOURCES

- [IRS regulations](#) on midyear election changes
- [IRS Notice 2014-55](#), which expanded the midyear election change rules in response to the ACA
- [IRS Notice 2004-50](#), which explains that the irrevocable election rules for cafeteria plans do not apply to HSAs

### HIGHLIGHTS

#### ELECTION CHANGE RULES

- An employee must experience a midyear election change event.
- The cafeteria plan must permit midyear election changes for that event.
- The employee's requested change must be consistent with the midyear election change event.

#### ELECTION CHANGE EVENTS

- Change in status events (major life events, such as marriage, birth, adoption and certain employment changes)
- Changes in cost or coverage
- Changes due to other laws or court orders (such as COBRA, FMLA and QMCSOs)

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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## GENERAL RULES

Cafeteria plans may recognize certain events as entitling a plan participant to change his or her elections (if the change is consistent with the event). Although a cafeteria plan may not be more generous than the IRS permits, it may choose to **limit to a greater extent** the election change events that it will recognize.

A cafeteria plan sponsor that recognizes one or more midyear election change events allowed by the IRS should review its plan document to confirm that it addresses the permitted election changes.

**Key Concept**—If a cafeteria plan incorporates one or more of the midyear election change events, an employee who experiences one of these events may revoke an existing election and make a new election, consistent with the event, for the remaining portion of the period of coverage—but only with respect to cash or other taxable benefits that are not yet currently available.

Only an employee of the employer sponsoring a cafeteria plan is allowed to make, revoke or change elections in the employer's cafeteria plan. The employee's spouse, dependent or any other individual other than the employee may not make, revoke or change elections under the plan.

For an employee to be eligible to change his or her cafeteria plan election during a plan year, the following general rules apply:

1. The employee must experience a midyear election change event recognized by the IRS.

2. The cafeteria plan must permit midyear election changes for that event.

3. The employee's requested change must be consistent with the midyear election change event.

Also, employees' midyear election changes must be effective prospectively. The one exception to this rule is for retroactive election changes that are permissible under the HIPAA special enrollment event for birth, adoption or placement for adoption.

Some of the IRS' midyear election change events apply to all qualified benefits that can be offered under a cafeteria plan. However, other midyear election change events only apply to certain qualified benefits—for example, not all of the IRS' midyear election change events apply to elections for health flexible spending accounts (FSAs).

## SPECIAL RULE FOR HSAS

Health savings accounts (HSAs) are commonly offered with high deductible health plans (HDHPs) under an employer's cafeteria plan. This allows employees to make their HSA and HDHP contributions as pre-tax salary reductions.

**The irrevocable election rules do not apply to a cafeteria plan's HSA benefit.** An employee who elects to make HSA contributions under a cafeteria plan may start or stop the election or increase or decrease

the election at any time during the plan year, as long as the change is effective prospectively. If an employer places additional restrictions on HSA contribution elections under its cafeteria plan, then the same restrictions must apply to all employees. Also, to be consistent with the HSA monthly eligibility rules, HSA election changes must be allowed at least monthly and upon loss of HSA eligibility.

## PERMITTED ELECTION CHANGE EVENTS

Cafeteria plans may recognize certain events where an employee is entitled to make election changes during a plan year. The IRS recognizes three broad categories of midyear election change events.

Three types of midyear election change events:

- Change in status events (major life events, such as marriage, birth, adoption and certain employment changes)
- Changes in cost or coverage for the plan’s qualified benefits
- Other laws or court orders (for example, COBRA, HIPAA and the ACA)

The following chart provides an overview of the IRS’ permitted midyear election change events. Keep in mind that this is a general overview and that more detailed rules may apply to specific situations or certain types of qualified benefits.

CHANGE-IN-STATUS EVENTS		
DESCRIPTION	REQUIREMENTS	TYPE OF BENEFITS
<p>The IRS considers the following events to be changes in status that may permit a midyear election change:</p> <ul style="list-style-type: none"> <li>• Change in employee’s legal marital status (marriage, death of spouse, divorce, legal separation and annulment)</li> <li>• Change in number of dependents (birth, death, adoption and</li> </ul>	<p>Employee’s requested election change must be on account of and correspond with the change in status event.</p> <p>In general, no election change is allowed unless the event <b>affects eligibility</b> for the coverage. This includes a change in status event that results in an increase or decrease in the number of an employee’s family members or dependents who may benefit from the coverage.</p> <p>An election change for dependent care assistance or adoption assistance satisfies the consistency requirement if it is on account of and corresponds with a change in status that affects dependent care or adoption expenses.</p>	<p>Applies to all qualified benefits, including health FSAs</p>

<p>placement for adoption)</p> <ul style="list-style-type: none"> <li>• Change in employment status of employee, employee's spouse or employee's dependent (for example, a termination or commencement of employment, a strike or lockout, commencement of or return from an unpaid leave of absence or a change in worksite)</li> <li>• A dependent satisfies or ceases to satisfy dependent eligibility requirements (including attainment of age, student status or any similar circumstance)</li> <li>• Change in place of residence of the employee, spouse or dependent</li> <li>• Commencement or termination of adoption proceedings, for purposes of adoption assistance benefits</li> </ul>	<p>If the change in status is the employee's divorce, annulment or legal separation from a spouse, the death of a spouse or dependent, or a dependent ceasing to satisfy the eligibility requirements for coverage, an employee's election to cancel accident or health insurance coverage for any individual other than the spouse involved in the divorce, annulment or legal separation, the deceased spouse or dependent, or the dependent that ceased to satisfy the eligibility requirements for coverage, respectively, fails to correspond with that change in status.</p>	
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## COST CHANGES

DESCRIPTION	REQUIREMENTS	TYPE OF BENEFITS
Automatic increases or decreases in employees' contributions for <b>insignificant</b>	A cafeteria plan may automatically make a prospective increase or decrease in affected employees' elective contributions for the plan if:	Applies to all qualified benefits, except health

<p><b>cost changes</b></p> <p>The cost increase or decrease may be attributable to action by the employee (for example, switching from full time to part time while remaining eligible for coverage) or by the employer (for example, reducing the amount of employer contributions for a group of employees)</p> <p><i>IRS regulations provide little guidance as to when a cost change is insignificant or significant. Plan sponsors will need to make that determination based on all the facts and circumstances, including the dollar amount and percentage of increase (or decrease).</i></p>	<ul style="list-style-type: none"> <li>• The cost of a qualified benefit increases or decreases during a period of coverage; and</li> <li>• Under the terms of the plan, employees are required to make corresponding changes in their payments.</li> </ul> <p>This change must be made on a reasonable and consistent basis for plan participants.</p>	<p>FSAs</p>
<p><b>Significant cost changes</b></p> <p>As with insignificant cost changes, both employer-initiated and employee-initiated cost changes are recognized</p> <p><i>IRS regulations provide little guidance as to when a cost change is insignificant or significant. Plan sponsors will need to make that determination based on all the facts and circumstances, including the dollar amount and percentage of increase (or decrease).</i></p>	<p>If the cost charged to an employee for a benefit package option significantly increases or decreases during a period of coverage, the cafeteria plan may permit the employee to make a corresponding change in election under the cafeteria plan. Changes that may be made include:</p> <ul style="list-style-type: none"> <li>• Electing to participate in the cafeteria plan for the option with a decrease in cost; or</li> <li>• Revoking an election when there is an increase in cost and either:             <ul style="list-style-type: none"> <li>○ Electing coverage under another benefit package option providing similar coverage; or</li> <li>○ Dropping coverage if no other benefit</li> </ul> </li> </ul>	<p>Applies to all qualified benefits, except health FSAs</p>



	<p>package option providing similar coverage is available.</p> <p>For example, if the cost of an indemnity option under an accident or health plan significantly increases during a period of coverage, employees who are covered by the indemnity option may make a corresponding prospective increase in their payments or may elect to revoke their elections for the indemnity option and instead elect coverage under another benefit package option including an HMO option (or drop coverage under the accident or health plan if no other benefit package option is offered).</p>	
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**COVERAGE CHANGES**

DESCRIPTION	REQUIREMENTS	TYPE OF BENEFITS
<p><b>Significant curtailment of coverage</b></p>	<p>If an employee (or an employee’s spouse or dependent) has a significant curtailment of coverage under a plan during a period of coverage that is:</p> <ul style="list-style-type: none"> <li>• <b>Not a loss of coverage</b> (for example, there is a significant increase in the deductible, the copayment or the out-of-pocket maximum)—the plan may permit the employee to revoke his or her election for that coverage and elect coverage under another benefit package option providing similar coverage</li> <li>• <b>A loss of coverage</b>—the plan may permit the employee to revoke his or her election for that coverage and elect coverage under another benefit package option providing similar coverage or to drop coverage if no similar benefit package option is available.</li> </ul> <p>A “loss of coverage” means a complete loss of coverage under the benefit package option (including the elimination of a benefits package</p>	<p>Applies to all qualified benefits, except health FSAs</p>

	<p>option or an HMO ceasing to be available in the area where the individual resides). In addition, a cafeteria plan may treat the following as a loss of coverage:</p> <ul style="list-style-type: none"> <li>• A substantial decrease in the medical care providers available under the option;</li> <li>• A reduction in benefits for a specific type of medical condition for which treatment is being received; and</li> <li>• Any other similar fundamental loss of coverage.</li> </ul>	
<p><b>Addition or significant improvement of benefits package option</b></p> <p><i>IRS regulations do not define a “significant improvement” of coverage. One example from IRS regulations provides that a decrease in copayments under an indemnity health insurance plan is a significant benefit improvement.</i></p> <p><i>Also, in <a href="#">Notice 2015-86</a>, the IRS confirmed that changing the eligibility criteria for a qualified benefit during a plan year to add eligibility for same-sex spouses is a significant improvement in coverage.</i></p>	<p>If a plan adds a new benefit package option or other coverage option (or if coverage under an existing benefit package option or other coverage option is significantly improved during a period of coverage) the plan may permit eligible employees to revoke their elections under the cafeteria plan and to make elections for coverage under the new or improved benefit package option.</p> <p>Employees can elect the new (or improved) benefit regardless of whether they have previously made an election under the cafeteria plan or previously elected the benefit package option.</p>	<p>Applies to all qualified benefits, except health FSAs</p>
<p><b>Change in coverage under other employer plan</b></p>	<p>A cafeteria plan may permit an employee to make an election change that is on account of, and corresponds with, a change made under another employer plan (including a plan of the</p>	<p>Applies to all qualified benefits, except health FSAs</p>

	<p>same employer or of another employer) if:</p> <ul style="list-style-type: none"> <li>• The other cafeteria plan or qualified benefits plan allows an election change that is permissible under the IRS regulations; or</li> <li>• The other cafeteria plan has a different period of coverage.</li> </ul>	
<p><b>Loss of health coverage sponsored by governmental or educational institution</b></p>	<p>A cafeteria plan may permit an employee to make an election to add 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. This includes coverage under a state Children’s Health Insurance Program (CHIP).</p>	<p>Applies to all qualified benefits, except health FSAs</p>

## OTHER LAWS OR COURT ORDERS

DESCRIPTION	REQUIREMENTS	TYPE OF BENEFITS
<p><b>HIPAA special enrollment rights</b></p>	<p>A cafeteria plan may permit an employee to revoke an election for coverage during a period of coverage and make a new election that corresponds with the special enrollment rights provided under HIPAA.</p> <p>This allows an employee who enrolls during a special enrollment period to elect to pay for the newly elected health plan coverage on a pre-tax basis. The election can include payment for retroactive coverage when the special enrollment right is triggered due to birth, adoption or placement for adoption.</p>	<p>Group health plans that are subject to HIPAA’s portability rules</p> <p>In general, health FSAs are excepted benefits that are not subject to HIPAA’s portability rules.</p>
<p><b>COBRA qualifying event (or similar state law continuation coverage event)</b></p>	<p>A cafeteria plan may permit the employee to elect to increase payments under the employer’s cafeteria plan in order to pay for continuation coverage for which an employee, spouse or</p>	<p>Group health plans subject to COBRA, including health FSAs</p>



	dependent has become eligible.	
<b>Judgments, decrees or orders (including QMCSOs)</b>	<p>A cafeteria plan may change the employee’s election to provide coverage for a child if there is a judgment, decree or order resulting from a divorce, legal separation, annulment or change in legal custody (including a qualified medical child support order, or QMCSO) that requires accident or health coverage for the employee’s child or for a foster child who is a dependent of the employee.</p> <p>A cafeteria plan may permit an employee to make an election change to cancel coverage for a child if the order requires the spouse, former spouse or other individual to provide coverage for the child and that coverage is, in fact, provided.</p>	Accident or health plan coverage, including health FSAs
<b>Entitlement to Medicare or Medicaid</b>	<p>If an employee, spouse or dependent becomes entitled to coverage under Medicare or Medicaid, the cafeteria plan may permit the employee to cancel or reduce coverage of that employee, spouse or dependent under the accident or health plan.</p> <p>Also, if an employee, spouse or dependent who had been entitled to Medicare or Medicaid loses eligibility for this coverage, the cafeteria plan may permit the employee to commence or increase coverage for that employee, spouse or dependent under the accident or health plan.</p>	Accident or health plan coverage, including health FSAs.
<b>FMLA leave</b>	An employee taking leave under the federal Family and Medical Leave Act (FMLA) may revoke an existing election of accident or health plan coverage and make another election for the remaining portion of the period of coverage as may be provided for under the FMLA.	Accident or health plan coverage, including health FSAs.

<p><b>Changes in 401(k) Contributions</b></p>	<p>A cafeteria plan may permit an employee to modify or revoke elections related to a 401(k) plan, in accordance with Code Sections 401(k) and (m).</p>	<p>401(k) elections</p>
<p><b>ACA CHANGES</b></p>		
<p><b>DESCRIPTION</b></p>	<p><b>REQUIREMENTS</b></p>	<p><b>TYPE OF BENEFITS</b></p>
<p><b>Exchange enrollment</b></p>	<p>A cafeteria plan may allow an employee to revoke an election of coverage under a group health plan if both of the following conditions are met:</p> <ul style="list-style-type: none"> <li>• The employee is eligible for special enrollment in an Exchange plan or the employee wants to enroll in an Exchange plan during the Exchange’s annual open enrollment period; and</li> <li>• The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the employee (and any related individuals who cease coverage due to the revocation) in an Exchange plan. The Exchange coverage must be effective beginning no later than the day immediately following the last day of the original coverage that is revoked.</li> </ul> <p>A cafeteria plan may rely on the reasonable representation of an employee who has an enrollment opportunity for an Exchange plan, that he or she and related individuals have enrolled (or intend to enroll) in an Exchange plan for new coverage that is effective within the required time frame.</p>	<p>Group health plans that provide minimum essential coverage</p> <p>Does not apply to health FSAs</p>
<p><b>Reduction in hours of service</b></p>	<p>A cafeteria plan may allow an employee to revoke an election of coverage under a group health plan if both of the following conditions are</p>	<p>Group health plans that provide minimum</p>

	<p>met:</p> <ul style="list-style-type: none"><li>• An employee who was reasonably expected to average at least 30 hours of service per week has a change in employment status so that the employee will reasonably be expected to average less than 30 hours of service per week after the change (even if that reduction does not result in the employee ceasing to be eligible under the group health plan); and</li><li>• The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the employee (and any related individuals who cease coverage due to the revocation) in another plan that provides minimum essential coverage. The new coverage must be effective no later than the first day of the second month after the month in which the original coverage is revoked.</li></ul> <p>A cafeteria plan may rely on an employee's reasonable representation that he or she and related individuals have enrolled (or intend to enroll) in another plan that provides minimum essential coverage within the required time frame.</p>	<p>essential coverage</p> <p>Does not apply to health FSAs</p>
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