CARLTON FIELDS

Cafeteria Plan Amendments and the Employer Mandate

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This alert considers whether cafeteria plan amendments are required by plan sponsors who become subject to the Affordable Care Act's "employer mandate," which will normally be an employer with at least 50 full time employees and employee equivalents (100 in 2015). It also discusses three other items that may require cafeteria plan amendments.

Background

The employer mandate affects many aspects of group health coverage, and many employers and insurers have been hard at work updating their insurance policies to bring them into compliance with the employer mandate. For most employers, the insurance policy is one of at least two documents that address group health coverage. Another document, often called a "cafeteria plan" document, is required if employees will be permitted to pay their share of the premiums through pretax payroll deduction. A "wrap document" makes sure that the information participants are required to receive under ERISA is provided. Cafeteria plan documents often include the required ERISA language. To make matters more confusing, insurance companies often (but not always) incorporate cafeteria plan and wrap language into the insurance policy if it is a self -insured arrangement and the insurance company is serving as the stop loss carrier. These employers generally only need additional documentation if they offer separate dental, vision, or other supplemental benefits, including benefits through an HRA or health flexible spending account ("FSA").

In 2013, the Internal Revenue Service ("IRS") declared that properly amended cafeteria plans could allow health FSA carry-overs of up to $500. In 2014, the IRS created an allowance for cafeteria plan elections to change based on exchange coverage, and it was recently announced that 2015 health FSA limits are increasing to $2,550.

Timing of Plan Amendments

The employer mandate goes into effect for most employers on January 1, 2015, although employers with fiscal year plans or with between 50 and 100 employees and employee equivalents that satisfy several other requirements may qualify for a delayed employer mandate effective date.

Cafeteria plans and wrap documents must generally be updated as of the effective date of any change, unless the IRS or Department of Labor allows otherwise. Neither agency specifically issued any statement allowing delayed amendments for compliance with the employer mandate.

On September 18, 2014, the IRS issued IRS Notice 2014 –55, creating a new allowance for cafeteria plan participants to make midyear election changes, and specifically stated that the change could be adopted towards the end of the first year in which the employer allows the election change.

IRS guidance providing for health FSA carryovers provides that this option must be in place by the end of the last plan year in which a carryover to a later year is permitted. Therefore, health FSAs that want to allow unused 2014 balances to carry over to 2015 should be amended by December 31, 2014.

IRS guidance issued at the end of October, increasing the 2015 health FSA limits by $50, provides that utilizing this increase is optional, and may require a plan amendment in 2014.

Employer Mandate's Effect on Cafeteria Plans and Wrap Documents

While much has been written on the employer mandate, and information on cafeteria plans and ERISA wrap documents can

also be easily located, very little addresses what changes need to be made to cafeteria plans and wrap documents in light of the employer mandate. This is probably because employers have significant flexibility in drafting their cafeteria plans and wrap documents, and for this reason, **this should only be viewed as a general guide and not a substitute for carefully reviewing your individual documentation**. Nevertheless, following are highlights of the employer mandate provisions and some considerations on how it might affect your cafeteria plan and/or wrap document:

Employer Mandate Requirement	Cafeteria Plan/Wrap Document Consideration
Employee-only premium should not exceed 9.56% of household income	These documents normally do not express the specific amount paid for premiums, but if the plan expresses a division of costs in terms of percentages (ex: the employer will pay 50% of the employee only premium, with the employee paying the remainder), an amendment will be needed
Coverage should satisfy minimum value requirements	This issue focuses on items that are addressed in the insurance policy
Employees averaging 30 or more hours per week per month should be eligible	These documents must accurately reflect eligibility, so an amendment for this issue is probably needed
Employers can use a monthly assessment or a measurement period assessment to determine eligibility	These documents often express how eligibility is determined, so revisions may be appropriate, although the specifics concerning measurement, administrative, and stability periods may not be needed
Penalties apply based on noncompliance and employees obtaining subsidized exchange coverage	This is an employer issue and not an item that would normally be discussed in the cafeteria plan, wrap, or insurance documents
The establishment of the exchanges triggered required changes to COBRA information	These documents often contain COBRA information that may need to be updated
Recently issued IRS Notice 2014–55 allows cafeteria plans to permit participants (whose elections normally must remain unchanged throughout the plan year) to make midyear election changes to drop employer-provided coverage in favor of exchange coverage.	Since this allowance is optional, it is not permitted unless provided for in the document, but as long as participants are properly notified of their ability to make this election change, the cafeteria plan amendment can occur after a participant's election change, as long as the amendment and the election change occur in the same plan year.

Other Cafeteria Plan Items In general, after making cafeteria plan elections during open enrollment, those elections may not change until the following year, except under several limited circumstances. Changing coverage elections due to an employee obtaining or losing exchange coverage was not one of those permissible circumstances until September 18, 2014, when the IRS advised that a cafeteria plan may permit election changes on this basis. Since cafeteria plans are not required to allow election changes under this circumstance, the cafeteria plan must be amended prior to allowing election changes on this basis.

The IRS created an exception to the generally applicable "use-it-or lose it" rule that requires a forfeiture of unused health FSA amounts. Beginning in 2013, up to $500 of unused health FSA amounts can carry over to the following year. Since this is an optional provision, it must be incorporated into the plan document before it is used. Thus, any employers who allowed unused 2013 amounts to carryover to 2014 should have been amended in 2013, and employers seeking to first use this carryover feature this year must amend their plans before year-end.

As with “carryovers,” the increase in health FSA limits from $2,500 to $2,550 is optional because health FSAs can impose a lower limit. If your health FSA currently phrases its contribution limit as “the maximum amount allowed by law,” then it automatically adopted this higher limit, and it will be important for your employees to be aware of this. If your company already completed its open enrollment, and it did not allow elections of greater than $2,500, it may need to amend its plan if its limit is phrased as allowing the maximum contributions permitted by law. If your health FSA phrased its contribution limits by specifically setting it at $2,500, then that is the applicable limit for your plan until it is amended.

Penalties

As you may have heard, a failure to comply with the employer mandate can trigger penalties (expressed annually) of $2,000 per employee (with a permitted reduction) or $3,000 per affected employee, depending on the failure.

If an employer allows employees to pay premiums through pretax payroll deduction without having a valid, written cafeteria plan in place and operating the arrangement properly, that employer will have failed to properly withhold and remit the appropriate amount of employment and income taxes. An employer who allows employees to change elections, or carryover unused health FSA amounts, or elect benefits of up to $2,550 without properly amending the cafeteria plan to permit those options risks being found to not have a proper cafeteria plan document in place.

If an employer that is subject to ERISA (generally, all employers other than governments and churches) fails to include the required ERISA language in their documentation, the individuals with authority may be personally liable for Department of Labor penalties and potential claims by participants and beneficiaries. Failing to operate an ERISA plan in accordance with the specific terms of the document will generally result in similar liabilities.

If you have a question about the topics discussed above, how another portion of the Affordable Care Act might affect your cafeteria plan or wrap document, or anything else related to employee benefits, please contact the Carlton Fields attorney with whom you usually work, or the author of this Legal News Alert.