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As 2023 Approaches, Something Changes While Another Stays the Same

New Cafeteria Plan Election Changes Allowed Following Fix to "Family Glitch"

On October 11, 2022, the Department of the Treasury and the Internal Revenue Service (IRS) released finalized regulations[*] that revise a previous interpretation of an affordability test for employer-sponsored minimum essential coverage for purposes of premium tax credit eligibility under the Affordable Care Act (ACA).

By way of background, the ACA provides premium tax credits for individuals enrolling in qualified health plan coverage through an ACA Exchange. Eligibility for the premium tax credit was not available for individuals who – among other things – are eligible for employer-based health insurance that was considered affordable (i.e., the required employee contribution for self-only coverage does not exceed 9.5% of the employee's household income[†]). The 2013 interpretation of these eligibility provisions based the affordability text on self-only coverage, meaning if the self-only coverage is affordable to the employee, then that coverage is also affordable for a spouse with whom the employee is filing a joint income tax return and any dependents of the employee who may be eligible to enroll in that employer-based coverage. This "family glitch" effectively rendered those family members ineligible for ACA premium subsidies irrespective of the required employee contribution for *their* coverage or whether their coverage provides minimum value.

The final regulations clarify that, for taxable years beginning in 2023, the affordability test for family members is to be based on the cost of family (rather than employee-only) coverage. Based on this revision, employer-sponsored minimum essential coverage is considered affordable for family members if the required employee contribution for *family* coverage is less than 9.5% of household income.

Related guidance[‡] issued by the IRS clarifies that members of an employee's family, who now may be eligible to receive subsidized coverage through the ACA Marketplace, can drop the employer's family coverage to enroll in subsidized Marketplace coverage. Generally, cafeteria plan elections must be irrevocable and made before the first day of the plan year. Plans may allow for mid-year election changes following certain "change in status" events (e.g., termination of employment). Under this guidance, a cafeteria plan sponsor may – at its discretion – amend its cafeteria plans to permit employees to make a mid-year election change from family coverage to self-only coverage for elections made on or after January 1, 2023.

Plan amendments that allow for this mid-year cafeteria plan election change by the end of the plan year in which these election changes are to be allowed; the amendment may be effective retroactively to the first day of that plan year, provided that the cafeteria plan operates in accordance with the guidance under Notice 2022-41. Plan sponsors must notify eligible employees of the changes made under these rules.

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[*] https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-22184.pdf
[†] Indexed for inflation; see https://www.irs.gov/pub/irs-drop/rp-22-34.pdf
[‡] https://www.irs.gov/pub/irs-drop/n-22-41.pdf

For changes to elections made during a plan year beginning on or after January 1, 2023, the plan amendment must be adopted before the last date of the plan year beginning in 2024. As always, we strongly encourage employers and plan sponsors to consult competent legal or benefits counsel for all guidance on how this action applies in their circumstances. As part of the services provided by HealthEquity, you can speak with your HealthEquity contact(s) if you would like assistance or additional information.

The COVID-19 Public Health Emergency Extended

On October 13, 2022, the Department of Health and Human Services (HHS) announced, as was expected, that the Public Health Emergency (PHE) has again been extended for another 90 days.

As a refresher, HHS Secretary Alex Azar II declared a public health emergency retroactive to January 27, 2020, for the entire United States due to the COVID-19 pandemic. Generally, such declarations last for 90 days or until HHS declares that the emergency no longer exists (whichever comes first). HHS may extend the emergency health declaration for additional 90-day periods if the public health emergency continues to exist.

Originally scheduled to expire on April 26, 2020, HHS has renewed these periods at around the end of each 90-day period. This latest 90-day period is currently scheduled to expire on January 11, 2023.

HHS Secretary Xavier Becerra has promised to give a 60-day alert when the PHE period will be allowed to expire. In the meantime, employer plans are still required to cover COVID-19 testing and out-of-network vaccines without cost-sharing, prior authorization, or other medical management requirements[§]. Furthermore, the PHE suspended certain enforcement actions under the Mental Health Parity and Addiction Equity Act (MHPAEA) related to the coverage of COVID-19 testing items and services without cost-sharing, prior authorization, or other medical management requirements.

The extension of the PHE should not be conflated with the ongoing National Emergency, which is currently set to expire February 28, 2023. This national emergency began in March 2020 under President Donald Trump, and the Outbreak Period (during which certain[**] plan and participant deadlines are suspended for up to one year) is calculated as lasting until 60 days after the end of the national emergency. These extensions will end at the end of the Outbreak Period (i.e., 60 days following the declared end of the national emergency) or after any individual person has been eligible for any specific relief for a period of one year.

While the PHE and the national emergency are unrelated, the PHE (currently scheduled to expire in January) is likely to be renewed. As such, it seems similarly unlikely that the national emergency

[§] The Coronavirus Aid, Relief, and Economic Security (CARES) Act requires plans to continue to cover COVID-19 vaccines from in-network providers at no cost as a preventive service.
[**] Some of the key deadlines suspended during the ongoing Outbreak Period are the (1) the extension of the deadline to file, appeal, or request external review of a benefit claim; (2) the extension of COBRA election periods, COBRA premium payment deadline dates, and deadlines for employees/qualified beneficiaries to notify the plan of certain dependent qualifying events or Social Security disability; and (3) extensions of the 30- or 60-day HIPAA special enrollment windows.

period will be determined to have ended prior to its currently scheduled expiration on February 28, 2023

Please note: The CARES Act/Consolidated Appropriations Act 2021 provisions allowing for pre-deductible coverage of telehealth services for people with high-deductible health plans (HDHPs), including ones linked to Health Savings Accounts (HSAs), expire December 31, 2022, unless Congress acts again to extend it.

HealthEquity will continue to monitor agency guidance on these matters and provide updates accordingly.
