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New FSA rules from the IRS: Some Considerations

By Dave Tighe

This past week, the IRS has provided two notices (IRS [Notice 2020-29](#) and IRS [Notice 2020-33](#)) related to health flexible spending accounts and dependent care flexible spending account plans, commonly referred to as health FSAs and DCAP plans. Many employers and employees have been hoping for, or even expecting this type of guidance, which was a relaxation of strict IRS rules related to health FSA and DCAP plans.

Given the current COVID-19 public health emergency, childcare facilities have been shut down for a period of time nationwide. Elective surgeries have been deferred and for some people, may not be rescheduled this year. This means that money employees have set aside in DCAP or health FSA accounts may not be needed this year. Unlike other employee healthcare-related accounts, such as health savings accounts (HSAs), funds deferred into health FSAs and DCAPs have limited rollover capabilities. This new guidance from the IRS is a welcome effort to offer flexibility to these programs and it certainly makes sense in this unprecedented time.

A summary of specific changes can be found [here](#).

However, as an employer, there are a couple of things you should keep in mind.

Communication Plan

If you have a DCAP and/or a Health FSA, and you choose to implement these flexible options for 2020 you will want to take some action to notify your employees. Because these changes can have a significant financial impact on your employees during this unusual time, you may want to consider putting some extra efforts toward educating your employees as to their specific new options. You should also expect to work with your FSA and DCAP administrator(s), if applicable, to coordinate upcoming changes and necessary file feeds. This may be as simple as an email and you may be able to rely on your vendors or broker/consultant to draft communications.

Depending on the needs of your employees, you may feel a more robust communication plan is required. If that is the case, please reach out to the contact below or your Findley consultant and they can help.

Effects on Non-discrimination testing:

In general, employers who sponsor DCAP and Healthcare FSA plans are subject to Cafeteria plan non-discrimination testing under [IRS Code section 125](#). DCAPs are additionally subject to DCAP plan testing under [IRS Code section 129](#). Employers should know that the IRS notices do not suspend non-discrimination testing for the 2020 plan year and employers should be mindful that they still must pass applicable non-discrimination tests in order to maintain tax-qualified benefit plans. If you have already reviewed your current plan year and have passed testing related to IRS codes section 125 and 129, you may need to revisit those tests with updated information.

Particularly for DCAP testing under IRS code section 129, passing the average benefits test can be an annual source of anxiety for some employers. Adding deferral flexibility may change a plan from passing or failing this test in a given year, depending on changes your employees elect.

If you have questions regarding the impact of additional deferral changes on your ability to pass non-discrimination testing, you should reach out to whoever handles your testing annually. This may be your FSA or DCAP administrator or a consultant.

Here at Findley, we offer this type of expertise to our clients. If you should have any questions, please reach out to the Findley consultant you normally work with or Dave Tighe at Dave.Tighe@findley.com or [419.327.4194](tel:419.327.4194)

For the actual IRS notices click [here](#)