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Correspondence Memorandum

Date: June 5, 2020

To: Group Insurance Board

From: Renee Walk, Lead Policy Advisor
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Office of Strategic Health Policy

Subject: Cafeteria Plan Change Recommendations

The Department of Employee Trust Funds (ETF) recommends the Group Insurance Board (Board) adopt the following changes to its Section 125 Cafeteria Plan:

1. **Allow limited mid-year election changes for members who have Flexible Spending Accounts (FSAs) effective July 1, 2020 through September 1, 2020;**
2. **Allow limited mid-year election changes for members who have Dependent Day Care Accounts effective July 1, 2020 through September 1, 2020.**

Background

Since the beginning of the COVID-19 pandemic, the federal government has taken several steps to increase the flexibility of benefit programs provided by employers. In April and May, the Internal Revenue Service (IRS) and the Employee Benefits Security Administration (EBSA) released two joint notices allowing greater flexibility for Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage. IRS issued an additional notice that allows employers to make changes to the Section 125 Cafeteria plans that govern all benefits elected pre-tax.

This memo reviews each of the notices issued, discusses the extent to which the Board's programs must comply, and provides recommendations to the Board for how to respond to allow maximum flexibility for employees while still protecting the Trust.

EBSA Disaster Relief Notice 2020-01 and Federal Rule Changes

On April 28, 2020, IRS and EBSA coordinated the release of EBSA Disaster Relief Notice 2020-01. This Notice and the subsequent federal rule change issued by both agencies allows more time for plan administrators to provide benefit statements, annual funding notices, and other notices and disclosures required under the Employee Retirement Income Security Act (ERISA).

Reviewed and approved by Eileen K Mallow, Director, Office of Strategic Health Policy

Eileen K Mallow Electronically Signed 6/17/20

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First, these notices allow employers the option to extend flexible spending account (FSA) claim run-out periods through December 31, 2020. The Board's plan design has a run-out period that extends through March 31, 2020 for the 2019 plan year.

Second, these notices allow broad flexibility for health plan members in responding to COBRA documentation, including extended time to file, perfect, or appeal benefit claims, as well as to pay premiums. Currently, members must file their COBRA continuation application within 60 days from termination of current coverage or within 60 days of the date they were notified by their employer of the right to choose COBRA, whichever is later. If ETF is not notified within 60 days of the date of these two events, the right to COBRA is lost. Members must pay the initial premium payment within 45 days of electing COBRA, or they will be disenrolled. After the initial premium payment, premiums must be paid to the health plan within 30 days of the due date.

Notice 2020-01 states that the Secretary of Labor can "prescribe, by notice or otherwise, a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed" for both FSA and COBRA as long as the presidentially-declared national emergency remains in effect. The notice also recognizes that the national emergency may be lifted from different parts of the country at different times, and that if this is the case, additional guidance will be provided at that time. This means that effectively all notices and action timeframes could be delayed by a period of one year plus 60 days.

IRS Notice 2020-29
On May 12, 2020, the IRS released Notice 2020-29. This notice allows employers to make changes to a Section 125 Cafeteria Plan to allow mid-year elections for 2020 benefit plans. This notice impacts health insurance coverage, FSAs, and dependent daycare accounts. For health insurance, Notice 2020-29 allows employers to permit members to make a new election on a prospective basis, change to a new health plan offered by the same employer on a prospective basis, or drop coverage as long as the employee attests in writing that the employee has health coverage elsewhere. For FSA and dependent daycare accounts, the notice allows employers to permit members to make a new election, decrease a current election, or increase a current election on a prospective basis. The notices do not limit the number of times an employee can add, change, or drop coverage.

This notice applies to all employers offering group health insurance that is paid pre-tax under a Section 125 Cafeteria Plan. The changes allowed by the Notice are optional; employers can choose whether to modify their Cafeteria Plans to allow mid-year changes.

Employer Coverage Change Requests
ETF reviewed potential changes to the FSA, dependent daycare, and health insurance program elections with employers at a June meeting of the Payroll Council, a multi-

agency gathering of payroll professionals. Employers represented at that meeting felt strongly that the FSA and dependent daycare accounts should provide any additional flexibility to employees if possible, in order to help them meet other financial obligations. Employers were less concerned regarding changes to health insurance coverage; they noted that while they generally seek to maximize employee flexibility, none had actually received a request for health insurance changes.

ETF identified several potential internal challenges with properly administering a re-opening of enrollment for health insurance mid-year:

- *Additional workload is hard to anticipate.* The level of response or need for this change is unclear. If the change is limited to active employees, this change will require configuration for employers. If the change was extended to retirees, this could require ETF to hire additional staff to assist with application processing due to the extent of outreach that is often needed with these applications.
- *Substantial staff training would be necessary*. ETF and employers would need to extensively train all member-facing staff to ensure that they are able to communicate the nuances of an additional enrollment period. This time period also overlaps with the upcoming open enrollment period for 2021 and would add more complexity to an already challenging topic to communicate. It is possible that members could accidentally elect changes for 2020, thinking they were doing so for 2021, which could also cause challenges for plan administration.
- *Timing.* As stated in the last point, the timing is challenging given the overlap with open enrollment for next year. It is likely that it would take until mid-July to early August to implement a special enrollment period, which would then be closely followed by the 2021 open enrollment period.
- *Health plan burden*. Any changes to plan enrollment would trigger mailing of new ID cards and other enrollment materials. Mailings may be delayed as offices continue to limit onsite staff due to COVID-19.

ETF does not believe that the same set of challenges exist for FSA and dependent day care election changes, since that work is largely performed by ConnectYourCare (CYC). The primary burden that could exist for employers and CYC is if employees are allowed to decrease elections, since elections can only be decreased to any unspent account balances. Employers and CYC would have to reconcile accounts before decreasing the annual election and/or refunding money.

Options for Changes to the FSA and Dependent Daycare
The Board can adopt certain clauses of the Notices and is not obligated to adapt their Cafeteria Plan for mid-year election changes related to COVID-19. The following options are suggested to the Board:

- **Option 1: No change to the FSA and Dependent Daycare election periods.**
    - **Pros**: There are no additional changes to the benefit program. Administrative work will not be impacted.

   - **Cons**: Participants may have anticipated different medical, vision, and dental expenses than they are experiencing now due to the pandemic, and this may cause either shortfalls or surplus funds for members.
- **Option 2: Limited expansion to allow mid-year election changes for members who have already enrolled in the FSA or dependent daycare accounts.**
   - **Pros:** This option is responsive to members' financial needs. Members who have over-saved can divert unspent funds back to their paychecks to pay other bills. The election change will be prospective, effective the first of the month following the date the employer received the request. There are no additional cost fees to having a limited expansion for mid-year election changes.
   - **Cons:** This option will increase administrative work between employer staff and CYC. A decrease in election will require detailed back-end support between employers and CYC to determine the correct total reimbursement or spent amount. Payroll centers have indicated they understand this burden but agree that it is desirable to allow employees flexibility.
- **Option 3: Unlimited Expansion for Mid-Year Changes Through 2020**
   - **Pros:** This option would permit participants to make an election change at any point and in whatever way they choose. This would allow maximum flexibility for any member to come in or out of the FSA or dependent daycare programs.
   - **Cons**: Choosing this option will be significantly burdensome for employer staff. This could also create risk for employees if they do not fully understand how the FSA is funded or their liability for spent funds if they come and go throughout the year.

ETF recommends Option 2, to provide a limited expansion of election opportunities for the FSA and dependent daycare account programs to reduce or increase 2020 annual elections. This limited option would not allow employees to add new coverage. Participants would have a one-time opportunity to make an election change effective July 1, 2020 through September 1, 2020. Participants could not reduce their annual election below any amount they have already spent in 2020. The goal is to help participants limit financial liability and increase liquidity.

As mentioned above, these rules also allow the Board to extend the claim run-out period for 2019. ETF does not recommend adopting this change for the following reasons:

- *Administrative Challenges:* This would require extensive coordination between CYC and Total Administrative Services Corporation (TASC) to manage retroactive carryover balances that have already been transferred. CYC currently does not have any record of 2019 claims data to substantiate expenses. CYC, ETF, and employers all will not have enough staff to accommodate changes to the claim run-out period. This will cause substantial coordination needs between multiple vendors, one of which is no longer under

contract, at the same time that ETF, CYC, and employers are gearing up for the 2021 open enrollment period.
- *Cost:* Implementing an extended run-out period will incur a fee from CYC to reverse FSA carryover balances that have already been transferred from TASC. The minimum estimated cost for CYC to reverse carryover balances is estimated to be $15,000. Since the Board no longer has a contract with TASC, there may also be a fee to reprocess.
- *Limited Member Impact:* ETF has received relatively few requests to extend the ability of members to retroactively receive reimbursement for 2019 claims. Further, this would not create any additional opportunity to offset 2020 costs; the runout period is still limited to expenses incurred in 2019.

The Notices also allow for an extension of the time period for members to elect COBRA for FSA accounts. ETF does not recommend these changes for similar reasons to those described for the health insurance COBRA section below.

Enrollment Opportunity Changes for Health Insurance
The Notices described above allow for a potentially broad array of changes related to health plan enrollment. If the Board were to follow the allowed changes from Notice 2020-29, the Board could theoretically offer a continuous enrollment period from now through the end of 2020. While on its face, a change to allow broad health insurance enrollment flexibility may seem positive, ETF is concerned about the potential ramifications to coverage continuity if the Board does change the Cafeteria Plan to allow mid-year health insurance elections.

Also, the number of people who would potentially benefit from any mid-year change opportunity is likely very small. ETF queried available employee data to determine how many employees were eligible for health insurance coverage that did not elect coverage. Approximately 5% of state employees, or around 7,000 employees, have not elected health insurance through their employer. As mentioned in the May COVID-19 memo, ETF is not able to tell whether any of these people have other coverage, but given the Affordable Care Act's push for coverage, it is likely that the number of people who are not insured at all is extremely low.

In addition, any employee that is on a spouse's plan and loses that coverage because the spouse loses coverage will already have a mid-year enrollment opportunity. Therefore, the number of people who would need to take advantage of a health insurance enrollment change at this time is likely very small.

As mentioned earlier, the administrative burden to create this opportunity could be significant. In addition to regular enrollment processes, ETF and employers would need to establish a means of collecting and processing the written attestations for members who choose to drop coverage if the Board opted to allow this change for 2020.

ETF provides the following options for the Board to consider regarding changes to the health insurance enrollment portion of the Section 125 Cafeteria Plan:

- **Option 1: No change.** Do not adjust the Cafeteria Plan to allow mid-year enrollment changes in 2020.
    - **Pros:** Making no change could protect members from opting out of the Board's programs or changing health plans and causing coverage issues later if their provider networks change or the coverage they move to is not as robust. Changing plans mid-year could also lead to continuity of care issues if a member has treatment in progress. The indicated need for this flexibility from employers is very low, and individuals who lose other coverage already have an opportunity to join the program. No system changes would be required in this scenario.
    - **Cons:** This option could miss the small number of members who would want to add coverage and have not taken the opt-out incentive which would potentially bar them from opting back in to the program.

- **Option 2: Add a limited enrollment opportunity.** The Board could open a limited opportunity, similar to a special enrollment period, and limit the allowable changes to only new coverage or changing health plans.
    - **Pros:** This would be somewhat responsive to the perceived possible need, but would limit the potential for members to make harmful choices like dropping coverage without adequate other coverage. Limiting the frequency of changes could mitigate some of the administrative issues noted above.
    - **Cons:** Issues still exist with members moving between health plans and inadvertently getting out of network care. Members could also move to a high-deductible health plan to take advantage of lower premiums, but may not be able to adequately fund the health savings account and would then be financially vulnerable should they need services. This option still presents system burdens for employers and ETF to create the limited enrollment period. There are also concerns about how to determine whether an employee received the opt-out incentive, which bars them from having coverage within the same year under current state law. This is all in the context that ETF is aware of no current employee requests for this option.

- **Option 3: Create an expansive and general mid-year enrollment opportunity through the end of 2020.** The Board could take advantage of all options provided for in the Notices and expand enrollment changes broadly through the end of the calendar year.
    - **Pros:** This option would provide the broadest flexibility to employees should they need or wish to change coverage.
    - **Cons:** All of the issues listed in Option 2 apply, plus the potential for confusion related to crossover with the regular open enrollment period.

There would also be a more substantial employer and ETF burden to manage application changes.

ETF recommends Option 1, maintaining the status quo and not offering any changes to the Cafeteria Plan enrollment opportunities for 2020. There has not been a substantial member request for relief, and even the potential number of eligible members is small.

Notice 2020-01 and the updated federal rule also allow extended timelines for COBRA continuation notifications and premium payments for health insurance elections. ETF does not recommend changing policy to allow for the additional timeline. ETF has received no requests for cases of pended COBRA notifications or premium payments due to the pandemic.

There is also a significant concern about the impact of creating a situation where members might not be able to pay insurance premiums for over a year but claims could be paid. As written, the rule would allow employers to disregard a period of up to 14 months before COBRA elections are submitted. During the usual disregard period, health plans typically cannot deny coverage of benefits. All premiums would be due at the end of the disregard period, which would be potentially thousands of dollars owed, presumably for a member who has been underemployed following loss of work and employer-based health coverage. That member would either have to pay the full premiums at that time, negotiate a payment plan with the health plan, or would have any claims incurred during that time re-processed and would be responsible for the full cost out of pocket. Either situation would put members at financial risk, and ETF does not recommend moving forward with changes to COBRA policy at this time.

If an employer is unable to provide notice timely due to the pandemic and disruption to business services, or if a member is delayed in returning paperwork or payment, ETF would instead work with members on a case-by-case basis to facilitate coverage as appropriate.

Staff will be available at the Board meeting to answer any questions.