MID-YEAR ELECTION CHEAT SHEET

Cafeteria Plans must follow the general principle that participant elections are irrevocable for the period of coverage (generally for the plan year). However, the IRS has recognized certain exceptions to the irrevocability rule — often referred to as mid-year election changes.

Below is a table that shows the events giving rise to possible mid-year election changes. Note that a Cafeteria Plan may be drafted to prohibit or allow all mid-year elections changes. Therefore, the plan document, more than IRS regulations, will determine if the event is a permissible mid-year election change. Often the cafeteria plan document will contain catch-all language allowing all changes permitted under the cafeteria plan regulations, but verify the cafeteria plan language when considering a mid-year election change.

<table>
<thead>
<tr>
<th>Events Permitting Election Change</th>
<th>Applicable Benefit Election</th>
<th>Notes/Examples</th>
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</thead>
<tbody>
<tr>
<td>1. Change in Status</td>
<td>Applies to elections for all qualified benefits (e.g., health coverage, health FSA and DCAP benefits) with the exception of changes in status resulting in a reduction in hours even if the change doesn’t impact plan eligibility.</td>
<td>• Employee has a baby; can modify pre-tax election to add family coverage • Employee gets divorced; can modify pre-tax election from employee and spouse coverage to employee-only coverage • Dependent child turns 26 and is no longer eligible for coverage; employee can modify pre-tax election to drop dependent’s coverage • Employee changes to part-time position and is no longer eligible for plan; can modify pre-tax election for coverage (to drop coverage) • Note that changes in employment status must affect eligibility for the plan (i.e., dropping from a 40hr/week position to 32 hr/week position would not justify a pre-tax election change if eligibility for the plan isn’t</td>
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<tr>
<td>Impact Plan Eligibility</td>
<td>Affected</td>
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<td>------------------------</td>
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<tr>
<td>(employee can drop coverage to enroll in Exchange or other MEC plan)</td>
<td>• Financial hardship alone will not justify an election change (i.e., moving from a high paid position to a lower paid position)</td>
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<td>• Change in dependent status (becomes eligible or ceases to satisfy eligibility req.)</td>
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<td>• Change in residence that impacts eligibility under the plan</td>
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<tr>
<td>• Commencement or termination of adoption</td>
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</tbody>
</table>

2. Cost Changes With Automatic Increase/Decreases in Elective Contributions. For example, a change in premium during the plan year.

<table>
<thead>
<tr>
<th>Applies to elections for all qualified benefits except health FSAs.</th>
<th>Allows participants to change their election amount to correspond with cost adjustments due to benefit changes in the plan</th>
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<tbody>
<tr>
<td>• Allows mid-year election changes on account of a cost change with automatic increases/decreases in election contributions (e.g., employer changes benefits or contribution mid-year).</td>
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</tbody>
</table>

3. Significant Cost Change. Allows participants to make a mid-year corresponding and prospective election change (broader than item 2 and may include add/drop due to a significant cost change).

<table>
<thead>
<tr>
<th>Applies to elections for all qualified benefits except health FSAs.</th>
<th>Election may be dropped if there is a significant cost increase and no similar coverage is available. The concept of similar coverage is somewhat complex. Please see the FAQ for further information on similar coverage.</th>
</tr>
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<tbody>
<tr>
<td>• Election may be added if there is a significant cost decrease and participant previously did not enroll due to cost (note that the underlying health plan must allow the mid-year enrollment also).</td>
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<tr>
<td>• IRS provides little guidance on what</td>
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</table>
is considered “significant.” Generally, the plan will have to use its judgment to determine whether a cost change is significant. See FAQ.

<table>
<thead>
<tr>
<th>4. Significant Coverage Curtailment. (With or without loss of coverage)</th>
<th>Applies to elections for all qualified benefits except health FSAs.</th>
<th>Employee can make an election change to choose alternative similar coverage or, if unavailable, to drop coverage altogether. Coverage curtailment includes: significant increases in cost-sharing. Coverage curtailment resulting in a loss of coverage includes elimination of a benefit package, HMO ceasing in area of residence, substantial decrease in providers, or a reduction in benefits for specific type of medical condition being received by the employee.</th>
</tr>
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<tbody>
<tr>
<td>5. Addition or Significant Improvement of Benefit Package Option.</td>
<td>Applies to elections for all qualified benefits except health FSAs.</td>
<td>If a plan adds a new benefit package option or other coverage option is significantly improved during a period of coverage, then the employee may change their election to add the new coverage.</td>
</tr>
<tr>
<td>6. Change in Coverage Under Other Employer Plan.</td>
<td>Applies to elections for all qualified benefits except health FSAs.</td>
<td>• <em>Open Enrollment Under Other Employer Plan/Different Plan Year.</em> Corresponding changes can be made under employer’s plan if employee, spouse, or dependents drop/add during OE of other employer coverage. Avoids the problem with “election lock” where spouses have plans with different plan years. • <em>Other Employer Plan Increases Coverage.</em> Employee may decrease or revoke election for employee, spouse or dependents making election on other employer plan, usually adding other employer coverage. • <em>Other Employer Plan Decreases Coverage.</em> Employee may enroll or increase election (add spouse,</td>
</tr>
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dependents) if spouse, dependents currently on other employer coverage experience a decrease in coverage.

- **Note that none of these are HIPAA special enrollment rights so the plan has the option whether or not to allow individuals on to the plan in these circumstances.**

### 7. Loss of Group Health Coverage Sponsored by Governmental or Educational Institution.

| Applies to elections for all qualified benefits except health FSAs. | Can make election change to come on employer plan. Applies only to loss of coverage for:

  - SCHIP State Children’s Health Insurance Program
  - IHS Indian Health Service or other government tribal coverage.
  - State health benefits risk pool.
  - Foreign government group health plan. |

### 8. HIPAA Special Enrollment Rights.

| Applies to elections for group health plans that are not excepted benefits under HIPAA (usually health FSA, and separately insured dental and vision benefits are considered excepted benefits). A special enrollee is entitled to select any benefit package under the plan, and the plan may not limit the employee’s right to change from one benefit package to another upon special enrollment. | HIPAA special enrollment rights include:

- Loss of coverage under another group health plan or health insurance. See FAQ after this chart for further information on what constitutes health insurance. Permitted for employees and dependents who are otherwise eligible, but had other coverage when previously offered coverage.
- Acquisition of new dependent by marriage, birth or adoption.
- Loss of eligibility for Medicaid or CHIP (permitted 60 days after loss of eligibility to notify the plan)
- Gain eligibility for premium subsidy under Medicaid or CHIP (permitted 60 days after loss of eligibility to notify the plan)
- Allows for **retroactive** changes when notified within 30 days of event for birth, adoption, or placement for adoption. For marriage, coverage must be effective the first of the |
The following are Exchange special enrollment rights:

1. qualified individual or dependent loses minimum essential coverage
2. A qualified individual gains a dependent or becomes a dependent through marriage, birth, adoption, or placement for adoption
3. An individual, who was not previously a citizen, national, or lawfully present individual gains such status
4. A qualified individual’s enrollment or non-enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, or inaction of the Exchange or HHS
5. An enrollee adequately demonstrates to the Exchange that the QHP in which he or she is enrolled substantially violated a material provision of its contract in relation to the enrollee
6. An individual is determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions, regardless of whether such individual is already enrolled in a QHP. (The Exchange must permit individuals whose existing coverage through an eligible employer-sponsored plan will no longer be affordable or provide minimum value for his or her employer’s upcoming plan year to access this special enrollment period prior to the end of his or her coverage through such eligible employer-sponsored plan)
7. A qualified individual or enrollee gains access to new QHPs as a result of a permanent move
8. An Indian may enroll in a QHP or change from one to another one time per month
9. A qualified individual or enrollee demonstrates to the Exchange that the individual meets other exceptional circumstances (as defined by the Exchange)
10. The Exchange determines that a qualified individual or enrollee (or his or her dependent) was not enrolled in QHP coverage, was not enrolled in the QHP selected by the qualified individual or enrollee, or is eligible for but is not receiving advance payments of the premium tax credit or cost-sharing reductions as a result of misconduct by a “non-Exchange entity” (for example, someone fraudulently claiming to be an Exchange-approved agent or broker).

Exchange Open or Special Enrollment Period

Applies to elections for all qualified benefits except health FSAs.

- An employee enrolled in a non-calendar year plan can drop coverage mid-plan year to enroll in an Exchange plan during Exchange open enrollment.
- An employee that has a special enrollment right event can drop calendar or non-calendar year employer coverage to enroll in an Exchange plan.

9. COBRA Qualifying Events.

Applies to elections for group health plans subject to COBRA, including health FSAs.

Employee may increase, decrease, or revoke contributions to corresponding COBRA event.

10. Judgments,

Applies to

A judgment, decree or order resulting in the loss of minimum essential coverage.

Note: HIPAA special enrollment rights in many cases overlap with the change-in-status events.

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<table>
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<tr>
<th>Decrees, or Orders (such as child support orders, including Qualified Medical Child Support Orders “QMSCOs”).</th>
<th>elections for health coverage, including health FSA's from a divorce, legal separation, annulment or change in legal custody that requires accident and health coverage be provided for an employee’s child or foster child permits changes if: • To cancel: order requires the child to be on other plan. • To add: order requires the child to be on employee’s plan.</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. Medicare or Medicaid Entitlement.</td>
<td>Applies to elections for plan’s health coverage, including health FSAs. Corresponding election changes for Medicare/Medicaid entitlement, usually dropping employer plan.</td>
</tr>
<tr>
<td>12. FMLA Leaves of Absences.</td>
<td>Applies to health coverage elections, including health FSAs. Employees are entitled to remain on the plan with the same employer contribution during FMLA leave. The employee can also revoke their election during FMLA leave, and make an election for coverage upon return from leave. If employee chooses to remain on the plan, there are three ways the regulations permit employees to handle their elections • Prepay – may change election to correspond with event. • Pay-as-you-go – may change election to the extent an employee has compensation – balance is after-tax. • Catch-up – may change election to adjust for missed contributions during leave.</td>
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<tr>
<td>13. Changes in Pre-tax HSA Contributions.</td>
<td>Applies to elections to make HSA contributions under a cafeteria plan. IRS Notice 2004-50 concluded that employees may change their HSA elections prospectively anytime.</td>
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</table>

The cafeteria plan and the rules related to the cafeteria plan are distinct from the underlying medical plan and other benefit offerings. As an initial matter, the mid-year change has to be permissible on the underlying plan, usually the major medical plan. For example, in order for an individual to add coverage or add a dependent to the plan mid-
year, the underlying medical plan must allow that change. The only changes a major medical plan is required to permit are those associated with HIPAA special enrollment rights. Other mid-year changes are generally optional for the plan. Be sure to verify that the underlying plan allows the requested change. If it does, then evaluate the cafeteria plan rules to determine if an associated mid-year election change is permissible.

Timing Issues. All mid-year election changes, with exception of HIPAA special enrollment rights, must be made on a prospective basis subject to the consistency rule. The consistency rule generally provides that the request change must make sense in light of the event that allows a mid-year election change. The deadlines by which an individual must notify the plan of an event that justifies a mid-year election change is a matter of plan design. Many plans require that such change requests be made within 30 days, but a plan can allow for a longer period of time.

The term “qualified benefits” used below refers to the benefits available for pre-tax payment/funding under the cafeteria plan.
FAQ

STATUS CHANGE EVENTS

1. **An employee was enrolled in an HDHP but just had a child and wants more comprehensive coverage. What is she allowed to do?**

This event is a status change that is also a HIPAA special enrollment right (birth). She can change her election and move from the HDHP plan to another plan, and can also add her spouse and new baby. Coverage for the baby would be retroactive to the date of birth. This is the one occasion where retroactive election changes are specifically permitted.

2. **An employee is transferred to an office in a different state. Can he make any mid-year election changes?**

Yes — under certain circumstances. The change in status rules allow mid-year election changes when a change in residence affects an employee’s (or dependents’) eligibility for coverage. This is most often the case with HMO coverage where an employee moves out of or into the service area. As with all mid-year election changes, any change must be consistent with the event in question.

COST AND COVERAGE RULES

3. **What if the plan increases the premium in the middle of the plan year?**

Plans are allowed to automatically increase (or reduce) employee contributions to reflect mid-year cost changes. If the cost change is significant, employees might be permitted to change their elections under the guidelines set forth in question 6 below.

4. **What is a “significant cost change” that would allow an employee to change plans or drop coverage?**

There is no direct guidance on what makes a cost change significant. The IRS provides some examples of significant cost changes but also warns they are not to be used as safe harbors. Plan administrators must make decisions based on the facts and circumstances. The percentage dollar increase and actual dollar increase can both be taken into account (a 50% increase to a $5/month dental premium may not be significant, but a 15% increase could significant to a plan with pricey premiums. A significant cost change result from employer action (such as reducing employer contributions) or from employee action (switching to part-time where employer pays a smaller portion of premiums) Note, however, where an employee’s pay decreases, if the employer contribution remains the same, the employee cannot make an election change under the cost and coverage rules. See question 7.
5. When looking at whether an employee can change an election for a significant cost change, the rules allow a change to other “similar coverage” or, if that’s not available, a drop in coverage. What is “similar coverage” for these purposes?

The IRS definition is: “Coverage for the same category of benefits for the same individuals (e.g., family to family or single to single). For example, two plans that provide coverage for major medical are considered to be similar coverage as long as coverage extends to the same people, i.e., employee plus spouse, or family coverage. Note there is no cost component to the definition of similar coverage. If the employer offers “similar coverage”, regardless of the cost, the employee cannot drop coverage altogether. In addition, another employer’s plan can be similar coverage so an employee for whom the cost of coverage increased significantly could enroll in a spouse’s employer plan if that plan provided similar coverage.

6. What if the employee goes from full-time to part-time, the employer contribution toward the premium remained the same, but the employee can no longer afford the premium?

A change in financial circumstance is not itself a permissible mid-year election change event. This is true even in cases of financial hardship.

ADMINISTRATION

7. What if the plan or participant makes an election mistake?

Informal comments by the IRS suggest that mistaken elections can be corrected if there is clear and convincing evidence a mistake has been made. In evaluating mistaken election situations, plan administrators can make determinations on a case-by-case basis, considering the facts and circumstances of each case. Given the lack of clarity in the regulations, plans will have to use judgment in these situations and apply a reasonable person standard to the facts and circumstances. By way of example, where an individual elected a DCAP even though they have no children, the plan should permit the change to remedy the mistaken election.

8. What proof does the plan administer need in order to allow a mid-year election change?

IRS guidance states that “employers may generally rely on an employee's certification” that facts and circumstances of a purported event permit a mid-year election change (and the requested change is consistent with the event); however in some cases it may be prudent to gather documentary evidence supporting an election change request (for example, in the case of a mistaken election, a description of how the error occurred and why a correction was allowed).
All requests for mid-year changes should be documented and retained for at least five years. This can be done electronically pursuant to certain IRS requirements that ensure the security of the data.

9. An employee narrowly missed the plan’s window to make a mid-year election change, can the change still be allowed?

Plans are allowed to set their own time limits for requesting mid-year election changes. The plan documents should specifically note how long a participant has to notify the plan of an event giving rise to a possible mid-year election change. When evaluating mid-year election change requests, the plan administrator should always adhere to the provisions of the plan document. As set forth in the introduction, if a plan prefers a more permissible time line, it should consider allowing participants more than the standard 30 days generally provided in cafeteria plan documents prepared by a TPA.

COVERAGE UNDER ANOTHER EMPLOYER PLAN

10. An employee wants to drop his existing coverage and join a spouse’s plan, but the spouse’s open enrollment period is a couple months after ours. Can the employee make an election change to switch to the spouse’s plan or should they not enroll and go without coverage for two months?

A change in coverage under another employer plan is a permitted mid-year election change event. The employee can make a pre-tax election to pay for employer-sponsored coverage then change the election (drop coverage) when enrolling in the spouse’s plan. This avoids “election lock”: without this rule, employees could never change to a spouse’s plan if the spouse’s plan had a different plan year without paying for dual coverage or going uninsured for some period of time.

FLEXIBLE SPENDING ACCOUNTS AND ELECTION CHANGES

11. If I have a mid-year election change event, can I also change the amount of my FSA election?

In general, FSA election changes are only permitted in the following circumstances:

- Change in status
- COBRA qualifying event
- Judgment, decree or court order
- Medicare/Medicaid entitlement
- FMLA
MEDICARE

12. **An employee is becoming eligible for Medicare this year. Can they change their elections when that occurs or will they have to maintain dual coverage until the next open enrollment?**

The regulations allow an employee to make a mid-year election change to drop the employer plan upon entitlement to Medicare or Medicaid.

FMLA

13. **How does a plan administrator treat employees who take FMLA leave?**

FMLA leave allows an employee to either revoke or continue health coverage. If an employee elects to continue health coverage, employee contributions can be prepaid, “pay-as-you-go,” or paid after returning from leave. If an employee opts to discontinue coverage (or doesn’t pay premiums, depending on the arrangement), the employee upon returning from leave has a right to be reinstated in the plan at the same terms as when leave began.