GBS Compliance

HIPAA Special Enrollment Rights and Section 125 Election Change Events

Group health plans typically provide eligible employees with two regular enrollment opportunities to elect health coverage–an initial enrollment period when an employee first becomes eligible and an annual open enrollment period before the start of each plan year. In addition to these typical enrollment opportunities, group health plans need to be aware of (1) required special enrollment rights under HIPAA and (2) permitted mid-year election change events under IRS Code Section 125.

A goal of the Health Insurance Portability and Accountability Act (HIPAA) is to make health coverage more portable, therefore group health plans are required under HIPAA to provide special enrollment opportunities in certain situations outside a plan's regular enrollment periods.

IRS Code Section 125 allows for participant elections to be made on a pre-tax basis. A tradeoff for the tax advantages of Section 125 is that participants ordinarily cannot make changes to their Section 125 elections during the plan year. However, IRS rules permit employers to allow participants to change their elections during the plan year if certain conditions are met.

Due to the COVID-19 pandemic some of the rules surrounding special enrollment and election change events were modified. For example, as discussed more below, certain time frames were extended for participants to request special enrollment under HIPAA, and Section 125 mid-year election rules were temporarily expanded and relaxed. .

HIPAA Special Enrollment Rights

Special enrollment must be provided in the following situations:

- Loss of eligibility for other health coverage.
- Becoming eligible for state premium assistance.
- The acquisition of a new spouse or dependent by marriage, birth, or adoption.

Special enrollment right due to loss of eligibility for other health coverage. HIPAA requires group health plans to allow special enrollment upon certain losses of coverage under another group health plan, health insurance coverage, Medicaid, or a state Children's Health Insurance Program (CHIP).

A group health plan is required to permit current employees and their dependents to enroll in the plan without regard to the plan's otherwise applicable limitations on enrollment periods if:

- The employee and the dependents are otherwise eligible to enroll in the employer's group health plan,

- When coverage under the plan was previously offered, the employee (or dependent seeking special enrollment) had coverage under another group health plan or health insurance coverage, and
- The employee or dependent lost eligibility for the other coverage as the result of one of three triggers:
  - The coverage was provided under COBRA, and the entire COBRA coverage period was exhausted,
  - The coverage was non-COBRA coverage and the coverage terminated because of loss of eligibility for coverage, or
  - The coverage was non-COBRA coverage and employer contributions for the coverage were terminated.

A group health plan must generally allow at least 30 days after the loss of eligibility of other health coverage. If the loss of eligibility was for Medicaid or CHIP coverage, then the plan must allow for an enrollment period of at least 60 days after the loss of eligibility. Note that the COVID-19 Outbreak Period needs to be disregarded for these 30/60-day periods (see below for more details).

Special enrollment right for becoming eligible for state premium assistance. Special enrollment rights are available if an employee or dependent becomes eligible for a premium assistance subsidy through a Medicaid plan or state CHIP. A group health plan must allow an enrollment period of at least 60 days after eligibility for a premium assistance subsidy is determined. Note again that the COVID-19 Outbreak Period needs to be disregarded for this 60-day period.

Special enrollment right for new spouse or dependent. Group health plans must offer a special enrollment opportunity to newly acquired spouses and dependents of participants and to current employees who acquire a new spouse or dependent. This special enrollment applies if the plan offers dependent coverage, and the new dependent is acquired through marriage, birth, adoption, or placement for adoption. A group health plan must allow an enrollment period of at least 30 days to request enrollment, beginning on the date of the marriage, birth, adoption or placement for adoption (the COVID-19 Outbreak Period needs to be disregarded for this 30-day period).

Additional notes regarding special enrollment rights:

- Special enrollment deadline changes due to COVID-19. The 30-day period (or 60-day period, if applicable) to request special enrollment under HIPAA has been extended by disregarding an Outbreak Period that started on March 1, 2020. Disaster Relief Notice 2021-01 clarified the duration of this relief and the applicable deadlines are extended until the earlier of (a) one year from the date first eligible for relief or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). On the applicable date, the time periods that were disregarded resume.
- HIPAA special enrollment rules apply to group health plans. However, "excepted benefits" are not subject to these special enrollment rules. Excepted benefits include, for example, limited-scope dental/vision benefits, most flexible spending accounts (FSAs), and other benefits that are generally not health coverage.

- HIPAA special enrollment rights do not always apply to all the employee's dependents. For example, under the special enrollment right for acquiring a new dependent, only the employee, spouse and any newly acquired dependents receive special enrollment rights. Other dependents (e.g., siblings of a newborn child) are not entitled to special enrollment rights upon the acquisition of a new dependent. Plans may go beyond what HIPAA requires and allow the employee's other children to be enrolled in addition the employee, spouse and newly acquired dependents, but employers should verify their insurance or stop-loss carrier will allow for special enrollment beyond what HIPAA requires.
- The 30- or 60-day election periods are the minimum required under HIPAA. A plan may go beyond what HIPAA requires and allow for a longer time period to elect coverage under the special enrollment events. Employer should verify their insurance or stop-loss carrier will allow for special enrollment beyond the time periods that HIPAA requires. Also, employers should verify the plan documents are drafted to allow for any expanded election period.
- Retroactive coverage. In general, there is a rule against retroactive election changes. However, if a newborn child, an adopted child, or a child placed for adoption is enrolled within the HIPAA special enrollment period, the child's coverage (and the coverage of any other who can be added under the special enrollment event) must be retroactive to the date of birth, adoption, or placement for adoption.
- Interaction of Section 125 rules and HIPAA special enrollment rules. A Section 125 plan may be designed to permit mid-year election changes that correspond with HIPAA's special enrollment rules (discussed below). This allows participants to pay for their health coverage on a pre-tax basis when they obtain coverage during a special enrollment period. If a Section 125 plan does not allow mid-year election changes for HIPAA special enrollment events, eligible employees and dependents must still be allowed to enroll in health plan coverage under the special enrollment right and will pay their premiums on an after-tax basis. In practice though, for ease of plan administration, most Section 125 plans allow for pre-tax election changes when there is a HIPAA special enrollment event. Participants qualifying for HIPAA special enrollment rights must be able to elect coverage and allowing for coverage to be paid for on a pre-tax basis will be administratively easier than facilitating contributions on an after-tax basis.
- Risks of noncompliance. Failure to comply with HIPAA special enrollment provisions may trigger penalties under IRS Code Section 4980D of $100 per day of noncompliance for each individual to whom a failure relates (subject to certain minimums, maximums, and exceptions). Also, the DOL may bring a civil action to enforce HIPAA requirements. Lastly, because HIPAA special enrollment provisions are a part of ERISA, participants and beneficiaries covered by group health plans subject to ERISA may sue under ERISA Section 502 for violations of the special enrollment rules.

Section 125 Plan Mid-Year Election Changes

IRS Code Section 125 allows for participant elections to be made on a pre-tax basis. A tradeoff for the tax advantages of Section 125 is that participants ordinarily cannot make changes to their Section 125 elections during the plan year (i.e., the "irrevocable election rule"). However, IRS rules permit employers to allow participants to change their elections during the plan year if certain conditions are met.

For an employee to be eligible to change his or her Section 125 plan election during a plan year, the following general rules apply:

- The employee must experience a mid-year election change event recognized by the IRS.
- The Section 125 plan must be drafted to permit a mid-year election change for that event.
- The employee's requested change must be consistent with the mid-year election change event. In general, no election change is allowed unless the event impacts eligibility for the coverage.

List of Permitted Section 125 Election Change Events:

Change in status events. The IRS considers the following events to be changes in status that may permit a mid-year election change. These apply to all qualified benefits including health FSAs. The requested election change must be on account of and correspond with the change in status event.

- *Change in employee's legal marital status* (marriage, death of spouse, divorce, legal separation, and annulment). Both same-sex and opposite-sex legal marital status changes qualify as election change events. Marriage generally will also trigger HIPAA special enrollment rights (see above) which is also another permitted Section 125 election change event (see below).
- *Change in number of dependents* (birth, death, adoption, and placement for adoption). Gaining a dependent by birth, adoption, or placement for adoption generally will also trigger HIPAA special enrollment rights, which is another permitted election change.
- *Change in employment status* of employee, spouse, or dependent (e.g., a termination or commencement of employment) that impacts eligibility under either the underlying benefit or the Section 125 plan will qualify as a change in status event.
- *Dependent satisfies (or ceases to satisfy) dependent eligibility requirements* due to attainment of a certain age, gain or loss of student status, marriage, or any similar circumstance.
- *Change in residence* of employee, spouse, or dependent that impacts eligibility for coverage.
- *Commencement or termination of adoption proceedings* will allow an election change under an adoption assistance program.

Cost or coverage changes. The following cost or coverage change permitted election change events apply to all qualified benefits except health FSAs.

- *Cost change with automatic increase/decrease in elective contributions*. Automatic increases or decreases in employees' contributions may be made for "insignificant" cost changes.

  - IRS regulations provide little guidance as to when a change is insignificant or significant. Employers will need to make that determination based on the facts and circumstances.
  - The cost change may be attributable to the employee (e.g., switching from full-time to part-time while remaining eligible) or by the employer (e.g., reducing or increasing the employer contribution).

- *Significant cost changes*. If the cost for a benefit option significantly increases or decreases, a Section 125 plan may permit employees to make a corresponding change in election.
  - Changes that may be made include:
    - Electing to commence participation in the Section 125 plan for the option with a decrease in cost, or
    - Revoking an election when there is an increase in cost and either: (a) electing coverage under another benefit package option providing similar coverage or (b) dropping coverage if no other benefit package option is available providing similar coverage.
  - Note that "similar coverage" is defined by the IRS as coverage for the same category of benefits for the same individuals (e.g., family to family or single to single). Two plans that provide major medical coverage are considered to be similar coverage regardless if the other coverage is much more expensive. Therefore, the availability of any similar coverage, even at greater expense, would preclude an employee from dropping a coverage election.
  - IRS regulations provide little guidance as to when a change is insignificant or significant. Employers will need to make that determination based on the facts and circumstances.
  - Both employer- and employee-initiated cost changes are recognized.
- *Significant coverage curtailment* (with or without loss of coverage). If an employee, spouse, or dependent has a significant curtailment of coverage under a plan that is:
  - Not a loss of coverage (e.g., significant increase in deductible), the plan may permit the employee to revoke his or her election for that coverage and elect coverage under another benefit package providing similar coverage.
  - A loss of coverage, the plan may permit the employee to revoke his or her election for that coverage and elect coverage under another benefit package option providing similar coverage or to drop coverage if no similar benefit package option is available. A "loss of coverage" means a complete loss of coverage. In addition, a plan may treat a substantial decrease in medical care providers available, a reduction in benefits for a specific medical condition for which treatment is being received, and any other similar fundamental loss as a "loss of coverage."
- *Addition or significant improvement of benefit package option*. A plan may permit eligible employees to revoke their current elections and make new elections for coverage under a new or

improved benefit package option. Employees can elect the new or improved benefit regardless if they previously made an election. The IRS does not define "significant improvement," but the IRS has stated that a decrease in copayments or adding eligibility for same-sex spouses are considered significant improvements in coverage.

- *Change in coverage under other employer plan*. A plan may permit an employee to make an election change that is on account of, and corresponds with, a change made under another employer plan if the other plan allows an election change that is permissible under the IRS Section 125 rules or the other plan has a different period of coverage.
- *Loss of group health coverage sponsored by a governmental or educational institution*. A plan may permit an employee to make an election to add coverage under a Section 125 plan for the employee, spouse, or dependent if the employee, spouse, or dependent loses coverage under any group health coverage sponsored by a governmental or educational institution. This includes coverage under a state Children's Health Insurance Program (CHIP). This provision does not apply to health FSAs.

HIPAA special enrollment rights. A plan may permit an employee to revoke an election for coverage and make a new election that corresponds with the special enrollment rights provided under HIPAA (see above). This allows an employee who enrolls during a special enrollment period to pay on a pre-tax basis. The election can include payment for retroactive coverage when the special enrollment right is due to birth, adoption, or placement for adoption. This applies to group health plans that are subject to HIPAA's portability rules. Note that excepted benefits, including most health FSAs, are not subject to HIPAA's portability rules.

COBRA qualifying events (or similar state continuation coverage event). A plan may permit an employee to elect to increase payments under the employer's Section 125 plan in order to pay for continuation coverage for which an employee, spouse, or dependent has become eligible. This applies to group health plans subject to COBRA, including health FSAs.

Judgement, decrees, or orders. A plan may change an employee's election to provide coverage for a child if there is a judgment, decree, or order resulting from a divorce, legal separation, annulment, or change in legal custody that requires health coverage for the employee's child or for a foster child who is a dependent of the employee. A plan may also permit an employee to make an election change to cancel coverage for a child if the order requires the spouse, former spouse, or other individual to provide coverage for the child and that the coverage is in fact provided. This applies to health plan coverage including health FSAs.

Medicare or Medicaid entitlement. If an employee, spouse, or dependent becomes entitled to coverage under Medicare or Medicaid, the plan may permit the employee to cancel or reduce coverage of that employee, spouse, or dependent under the health plan. Also, if the employee, spouse, or dependent who had been entitled to Medicare or Medicaid loses eligibility for that coverage, the plan may permit the employee to commence or increase coverage for that employee, spouse, or dependent under the health plan. This applies to health plan coverage including health FSAs.

FMLA leave. An employee taking leave under the federal Family and Medical Leave Act (FMLA) may revoke an existing election of health plan coverage and make another election for the remaining portion of the period of coverage as may be provided for under the FMLA. This applies to health plan coverage including health FSAs.

Reduction in hours of service. A plan may allow an employee to revoke an election if both the following conditions are met (this applies to group health plans that provide minimum essential coverage and does not apply to health FSAs):

- An employee who was reasonably expected to average at least 30 hours of service per week or 130 average hours of service per month has a *change in employment status* so that the employee will reasonably be expected to average less than 30 hours of service per week or 130 average hours of service per month after the change (even if that reduction does *not* result in a loss of eligibility under the group health plan due to the ACA measurement method policy); and
- The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the employee (and any related individuals who cease coverage due to the revocation) in another plan that provides minimum essential coverage. The new coverage must be effective no later than the first day of the second month after the month in which the original coverage is revoked.

Exchange enrollment. A plan may allow an employee to revoke an election if both of the following conditions are met (this applies to group health plans that provide minimum essential coverage and does not apply to health FSAs):

- The employee is eligible for special enrollment in an Exchange plan or the employee wants to enroll in an Exchange plan during the Exchange's annual open enrollment period; and
- The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the employee (and any related individuals who cease coverage due to the revocation) in an Exchange plan. The Exchange coverage must be effective beginning no later than the day immediately following the last day of the original coverage that is revoked.

Additional notes regarding Section 125 mid-year election changes:

- An employee's mid-year election change generally must be effective prospectively. The only exception to this rule is for retroactive election changes that are permissible under the HIPAA special enrollment event for birth, adoption, or placement for adoption.
- Time limits for employees requesting an election change. Most plans impose a time limit (e.g., 30 or 60 days) on when an election change must be made following a permitted election change event. Such limits are a matter of plan design and are not required under the Section 125 rules.
- Special rule for HSAs. Health savings accounts (HSAs) are commonly offered under a Section 125 plan to allow employees to make HSA contributions as pre-tax salary reductions. The general Section 125 plan irrevocable election rule does not apply to HSA elections. An employee who elects to make pre-tax HSA contributions under a Section 125 plan may start or stop the

election or increase/decrease the election at any time during the plan year, as long as the change is prospective.

- A Section 125 plan is limited to allowing pre-tax election changes only in line with what the IRS rules allow and may not be more generous that what Section 125 rules allow. On the other hand, Section 125 mid-year election change events are optional, and a plan may choose to prohibit some or all Section 125 mid-year election changes. In practice, most Section 125 plans are drafted to allow for ALL the permitted election change events.
- Risks of noncompliance. The penalties for failing to comply with IRS Code Section 125 requirements can be severe, including the imposition of income taxes against participants, employment taxes against the employer and employee, and potential penalties for failing to withhold and report taxes properly. See below for more details.

Documentation Requirements

In each case, the employer will need to document the special enrollment or mid-year election change request. The documentation may be in paper or electronic form. For a HIPAA special enrollment, the employer should document the specific event triggering the special enrollment right request and the associated enrollment change result. For a Section 125 mid-year election change, the employer should document the permitted election change event and the election change(s) requested.

An employer may generally rely on an employee's paper or electronic certification (i.e., an official document attesting to the change request and supporting circumstances). An employer should have a level of proof showing that an event has occurred and that the enrollment or election change request is permitted for that event. Regulations suggest an employer need not look beyond an employee's certification, unless there is reason to believe the certification is incorrect. Regulations do not provide any content or form requirements for a certification, and therefore the format of the certification is up to the employer's discretion. Below in Appendixes A and B are sample forms for these purposes. Records of special enrollment requests and mid-year election change requests should in general be retained for at least eight years.

Risks of Noncompliance with HIPAA Special Enrollment Rights Provisions and Section 125 Election Change Event Rules

Employers that do not comply with HIPAA's special enrollment provisions may face penalties, excise taxes, and lawsuits.

- Failure to comply with HIPAA special enrollment provisions may trigger penalties under IRS Code Section 4980D of $100 per day of noncompliance for each individual to whom a failure relates (subject to certain minimums, maximums, and exceptions).
- The DOL may bring a civil action to enforce HIPAA requirements.

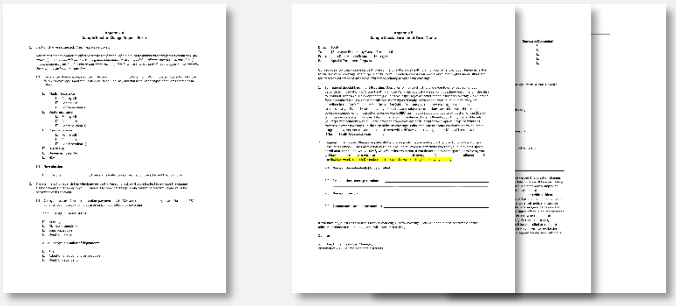
- Because HIPAA special enrollment provisions are a part of ERISA, participants and beneficiaries covered by group health plans subject to ERISA may sue under ERISA Section 502 for violations of the special enrollment rules

The penalties for failing to comply with IRS Code Section 125 requirements can be severe, including the imposition of income taxes against participants, employment taxes against the employer and employee, and potential penalties for failing to withhold and report taxes properly. Under IRS Section 125 rules, errors that cause a Section 125 plan to operate in a way that is inconsistent with its terms or with the requirements of the IRS rules may even cause the IRS to treat the Section 125 plan as if it did not exist, that is, disqualify the plan and impose on the employer employment tax withholding liability and penalties for all employee pre-tax and elective employer contributions. Also, employees could be required to pay employment and income taxes and penalties on their pre-tax and elective employer contributions.

If there has been a mistake in the administration of election changes or special enrollments, the general rule of thumb is to correct the mistake so that the plan and the participants are put back into the position they would have been in had the mistake never occurred. Reasonable good faith efforts to bring a plan into prospective compliance while doing whatever is possible to reverse past errors will put a plan in the best position to request reduced penalties.

Links and Resources

- Federal regulations regarding HIPAA special enrollment rights.
- IRS regulations on Section 125 mid-year election changes.
- IRS Notice 2014-55 - expanded the mid-year election change rules in response to the ACA.
- IRS Notice 2004-50 - explains that the irrevocable election rules for cafeteria plans do not apply to HSAs.
- IRS Notice 2021-15 and IRS Notice 2020-29 - temporarily expand the mid-year election change rules in response to COVID-19.



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Appendix A - Sample Election Change Request Form

Appendix B - Sample Enrollment Form Memo

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