Q&A from Assurex Global Webinar "Section 125"	June 22, 2017
Question	**Answer**
Are the requirements the same if you are non-ERISA?	§125 rules are separate from ERISA. §125 rules must be followed for all benefits run through a cafeteria plan (allowing employee contributions to be handled on a pre-tax basis). While many of the benefits run through a cafeteria plan may be subject to ERISA, a cafeteria plan itself is not subject to ERISA.
So I think what I heard you to say is that if an employee is in a PPO plan with a FSA, they can't transition to a High deductible plan with an HSA...correct?	Employees who make an election for a general-purpose health FSA are ineligible to contribute to an HSA for the entire health FSA plan year, regardless of whether health FSA funds are exhausted. This can be extended further by any applicable grace period or carryover. Therefore, while an individual could move from a PPO plan to an HDHP, the individual would not be eligible to begin contributing to an HSA until at least the end of the health FSA plan year.
With a change in residence that does not constitute a change in plan availability, would an employee be able to add Dependent Care FSA becuase they no longer have access to child care with their move? Thanks in advance.	Generally, yes. There is more flexibility to make changes for DCAPs than for other benefit elections under a cafeteria plan. The permitted election change events that apply to DCAPs fall into the following broad categories: • Change in status. For DCAP purposes, various changes in status may justify a midyear DCAP election change. A special consistency rule for DCAPs allows election changes that are on account of, and correspond with, a change in status that affects eligibility of dependent care expenses for the Code §129 tax exclusion. • Change in cost and coverage. Under these rules, certain changes in cost and coverage of the DCAP will justify a midyear change in election. When there is a change in the cost of a dependent care provider, or when a participant changes dependent care providers, a plan usually can permit a midyear change in election. • FMLA. Employees who take FMLA leave are entitled to revoke elections of non-health benefits (such as a DCAP) under a cafeteria plan to the same extent as employees taking non-FMLA leave. And certain reinstatement rules apply on return from FMLA leave. Keep in mind, the rules set forth what is permitted and do not require employers to allow changes. Therefore, whether or not the change is actually allowed under the plan and required timeframes for such a request will depend upon plan design (language in the cafeteria plan document).
If someone wants to cancel their health insurance mid-year for the sole reason that it is too expensive, are you saying you have to tell them no, you can't drop your coverage because you think it is too	Yes, that's right. Without a corresponding change in status allowing a mid-year election change under §125 rules (simply deciding the coverage is too expensive is not a recognized change in status), the employer could jeopardize the status of the cafeteria plan by allowing a change in elections.

so you can't have a person on FMLA leave pre-pay into a new calendar year..	For employers offering the pre-pay option, guidance clearly prohibits pre-paying for coverage on a pre-tax basis when the leave of absence straddles two plan years. It is tied specifically to the benefit plan year (which might be non-calendar), not necessarily the calendar year. In other words, for an August - July plan year, the pre-payments could not be for July thru September.
If an employee is terminated and their benefits end on their last day of employment (including FSA), what's the best way for the employee to understand why they can't get the money if they don't have medical expenses to submit prior to their last day?	A health FSA can only reimburse expenses that are incurred during the coverage period. There are only three types of expenses that a health FSA can reimburse after an employee's coverage terminates: • claims for expenses incurred before the employee's coverage terminates (e.g. on or before the employment termination date) tsubmitted before the end of the run-out period; • if the participant elects COBRA, claims for expenses incurred during the COBRA coverage period and submitted before the end of the run-out period; and • claims incurred during a grace period provided under the plan.
When our employees are out on work comp our work comp insurer pays them and we cannot take their FSA dollars out of the checks. What is the best way to handle that?	Assuming the employee remains eligible for the health FSA while out on leave (e.g. under FMLA or company leave policy)…If the leave is unpaid, FMLA rules provide that an employer can offer the following options to an employee for employee contributions: • pre-pay on a pre-tax basis (this cannot be the sole option), • pay during the leave on an after-tax basis • make up contributions on a pre-tax basis upon return from leave. FMLA requires that the employer provide a 30-day grace period and notification at least 15 days prior to the termination (e.g. if your contribution is not received by XX, your coverage will be terminated). Outside of FMLA, employer's have more flexibility in regard to how to handle payment of the employee contribution, but it may be easier administratively to follow FMLA requirements so that there is uniformity regardless of the type of leave.
If an employee indicates that they made a mistake during Open Enrollment; do we have to allow a grace period (30 days) after Open Enrollment for administrative errors to be corrected for employees	No. There isn't any type of 30-day grace period once the plan year begins, and allowing such changes could potentially violate §125 rules. §125 rules prohibit election changes during the plan year unless there is a recognized change in status. Informal guidance from the IRS indicates a limited ability to make corrections for mistakes...It is generally easy to justify correcting mistakes that are clearly employer administrative errors. On the other hand, it is significantly harder to justify employee mistakes because the IRS worries that it is hard to differentiate an honest employee mistake from one where the employee has simply changed their mind and is using the “mistake” as a way to circumvent the irrevocability rule. Ultimately it is up to the employer to make a decision about correcting the mistake, the risk being that the IRS will not agree with the employer’s approach and rule they have not properly administered the §125 plan, thereby putting its tax-favored status in jeopardy.
And under this example #3 they would not be eligible for COBRA coverage, correct?	Correct. When coverage is terminated due to nonpayment, a COBRA continuation right is not triggered.

Under ACA Related Mid-Year Change- if EE does not enroll in ER's plan during OE (earlier than ACA OE period) with the intention to receive subsidy, but later realize they are not qualify for subsidy, is this a QLE to allow EE to enroll in ER's plan?	No. The ACA-related mid-year election changes allow employees meeting certain criteria to revoke elections for the employer's group health plan to move to other coverage, but not vice versa (not add group health coverage). Unless an event occurs triggering a special enrollment right under HIPAA (loss of coverage, acquisition of a dependent (e.g. marriage or birth), or eligibility for Medicaid or CHIP), the group health plan would not have to allow mid-year enrollment.
Can FSA rollover amount transfer to a HSA?	No. In general, rollovers are allowed only from HSA to HSA, with a one-time exception from a traditional or Roth IRA to an HSA. See Q&A #23 found at https://www.irs.gov/irb/2004-02_IRB/ar09.html#d0e1798 (excerpt below): Q-23. Are rollover contributions to HSAs permitted? A-23. Rollover contributions from Archer MSAs and other HSAs into an HSA are permitted. Rollover contributions need not be in cash. Rollovers are not subject to the annual contribution limits. Rollovers from an IRA, from a health reimbursement arrangement (HRA), or from a health flexible spending arrangement (FSA) to an HSA are not permitted.
If an EE enroll in the FSA with the maximum election through a prior ER, can they also enroll in FSA under a new ER with the max election?	Yes, unless the employers are part of the same controlled group or affiliated service group under §414 rules. If an employee participates in multiple health FSAs maintained by members of the same controlled group or affiliated service group, then salary reductions to the health FSAs are aggregated and a single limit applies (in 2017, only $2600 could be elected in total). In contrast, if the employers are not members of a controlled group or affiliated service group, then the employee may make salary reductions up to the limit ($2600 in 2017) under each employer's health FSA.
With the globalization of our workforce, how do we apply Cafeteria 125 to our global work force?	A cafeteria plan, allowing employee contributions to be handled on a pre-tax basis, is only advantageous to those receiving income subject to taxation in the U.S.
If an employee is eligible for Medicaid or CHIP and enrolls in it, are they allowed to drop the employer paid benefit?	While §125 rules permit an employee to revoke elections mid-year upon enrolling in Medicaid, and to increase elections upon losing Medicaid coverage, the same is not true for enrollment in CHIP. An election change is allowed upon losing CHIP coverage, but is not allowed upon gaining CHIP coverage.
Is there a requirement which indicates how often the 125 Plan Doc needs to be updated?	Once the plan document is executed, it requires updating only when changes are made affecting the content. Any amendments to the plan must be executed prior to the change being made effective.
My employee wants to drop medical coverage because spouse's new employer offers less expensive / better coverage.	§125 rules permit a change in election upon a change in the employment status of a spouse or dependent if the change in status affects plan eligibility (e.g. newly eligible for coverage under a group health plan due to spouse's employment).

Can an employee term coverage at any time under a 125 plan but enroll outside of open enrollment only if there is a qualifying event? Are restrictions on both enrollment and termination?	§125 places restrictions on election changes relating to both enrollment and termination of benefit coverage. §125 rules prohibit reducing or increasing the election amount during the plan year unless there is a recognized change in status. Therefore, even if the group health plan allows coverage to be dropped, §125 rules would not allow a corresponding reduction in election amount unless there was a recognized change in status.
What if a company doesn't a Section 125 plan...?	Without an executed cafeteria plan document in compliance with §125 rules, there is no valid plan allowing for employee contributions to be handled on a pre-tax basis. Technically, if there is no written cafeteria plan document, or the written plan doesn't comply with applicable requirements in regard to content and timing of adoption, then the plan is not valid and employees' elections should be included in gross income.
what would it mean to not offer HSA through cafeteria plan? would that mean it wasnt pretax?	For employer HSA contributions, the rules differ depending upon whether contributions are made through a cafeteria plan or not... • If employer HSA contributions are made outside of a cafeteria plan, the comparability rules require that an employer make the same contribution amount to an HSA (or make a contribution that is the same percentage of the deductible) for all HSA-eligible employees in a given tier (e.g. self-only, or family) in the same non-collectively bargained employee category. These categories include current full-time, current part-time, and former employees. • If contributions are made through a cafeteria plan (and employee contributions are allowed via salary reduction), then the employer has more flexibility to provide different contributions to different employees. However, it would be necessary to consider the §125 nondiscrimination rules with respect to any contribution structure. Such rules prohibit the plan from offering benefits in a way that favors highly compensated individuals, however, benefits are aggregated for purposes of §125 discrimination testing, and therefore differing HSA contributions generally does not matter unless a small employer is involved. For employee contributions, it may be easier for employees to make contributions pre-tax through salary withholding, but employees can achieve the same tax savings result by contributing after-tax and taking an above-the-line deduction when filing a personal tax return.
One question I get all the time is whether an employee can drop off of a beenfit plan without having had a qualifying event. The plan provider generally says yes, but what about the payroll deductions? Can they stop?	Whether the employer and/or carrier will allow individuals to add or drop coverage under a plan (e.g. medical or dental) mid-year is separate from whether or not pre-tax election changes under a cafeteria plan are allowed. Regardless of whether the employer and/or carrier will allow a change in plan coverage, a change in pre-tax elections mid-year is allowed only if there is a recognized change in status under §125 rules. If the employer fails to follow §125 change in status rules, the cafeteria plan may not be considered a qualified plan and any benefits provided through such plan may ultimately lose their tax-favored status.

If an employee elects an amount for a health FSA, and contributed less than they have used, are they eligible for COBRA continuation?	For health FSAs meeting excepted benefit status, COBRA coverage need not be offered to qualified beneficiaries who have "overspent" their accounts as of the date of the qualifying event. COBRA must be offered if the health FSA benefit still available is greater than the COBRA premium due for the remainder of year, but may be cut off at the end of the year in which the qualifying event occurs. Example -- Employee elects $2400 (1/1/17), submits claims totaling $400 (Jan – Apr 2017), and terminates employment (6/15/17). Employee still has $2000 available and COBRA premiums for the remainder of the year would be $1200, so COBRA must be offered ($2000 > $1200).
On the revised slides, it shows FSA limits to $2500 per employee year. Didn't that change to $2600 for 2017?	Yes, $2600 is the annual limit on employee contributions for 2017. The annual limit started at $2500 in 2013 and has increased now to $2600 in 2017.
If employee was eligible for insurance, enrolled in coverage under Section 125 plan, covered for 5 months, then decides to drop to part time, how does that affect their coverage? Can employer remove them from coverage or do you have to allow them to continue coverage?	If the individual is no longer eligible for coverage as a part-time employee under the plan eligibility rules, coverage may be dropped and corresponding pre-tax elections may be changed. However, if the employee is still eligible as a part-time employee under the plan eligibility rules (e.g. employer offers coverage to part-time employees or follows stability period rules), then the employer would have to allow the part-time employee to continue coverage.
Divorced Wife takes the health FSA under COBRA, immediately submits for all claims, employer must advance payment, correct? So paying one month health FSA COBRA could be advantages.	Yes, that's correct. For example, upon termination of employment, an employee has $1200 remaining in the health FSA and would be required to pay $200/month in COBRA premiums to continue. If the former employee elects COBRA for the health FSA and incurs $1200 or more in medical expenses in the first month, the individual could pay $200 for one month, submit the claims for reimbursement, and cancel COBRA prospectively.
Why can't owners of LLC's participate in a 125 pre tax benefit? This would be a 99% sole member owned LLC.	In general, all "common law employees," are able to participate in the cafeteria plan, including its component benefits such as an FSA. However, individuals considered to be self-employed (i.e. a sole proprietor, a partner in a partnership, or a director serving on the corporation's board of directors) or more-than-2% shareholder of an S-Corporation are not considered employees and are not able to participate in tax-favored options such as cafeteria plans (e.g. pre-tax premiums), health FSAs or HRAs.

Is it possible that under our plan an employee would not be able to switch from the lower deductible option to the HDHP option upon having a baby? We were told that they could add the child, but not switch between plans mid year.	The birth of a child triggers a HIPAA special enrollment right allowing the employee, spouse and child to be added to the plan (if not already enrolled). The final regulations clarify that a HIPAA special enrollee is entitled to select any benefit package under the plan when the special enrollment right is triggered. See example #2 from Treas. Reg. §54.9801-6(b)(4). Exactly which plan options are available may depend upon how things are drafted. If it is drafted as one plan with two benefit package options, both options must be made available to HIPAA special enrollees upon the birth of a child. However, it is a little less clear when there are two separate plans, each with one benefit package option. As set forth in EBIA, a resource we often rely upon… "One provision in the regulations states that special enrollees must be permitted to be enrolled for coverage in a benefit package under the terms of the plan. That provision does not explicitly allow a special enrollee to switch from one plan to another. However, another provision in the regulations states that special enrollees must be offered all the benefit packages available to similarly situated individuals who enroll when first eligible, and does not limit the requirement to a benefit package under the terms of the plan. Further guidance on this point would be welcome."
What if my spouse's employer has an open enrollment period mid year? Am I able to terminate benefits to go on his?	§125 rules do allow a mid-year election change on account of a change under another employer's plan, including when the other employer's plan has a different plan year. Therefore a change could be made for medical, dental, vision, etc., but this would NOT allow for a change in health FSA elections.
Should I require documentation verifying the qualifying change reason?	It is common for employers to use an election change form on which employees may indicate the reason for the change. Generally a certification/attestation of the change via an election form is adequate unless there is reason to doubt the change occurred. That being the case, the employer could design the plan to require further documentation so long as the requirements for a change are properly communicated.
If they have the carryover of $500, can they open an HSA once it's spent?	A general purpose health FSA with a carryover may result HSA-ineligibility for the entire next plan year (because the $500 can be used any time during the year), unless funds are exhausted at the end of the plan year and there is nothing to carryover. To avoid this, the employer does have options to allow the employer to waive the carryover, or to make the carryover a limited purpose or post-deductible carryover. I the health FSA carryover is not designed in such a way, the individual is not eligible to contribute to an HSA for any plan year in which a balance is carried over.
Does the match requirement (employer contribution over 500.00) apply to the HSA along withe the FSA?	No. The limitation on employer contributions to maintain excepted benefit status (i.e. the greater of $500 or a match of employee contributions) applies only to health FSAs. There are different rules in regard to HSA contributions.

Clarification requested. If an employee has a 2600 limit and they contribute thier full 2600. the employer can still contribute and add to the balance, for instance we, as the employer, contribute approx $750 per year to our employees.	Yes, that's correct. The $2600 annual limitation (for 2017) is applicable only to employee contributions. There is no dollar limit on employer contributions other than what is required to maintain excepted benefit status (i.e. the greater of $500 or a match of employee contributions). Therefore, if the employee contributes $2600, the employer could contribute an additional $2600 and still maintain excepted beenfit status. However, if the employer would prefer to make a flat dollar contribution to all employees, $500 should be the maximum.
If we are still a small employer, less than 50 employees, are we still required to do the Section 125 testing?	§125 nondiscrimination testing rules generally apply to all employers offering the ability for employees to contribute toward benefits through a cafeteria plan (on a pre-tax basis). Size of the employer doesn't matter. The only exception is for a simple cafeteria plan. A simple cafeteria plan can help an eligible employer that would otherwise have problems meeting applicable nondiscrimination requirements. Basic requirements that must be satisfied under the simple cafeteria plan rules are summarized below: • Employer size. The employer (including certain affiliated entities) must have employed an average of 100 or fewer employees in either of the two preceding years. Special rules apply to new employers and certain growing employers with fewer than 200 employees. • Eligibility. In general, all employees with at least 1,000 hours of service during the preceding plan year (other than certain excludable employees) must be eligible to participate in the plan. Each employee who is eligible to participate must be able to elect any benefit available under the plan (subject to any terms and conditions that apply to all participants). • Required employer contributions. Employees who are not key employees or highly compensated must receive employer contributions of at least (1) 2% of the employee's compensation for the plan year, or (2) the lesser of 6% of the employee's compensation for the plan year or twice the employee's salary reductions.
Are we supposed to provide a copy of the plan, or access to view the plan on a new employee's hiring, or during open enrollment each year? So the EE can read and see the Plan.	§125 (cafeteria) plans are not subject to ERISA and therefore, other than a plan document requirement, is not subject to any specific disclosure requirements. However, the various benefits provided on a tax-favored basis through the cafeteria plan (e.g. medical/dental/vision benefits or health FSA) are subject to ERISA and must therefore provide participants with an SPD describing the source of contributions and the method by which the amount of contributions is calculated, so such SPDs should include general information about the impact of the cafeteria plan rules such as enrollment procedures, irrevocability of elections absence a change in status, and the use-it-or-lose-it rule specific to FSAs. Some employers may choose to prepare a separate document outlining the details of the cafeteria plan, while others may make it part of the SPD for the various benefits being offered under the cafeteria plan.
How often can a person change their HSA contribution throughout the plan year?	If the employer allows for pre-tax HSA contributions through its cafeteria plan, changes to election amounts must be allowed at least monthly.
Question... LTC employee contribution can not be handled on a pre tax basis?	Correct. Premiums for long-term care are not eligible to be run through a cafeteria plan on a pre-tax basis.

Isn't it true that under the ACA once an employee starts paying the reduced amount as a full time rate, they can not be charged as a part rate	Not quite…§4980H requires applicable large employers (50 or more FTEs) to offer minimum value, affordable coverage to full-time employees to avoid potential penalties. While the employer can certainly charge different contribution amounts for different categories of employees (e.g. full-time and part-time), the employer may face penalties under §4980H(b) if the employee is still considered full-time (e.g. due to a stability period), but charged a higher rate which is not affordable.
Does HIPAA special enrollment specify loss of coverage or loss of eligibility for coverage?	To qualify for special enrollment rights due to a loss of coverage, the employee, spouse or dependent must have lost health insurance or other group health plan coverage because— • 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.
What if an employee is demoted and their salary/rate is decreased? Are they then allowed to drop coverage mid-year?	While the individual may be allowed to drop coverage, §125 rules do not recognize this as an event allowing a mid-year change in pre-tax elections, and so payroll deductions would need to continue (therefore not beneficial to drop coverage).
If spouse elects FSA COBRA, what happens to EE? Does EE lose access to account balance? Is EE required to continue payroll deductions?	For COBRA purposes, the full health FSA balance amount would be available to each qualifying beneficiary. For example, if there is $2000 remaining in the health FSA and the monthly premium for COBRA is $200/month...if both employee and spouse elect to continue health FSA coverage via COBRA, each would have access to up to $2000 if choosing COBRA continuation, but each would have to pay the monthly COBRA premium of $200/month.
What about domestic partner's change in cost?	Unless the domestic partner also meets the definition of a tax dependent (which is rare), the domestic partner cannot participate in the cafeteria plan and premiums paid for the coverage of a domestic partner would need to be handled on an after-tax basis, or income would need to be imputed to the employee, at least for federal taxation purposes.
Does an FSA have to be for 12 months. I have 9 month employees who plan to retire in August and want to use 8 mo instead of 12 that last year. Our TPA doesn't encourage this.	§125 regulations require that a plan year must be 12 consecutive months, unless a short plan year is allowed for a valid business purpose (e.g. changing plan year). If the employer uses a short plan year, the $2600 annual maximum on participant contributions must be pro-rated. On the other hand, if there are employees who will only participate for a portion of the regular 12-month plan year, they are still allowed to elect up to $2600, but may only submit claims incurred during the time they are actively participating in the health FSA.

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