

an employee whose coverage has terminated while on FMLA leave to reinstate coverage under a health FSA upon return from FMLA leave. See 29 CFR 825.214(a).

(b) *Uniform Coverage Rule* (1) Q&A-7(b)(2) of § 1.125-2⁴ (the uniform coverage rule) applies during the FMLA leave period as long as the employee continues health coverage. Therefore, regardless of the payment option selected under Q&A-3 of this section, for so long as the employee continues coverage (or for so long as the employer continues the coverage of an employee who fails to make the required contributions as described in Q&A-3(a)(2)(iii) of this section), the full amount of the elected coverage, less any prior reimbursements, must be available to the employee at all times, including the FMLA leave period.

(2)(i) If an employee's coverage under the health FSA terminates while the employee is on FMLA leave, the employee is not entitled to receive reimbursements for claims incurred during the period when the coverage is terminated. If that employee subsequently elects to be reinstated in the health FSA upon return from FMLA leave for the remainder of the plan year, the employee may not retroactively elect health FSA coverage for claims incurred during the period when the coverage was terminated. Further, the employee is not entitled to greater FSA benefits relative to premiums paid than an employee who has been continuously working during the plan year. See 29 CFR 825.216. Therefore, if an employee elects to be reinstated in a health FSA upon return from FMLA leave, the employee's coverage for the remainder of the plan year is equal to the employee's election for the 12-month period of coverage (or such shorter period as provided under § 1.125-2⁵), prorated for the period during the FMLA leave for which no premiums were paid, and reduced by prior reimbursements.

(ii) An employee on FMLA leave has the right to revoke or change elections (e.g., because of changes in family status) under the same terms and conditions that apply to employees participating in the cafeteria plan who are not on FMLA leave. Thus, notwithstanding the rules described in paragraph (b)(2)(i) of this Q&A-6, an employee who returns from FMLA leave may make a new health FSA election for the remainder of the plan year if return

from leave without pay constitutes a change of family status under the employer's cafeteria plan.

(3) The following examples illustrate the rules in this Q&A-6:

Example 1: (a) Employee A elects \$1200 worth of coverage under a calendar year health FSA provided under a cafeteria plan, with an annual premium of \$1200. A is permitted to pay the \$1200 through pre-tax salary reduction amounts of \$100 per month throughout the 12-month period of coverage. A incurs no medical expenses prior to April 1. On April 1, A takes FMLA leave after making three months worth of contributions totalling \$300 (3 months \times \$100 = \$300). The plan does not permit a revocation of election on account of a change in family status. However, pursuant to A's rights under FMLA, A elects to terminate coverage upon going on FMLA leave. Consequently, A makes no premium payments for the months of April, May, and June, and A is not entitled to submit claims or receive reimbursements for expenses incurred during this period. A returns from FMLA leave and elects to be reinstated in the health FSA on July 1.

(b) Under FMLA, A has no greater right to benefits upon reinstatement than if A had been continuously working during the plan year. Therefore, A is reinstated to A's annual election (i.e., \$1200) prorated for the period during the FMLA leave for which no premiums were paid (i.e., reduced for 3 months or $\frac{1}{4}$ of the plan year) less prior reimbursements (i.e., \$0). Consequently, A's coverage for the remainder of the plan year equals \$900. A must also begin making premium payments of \$100 per month for the remainder of the plan year.

Example 2: Assume the same facts as *Example 1* except that A incurs medical expenses totaling \$200 in February and obtains reimbursement of these expenses. The results are the same as in *Example 1*, except that A's coverage for the remainder of the plan year equals \$700.

Example 3: Assume the same facts as *Example 1* except that prior to taking FMLA leave, A elects to continue health FSA coverage during the FMLA leave. The plan permits A (and A elects) to use the catch-up payment option described in Q&A-3 of this section, and as further permitted under the plan, A chooses to repay the \$300 in missed payments on a ratable basis over the remaining six-month period of coverage (i.e., \$50 per month). Thus, A's monthly premium payments for the remainder of the plan year will be \$150 (\$100 + \$50).

Q-7: Are employees entitled to non-health benefits while taking FMLA leave?

A-7: FMLA does not require an employer to maintain an employee's non-health benefits (e.g., life insurance) during FMLA leave. An employee's entitlement to benefits other than group health benefits under a cafeteria plan during a period of FMLA leave is to be determined by the employer's established policy for providing such benefits when the employee is on non-

FMLA leave (paid or unpaid). See 29 CFR 825.209(h). Therefore, an employee who takes FMLA leave is entitled to revoke an election of non-health benefits under a cafeteria plan to the same extent employees taking non-FMLA leave are permitted to revoke elections of non-health benefits under a cafeteria plan. For example, election changes are permitted due to changes of family status or upon enrollment for a new plan year. See § 1.125-2, Q&A-6(c)⁶ and § 1.125-1, Q&A-8.⁷ However, the FMLA regulations provide that, in certain cases, an employer may continue an employee's non-health benefits under the employer's cafeteria plan while the employee is on FMLA leave to ensure that the employer can meet its responsibility to provide equivalent benefits to the employee upon return from unpaid FMLA. If the employer continues an employee's non-health benefits during FMLA leave, the employer is entitled to recoup the costs incurred for paying the employee's share of the premiums during the FMLA leave period. See 29 CFR 825.213(b). In addition, a cafeteria plan must, as required by FMLA, permit an employee whose coverage terminated while on FMLA leave (either by revocation or nonpayment of premiums) to be reinstated in the cafeteria plan on return from FMLA leave. See 29 CFR 825.214(a) and 825.215(d).

Q-8: How may taxpayers rely on these proposed regulations?

A-8: (a) The guidance provided by the questions and answers in this section may be relied upon to comply with provisions of section 125 and will be applied by the Internal Revenue Service in resolving issues arising under cafeteria plans and related Internal Revenue Code sections. If final regulations are more restrictive than the guidance in this section, the regulations will not be applied retroactively. No inference, however, should be drawn regarding issues not expressly raised that may be suggested by a particular question or answer or by the inclusion or exclusion of certain questions.

(b) The Department of Labor has advised the Department of the Treasury, including the Internal Revenue Service, that the provisions of this section are not inconsistent with the provisions of

⁴ Published as a proposed rule at 54 FR 9460 (March 7, 1989).

⁵ Published as a proposed rule at 54 FR 9460 (March 7, 1989).

⁶ Published as a proposed rule at 54 FR 9460 (March 7, 1989).

⁷ Published as a proposed rule at 49 FR 19321 (May 7, 1984).