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Section 125 Election Change Rules and HIPAA Special Enrollments

Compliance Series
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Presenters



Liz Mann, J.D.

Liz Mann is EPIC's internal compliance director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. As a client, you have the option of directly accessing Liz or accessing her traditionally through your account team. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 12 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.



Bob Radecki, Senior Regulatory and Public Policy Analyst

Bob Radecki has over 30 years of experience in the HR and employee benefits industry helping employers deal with difficult benefit and compliance matters. Previously Mr. Radecki founded, and served as President of A.E. Roberts Company, a nationally recognized compliance consulting and training firm. Bob is recognized as a leading expert on a variety of benefit compliance issues including COBRA, FMLA, ERISA and Health Reform. Bob has been the featured speaker at many industry events and conferences and has published several articles concerning employee benefits compliance issues.

Agenda

- Section 125 and HIPAA Special Enrollment background and concepts
- Section 125 Election Change Details
- HIPAA Special Enrollment Details
- Common Election Change Questions



SECTION 125 AND HIPAA SPECIAL ENROLLMENT BACKGROUND AND CONCEPTS

Section 125 Cafeteria Plan Background

- Section 125 was added to the internal revenue code in 1978 – creating Cafeteria Plans
- Tax Free vs. Pre-tax
 - Employers were already allowed to provide many employee benefits to employees on a tax-free basis and can do so without a cafeteria plan
 - Section 125 Cafeteria Plans exist to allow employees to pay for their portion of the cost of employee benefits on a pre-tax basis
- The principal benefit of offering employee benefits through a Section 125 plan are tax savings to the employee and employer by reducing taxable income
 - Employee saves income and payroll taxes
 - Employer saves payroll taxes

Section 125 Election Change Basics

- Section 125 imposes rules on when an employee is allowed to change their pre-tax payroll deduction
- Basic Requirements (IRC §1.125-4)
 - Pre-tax elections are irrevocable for the duration of the plan year and cannot be changed unless it is for a reason permitted under the Code
- The Code indicates what is permitted...not what is required
 - Definition of allowable status changes becomes a plan design consideration
 - The cafeteria plan document is always the ultimate source to determine whether a particular status change is recognized by the plan
 - In practice, most plans are written to allow the majority (if not all) permitted election changes
- Election changes must be effective prospectively – Not retroactively (except for limited exceptions – e.g. birth/adoption)

HIPAA Special Enrollment Background

- Health Insurance Portability and Accountability Act (HIPAA) Passed in 1996
- HIPAA Title I contains special enrollment rights designed to address certain issues in plans that did not allow employees to enroll other than at annual enrollment
- HIPAA Special Enrollment Rights
 - When a HIPAA special enrollment event occurs, plans are **required** to permit mid-year enrollment for the special enrollee(s)
 - Special enrollees must be eligible for the plan and make their request for coverage within the required notification timeframes
- Events that Trigger a HIPAA Special Enrollment Right
 - Loss of other coverage
 - Marriage, birth or adoption
 - Eligibility for Medicaid or CHIP subsidy
- HIPAA special enrollment events also qualify as Section 125 election change events

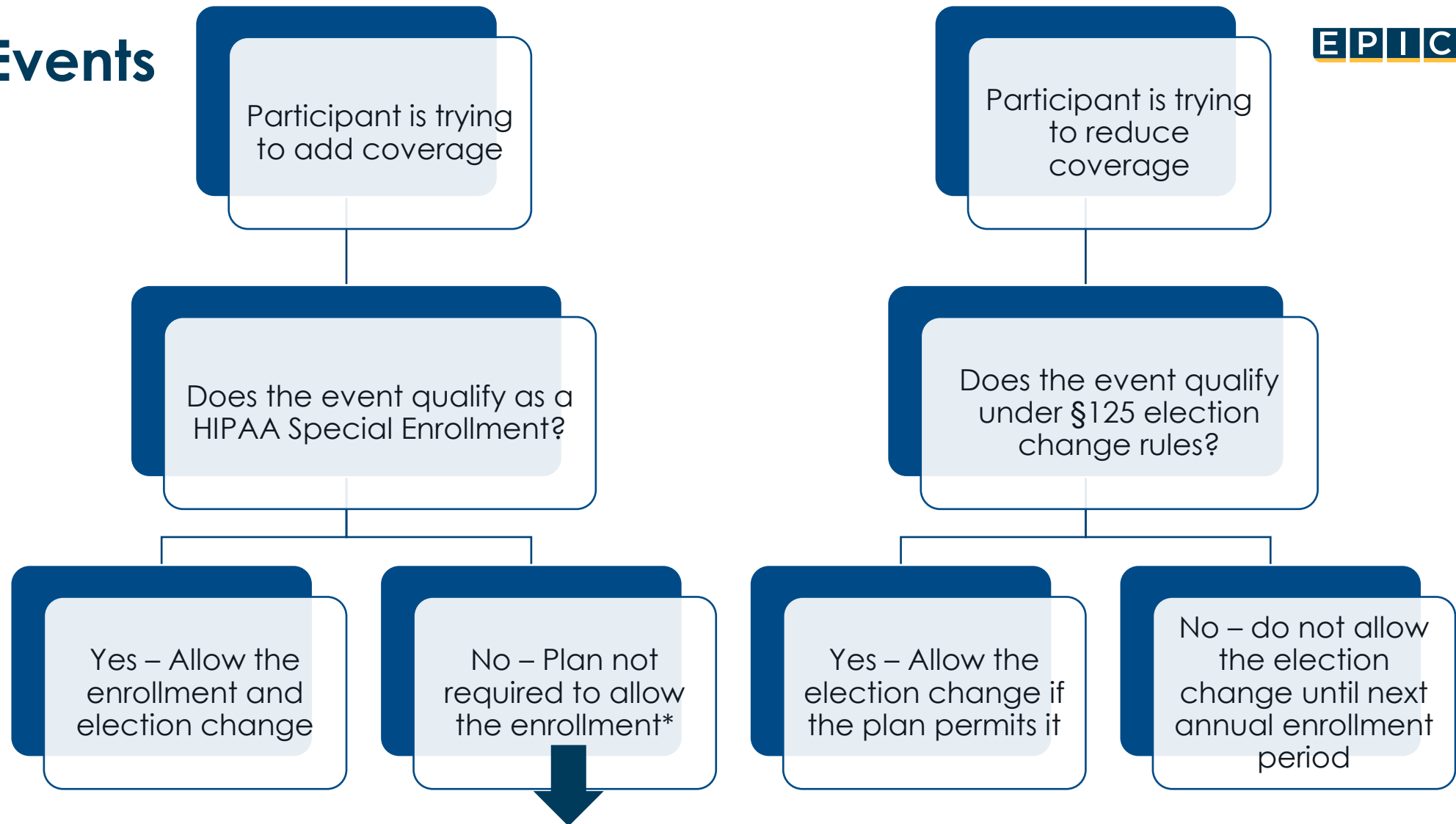
Election Change Events v. HIPAA Special Enrollment

- Section 125 Election Change events permit an individual to make changes to their pre-tax elections (i.e., salary reductions) mid-year
 - Plans may be written to recognize some or all of the permitted events (most do)
 - Plan may set notification timeframes
 - Prospective election changes only, except in the case of birth/adoption
 - Tag-along rule applies to several events

vs.

- HIPAA Special Enrollment events require a plan to allow midyear enrollment
 - HIPAA Special Enrollment events are recognized as Section 125 election change events
 - Must permit at least a 30-day notification timeframe (60 days for loss of Medicaid/CHIP or eligibility for Medicaid/CHIP subsidy)
 - All benefit packages must be available
 - Plan may permit retroactive coverage

Evaluating Events



* Important note – Employers may still allow a coverage addition if the event qualifies as a Section 125 election change – However, since the plan is not required to allow mid-year enrollment (since it is not a HIPAA special enrollment), the carrier, or stop-loss carrier may not allow the addition.



SECTION 125 ELECTION CHANGE DETAILS

Consistency Rule for Election Changes

- General Consistency Rule: Election changes must be consistent with the event
- An election change satisfies the consistency requirement “if the election change is on account of and corresponds with the underlying event”
 - Ex. 1: Divorce permits an employee to make an election change to drop the ex-spouse from coverage.
 - It would not be consistent to also add another dependent to coverage at the same time.
- For Change in Status events, plan eligibility must be impacted by the change
 - Ex. 2: Employee moves to another state (i.e., has a change in residence) but eligibility for the employer’s plan isn’t affected
 - Since eligibility under the plan hasn’t changed, an election change wouldn’t be considered consistent with the event

Change in Status Events

- Includes Six Categories of Events
 - Change in employee's marital status
 - E.g., marriage, divorce, death of spouse, legal separation, and annulment
 - Change in the number of dependents
 - Birth, adoption, placement for adoption, and death
 - Change in employment status
 - Events that change the employment status of the employee, the employee's spouse, or the employee's dependent
 - Dependent satisfies or ceases to satisfy definition of dependent
 - E.g., attainment of a certain age, gain or loss of student status, marriage
 - Change in residence
 - If the change in residence affects the individual's eligibility!
 - Commencement or termination of adoption proceedings
 - Allows for a change in adoption assistance program

Plan Cost or Coverage Changes

- Plan Cost Changes
 - “Insignificant” cost changes
 - Employer can make automatic adjustment of employee’s pre-tax contributions
 - Significant cost changes
 - Employer could allow the employee to make election changes
 - Employer is NOT required to allow employees to make election changes or offer an “open enrollment”
- Coverage Changes to Employers Plan
 - Significant curtailment of benefit or loss of benefit option
 - Significant expansion of benefit or addition of benefit option
 - Employer could allow the employee to make election changes
 - Employer is NOT required to allow employees to make election changes or offer an “open enrollment”
- Change in coverage under another employer’s plan
 - (e.g., change in coverage to spouse’s plan or different open enrollment period)

Other Permitted Election Changes (Cont.)

- ACA Related Mid-Year Election Change Opportunity
 - Special rule allows one mid-year election change to discontinue coverage through an employer-sponsored plan in order to secure coverage through an Exchange occurs when the employee has a special or open enrollment period for the Exchange
 - Employee must actually intend to enroll in the Exchange
 - Reverse isn't true – more expensive Exchange coverage does not permit an employee to join employer's plan mid-year
 - Second rule allows a mid-year election change to discontinue coverage upon a reduction in hours, if the employee intends to enroll in other minimum essential coverage
 - This applies even if employee doesn't lose eligibility for employer's plan as a result of the reduction in hours
- Plan amendment is necessary if employer wants to recognize these permissible events

Other Permitted Election Changes (Cont.)

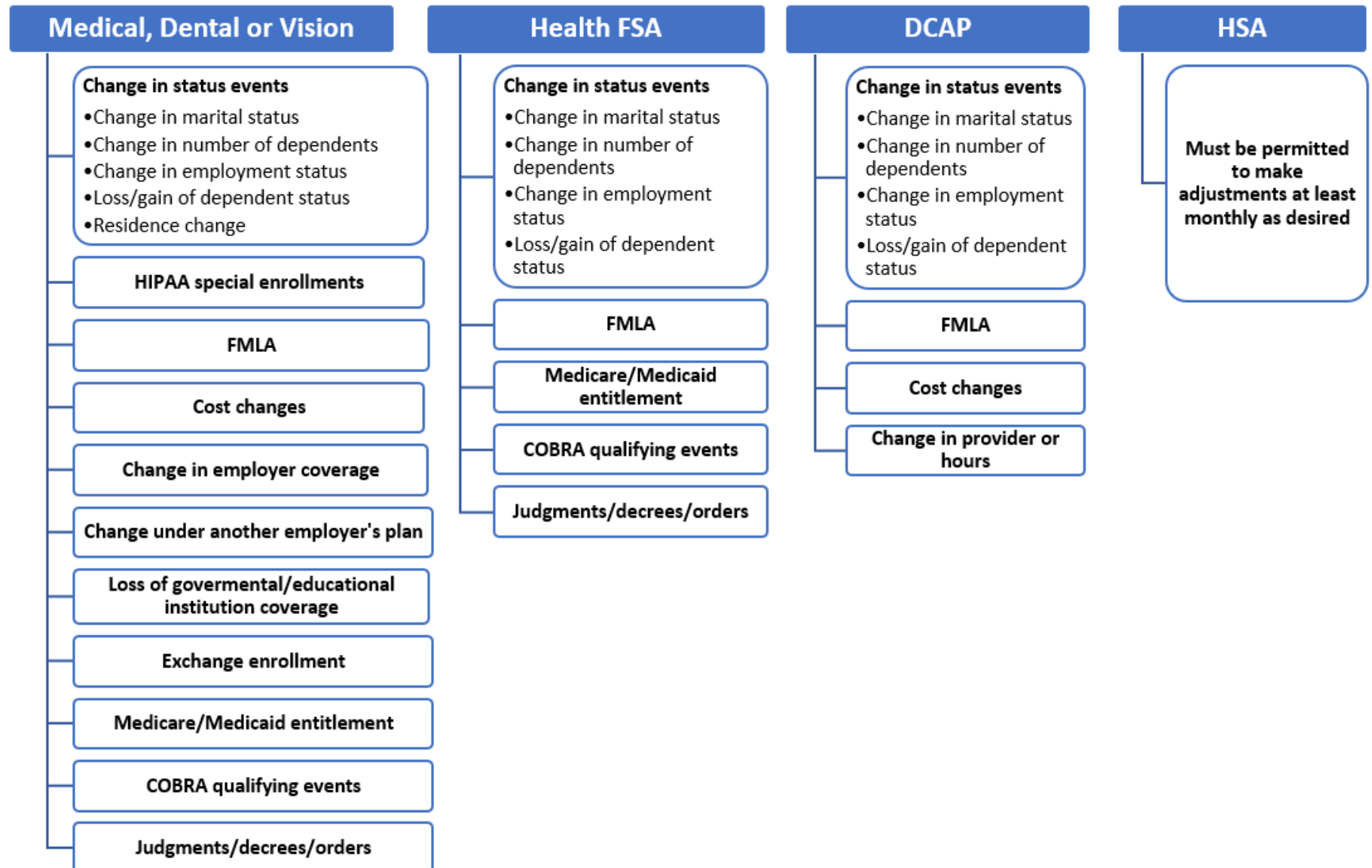
- Other Events That Permit Election Changes
 - Judgments, decrees or orders
 - Medicare or Medicaid entitlement
 - Loss of group health coverage sponsored by a governmental or educational institution
 - FMLA leave of absence
 - COBRA qualifying events
 - **HIPAA special enrollment events**

Special Considerations for Different Benefits

- Important to look at which benefit the employee wants to change
- Rules are different for some benefits
 - Health FSA election changes
 - Not all events allow the participant to make changes to the amount of health FSA elections
 - DCAPs
 - There tends to be more flexibility regarding the ability to make election changes
 - Special rule for HSA elections
 - If HSAs are offered through a cafeteria plan, employees must be allowed to make pre-tax payroll contributions to their HSA account
 - Employer must allow employees to change HSA contributions on at least a monthly basis

Section 125 Election Changes by Benefit

- Note that allowed election change events differ by type of benefit



Tag-Along Rule

- Allows other eligible individuals to be added to plan when spouse or dependent gains eligibility as a result of a recognized election change event
 - Ex. Employee married with a child but has elected self-only coverage. Employee and spouse adopt new child. Employee may make an election change to increase to family coverage, adding new child, spouse and first child to plan at the same time.
- This rule is based on examples in the regulations – not specifically recognized in the regulations themselves



HIPAA SPECIAL ENROLLMENT DETAILS

HIPAA Special Enrollment Rights

- Events that Trigger a HIPAA Special Enrollment Right
 - Loss of other coverage
 - Marriage, birth or adoption
 - Eligibility for Medicaid or CHIP subsidy
- Notice Requirements
 - Provides those who are eligible for coverage information about what events may trigger a HIPAA special enrollment right and how to request special enrollment
 - Must be provided to all eligible employees at or before the time the employee is eligible to enroll in the group health plan
 - Delivered by hand, by mail, or electronically in accordance with the DOL safe harbor
 - Often included as part of the enrollment packet
 - Information about special enrollment rights should also be in the summary plan description (SPD)
 - Model notice - <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-c.pdf>

Loss of Coverage

- Loss of Coverage
 - Includes loss of coverage under a group health plan, individual health plan, Medicaid or CHIP
 - Does not include loss of coverage under TRICARE or Medicare
 - Loss of coverage
 - Loss of eligibility
 - Termination of employer contributions
 - Reaching the participant's COBRA maximum coverage period
 - Does not include voluntarily terminating COBRA coverage
 - Voluntary termination of coverage, including terminating COBRA early, terminations due to fraud, reductions in benefits, or an increase in the cost of benefits does not trigger a HIPAA special enrollment

Loss of Coverage – General Requirements

- Notification Timeframe
 - Request for enrollment must be made within 30 days of the date of the loss of coverage (60 days for loss of Medicaid/CHIP coverage)
 - Employers can choose to be more generous subject to carrier approval
- Effective Date of Coverage
 - Coverage must be effective no later than the 1st of the month following the date the special enrollment request is received
 - If coverage is made effective retroactively (e.g. to coincide with the date of the loss of coverage), retroactive employee contributions should be after-tax as §125 rules require prospective election changes to pre-tax contributions

Loss of Coverage – Special Enrollees

- Special Enrollees upon Loss of Coverage
 - If employee loses coverage, employee and all eligible dependents are special enrollees
 - If a dependent loses coverage, employee and eligible dependent(s) who lost coverage are special enrollees
- Dependents include the following (assuming they are eligible under the plan):
 - Spouses (opposite- and same-sex)
 - Domestic partners
 - Children of spouses or domestic partners
 - Parents
 - Stepchildren

Marriage, Birth, or Adoption – General Requirements



- Events
 - Marriage
 - Does not include domestic partnerships, civil unions, or other relationships that are not a legal marriage
 - Birth, Adoption or Placement for Adoption
- Notification Timeframe
 - Request for enrollment must be made within 30 days of the date of the marriage, birth, or adoption
 - Employers can choose to be more generous subject to carrier approval
- Effective Date of Coverage
 - Coverage in the case of marriage must be effective no later than the 1st of the month following the date the special enrollment request is received
 - If coverage is made effective retroactively (e.g. to coincide with the date of marriage), retroactive employee contributions should be after-tax as §125 rules require prospective election changes to pre-tax contributions
 - Coverage in the case of birth/adoption must be made effective back to the date of birth/adoption
 - §125 rules allow retroactive pre-tax election changes for a birth/adoption (an exception to the general rule)

Marriage, Birth, or Adoption – Special Enrollees

- In General
 - Employee, spouse and newly acquired child dependent(s) who are eligible under the plan
 - Only child dependents **newly acquired** as a result of the marriage, birth, or adoption are special enrollees. Preexisting dependents are NOT special enrollees
- Marriage
 - Spouse
 - New children of employee (including stepchildren)
- Acquisition of Dependent by Birth/Adoption
 - Spouse
 - Domestic partners, other non-marital partners, not eligible for special enrollment even if their children are
 - Newly born or adopted child
 - Includes child(ren) of a domestic partner, if the employee is considered the parent under applicable law

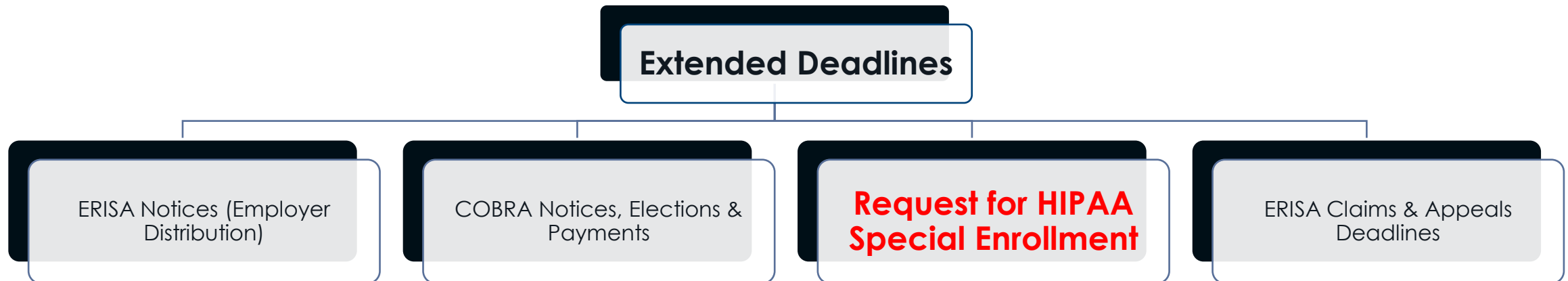
Eligibility for Medicaid/CHIP Subsidy

- Medicaid/CHIP Subsidies
 - Some states offer premium assistance through Medicaid or the state children's health insurance program (CHIP)
 - Becoming eligible for such subsidies triggers a special enrollment right
- Notification Timeframe
 - Individuals have 60 days from the date eligibility for the subsidy is determined to make their special enrollment request
- Effective Date of Coverage
 - No effective date specified in statute
 - Coverage should be made effective no later than the 1st of the month following the date the special enrollment request is received
- Employee and any dependents eligible for the subsidy are special enrollees
 - Dependents as defined by the plan are special enrollees (e.g., spouses, children, same-sex spouses, domestic partners)

Outbreak Period Impact on HIPAA Special Enrollment

Outbreak Period = National Emergency + 60 Days

- National Emergency: March 1st, 2020 - ???
 - Will be declared over by President or Congress



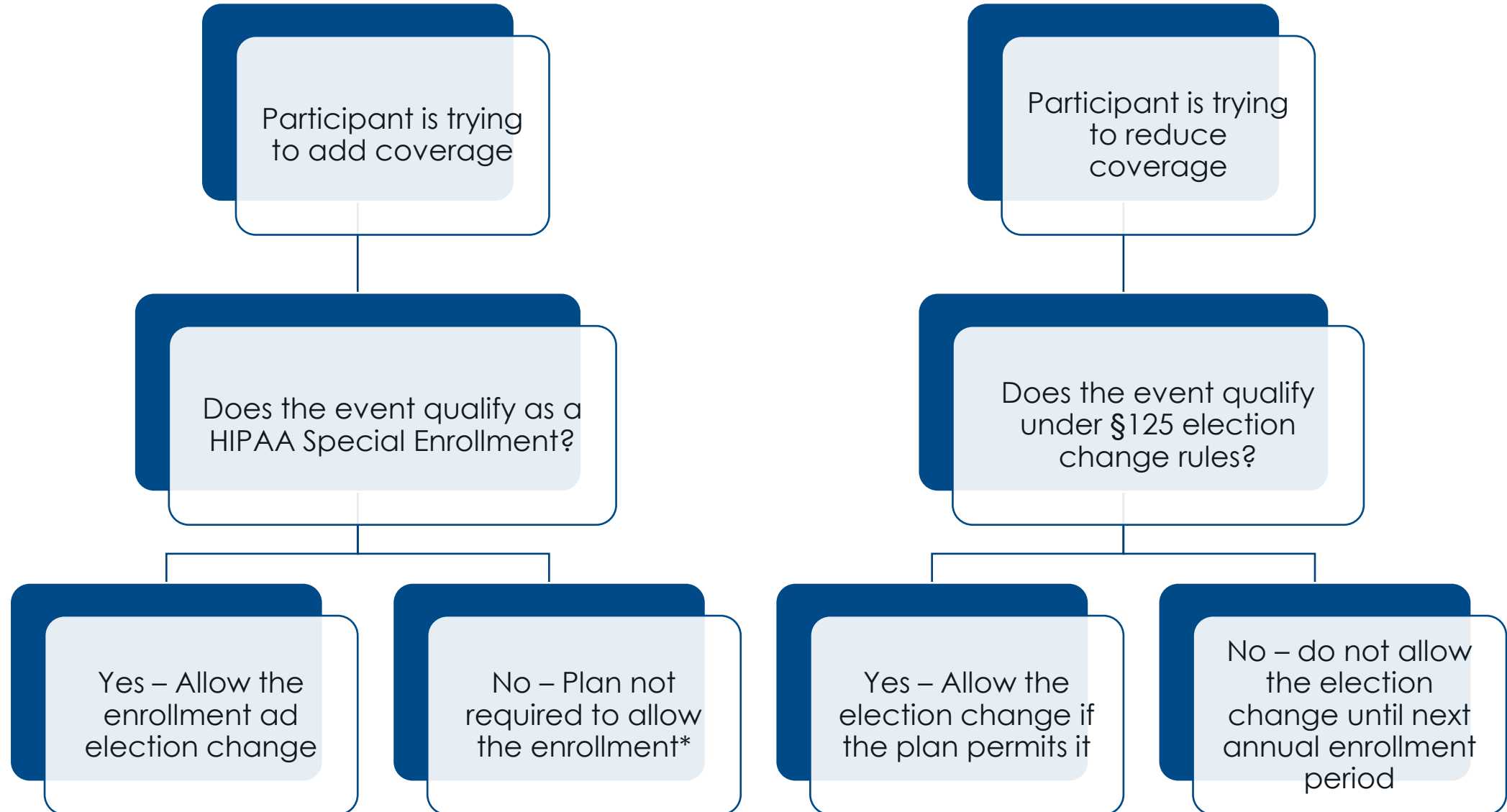
HIPAA Special Enrollment Rights Extended

- EBSA Disaster Relief Notice 2021-01
 - Participants have 12 months from their original notification deadline to notify employer of a HIPAA special enrollment event
 - Or the end of the outbreak period – whichever is sooner
- Coverage effective date
 - Marriage or Medicaid/Chip Eligibility = first of the month following notice by the participant
 - Birth or adoption = retroactive to date of birth or adoption
- HIPAA Special Enrollment example
 - Assume an employee is married on January 15, 2021.
 - Plan would normally require the employee to notify the employer of the marriage by February 14, 2021 (within 30 days) to enroll the spouse mid plan year.
 - Outbreak period rules would permit the employee to notify the employer within one year of the regular notice date of February 14th, 2021, or the end of the Outbreak Period, whichever is earlier.



COMMON ELECTION CHANGE QUESTIONS

Evaluating Events



Common Election Change Questions

- Can My Employee Add a Spouse Mid-Plan Year Because the Spouse's Employer is Charging More for Coverage?
 - Is the plan required to allow the mid-plan year election because the event is a HIPAA special enrollment?
 - No – This is not a HIPAA special enrollment event since the spouse has not lost eligibility in their plan, so the plan is not required to allow this
 - Is the election change permissible under the Section 125 rules?
 - Yes – Under Section 125 status change rules, a significant change in cost under the spouse's plan allows the employee to make an election change
 - If employer wants to allow the change, the employee can change their pre-tax election but don't forget:
 - What do the health plan's particular eligibility rules state?
 - Will the carrier (or stop-loss carrier) allow a mid-plan year enrollment if it is not required by HIPAA special enrollment rules?

Common Election Change Questions

- My Spouse Terminated Employment But Was Not Covered By a Plan at the Time of Termination. Can I Add My Spouse to My Group Plan Mid-Plan Year?
 - Is the plan required to allow the mid-plan year election because the event is a HIPAA special enrollment?
 - No – Termination of employment without a loss of coverage does not trigger a HIPAA special enrollment requirement.
 - Is the election change permissible under the Section 125 rules?
 - Yes – Under Section 125 status change rules, the spouse's change in employment status allows the employee to make an election change
 - If employer wants to allow the change, the employee can change their pre-tax election but don't forget:
 - What do the health plan's particular eligibility rules state?
 - Will the carrier (or stop-loss carrier) allow a mid-plan year enrollment if it is not required by HIPAA special enrollment rules?

Common Election Change Questions

- I Was Covered Under My Spouse's Plan and My Coverage Was Terminated Because We Failed to Make a Required Premium Payment. Can I Join My Employer's Plan Mid-Plan Year?
 - Is the plan required to allow the mid-plan year election because the event is a HIPAA special enrollment?
 - No – Loss of coverage due to failure to pay premium does not trigger a HIPAA special enrollment requirement.
 - Is the election change permissible under the Section 125 rules?
 - No – loss of coverage due to failure to pay premium is not a Section 125 election change event
 - If employer wants to allow the change, the employee would need to pay for spouse's coverage on an after-tax basis until the next annual election period. But don't forget:
 - What do the health plan's particular eligibility rules state?
 - Will the carrier (or stop-loss carrier) allow a mid-plan year enrollment if it is not required by HIPAA special enrollment rules?

Common Election Change Questions

- I Am Covered By My Employer's PPO Plan and I Get Married. When I Add My New Spouse to My Coverage Can I Change to My Employer's HDHP Plan Alternative?
 - Is the plan required to allow the mid-plan year election because the event is a HIPAA special enrollment?
 - Yes - new spouse through marriage triggers a HIPAA special enrollment requirement
 - Is the election change permissible under the Section 125 rules?
 - Yes - All HIPAA special enrollments are also a Section 125 election change event
 - Can the employee switch benefit options?
 - Yes - Employees must be allowed to make benefit option changes in conjunction with a HIPAA special enrollment

Common Election Change Questions

- I am covered by an individual plan through the Exchange, and my premiums are going up for next year. Can I drop my individual coverage and join my employer's plan midyear?
 - Is the plan required to allow the mid-plan year election because the event is a HIPAA special enrollment?
 - No – an increase in premiums does not trigger a HIPAA special enrollment requirement
 - Is the election change permissible under Section 125 rules?
 - No – a change in the cost of coverage for an individual plan is not a Section 125 election change event
 - If employer wants to allow the employee to enroll midyear, the employee would need to pay for coverage on an after-tax basis until the next annual election period. But don't forget:
 - What do the health plan's particular eligibility rules state?
 - Will the carrier (or stop-loss carrier) allow a mid-plan year enrollment if it's not required by HIPAA special enrollment rules?



Questions?

Optional Subtitle Text



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