*This commentary is only a brief description of checklist variables. Actual language should always be carefully reviewed to ensure that it meets specific client needs.* Before completing the checklist, determine if it is the correct one for the type of plan desired. If a Health Flexible Spending Account, Dependent Care Flexible Spending Account or Adoption Assistance Flexible Spending Account is desired, use the FLEXIBLE SPENDING ACCOUNT CHECKLIST. This checklist permits premium conversions in addition to the other reimbursement plans. If only premium conversion features are desired, use the PREMIUM CONVERSION ONLY CAFETERIA CHECKLIST. The following commentary is keyed to the FLEXIBLE SPENDING ACCOUNT CHECKLIST but can be used for the corresponding questions on the PREMIUM CONVERSION ONLY CAFETERIA CHECKLIST.

Checklist completed by _____ (Ext. ____)
If unavailable, contact _____ (Ext. ____)
Telephone No. (  ) _____
Shipping Address: ☐ Check if new address
Firm _____
Address (no P.O. Box) _____
City _____ State _____ Zip _____
County _____

Your Relius Account No. _____
Type of Firm: ☐ CPA ☐ LAW ☐ ADMIN./CONS. ☐ OTHER _____
Fax No. (  ) _____
Postal Address: (if different) ☐ Check if new address
Firm _____
Address (no P.O. Box) _____
City _____ State _____ Zip _____
County _____

Authorizing Professional (required) _____ Date _____
(Attorney, CPA, Enrolled Actuary or Enrolled Agent) (Name & Address) (Must be completed or documents will not be processed)

Plan Name _____

Approximate number of Plan Participants _____ E-mail Address _____

If you are sending the checklist to Relius for processing, place your name on the first line. On the second line, place the name of a coworker who is familiar with the plan. Put the telephone number at which you can be reached on the third line. If we have any questions regarding the checklist, we will call you before processing the plan.

Fill in your six-digit account number. If you do not have one, a number will be assigned to you upon receipt of your checklist. If you do not have an account with us, please enclose the payment as set forth on the second page.

If your postal address is a post office box, your shipping address must be a street address. Plans are delivered by UPS or Federal Express, all of whom cannot deliver to a PO Box.

**1 Name of Employer:** (exactly as it is to appear with punctuation)

a. _____

b. _____

If the Employer is part of a controlled group of entities (see Code Section 414(b), (c) and (o)), list the name of one of the entities in this blank and list the others at the question entitled "Will Adopting Employers execute this Plan?" along with their addresses and tax identification numbers.

**Plan Information:**
a. ☐ New Plan
b. ☐ Amendment and Restatement

**AND,** is this Plan a "wrap" plan for Form 5500 filing purposes?
c. ☐ Yes
d. ☐ No

Provides introductory clauses for a new or amended and restated plan. Other coordinating provisions are found throughout the document. The document now provides the necessary clauses to have the cafeteria plan act as a "wrap" plan if the sponsor wishes to file one Form 5500 for all its welfare plans that are required to file Form 5500.

**Plan Name/Title of Document:** (exactly as it is to appear with punctuation)

a. _____

b. _____

c. _____

Generates the title of the document and plan name, both of which will be the same. There are no legal requirements as to what the name of the Plan should be, although most plans are named "Premium Conversion Plan" or "Flexible Spending Account Plan" or "Cafeteria Plan."

**Plan Year:**
a. Begins _____
(month) (day)

b. Ends _____
(month) (day)

Is first year a short Plan Year?
c. ☐ Yes, beginning _____
(month) (day)

d. ☐ N/A

Defines the first and last day of the Plan Year, which is the twelve-month period of plan operation and administration. The Plan Year can be structured to coincide with the health coverage period. However, for plans with flexible spending accounts, a calendar year may make it easier for employees to anticipate their expenses and for the Employer to account for the expenses.

**Effective Date(s):**
a. Initial Effective Date _____
(month) (day) (year)

b. This Restatement _____
(month) (day) (year)

The proposed Section 125 regulations provide that the only expenses which may be provided tax free through the cafeteria plan are those expenses incurred prior to the later of the effective date of the plan or the date the plan is adopted. Therefore, the initial effective date should never be retroactive.

a. The original effective date (prior to any interim amendments) must always be entered for a plan being amended and restated. If preparing a new plan, **b.** can be disregarded.

b. Enter the effective date of the amendment or restatement.

**Employer Entity:**
a. ☐ S Corporation (2% shareholders not eligible)
b. ☐ Corporation
c. ☐ Partnership (self-employed (partners) not eligible)
d. ☐ Sole Proprietorship (self-employed not eligible)
e. ☐ Governmental Entity or Church
f. ☐ Non-Profit Organization
g. ☐ Limited Liability Company (members not eligible)

**Note: 13a., c., d.,** & **g.,** add a provision that excludes the group in parentheses from participating in the plan.

This question affects various provisions of the plan and also determines whether a Corporate Resolution or an Adopting Resolution will be generated.

a. If the Employer is an S Corporation, 2% shareholders are not eligible to participate in the plan pursuant to IRC Section 1372. Certain family members of 2% shareholders would also be prohibited from participating in the plan due to the stock attribution rules of IRC Section 318. By selecting this option, the plan will automatically include language which excludes 2% shareholders from the plan.

b. This option should be selected if the Employer is any type of corporation other than an S Corporation. This would include C Corporations and Professional Corporations.

c. This option will bring in language which excludes partners from participating in the plan. However, their family members who are bona fide employees may be able to participate in the plan. This option should also be selected by Limited Liability Partnerships.

d. Sole proprietors are ineligible to participate in cafeteria plans. Family members who are bona fide employees would be eligible to participate.

e., f. Governmental entities and non-profit organizations may sponsor cafeteria plans. There are no special rules that apply to such entities; however, some provisions of ERISA do not apply to governmental entities and those provisions are removed by selection of these options.

g. LLCs should select this option, as it excludes "members" of the LLC from participation, as is required for LLCs being taxed as S-corporations.

**Eligible Class of Employees:**
a. ☐ All Employees who satisfy eligibility requirements
b. ☐ Salaried Employees only
c. ☐ Hourly Employees only

d. ☐ All Employees except:
   1. ☐ Commissioned Employees
   2. ☐ Union Employees
   3. ☐ Leased Employees
   4. ☐ Part-time Employees, expected to work less than _____ hours per week
   5. ☐ Nonresident Aliens
   6. ☐ Employees not eligible under the Employer's group medical plan
   7. ☐ Those who have not completed _____ Hours of Service (if left blank, default will be 1 Year of Service (1000 hours))
   8. ☐ Those who have not attained age _____ (cannot exceed 21; if left blank, default will be age 21)
   9. ☐ Other _____

The exclusion of classes of employees is permitted in the design of cafeteria plans. However, care must be taken to ensure that the eligibility discrimination tests under IRC Sections 79, 125, 129 and 105(h) are still satisfied after the exclusion of an employee class. Certain union employees and non-resident aliens may be excluded from the plan without any potential of violating the discrimination rules. Any other group of employees should only be excluded after careful review of the impact on the discrimination tests. If no exclusions are desired (i.e., all employees are eligible for participation in the plan once the eligibility requirements are met) select **a.** If the plan is to be a Simple Cafeteria plan, then only **2.**, **5.**, **7.** and **8.** can be selected as exclusions.

**Conditions for Eligibility:**

a. ☐ Same as Employer's group medical plan

**OR**

b. ☐ For **first** Plan Year **only**, anyone employed on the effective date of the Plan is eligible, **thereafter**:
(choose one from **e.** - **g.** below)

**OR**

c. ☐ For **all** years, eligibility is as follows:
(choose one from **d.** - **g.** below)

d. ☐ Date of hire (no service required)

e. ☐ _____ years after date of hire

f. ☐ _____ days after date of hire

g. ☐ _____ months after date of hire

Under IRC Section 125, the maximum service requirement for eligibility in a cafeteria plan is three years of employment.

Generally, it is desirable to allow employees to participate in a cafeteria plan as soon as possible because the employer will save more money in the form of FICA savings if more employees participate in the plan.

a. If this option is selected, the plan will incorporate by reference the requirements for eligibility under the employer's group health plan. This is best for a plan that only contains group health benefits.

b. A new plan might consider this option which, for the first plan year only, will make all employees employed on the specified date immediately eligible for participation in the plan. After the first plan year, service requirements may be established for new employees. If **b.** is selected, a selection must also be made at **e.** through **g.**

c. This option establishes the same conditions of eligibility for all plan years. If selected, a selection must also be made at **d.** through **g.** Employees could be required to be employed for a specified number of years, days, or months before participating in the plan. The maximum is three years of employment.

**For Health Flexible Spending Account only,** eligibility is as follows:

h. ☐ No Health Flexible Spending Account, or eligibility is the same as above for all benefits

i. ☐ _____ days after date of hire

j. ☐ _____ months after date of hire

k. ☐ _____ years after date of hire

**Note:** If option **i., j.** or **k.** selected, **21l** must be selected.

A plan may require a longer eligibility requirement for the Health Flexible Spending Account (Health FSA) in order to mitigate the effects of the "uniform coverage and availability" rules. Applying a separate (and usually longer) eligibility period to the Health FSA portion of the plan may help safeguard the Employer since the highest rate of turnover is usually experienced in the first six months of employment. With a longer eligibility requirement, only those who have "committed" to employment are able to participate in the Health FSA.

**Entry Date:**

a. ☐ First day of the pay period next following date requirements were met

b. ☐ Date conditions for eligibility are met

c. ☐ Dual entry (1st day of Plan Year & 6 months later)

d. ☐ First day of Plan Year following date requirements were met

e. ☐ First day of month following date requirements were met

f. ☐ Same as Employer's group medical plan

The effective date of participation, or entry date, is primarily a matter of plan design and administrative efficiency. Code Section 125 requires that an eligible employee become a participant no later than the first day of the plan year next following the date on which the employee satisfied the eligibility requirements (option **d.**). Maximum administrative efficiency is accomplished by having eligible employees participate in the plan as of a single effective date. However, most cafeteria plans have more frequent entry dates. The most flexible options are **a., b.,** and **e.,** allowing for participation almost immediately upon fulfilling the service requirement. Option **c.** provides for two entry dates per year, the earlier of the first day of the seventh month of the plan year or the first day of the plan year following satisfaction of the eligibility requirements. Option **f.** provides for entry upon satisfaction of the group medical plan's requirements; probably the easiest to administer for a simple premium conversion plan.

**Family and Medical Leave Act:** Is the Employer subject to these provisions?
a. ☐ No
b. ☐ Yes

Employers of 50 or more employees within a 75 mile radius on each working day for 20 or more work weeks are subject to the federal Family and Medical Leave Act of 1993. If this is selected, the plan document incorporates the Act by reference and the SPD details the three methods of dealing with salary reductions for a cafeteria plan as set forth in Regulation 1.125-3. This language only covers federal FMLA; this language does not cover any state law version.

**Contributions.** Plan will provide for...
a. ☐ Salary reduction contributions **ONLY** (no Employer contributions) (skip to **20**)
b. ☐ Employer contributions **ONLY** (no salary reductions) (answer **19**, then skip to **21**)
c. ☐ Both salary reductions **AND** Employer contributions

**Note:** Salary reduction contributions are set at the amount sufficient to cover a Participant's benefit elections.

**Note:** If Employer contributions are only paying a portion of the cost of insurance with no cash option, select **18a.**

**Employer Contributions.** For each Plan Year, Employer will contribute...
☐ N/A
a. ☐ _____% of compensation per Participant
b. ☐ $_____ per Participant
c. ☐ Discretionary
d. ☐ Other _____
e. ☐ "Opt Out" (payment if health coverage waived)

**AND,** the contributions shall be made...
f. ☐ At beginning of Plan Year
g. ☐ Pro rata each pay period

**AND,** the contributions are convertible to cash
h. ☐ Yes
i. ☐ No

**Note:** Option **i.** may not be selected with **18b** or **19e**

**AND,** the contributions are to be made to: (choose **j.** or all that apply from **k. - m.**)
j. ☐ All accounts
k. ☐ Health FSA (must answer **24**)
l. ☐ Health Savings Account (must answer **25**)
m. ☐ Dependent Care FSA (must answer **21m**)

Most cafeteria plans are funded by salary reductions only. If option **18a** or **c.** is selected, the required limit on salary reductions is set at the amount sufficient to support the participant's benefit elections.

A cafeteria plan will satisfy the written plan requirement only if the plan document describes the maximum participant elective contribution (expressed as a dollar amount or percentage of compensation) or a method of determining the maximum. In the Relius Master Plan, the maximum salary reduction is determined through a combination of statutory limitations and maximum allocations to specific funds. The Dependent Care Flexible Spending Account is capped at its statutory limits (generally $5,000). The Adoption Assistance Flexible Spending Account is capped at its statutory limits (now $13,810 as adjusted). Premium payment amounts are controlled by the actual policies, which are incorporated by reference into the Plan. Plans which include a Health Flexible Spending Account will need to provide an amount at option **24b**, which puts an annual limit on the Health FSA.

If a plan wishes to provide for Simple contributions, then select **c.** If an employer wishes to also make a contribution in addition to the Simple contribution, select **c2.** and fill out **19.**

Question **19** concerns the limits on employer contributions for all benefits in the Plan. If a contribution is to be limited to a particular benefit or benefits, selections can be made at **19j** - **m**. The first four selections concern the limits on employer contributions to the plan, contributions which can be used for purchasing any of the benefits under the plan.

**19e** adds "opt out" language to the plan. This option should be selected if the employer contribution is solely a payment to participants who do not select group medical coverage (a reward for "opting out" of coverage).

For those plans which include Employer contributions, consideration should be given as to whether these contributions are convertible to cash (options **h.** and **i.**). This is because a cafeteria plan, by definition, must offer a choice between cash and qualified benefits. If a cafeteria plan provides both salary reduction and Employer contributions, the Employer contribution need not be convertible to cash since the plan does contain a cash component (i.e., the ability to reduce salary). It is not clear if Employer contributions not subject to cash are taken into account when performing the 25% concentration test of Section 125(b)(2).

The majority of those plans which provide for Employer contributions make the contributions available pro rata each pay period (option **g.**). If the full amount is available at the beginning of the plan year, those participants who elected cash and then terminated employment in the middle of the year would have received a windfall gain.

**Flexible Spending Accounts** will be established for...
(select all that apply)
l. ☐ Health Flexible Spending Account
m. ☐ Dependent Care Flexible Spending Account
n. ☐ Adoption Assistance Flexible Spending Account

**Note:** The terms of the Health Flexible Spending Account are set below at **24.** For the Dependent Care Flexible Spending Account and Adoption Assistance Flexible Spending Account, statutory maximums and terms are standard in the Flexible Spending Account Plan.

**AND** include account for insurance premium payments
o. ☐ Yes, include Premium Payment Account -- must check options **a.** through **k.** below
p. ☐ No (skip to **24**)

l. The Health Flexible Spending Account (Health FSA) covers those medical expenses otherwise reimbursable under IRC Section 213. (See IRS Publication 502 for a detailed description of eligible medical expenses.) The Health FSA functions in a manner similar to insurance. The total dollar amount elected by a participant must be available for use from the first day of the plan year forward, regardless of the amount contributed. For example, assume that a participant elected a benefit of $1,200 for the Health FSA. In February, the participant incurs $1,200 of medical expenses. The plan must reimburse the participant for the full $1,200 even though the participant has only contributed $200 to the plan.

   Until 2013, there was no statutory limitation on the amount of benefits that could be provided by a Health FSA. However, the discrimination tests under IRC Section 105(h) may mandate that a limit be put on the plan in an amount that is lower than the lowest paid employee. This will ensure that the same benefit is available to all participants. (This limit is selected at **24b**).

m. The Dependent Care Flexible Spending Account is governed by IRC Section 129 and reimburses participants for those expenses necessary for the participant to be gainfully employed. IRC Section 21, the child care credit, describes these expenses. (See IRS Publication 503 for a detailed description of eligible dependent care expenses.) While mainly thought of as an account for child care (up to age 13), the Dependent Care FSA is available for the daily care of any dependent (e.g., disabled or elderly adults). Unlike a Health Flexible Spending Account, the program functions like a checking account in that only those amounts currently in the participant's account are available for reimbursement. Pursuant to Section 129, the maximum amount of reimbursements that may be made is $5,000 for single individuals and married couples filing jointly; and $2,500 for married couples filing separately. However, these limits may be less since the reimbursement is also limited to the earned income of the least paid spouse.

n. The Adoption Assistance Flexible Spending Account is governed by IRC Section 137 and reimburses participants for those expenses incurred while adopting a child. Unlike a Health FSA, the program functions like a checking account in that only those amounts currently in the participant's account are available for reimbursement. Pursuant to Section 137, the maximum amount for reimbursements is $14,080 for 2019.

   Note: The terms of the Health Flexible Spending Account are set below at **24.** For the Dependent Care Flexible Spending Account and Adoption Assistance Flexible Spending Account, statutory maximums and rules are standard in the Flexible Spending Account Plan. These limits can be changed at Q. **39.**

o. If the plan also includes premium conversion, this option should be selected.

**Premium Payments** may be elected for...
a. ☐ Health insurance (employee AND dependent coverage)
**OR**
b. ☐ Dependent health insurance ONLY
**OR**
c. ☐ No group health insurance
**AND**
d. ☐ Group-term life insurance
e. ☐ Disability insurance
f. ☐ Dental insurance
g. ☐ Cancer insurance
h. ☐ Vision insurance
i. ☐ Accidental Death and Dismemberment insurance
j. ☐ Prescription Drug Coverage
k. ☐ Other Insurance Coverage

**Note:** **k.** adds language that allows for other types of health coverage not listed above.

This question applies only if the plan provides for premium conversions in addition to a Health Flexible Spending Account, Dependent Care Flexible Spending Account and/or Adoption Assistance Flexible Spending Account. Options **d.** through **k.** are some of the more popular forms of insurance coverage available on a pre-tax basis under a cafeteria plan. Most of the options are types of health and/or disability insurance, which may be provided by an Employer on a pre-tax basis pursuant to IRC Sections 105 and 106.

a. This should be selected if participants must pay all or a portion of employee health coverage, as well as dependent coverage only.

b. This should be selected if employee coverage is provided by the Employer but participants must pay all or a portion of dependent coverage only.

c. This option should be selected if the plan offers no group health plan. This option should be selected in limited circumstances, either with individual coverage HRA arrangements or excepted benefits.

d. Group-term life insurance is available under the terms of the IRC Section 79, only for employees. Whole life or universal policies, which have cash surrender values, are not permissible benefits. While a cafeteria plan may include more than $50,000 of group-term life insurance coverage, there is no tax advantage since any amount of group-term life insurance above $50,000 is taxable. Dependent life insurance is also not allowed in a cafeteria plan.

e. This allows for short-term and long-term disability coverage to be funded through the cafeteria plan. If offered through a cafeteria plan, participants should be informed of the tax consequences. When disability coverage is paid for on a pre-tax basis, any payments made from the policies to a disabled participant are taxable. Thus, a participant is getting an immediate tax savings with the risk that should he or she become disabled, there will be a taxable stream of payments from the policy. This could be a significant factor with regard to long-term disability since payments could extend for many years.

f. Dental insurance is a type of health insurance.

g. Cancer insurance is also a type of health insurance. However, many cancer policies have a refund of premiums feature. The IRS has not made a determination as to whether a cancer policy that has a refund feature is a form of deferred compensation. If this is considered to be deferred compensation, then it would not be a permissible benefit since IRC Section 125 prohibits any benefits (other than 401(k) plan) which are a form of deferred compensation.

h. Vision insurance is another form of health insurance.

i. Accidental Death & Dismemberment (AD&D) is a qualified benefit pursuant to the Proposed Regulations under IRC Section 125. In the past, there had been some concern as to whether the death benefit component (which would not qualify as group-term insurance) would disqualify AD&D as a permissible benefit. The current position of the IRS is that the death benefit component is insignificant compared to the primary purpose of the coverage which is to provide disability and medical benefits.

j. Covers both prescription drug insurance as well as by-mail services or drug cards.

k. "Other" insurance can be any variety of health or disability insurance with several caveats. First, the insurance cannot have a cash surrender or cash buildup feature. Second, the key to determining whether a particular type of insurance may be included in a cafeteria plan is whether the IRC contains a provision which would allow an Employer to provide the insurance without any inclusion in an employee's gross income. Long-term care insurance cannot be included in a cafeteria plan.

**Are the health premium payments elected above self-insured by the Employer?**
a. ☐ Yes
b. ☐ No

Employer self-insurance covers "self-funding," reinsurance, stop-loss, or partial self-funding. By selecting "yes," language referring to insurance will be removed from the plan.

**For Excepted Benefits and Disability Insurance,** may Participants seek reimbursement for individual policies through the Premium Conversion Plan?
a. ☐ N/A
b. ☐ Yes, at the Administrator's discretion
c. ☐ No

Under the Affordable Care Act, individual health policies purchased on the exchanges cannot be reimbursed through a cafeteria plan. Only "excepted benefits" such as dental and vision should be allowed. The Proposed Regulations prohibit a Health Flexible Spending Account from reimbursing a participant for insurance coverage. The IRS had indicated informally that certain individual health policies could be reimbursed, provided such reimbursement is provided as a benefit **separate** from the Health FSA. However, in no case may a spouse's coverage from another Employer could be paid through a cafeteria plan.

**Health Flexible Spending Account (Health FSA) Options:** (select as applicable)
a. ☐ N/A (No Health Flexible Spending Account, skip to **25**)
b. ☐ Limit for Health Flexible Spending Account: (select one of 1 or 2; select 3 -5 as applicable)
   1. ☐ $_____ is the maximum amount to be contributed to the Health FSA (includes all contribution sources)
   2. ☐ The maximum amount allowed, as adjusted for cost of living (includes salary reductions and Employer contributions convertible to cash, if applicable)

For the limit above, if there are Employer contributions NOT convertible to cash (19i selected)
a. ☐ Are included in limit at b.
b. ☐ Are subject to separate limit of: $_____

**AND,** further restrictions shall apply: (select all that apply)
3. ☐ the minimum amount to be contributed shall be: $_____
4. ☐ for a short Plan Year, $_____ is the maximum amount to be contributed to the Health Flexible Spending Account
5. ☐ if an Eligible Employee enters the Plan mid year, $_____ is the maximum amount to be contributed to the Health Flexible Spending Account

**AND,** amounts can be carried over: (select all that apply)
6. ☐ N/A (no carryover or grace period applies)
7. ☐ $_____ can be carried over for use in the following Plan Year (maximum is $500). NOTE: Grace Period for Health FSA (33b) CANNOT be selected)

Further Conditions (select all that apply):
a. ☐ $_____minimum carryover
b. ☐ Carryover only through next Plan Year
c. ☐ Carryover only if elect to participate for next Plan Year

Various questions from previous checklists concerning the Health Flexible Spending Account (Health FSA) have been consolidated into one question with multiple sub questions.

b. Specify the maximum amount of contributions that may be made to the Health FSA each plan year. The regulations under IRC Section 105(h) only require that the benefits are available on a non-discriminatory basis. If the Health FSA is funded solely with salary reductions, then arguably the maximum reimbursement under the Health FSA should be an amount that is less than the salary of the lowest paid employee. The maximum amount of reimbursements cannot be based on a percentage of the individual's compensation or years of service.

   New options have been added to set minimums, and short year maximums both for a plan's short plan year and for an eligible employee entering a plan mid-year.

   Participants are allowed to "carry over" up to $500 of unused monies to be used in the following plan year. The carryover cannot be used with the grace period, however.

**AND,** Terminated Employees shall... (select one)
c. ☐ N/A--COBRA applies
d. ☐ Continue contributions and reimbursements for the remainder of the Plan Year
e. ☐ Cease contributions and reimbursements upon termination
f. ☐ Continue or cease at Participant's election

This portion of the question offers various alternatives which may limit an Employer's risk of loss should a participant terminate employment. These provisions only apply if the employer is not subject to COBRA - in that case, option **c.** should be selected. Any Health FSA can avoid providing COBRA continuation coverage beyond the year of termination if the FSA is not be subject to HIPAA requirements and the amount the Health FSA charges for a full year of COBRA coverage is equal to or greater than the maximum benefit a person could receive from the Health FSA for that year. In addition, a participant does not have to receive COBRA coverage at all if the Health FSA is not subject to HIPAA requirements, and a participant's COBRA payments for the remainder of the year equal or exceed the amount of benefits available for the remainder of the year if coverage were continued. This exemption is based on the level of claims that a participant has already submitted to the Health FSA. A snapshot is taken on the date of the qualifying event. If the participant has contributed more to the Health FSA than what has been claimed, the participant would benefit by electing COBRA coverage. If the participant has drawn out more than he or she has paid in so far during the plan year, COBRA continuation does not have to be offered. The employers to whom COBRA does not apply are:

(1) those who normally employed fewer than 20 employees on more than 50% of its typical business days in the previous calendar year;

(2) any governmental plan (except those maintained by the District of Columbia, territories, possessions, agencies, or instrumentalities of the United States and plans of the federal government); and

(3) church plans as defined in IRC Section 414(e).

In plans with only premium conversion, Adoption Assistance Flexible Spending Account and/or Dependent Care Flexible Spending Account features, termination of employment is not an issue. The insurance carrier bears the risk of loss for the insured benefits and reimbursements from the Dependent Care Flexible Spending Account or Adoption Assistance Flexible Spending Account are limited to the amount the participant has contributed to the plan. The Health FSA, however, must exhibit the same risk shifting and risk distribution features as insured benefits. Therefore, the Employer is exposed to a risk of loss if a participant terminates employment after having been reimbursed for more expenses than monies have been contributed to the plan. Conversely, the participant faces a risk of loss if employment is terminated after having contributed more to the plan than reimbursement received for medical expenses.

d. This alternative requires terminated participants to continue in the plan through the end of the Plan Year. Generally, contributions would be made with after-tax money. But, with the consent of the participant and in accordance with individual state garnishment laws, the amount due through the end of the year could possibly be taken from the employee's last paycheck on a pre-tax basis. (This language is not part of the Relius Master Text and must be added via special language.) This option provides the Employer with a possible method of recouping amounts that may have already been reimbursed, and allows terminated participants to retain their coverage and benefits despite the fact they are no longer employed. It should be kept in mind that all participants must be treated uniformly. Thus, even participants who have contributed more than what they have claimed would need to continue paying though the end of the plan year. Option **d.** is the best alternative for limiting the Employer's risk of loss.

e. Provides that terminated employees are required to cease participation in the plan upon termination of employment. Employee salary redirection contributions (and Employer contributions, if any) will cease upon termination of employment and benefits will not be paid for expenses incurred after the date of termination (regardless of the level of funding at the time of termination). Although the participant may submit claims for expenses incurred prior to the date of termination, any funding for which there has been no pre-termination claims will be forfeited and treated as if the participant failed to "use up" his or her contributions. Likewise, the Employer will not be able to collect amounts that have been previously reimbursed but not funded by the employee, thereby putting the Employer at a risk of loss.

f. This option most closely resembles COBRA, although it leaves the Employer with substantial risk because employees "owing" the plan could cease participation. Employees who have contributed more to the plan than what they have claimed can elect to continue coverage until they incur expenses up to their annual election.

**AND,** new election due to change in status permitted? (select one)
g. ☐ No
h. ☐ Yes
i. ☐ Yes, only if salary redirections to the Health FSAs are increased

The regulations permit (but do not require) a plan to allow changes in elections due to a change in status. As is the case with termination of employment, the change in status rules are less problematic when applied to plans with premium conversion or adoption assistance and/or dependent care, as these benefits are not prefunded by the Employer. However, a participant's ability to change benefit elections in the Health Flexible Spending Account as the result of a change in status could expose the Employer to a higher risk of loss. If a participant has already been reimbursed in excess of salary redirections contributed to date and then has a change in status, he or she could opt out of the Health FSA completely. The Employer would then incur a loss. For this reason, it may be advisable to modify what election changes, if any, may be with respect to a Health FSA when there is a change in status. This question only affects the Health FSA; the Relius Master Plan provides for a change in status for the premium conversion, adoption assistance and dependent care portions of the plan. There is no time limit for reporting changes in status under the Relius Master Text.

g. This option provides that no election changes are permitted with respect to the Health FSA when a change in status occurs.

h. This allows unlimited changes when there is a change in status. Besides the risk of loss associated with this option, it is unclear as to how to apply this provision when a participant wants to increase or decrease (but not to $0) an election. For example, if a participant increases an election, it is not clear how to determine the amount of required contributions for the remainder of the period of coverage and how to account for amounts that have already been reimbursed.

i. This option only allows increases in the amount contributed towards the Health FSA. This ensures that a participant will not change his or her election to $0 if the participant has already been reimbursed for more than what has been contributed to the plan. However, the same administrative problems mentioned at **d.** above must still be addressed.

Note: over-the-counter drugs can only be reimbursed if prescribed by a doctor or medical professional.

**AND,** to accommodate Health Savings Accounts (HSAs), the Health FSA will be limited to the following types of medical expenses… (select all that apply)
j. ☐ N/A
k. ☐ certain types of expenses only: (select all that apply)
   1. ☐ dental expenses
   2. ☐ vision expenses
   3. ☐ preventive expenses
l. ☐ only expenses in excess of the HDHP deductible

**FOR**
m. ☐ all Participants
n. ☐ only HSA contributing Participants

**AND,** claims for medical expenses can only be submitted for:
o. ☐ the Participant
p. ☐ the Participant and all dependents

**Note:** If medical expenses are not limited, HSA eligibility may be affected.

**Health Savings Account provided by Employer?**
a. ☐ Yes
b. ☐ No

The Health Savings Account or HSA can be established by an individual to pay for most of the same medical expenses as are allowed under a cafeteria plan. Contributions can be made to the account with pre-tax dollars, either by an individual or an employer. Contributions made by an employer to an employee's HSA are excludable from income for Federal income tax purposes and are not subject to Federal payroll taxes (i.e., Social Security or unemployment taxes). Earnings in the HSA accumulate tax-free and distributions from the account that are used to pay for medical expenses are also tax-free.

To qualify to have an HSA:

(1) An individual must be covered by a High Deductible Health Plan (HDHP),

(2) An individual may not be covered by any other non-HDHP that covers expenses covered by the HDHP, except for certain permissible benefits such as disability, dental care or vision care,

(3) An individual must not be entitled to Medicare benefits (generally age 65), and

(4) An individual may not be claimed as a dependent on another person's tax return.

The second condition for being able to contribute to an HSA is that an individual generally cannot have health plan coverage for expenses covered by the HDHP. However, coverage for expenses related to accidents, disability, dental care, vision care, or long-term care is also permitted in addition to the HDHP. Coverage under the Health Flexible Spending Account can violate this requirement and mean that a person is not eligible. Thus the earlier question under the Health Flexible Spending Account option limits FSA expenses to dental and/or vision expenses.

A HDHP has limits that change each year as to the deductible and annual out of pocket expenses.

Eligibility for an HSA is made on a month-to-month basis. The maximum amount that may be contributed for a particular year is the sum of the monthly limits for each month in which an individual is eligible. The monthly limit is 1/12 of the lesser of: (1) the deductible under the HDHP, or (2) $2,600 for self-only coverage or $5,150 for family coverage (as adjusted for future cost-of-living increases).

**Benefit Election Period shall be...**
a. ☐ The _____ day period prior to each Plan Year
b. ☐ From the _____ day to 1. _____ day period prior to each Plan Year
c. ☐ Established by Administrator in nondiscriminatory manner

The proposed regulations require that benefit elections be made before the beginning of each plan year. There is no required time limit as to how long this election period should be, therefore, the primary consideration is administrative convenience. The larger the Employer, the longer the election process will take. The Relius Master Text includes a 30 day period for initial enrollment by new participants. Most employers choose **c.** for ease of administration.

**Is automatic enrollment for insured benefits provided under this Plan?**
a. ☐ Yes
b. ☐ No

If **a.** (Yes) is selected, automatic enrollment (also referred to as "negative election") language will be included in the plan. This language provides that unless eligible employees elect not to participate in the plan, they will automatically become participants in the plan for the insured benefits and their salaries will be automatically reduced to pay for the coverage. In other words, rather than making an affirmative election to participate in the plan, participants must make an affirmative election NOT to participate in the plan. An affirmative election to participate is always required for the Health Flexible Spending Account, Adoption Assistance Flexible Spending Account and/or Dependent Care Flexible Spending Account since these benefits require participants to estimate the amount of their eligible expenses. If this option is selected, no election form for insurance coverage will be generated.

The negative election is attractive to large employers that would have excessive paperwork if affirmative elections were required and to employers that have multiple locations. However, in order to prevent an employee from inadvertently becoming a participant in the plan, the same amount of employee communication is required as with the traditional affirmative election to participate. CAUTION: A negative election could violate the law in states which require that salary reduction arrangements be in writing.

**Participants who fail to sign** a new election form shall...
a. ☐ Be considered to have elected not to participate for upcoming Plan Year (may not be selected with **27a**)
b. ☐ Continue same elections as prior year only for insured benefits (may only be selected with **21o**)

Before the beginning of each plan year there is an election period for employees to choose benefits. This question applies when participants have, at some point, actually elected to participate in the plan. If a plan uses a negative election, then this question will apply to the Health Savings Account (for both Premium and Flex checklists), and the flex options of Health Flexible Spending Account, Adoption Assistance Flexible Spending Account and/or Dependent Care Flexible Spending Account, as those benefits always require an affirmative election by the participant.

a. Under this option, a new election is required each year.

b. If selected, a new election is required each year for the Health Savings Account (for both Premium and Flex checklists), and the flex options of Health Flexible Spending Account, Adoption Assistance Flexible Spending Account and/or Dependent Care Flexible Spending Account, but a new election is not required for the insured benefits.

**Witnesses to Employer's signature:**
a. ☐ Yes
b. ☐ No

 

**Note:** State law may require witnesses to the Employer's signature. Relius does not have this information.

As a cafeteria plan is a legally binding document, some Employers may prefer, and some states may require, witnesses to the Employer's signature on the plan.

**Is a 401(k) Plan a benefit under this Cafeteria Plan?**
a. ☐ Yes, name of Plan: _____
b. ☐ No or N/A

Generally, a cafeteria plan may not offer any benefit which is a form of deferred compensation. The only exception to this rule is that a 401(k) plan may be offered as a benefit in a cafeteria plan. A 403(b) plan may not be offered as a benefit in a cafeteria plan.

It is questionable as to the advantages of a 401(k) plan as a cafeteria plan benefit. If the cafeteria plan only permits salary redirection, a participant could elect a salary deferral directly into the 401(k) plan. Amounts that are contributed through the cafeteria plan into the 401(k) plan will still be subject to FICA and FUTA. The only possible advantage to doing this is that presumably these amounts are taken into account when running the 25% concentration test of the IRC Section 125(b)(2).

If the cafeteria plan provides for an Employer contribution, the same situation exists. The participant could elect to receive the Employer's contribution in cash as additional compensation and then elect to defer the amount into the 401(k) plan. Again, the only advantage to having these amounts go through the cafeteria plan and then into the 401(k) plan is that they might be taken into account when applying the 25% concentration test.

As explained earlier, it is possible that a plan may not provide a cash option over the Employer's contribution. In lieu of the cash option, such a plan may provide that the Employer's contribution may be made to a 401(k) plan if the participant does not want any of the other benefits offered in the cafeteria plan. The potential problem with this approach is that the amounts contributed to the 401(k) plan are not considered elective deferrals because they are not subject to a cash option. Therefore, in the 401(k) plan, these amounts would be treated as nonelective employer contributions and would need to be tested under the Regulations of IRC Section 401(a)(4), since they are not uniform for all participants.

**May Participants convert vacation days** into Cafeteria Plan benefit dollars?
a. ☐ Yes
b. ☐ No

This option allows a participant to convert vacation days to benefit dollars to be used for additional benefits. For example, a participant who is entitled to three weeks of vacation may decide to cash in one (1) week in order to purchase health insurance or some other benefit. The conversion is based on the participant's rate of pay at the time of conversion multiplied by the number of days converted.

**"Grace Period"** Extend the time to incur expenses past the end of the Plan Year:
a. ☐ Yes
b. ☐ No

**AND,** extend the time period by how long? (select one)
c. ☐ _____ days (maximum 75)
d. ☐ 2 1/2 months after the end of the Plan Year (March 15 for a calendar year plan)

**AND,** allow up to what amount? (select one)
e. ☐ Entire remaining account balance
f. ☐ $_____

**AND,** for which accounts?
g. ☐ Health FSA
h. ☐ Dependent Care FSA
i. ☐ Adoption Assistance FSA

Instead of having to spend down remaining amounts in the last month of the year, plans can now provide participants with a "grace period" of up to 2 and one-half months after the end of a plan year to incur expenses and pay for them, using money from the prior year. Thus, participants may have as long as 14 months and 15 days (12 months in the current cafeteria plan year plus the grace period) to incur expenses for a plan year before forfeiting any remaining amounts. However, the Notice does not eliminate the "use it or lose it" rule. A cafeteria plan may not permit unused amounts to be cashed-out or converted to any other taxable or nontaxable benefit. Likewise, unused amounts in one FSA cannot be transferred to another FSA.

Cafeteria plan sponsors are not required to provide for a grace period. However, if a sponsor wants to provide one, then the grace period must apply to all participants in the cafeteria plan. Options are provided as to how long the grace period will be (the maximum is 2 1/2 months following the end of the plan year), how much of the account balance can be carried into the grace period, and which accounts are subject to the grace period.

**Claims for Reimbursement must be filed within**
**Health FSA:** (must select **a.** or **b.**; **c.** is optional in addition to **a.** or **b.**)
a. ☐ _____ days following each Plan Year (e.g., 60)
b. ☐ _____ days following the Grace Period (e.g., 60) (may not be selected with **32b**)

**AND,** for Participants who terminate employment, will a different filing deadline apply? (optional, leave blank if N/A)
c. ☐ _____ days following termination of employment (e.g., 60)

**Dependent Care FSA:** (must select **d.** or **e.**; **f.** is optional in addition to **d.** or **e.**)
d. ☐ _____ days following each Plan Year (e.g., 60)
e. ☐ _____ days following the Grace Period (e.g., 60) (may not be selected with **32.b.**)

**AND,** for Participants who terminate employment, will a different filing deadline apply? (optional, leave blank if N/A)
f. ☐ _____ days following termination of employment (e.g., 60)

**Adoption Assistance FSA:** (must select **g.** or **h.**; **i.** is optional in addition to **g.** or **h.**)
g. ☐ _____ days following each Plan Year (e.g. 60)
h. ☐ _____ days following the Grace Period (e.g., 60) (may not be selected with **32.b.**)

**AND,** for Participants who terminate employment, will a different filing deadline apply? (optional, leave blank if N/A)
i. ☐ _____ days following termination of employment (e.g., 60)

Any length of time after the plan year for claims reimbursement is acceptable. However, there should be a balance between the administrator's desire to close the plan year and the needs of the participants to have some period of time to submit claims for expenses incurred during the plan year, especially at the end of a calendar year. Generally, thirty to sixty days is sufficient time for this "run out" period. Each flexible spending account now has its own "run out" period.

Options **a., d., g.**: The run out period begins on the day after the last day of the Plan Year, regardless of whether there is a grace period added or not. Therefore, even if a grace period is added, if 90 days is selected on a calendar year plan, then the 90 day run out period begins January 1.

Options **b., e., h.**: If the grace period provisions are added to the plan, the run out period selected here will begin after the last day of the grace period.

Therefore, on a calendar year plan, a 90 day run out period would begin March 16.

Options **c., f., i.**: allows an Employer to limit the time in which claims may be submitted to a period beginning on a participant's termination date, not beginning at plan year end.

**Claims should be submitted to:**
a. ☐ Employer, using Employer's address
b. ☐ _____ at address below:
1. _____
(Street--Physical not P.O. Box)
2. _____
(City) (State) (Zip)

This option allows for a third party administrator's address to be listed in the summary plan description as the address to which to submit claims.

**Are employer provided debit or credit cards used for expenses through Flexible Spending Accounts?**
a. ☐ Yes **AND,** for which accounts?
1. ☐ Health FSA (may only be selected with **21l)**
2. ☐ Dependent Care FSA (may only be selected with **21m)**
b. ☐ No

Employer issued debit or credit cards can be used to pay for expenses under a Health Flexible Spending Account, as long as expenses are substantiated in accordance with the rules under IRC Sections 125 and 213. Employees must sign a certification that they will only use the card for medical expenses and the expenses have not been and will not be reimbursed by any other plan. This certification should be printed on the back of the card. In certain instances, the transactions the card pays for are substantiated as medical expenses automatically -- such as doctor visit co-pays and recurring prescriptions that were approved originally. Also, there can be "real time" substantiation at the point of sale by fax, email or phone by the merchant or provider, certifying the expenses are medical. Any other expense is paid conditionally and the participant must submit receipts as in a traditional expense reimbursement arrangement. If the expense is disallowed, there must be reimbursement of the improper payment. Additionally, employees can also still submit expense reimbursement requests without using the card.

The Relius Master Text conforms with the language of the ruling and includes methods for correcting payments made with the cards which do not qualify as expenses under the plan.

Although the Ruling did not address Dependent Care Flexible Spending Accounts, many practitioners are using debit or credit cards for dependent care expenses and the Relius Master Text has been modified to allow for use of cards with such accounts. The same rules for certification and substantiation would apply.

This selection should not be made if debit or credit cards are provided with a Health Savings Account.

**Add COBRA?** (**a.** must be selected if **24c** chosen, **b.** must be selected if **24d, e.,** or **f.** chosen)
a. ☐ Yes
b. ☐ No

A choice has now been added as to whether COBRA provisions will be part of the Plan and SPD. The Plan document incorporates COBRA by reference; the SPD has been updated with language complying with the final DOL regulations. The language also complies with the rules regarding Health FSA compliance.

 

The employers to whom COBRA does not apply are:

a. those who normally employed fewer than 20 employees on more than 50% of its typical business days in the previous calendar year;

b. any governmental plan (except those maintained by the District of Columbia, territories, possessions, agencies, or instrumentalities of the United States and plans of the federal government); and

c. church plans as defined in IRC Section 414(e).

If the employer is other than one listed above, and a Health FSA is part of the plan, COBRA language should be included. If only health insurance is included, the underlying health plan or policy should have the necessary COBRA language. However, a choice is provided to include the language.

**Is the Plan subject to HIPAA?**
a. ☐ Yes
b. ☐ No

For plans with Health FSAs, this question asks whether HIPAA provisions will be added—the provisions include language to comply with both privacy and security standards. If the plan is self-administered with 50 or less employees, it is exempt from HIPAA. If only health insurance is included, the underlying health plan or policy should have the necessary HIPAA language.

**HEART Act.** Add Qualified Reservist Distribution (QRD) provisions for Health FSA:
a. ☐ N/A or No (skip to 39)
b. ☐ Yes

**AND,** select distribution amount (all amounts minus reimbursements paid) (select one):
c. ☐ the beginning of year FSA amount
d. ☐ amount contributed up to point of distribution request
e. ☐ $_____ (cannot exceed beginning of the year FSA amount)

**AND,** how many distributions per year?
f. ☐ _____ per year

**AND,** claims submitted after QRD (select one):
g. ☐ be paid on submission as any other claim
h. ☐ shall not be paid

Health Flexible Spending Accounts may offer Qualified Reservist Distribution provisions. The distributions can be allowed for the Health Flexible Spending Account if a participant who is a military reservist is called up for military duty for 180 days or more or indefinitely. The amount of distribution can be either the beginning of the year FSA amount, minus reimbursements; the amount contributed up to the point of the distribution request, minus reimbursements; or a dollar amount. The sponsor can also limit the number of distributions per year, and can stop claims when the distributions are requested. These provisions are optional.

**Dependent Care and Adoption Assistance Flexible Spending Account Maximums.** The statutory maximums for Dependent Care and/or Adoption Assistance will be the maximums for Plan unless elected below. Options **b. - d.** may be added if the statutory maximums are selected. (select all that apply; leave blank if not applicable)
a. ☐ The statutory maximum is replaced by the amount below:
   1. ☐ $_____ for Dependent Care FSA
   2. ☐ $_____ for Adoption Assistance FSA

**AND,** will there be a minimum?
b. ☐ Yes
   1. ☐ $_____ for Dependent Care FSA
   2. ☐ $_____ for Adoption Assistance FSA

**AND,** for a short Plan Year, will there be a different maximum?
c. ☐ Yes
   1. ☐ $_____ for Dependent Care FSA
   2. ☐ $_____ for Adoption Assistance FSA

**AND,** if an Eligible Employee enters the Plan mid-year, will there be a different maximum?
d. ☐ Yes
   1. ☐ $_____ for Dependent Care FSA
   2. ☐ $_____ for Adoption Assistance FSA

The basic document builds in the statutory maximums for Dependent Care Flexible Spending Account and Adoption Assistance Flexible Spending Accounts. These new options allow for other maximums that do not exceed the statutory amounts, as well as minimums and maximums for short years, either of the plan or of a participant.

**Simple Cafeteria plan (for employers with 100 or fewer employees):**
a. ☐ Yes, effective _____
b. ☐ No

**AND,** the Employer Contribution shall be... (select one)
c. ☐ ____% (not less than 2%) of a Participant's Compensation
d. ☐ Matching contribution equal to ____% of compensation but in no event more than ____% (cannot be less than 6% of compensation)

**AND,** the contributions are convertible to cash
e. ☐ Yes
f. ☐ No

**Coverage for Children provided in Health FSA?**
a. ☐ Yes
b. ☐ No (may only be selected if Health FSA limited to participant only)

**Change in Status:** New Provisions for employee change (due to reduction in hours or enrollment in exchange):
a. ☐ Yes
b. ☐ No

New options have been added to handle the Affordable Care Act (also known as health care reform). Question 40 allows for a plan to be a Simple Cafeteria plan, which gives an employer a "free pass" on the nondiscrimination tests if an employer contribution is made. This question gives the two types of contributions allowed. Only employers of 100 employees or less (with certain allowances for growth of the employer up to 200 employees) are allowed to sponsor the Simple plan.

Question 41 allows the employer to make a choice of whether a limited to participant health care flexible spending account will cover children up to the end of the calendar year in which the dependent turns age 26. The plan default choice for insurance coverage and the health flexible spending account is to allow the participant to cover those children if the underlying insurance allows.

Question 42 allows the employer to add the new change in status provisions that allow participants to change health insurance coverage for a reduction in hours or if a better policy is available during open enrollment under the health exchanges.

As part of health care reform, the ability to reimburse for over the counter drugs without a prescription is removed. At this point in time, it looks as if other "over the counter" items seem to still be reimbursable but further guidance is needed.

 