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**Special rules for Health Flexible Spending Accounts (“FSAs”) under FMLA.  
FMLA means Family Medical Leave Act of 1993 and applies to employers with 50 or more full time employees with benefits.**

## **Rules before January 1, 2002**

A health FSA offered under a cafeteria plan must conform to the rules that generally apply to cafeteria plan health benefits concerning employees who take leaves under the Family and Medical Leave Act. Thus, the FMLA requires that an employee taking a FMLA leave be permitted to:

- continue coverage under a health FSA while on FMLA leave, or
- revoke an existing health FSA election under the cafeteria plan for the remainder of the coverage period. [29 CFR §825.209(e); Prop Reg § 1.125-3, Q & A 6(a)(1)].

The FMLA also requires the plan to permit the employee to be reinstated in the health FSA upon return from the FMLA leave on the same terms as before taking the leave. However, reinstatement is at the employee's option, and the employer *may not* require an employee whose coverage has terminated while on FMLA leave to reinstate coverage under a health FSA after returning from the leave. [Prop Reg § 1.125-3, Q & A 6(a)(2)]

## **Rules For Plan Years on or After January 1, 2002**

Under final regulations that are effective for plan years beginning on or after January 1, 2002, a health FSA offered under a cafeteria plan must conform to the generally applicable rules of Reg § 1.125-3 concerning employees who take a FMLA leave.

Thus, insofar as required by the FMLA under 29 CFR §825.209(b), an employer must:

- permit an employee taking a FMLA leave to continue coverage under the health FSA while on FMLA leave; and
  - if an employee is on unpaid FMLA leave, either—
    - (i) allow the employee to revoke coverage, or
    - (ii) continue coverage, but allow the employee to discontinue payment of his share of the premium for the health FSA under the cafeteria plan during the unpaid FMLA leave period.
- [Reg § 1.125-3, Q & A 6(a)(1)]

The final regulation provides that a cafeteria plan *may* require an employee to be reinstated in health coverage upon return from a period of unpaid FMLA leave, provided that employees who return from a period of unpaid leave not covered by the FMLA are also required to resume participation upon return from leave. [Reg § 1.125-3, Q & A 6(a)(2)]

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