



OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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The Honorable Amy Klobuchar  
United States Senator  
1200 Washington Avenue South, #250  
Minneapolis, MN 55415

Dear Senator Klobuchar:

I am responding to your inquiry on behalf of your constituent, . We received your inquiry as a referral

. , asked for help with an issue about a cafeteria plan subject to Section 125 of the Internal Revenue Code (the Code). Your constituent asked whether an election under a Section 125 plan (frequently referred to as a cafeteria plan), made pursuant to a court order entered in connection with the employee's divorce, can be changed upon the death of the former spouse. Although we can't provide specific advice on your constituent's particular situation, we can provide the following general information that we hope will be useful to your constituent.

Generally, the terms of a cafeteria plan must provide that employees elect benefits before the beginning of the plan year (period of coverage), and that the employees cannot change their elections during the period of coverage. Under Treasury Regulation Sections 1.125-4(c), a cafeteria plan may permit an employee to revoke an election during a period of coverage and make a new election for the remaining period of coverage if a "change in status" occurs and the change to the election satisfies the consistency rule. A change to an election satisfies the consistency rule if the change to the election is because of, and corresponds with, a change in status. For example, under the consistency rule an election for family coverage under a health plan generally can be changed to single coverage or no coverage during a period of coverage only if, under the facts and circumstances, the employee has experienced a change in status that is consistent with a change out of family coverage.

Only a limited number of events are considered a change in status under the regulations, but they include situations in which there is a change in the number of an employee's dependents. Under Section 152(a) of the Code, in general, a "dependent" means a qualifying child or qualifying relative. A former spouse is not a dependent as defined under Section 152 of the Code. Because a former spouse is not a dependent under the Code, the death of a former spouse does not change the number of dependents and is not a change in status under the regulations.

The regulations also do not provide that the death of an employee's former spouse that nullifies a court order providing for the former spouse's health coverage results in a change in status. While Treasury Regulation Section 1.125-4(d)(1) provides that cafeteria plans may treat certain court orders requiring health coverage for an employee's child as a change in status, the regulations do not include as a change in status a situation in which the death of a former spouse effectively terminates the requirement to provide health coverage under a court order. Also, these regulations do not otherwise provide that the death of a former spouse is a change in status that would permit an employee to change an election during a period of coverage. Nonetheless, employees generally are permitted to change their cafeteria plan elections, including dropping coverage, as part of the annual open enrollment period.

I hope this information is helpful. If you have any questions, please contact me at \_\_\_\_\_ or you may contact \_\_\_\_\_ at \_\_\_\_\_.

Sincerely,

/s/

Victoria A. Judson  
Associate Chief Counsel  
(Employee Benefits, Exempt Organizations  
and Employment Taxes)