

Spousal Carve Out/Opt-Out Bonus Cheat Sheet

Examples of Carve Outs:

- “Cash option” under cafeteria plan where employee declines employer’s health plan (taxable to employee).
- Charge higher premium.
- Exclude spouse from eligibility if eligible for or covered under other group coverage.
- Require spouse to enroll in other group coverage.

There may be compliance concerns to consider.

Discrimination: carve outs may run afoul as more spouses of highly compensated individuals (HCIs) (generally, the top 25%) do not work outside the home. As a result, HCIs disproportionately pay less in premium or disproportionately have spouses who are eligible. The penalty is \$100 per day per person who did not get benefit plus the government can force compliance. This can be avoided if HCIs’ premiums are paid on an after-tax basis.

COBRA: COBRA should only be offered when there is a qualifying event. The only qualifying events that apply to spouses are:

- Termination of a covered employee’s employment.
- A reduction of covered employee’s hours.
- A death of a covered employee
- A divorce or legal separation from covered employee.

HIPAA/Section 125

For a carve-out, the spouse can choose to enter his or her employer’s plan mid-year under the HIPAA special enrollment rule (loss of eligibility under group medical plan).

For a surcharge, a spouse may be able to enter his or her employer’s plan mid-year under the cafeteria plan rules around having different plan years.

Title VII: Excluding spouses may impact protected classes more than non-protected classes. For example, a spousal carve out may impact an employer’s male employees more than an employers’ female employees.

Opt-Out Arrangements: Employers should review any opt-out arrangements in place and determine if the arrangement meets the conditional opt-out arrangement requirements. If so, the employer should ensure proper disclosure to employees of the arrangement and annual collection of proof of other coverage.

Rule: A conditional opt-out payment does NOT affect affordability. To qualify as a conditional opt-out payment, the employee must:

- Decline the employer sponsored coverage and;
- Provide reasonable evidence that the employee and the expected tax family* have MEC, other than individual coverage (whether or not obtained in the Marketplace).

***Expected Tax Family:** the individuals for whom the employee can claim a personal exemption on his/her tax return.

Reasonable evidence includes an attestation that the employee and the expected tax family have MEC or other reasonable proof of coverage. Such documentation must be furnished by the employee at least annually and within a reasonable amount of time prior to the start of the plan year.

If an Opt-out arrangement meets the requirements above, the payment will not affect the cost of coverage.

Rule: An unconditional opt-out payment affects affordability. For example, if an employee declines coverage and receives a taxable payment with no other conditions, this is not a conditional opt-out payment and the amount of that payment is added to the employee’s cost of coverage when determining affordability.

In other words, when it’s an unconditional opt-out, any money being paid to the employee needs to be counted as part of the contribution of coverage and needs to be included when the annual affordability calculation is done.