



**BURNING
BENEFITS
NEWS**

**S T E ▼ E N S O N
K E P P E L M ▲ N
A S S O C I A T E S**

June 3, 2011

**IN THIS ISSUE: JUNE 30TH DEADLINE QUICKLY APPROACHING
FOR AMENDING CAFETERIA PLANS
FOR OVER-THE-COUNTER DRUGS**

In our December 2010 BBN, we told you about a Health Care Reform requirement concerning over-the-counter drugs. This is a reminder that employer-provided health plans including FSAs or HRAs, as well as HSAs and Archer MSAs, cannot reimburse over-the-counter drugs purchased on or after January 1, 2011, unless they are prescribed (including drugs purchased during a Health FSA grace period). The January 1, 2011 effective date applies to all plans regardless of plan year (calendar year or otherwise). However, the IRS has stated it will not challenge the use of an account-based debit card for over-the-counter medications obtained without a prescription prior to January 16, 2011.

Cafeteria plans need to be amended to conform to the new over-the-counter drug requirements by June 30. Prop. Treas. Reg. § 1.125-1(c) provides that cafeteria plan amendments may be effective only prospectively. Notwithstanding this rule against retroactive amendments, IRS Notice 2010-59 issued in September 2010, stated cafeteria plans have until June 30, 2011, to be amended retroactively for expenses incurred after December 31, 2010 (or after January 15, 2011 for Health FSA and HRA debit card purchases).

This does not mean that your entire cafeteria plan has to be amended and restated by June 30, 2011. A standalone amendment will suffice, and restatement of the plan document can take place at a later date.

You will want to have an adopting resolution evidencing execution of the amendment by June 30. You may also want to prepare a Summary of Material Modifications (SMM) if you maintain a Summary Plan Description (SPD) for your cafeteria plan. (Cafeteria plan documents are required by the Internal Revenue Code, and are not generally considered to be ERISA plans, which require SPDs and SMMs. However, many employers maintain similar documents for their cafeteria plans to help communicate the terms of the cafeteria plan to its employees.)

Please let us know if you would like SKA to assist in any last minute needs for your cafeteria plan, or if you have any questions or would like further information on these issues.

Contributing to this BBN:

Bob Stevenson Bob@skalaw.com
Nancy Keppelman Kep@skalaw.com
Tim McGraw Tim@skalaw.com
Michelle Bartlett Mickey@skalaw.com

Stevenson Keppelman Associates
444 S. Main Street
Ann Arbor, Michigan 48104
(734) 747-7050 ▪ www.skalaw.com

Burning Benefits News is a communication designed to provide timely information regarding current employee benefits issues. It does not constitute legal advice, as we must address your specific facts in rendering legal opinions. As required by IRS Circular 230, any tax information contained in this communication is not intended to be and cannot be used for the purpose of avoiding tax penalties.