

Hate to Lose FSA Contributions? Employees Don't Have to for 2020 and 2021

Among its many provisions, the Consolidated Appropriations Act, 2021 (the CAA) provides greater flexibility for employees who were enrolled in health and dependent care flexible spending arrangements (FSAs) in 2020, or are enrolled in 2021. The CAA provides for the following optional relief for health and dependent care FSAs:

Carryovers from 2020 to 2021 and 2021 to 2022

Participants may carry over unused health FSA or dependent care FSA funds from the plan year ending in 2020 to the plan year ending in 2021, and from the plan year ending in 2021 to the plan year ending in 2022. Unlike the typical carryover rules that apply to health FSAs, the amount of funds that may be carried forward is not capped; all remaining funds may be carried forward.

The CAA does not state whether a plan must already have a carryover in place to take advantage of this extension. However, because the intent of this provision is to provide relief to employees unable to use their funds due to COVID-19, and because dependent care FSAs were previously prohibited from carrying over unused funds, a plan can likely add this temporary carryover without having previously allowed for carryovers.

If a plan already utilizes a grace period, the plan likely cannot choose to also add a carryover. Nothing in the CAA suggests that the general rule prohibiting a plan from offering both a grace period *and* a carryover has been overruled. Accordingly, if a plan already offers a grace period, it is likely limited to the extension of the grace period relief described below.

Extension of Grace Periods

As an alternative to carryovers, plans may extend their grace periods to allow participants to use remaining amounts from their health FSAs and dependent care FSAs for plan years ending in 2020 or 2021. The grace periods can last until 12 months after the end of the relevant plan year, rather than the usual two and one-half months.

Similar to the carryover rules, the CAA does not state whether a plan must already have a grace period in place to take advantage of this extension. The CAA provides that plans may "extend" their grace periods, which suggests that plans

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must previously have provided for a grace period. Furthermore, because it appears that any plan without a grace period can provide a carryover instead, plans will still have an option to provide relief to participants. Accordingly, pending further guidance, the conservative approach would be to extend a grace period only in plans that previously included a grace period.

Post-Termination Reimbursements from Health FSAs

Employees who stop participating in a cafeteria plan during 2020 or 2021 (for example, due to termination of employment), may continue to receive reimbursements from unused health FSA funds through the end of the plan year in which their participation ended (including any grace period).

This option may require some coordination with the FSA vendor, as the vendor would need to administer the FSA for former employees who have not elected COBRA.

Special Carry Forward Rule for Dependent Care FSAs Where Dependent Aged Out During Pandemic

The CAA increases the dependent age limit for reimbursements from a dependent care FSA to 14 years old, rather than 13 years old for “eligible employees.” An eligible employee is one who

- was enrolled in the dependent care FSA during the last plan year for which open enrollment ended on or before January 31, 2020 (the 2020 Plan Year); and
- has one or more dependents who attain age 13 during
 - the 2020 Plan Year; or
 - in the plan year immediately following the 2020 Plan Year, if the employee has an unused account balance for the 2020 Plan Year.

All eligible employees may be reimbursed for charges relating to dependents not yet age 14 during the 2020 Plan Year. If an eligible employee has an unused balance in their account for the 2020 Plan Year, then they may also be reimbursed for charges relating to dependents not yet age 14 during the plan year which follows the 2020 Plan Year as well.

Change in Election Amount

For the 2021 plan year, employees may prospectively change the amount of their health FSA or dependent care FSA elections. As with any FSA election, employees



may not exceed the statutory limit for each type of FSA with no election change event required. For 2021, the statutory limit for contributions to a health FSA is \$2,750. The 2021 limit on contributions to a dependent care FSA is \$5,000 for individuals or married couples filing jointly and \$2,500 for a married person filing separately.

Next Steps

Each of the relief provisions is optional, and plan sponsors of health or dependent care FSAs are not required to take any action. However, plan sponsors should note that the cafeteria plan rules require any changes to a cafeteria plan to be set forth in writing. Therefore, plan sponsors wishing to implement any of these changes must amend their plan accordingly, even though the relief is temporary.

Employers have until December 31, 2021, to adopt an amendment that includes changes for the plan year ending in 2020, or until December 31, 2022 if the amendment will only include changes for the plan year ending in 2021. However, employers must operate their plans consistent with the terms of any amendment as of its effective date.

Next up in our CAA series is the No Surprises Act. Look for that in the next few days.

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