

RELIEF FOR FLEXIBLE SPENDING ARRANGEMENTS

Relaxed Rules for Health and Dependent Care Flexible Spending Arrangements Become Law, Providing New Options for Employers.

The Consolidated Appropriations Act, 2021 was signed into law Sunday, December 27 and includes nearly \$1 trillion in COVID-related relief, including welcome relief for Flexible Spending Arrangements requested employer, and industry advocates. The following summary is provided to assist employers and plan sponsors with understanding the potential impacts of recent government actions on Health Care and Dependent Care Flexible Spending Arrangements. This is not legal advice, and the relief actions are complex, making it likely that the IRS will, at some point, issue interpretive guidance. We assume no liability whatsoever in connection with its use, nor are these comments directed to specific situations. As always, we strongly encourage employers and plan sponsors to consult their legal or benefits counsel for conclusive guidance on how the actions apply in their circumstances.

The Consolidated Appropriations Act, 2021 (the “Act”), provides – among many other things - temporary relief for Healthcare Flexible Spending Arrangements (health FSAs) and Dependent Care Flexible Spending Arrangements (DCFSA). The optional provisions included in the package allows employers the opportunity to review their plan designs and consider adopting certain provisions to provide additional assistance to their employees. A summary of each provision is listed below:

CARRYOVER OF UNUSED FUNDS FOR HEALTH FSAs AND DCFSA

Carryover From 2020 Plan Year

For plan years ending in 2020, a plan that includes a health FSA or DCFSA may allow any unused benefits or contributions remaining in either arrangement to be carried over from such plan year to the plan year ending in 2021. Note: This effectively eliminates (at the plan sponsor’s option) any cap on carryover of unused funds that previously existed (see Notice 2020-33) for the 2020 and 2021 plan years. It also applies, for the first time, to Dependent Care FSAs.

Carryover From 2021 Plan Year

For plan years ending in 2021, a plan that includes a health FSA or DCFSA may allow any unused benefits or contributions remaining in either arrangement to be carried over from such plan year to the plan year ending in 2022.

Extended Grace Period for 12 months for Health FSAs and DCFSA

A plan that includes a health FSA or DCFSA may extend the grace period for a plan year ending in 2020 or 2021 to 12 months after the end of such plan year, with respect to unused benefits or contributions remaining in either arrangement. For example, a 2020 calendar year plan year with a grace period to March 15, 2021 may extend the grace period to December 31, 2021, effectively allowing participants until December 31, 2021 to incur claims against their 2020 plan year balances.

- Please note that health FSAs may not have both a grace period and a carryover.¹



Spend-Down for Health FSAs (similar to DCFSA)

A plan that includes a health FSA may allow (similar to the rules applicable to DCFSA) an employee who ceases participation in the plan during calendar year 2020 or 2021 (for example, due to termination of employment) to continue to receive reimbursements from unused benefits or contributions for expenses incurred through the end of the plan year in which such participant ceased participation (including any extended grace period permitted in the temporary Act).

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

An “eligible employee” may be reimbursed for an eligible dependent who is not yet age 14 (previously age 13) for purposes of determining the dependent care assistance which may be paid or reimbursed with respect to such employee under the dependent care FSA.

- The term “eligible employee” is defined as any employee who (A) is enrolled in a DCFSA for the last plan year with respect to which the end of the regular enrollment period for such plan year was on or before January 31, 2020; and (B) has one or more dependents (as defined in Internal Revenue Code § 152(a)(1)) who attain the age of 13— (i) during such plan year, or (ii) in the case of an employee who (after the application of this section) has an unused balance in the employee’s account under such arrangement for such plan year (determined as of the close of the last day on which, under the terms of the plan, claims for reimbursement may be made with respect to such plan year), the subsequent plan year.

Prospective Changes in Elections (Without a Change in Status)

For plan years ending in 2021, a plan that includes a health FSA or DCFSA may allow an employee to make an election to prospectively modify the amount (but not in excess of any applicable dollar limitation) of such employee’s contributions to any health FSA or DCFSA (without regard to any change in status). This extends the election change relief that the IRS provided for FSAs in Notice 2020-29 for an additional year.

Plan Amendments

A plan that includes a health FSA or DCFSA may amend their plan and the amendment may be retroactive, if (1) such amendment is adopted no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, and (2) the plan or arrangement is operated consistent with the terms of such amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted. For example, employers adopting the unlimited carryover for a plan year ending December 31, 2020 have until December 31, 2021 to execute the plan amendment as long as they follow the terms of the change consistently prior to the amendment.

The additional flexibility with respect to health FSAs and DCFSAs is a welcome response to the ongoing economic and health impacts of the COVID-19 pandemic. We will continue to monitor any further developments and remain abreast of future relief. We will provide a follow-up action plan regarding how to inform us if you want to adopt any of the optional provisions listed above. As always, we encourage employers and plan sponsors to consult their legal or benefits advisors for conclusive guidance on how adopting any of the optional provisions will impact their specific circumstances.

¹ <https://www.irs.gov/pub/irs-drop/n-13-71.pdf>