

December 30, 2020

## At Last: Flexible Spending Account Plan Carryovers

The Consolidated Appropriations Act (“CAA”), passed by Congress on December 21, 2020 and signed into law by President Trump on December 27, 2020, contains some long-hoped-for relief for employees who make contributions to health care flexible spending account plans and dependent care flexible spending account plans (“FSA Plans”). Employers will want to immediately take note of the options afforded to them by this relief, in particular the option that permits them to amend their FSA Plans to allow employees to roll over any contributions remaining in their FSA Plan accounts for the 2020 plan year and to use those funds to pay for qualifying health care and dependent care expenses incurred at any time during the 2021 plan year.

The CAA provides for the following adjustments to the administration of FSA Plans:

- 2020 Plan Year Carryovers. FSA Plans with plan years ending in 2020 may permit participants to carry over any unused benefits or contributions remaining in any such FSA Plan accounts from the 2020 plan year to the plan year ending in 2021. This rule extends to dependent care flexible spending arrangements the current carryover rule available to health care flexible spending arrangements and eliminates the \$550 cap imposed on those carryovers.
- 2021 Plan Year Carryovers. FSA Plans with plan years ending in 2021 may also permit participants to carry over any unused benefits or contributions remaining in any such FSA Plan accounts from the 2021 plan year to the plan year ending in 2022.
- Grace Period extension. For any FSA Plans that have adopted the 2.5 month grace period with respect to unused funds remaining in a health care flexible spending arrangement or a dependent care flexible spending arrangement, the legislation extends the grace period for a plan year ending in 2020 or 2021 from 2.5 months to 12 months after the end of such plan year.
- Post-Termination Reimbursements from a health FSA. An employee who ceases participation in an FSA Plan during calendar year 2020 or 2021 may continue to receive reimbursements from unused benefits or contributions for expenses incurred through the end of the plan year in which such participation ceased (including any grace period, as extended by the legislation). Note that this modification simply permits participants to access funds remaining in their health FSAs on the date participation ceases. Participants would still have to elect COBRA if they wished to continue to contribute to their health FSAs for any months following termination of their participation.
- Special carryforward rule for dependent care FSAs where a dependent child turned age 13 during the pandemic. Under current law, dependent care FSAs may reimburse qualifying dependent care expenses for qualifying children who have not turned 13. The CAA extends the age limit for such qualifying children from 13 to 14, permits dependent care FSAs to reimburse qualifying expenses for a plan year for which open enrollment ended before January 31, 2020, and allows employees to use any unspent funds from that plan year that are available (either by rollover or grace period) to the employee during the following plan year. This relief is especially helpful for employees with children who turned 13 in 2020 but for whom no childcare services were available due to the pandemic. Under this provision, employees may use any remaining 2020 dependent care FSA funds in 2021 to pay for care provided to these children until they turn 14.
- Change in election amount. Under the CARES Act, a health care FSA or a dependent care FSA could permit employees to make a prospective change in the amount they elected to contribute to their FSAs for the 2020 plan

year without the normally required change in status permitting such a change. The CAA extends this option to the 2021 plan year. Employers retain the discretion to set the conditions for any such changes, including whether to permit them at all, so long as any changes made are not for amounts in excess of any applicable dollar limits.

Because many FSA Plan plan years begin on January 1, 2021, employers who wish to allow employees to make changes in their FSA Plan contribution elections to take into account the availability of roll over funds from the 2020 plan year that were not anticipated when they made their elections during the fall 2020 open enrollment period may do so under the change in election amount relief discussed above. Employees should also understand that should they have any funds remaining in either of their FSA Plan accounts for the plan year ending in 2021 (after all reimbursements have been made), all such funds will be available to be rolled over to the 2022 plan year. Employees can, therefore, take into account any expected rollover amounts when making their FSA Plan elections during the 2021 open enrollment period.

None of these changes affects the rules governing contributions to health savings accounts. Therefore, any employees who participated in a health FSA in 2020 but who will be enrolling in a high deductible health plan with an HSA for the 2021 plan year will still be subject to the existing limitations imposed on their access to their prior health FSA funds.

Any employers wishing to adopt any of these changes should contact their FSA Plan third party administrators to confirm their readiness to implement them. Employers will also have to amend their FSA plans by December 31, 2021 with such changes effective retroactive to January 1, 2020. This long lead-time means that employers may communicate any permitted changes to employees and take steps to implement such changes as soon as practicable.

If you have any questions about the changes permitted under the CAA or need assistance with any employee communications or FSA Plan amendments, please contact your Ropes & Gray advisor.