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IRS and DOL Issue Separate COVID-19-Related Benefit Plan Guidance for Employee Benefit Plans and Plan Participants: Take Note of Opportunities and Deadlines

The Internal Revenue Service (IRS) and the Department of Labor (DOL) separately issued important guidance on COVID-19-related relief over the past week. This Alert provides information on both IRS Notice 2021-15 and EBSA Disaster Relief Notice 2021-01.

A. IRS Notice 2021-15

On February 18, 2021, the IRS released Notice 2021-15 to give employers additional guidance regarding the relief made available to health flexible spending arrangements (health FSAs) and dependent care assistance programs pursuant to the Consolidated Appropriations Act (CAA). Among other things, section 214 of the CAA provides for flexibility with respect to carryovers of unused health FSA and dependent care account balances from the 2020 and 2021 plan years; it extends the permissible period for incurring claims for plan years ending in 2020 and 2021; it provides a special rule regarding post-termination reimbursements from health FSAs during plan years 2020 and 2021; it provides flexibility for a special claims period and carryover rule for dependent care assistance programs when a dependent "ages out" during the COVID-19 public health emergency; and it allows certain mid-year election changes for health FSAs and dependent care assistance programs for plan years ending in 2021.

Notice 2021-15 generally tracks the legislative provisions of § 214 (which we discussed in our previous Alert available here), while also providing some clarity on certain administrative issues through examples and explanations. The notice also offers additional relief with respect to mid-year elections for plan years ending in 2021 as well as with respect to the effective date of amendments to § 125 cafeteria plans and health reimbursement arrangements (HRAs) to implement the expansion of allowed expenses for health FSAs and HRAs by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Below is a brief overview of the key clarifications contained in Notice 2021-15.

- 2020 and 2021 Plan Year Carryovers. The guidance confirms that an employer, in its discretion, may amend one or more of its § 125 cafeteria plans to provide a carryover to the immediately subsequent plan year of all or part of the unused amounts remaining in a health FSA or a dependent care assistance program account as of the end a plan year ending in 2020 or 2021. The carryover is available not only to cafeteria plans that currently have a grace period or provide for a carryover, but also to those that currently do not have a grace period or provide for a carryover. Notice 2021-15 also provides that an employer may limit the carryover to an amount less than all unused amounts and may limit the carryover to apply only up to a specified date during the plan year.

- Grace Period Extensions. According to Notice 2021-15, the extension of the grace period for incurring claims that may be reimbursed by a health FSA is an extension of the coverage by a health plan that is not a high deductible health plan (HDHP). As a result, an individual is not eligible to make contributions to an HSA if the individual participates in a general purpose health FSA (including during any period in which the participant can incur claims pursuant to the legislation's grace period extension). This restriction on making contributions to an HSA if amounts remain available in a general purpose health FSA applies not only to current participants in the health FSA but also to individuals who remain eligible to incur claims but have ceased participation in the health FSA as the result of termination of employment, change in employment status, or a new election during calendar year 2020 or 2021.

  - Interactions of the Carryovers and Grace Period Extension Rules. Consistent with current guidance, an employer may not amend its plan to adopt both the § 214 carryover and the extended grace period under § 214 for a particular plan year for a particular health FSA or dependent care assistance program, and an amendment must specify which option is adopted for the applicable plan years.

- Special Age Limit Relief Applicable to Carryover Relief for Dependent Care Assistance Programs. Notice 2021-15 makes clear that the special age limit relief for qualifying children from age 13 to 14 for dependent care FSAs is separate from the general carryover and extended claims periods relief available under the CAA. In other words, an employer that adopts the special age limit relief is not required to adopt the carryover or grace period extension for incurring claims, and vice-versa.

- Prospective Mid-year Election Changes. Notice 2021-15 explains how employers can permit their employees to make a variety of mid-year prospective election changes, including:

  - ***Revoking, Increasing or Decreasing Existing Health FSA or Dependent Care Assistance Program Elections.*** An employer may amend one or more of its § 125 cafeteria plans to allow employees, on a prospective basis, to (1) revoke an election, make one or more elections, or increase or decrease an existing election, for plan years ending in 2021 regarding a health FSA, or (2) revoke an election, make one or more elections, or increase or decrease an existing election, for plan years ending in 2021 regarding a dependent care assistance program. Prospective election changes may include an initial election to enroll in a health FSA or dependent care assistance program for the year, for example, to gain use of the carryover or grace period extension if the employee initially declined to enroll in the health FSA or dependent care assistance program for the year. An employer who adopts this relief may limit the period during which election changes may be made.

  - ***Electing Employer-Sponsored Health Coverage; Revoking and Enrolling in Different Health Coverage Sponsored by the Employer; or Revoking Existing Coverage and Enrolling in Different Health Coverage Not Sponsored by the Employer.*** An employer may amend one or more of its § 125 cafeteria plans to allow employees to (1) make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage; (2) revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis (including changing enrollment from self-only coverage to family coverage); or (3) revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer. For the last scenario, Notice 2021-15 provides details on what procedures must be followed in order for an employee's revocation to be deemed acceptable. Separately, with respect to mid-year election changes for employer-sponsored coverage, the relief contained in the CAA and Notice 2021-15 applies both to employers sponsoring self-insured plans and to employers sponsoring insured plans.

- Plan Amendments. Notice 2021-15 confirms that an amendment may be effective retroactively to the beginning of the applicable plan year, provided that the § 125 cafeteria plan operates in accordance with the terms of the amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted, and the employer informs all employees eligible to participate in the § 125 cafeteria plan of the changes to the plan.

- Reporting Requirements for Dependent Care Assistance Programs. Some employers may have questions on how they should report amounts contributed to a dependent care assistance program on Form W-2. Under current guidance, employers may report in Box 10 of Form W-2, for a year, the salary reduction amount elected by the

employee for the year for dependent care assistance (plus any employer matching contributions), and they are not required to adjust the amount reported in Box 10 to take into account amounts that remain available in a grace period. According to Notice 2021-15, this rule continues to apply with respect to employers who amend their § 125 cafeteria plans to provide for the temporary flexibility provided by the CAA. For this purpose, any amount carried forward from 2019 and used in 2020, whether a carryover or an extended grace period, is treated as an amount that remains available in a grace period and need not be reported for the year in which the carryover occurs.

- Expansion of Allowable Expenses for Health FSA and HRAs. The CARES Act amended the Internal Revenue Code (Code) to allow expenses incurred for menstrual care products to be treated as incurred for medical care with respect to reimbursement from health FSAs and HRAs, as well as HSAs and Archer medical savings accounts (MSAs). In addition, it allows health FSAs and HRAs, as well as HSAs and Archer MSAs, to reimburse expenses incurred for over-the-counter drugs without regard to whether the drug has been prescribed. As enacted, the expansion applies to expenses incurred after December 31, 2019. Notice 2021-15 says that health FSAs and HRAs may be amended to provide for reimbursements of expenses for menstrual care products and over-the-counter drugs without prescriptions incurred for any period beginning on or after January 1, 2020, and such an amendment will not result in a failure of the reimbursement to be excludable from income under § 105(b) or for the cafeteria plan to fail to meet the requirements of § 125.

B. EBSA Disaster Relief Notice 2021-01

On February 26, 2021, the DOL issued EBSA Disaster Relief Notice 2021-01 (EBSA Notice 2021-01) in which it announced that the period for the COVID-19-related relief provided under EBSA Disaster Relief Notice 2020-01 and the Notice of Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID–19 Outbreak (2020 Joint Notice) issued by the DOL, the Department of the Treasury, and the IRS would expire based on when plan participants were first eligible for the relief.

As a brief refresher, the 2020 Joint Notice provided group health plans subject to ERISA or the Code additional time for participants and beneficiaries to meet certain deadlines affecting COBRA continuation coverage, special enrollment, filing claims for benefits, appeals of denied claims, and external review of certain claims. For disability, retirement and other plans, the 2020 Joint Notice gave participants and beneficiaries extra time to make claims for benefits and appeal denied claims.

The relief provided to individuals and ERISA plans was to continue until the earlier of (a) one year from the date they were first eligible for relief or (b) sixty (60) days after the announced end of the COVID-19 National Emergency (the end of the DOL and IRS announced Outbreak Period). While the COVID-19 National Emergency is still in effect, since the relief went into effect on March 1, 2020, the end of the one-year period could occur as early as February 28, 2021. For many, the expiration date will be later than that. For example, the one-year period for plan participants who were eligible to elect COBRA beginning on May 1, 2020 will run on April 30, 2021 and they will have 60 days from that date to make their COBRA election. Should the National Emergency end before this one-year period runs for a plan participant, the relief period will end and the election period will commence once the National Emergency is over.

In recognizing that affected plan participants and beneficiaries may continue to encounter problems during the COVID-19 pandemic, the DOL said in EBSA Notice 2021-01 that “the guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.”

EBSA Notice 2021-01 further explains that "where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period. Moreover, plan disclosures issued prior to or during the pandemic may need to be reissued or amended if such disclosures failed to provide accurate information regarding the time in which participants and beneficiaries were required to take action, e.g., COBRA election notices and claims procedure notices. Further, in the case of ERISA group health plans, plans should consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace in their state."

Finally, the DOL acknowledges that there may be instances when compliance with ERISA's disclosure and claims processing requirements may not be possible. When such compliance is not possible, EBSA Notice 2021-01 states that "in the case of fiduciaries that have acted in good faith and with reasonable diligence under the circumstances, the Department of Labor's approach to enforcement will be marked by an emphasis on compliance assistance and includes grace periods and other relief." While it is unclear how the DOL will ensure good faith compliance, employers should work with their third party administrators, including those administering COBRA, to properly document the steps they are taking to notify affected participants of their rights and of any changes in deadlines that affect their benefits.

If you have any questions about IRS Notice 2021-15 and the changes permitted under the CAA, including FSA Plan amendments, or EBSA Notice 2021-01, or you need assistance with any employee communications regarding either notice, please contact your Ropes & Gray advisor.