

Consolidated Appropriations Act, 2021: Top Practical Considerations on FSA, Election Change Relief

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The Consolidated Appropriations Act, 2021 (Act) provides certain COVID-19-related relief, including temporary additional flexibility regarding flexible spending accounts (FSAs). Employers have several practical considerations when deciding whether to adopt one or more of the changes in their plans.

Under the FSA changes, employees need not lose the benefit of the dollars they set aside from their pay into healthcare and dependent care FSAs and may use the amounts contributed for up to 12 months after the end of the 2020 or 2021 plan years. These provisions are optional, like the prior relief from IRS Notices 2020-29 and 2020-33 for 2019 elections, and, if implemented, require plan amendments.

Following are some of key considerations for employers:

- 1. Administration:** Have you communicated with your administrator for the healthcare FSA and dependent care FSA to confirm their capabilities for implementing these rules? Employers have flexibility to implement and tailor one or more of the available options. These provisions do not require all items to be implemented. Some administrators have adopted the rules unless employers opt out of them. Pay attention to communications from your administrators to ensure you do not lose flexibility to choose what you are implementing and risk violating ERISA fiduciary responsibilities to communicate with plan participants. Other administrators are working with employers to determine which options fit their needs. There are many legal and practical considerations to evaluate when making these decisions (which may not be raised by your administrators).
- 2. Carryover Eligibility:** Who would qualify for the carryovers? Would they be limited to those who during open enrollment elected continued FSA participation? Would you allow employees to make election changes to add the FSA once the carryover is announced? How would this be applied to employees who terminated during 2020 and are rehired during 2021 whose benefits may have been forfeited months ago? Would employees who had elected COBRA coverage for the health FSA and had unexpended amounts at the conclusion of the 2020 plan year be eligible? (Further COBRA considerations are identified below.)
- 3. Amount:** Would you permit the entire amount or some lower amount to be carried over? Unlike current rules that limit carryover amounts to a maximum of \$550 (based on current cost of living amounts), the Act allows unlimited carryover up to the remaining amount in each person's FSA. Will it be an administrative burden to separately determine the maximum amount available for each employee, as opposed to having the same maximum dollar amount applied to all participants under current rules? Would you permit election changes to allow employees to reduce their 2021 elections because they now have substantial 2020 dollars available to them? Existing

rules do not allow a person to cancel their election and receive a cash-out of contributions previously made.

4. *HSA Eligibility:* What impact would the carryover or grace period have on health savings account (HSA) eligibility? Plans can permit an employee to choose to cancel the opportunity to carryover FSA opportunities to allow participation in an HSA; plans with grace period extensions cannot. Does your plan already offer a limited purpose FSA? Is your administrator capable of administering this?
5. *Ordering Rules:* Administrators already had to follow complicated rules when determining which dollars are spent first. These complications would be exacerbated under the extended relief, particularly as the new rules allow changes in FSA elections during the year. Are your administrators able to administer the ordering rules that enable employees to use FSA dollars from two different plan years for the entire next plan year?
6. *Aged Out Dependents:* If you broadly offer carryovers, some employees whose dependent children attained age 13 during 2020 could not benefit in the carryover, absent adoption of increase to age 14. Would you want to permit this? Do you have a significant number of employees affected by the age-13 limitation? Is your administrator capable of administering this and making a proper determination of who is an “eligible employee” during each year?
7. *COBRA Considerations:* The Act allows FSA plans to permit employees to fully utilize unused health FSA monies that exist if they are terminated in calendar year 2020 or 2021, even if no COBRA election is made (similar to what is permitted currently for dependent care FSA). For employers considering this option, have you considered the potential impact this may have on your COBRA notices? Employers with fiscal year plans should carefully consider the additional administrative burdens associated with accounting for those who terminated in 2021 where some employees would benefit from the termination extension and some might not.
8. *Fiscal Year Plans:* Since the Act extends the FSA deadline for up to 12 months after the end of the plan year, fiscal year plans generally will have a shorter FSA extension period than calendar year plans. The available guidelines also do not currently contemplate what relief, if any, should be afforded to fiscal year plans with a grace period approach in 2020 (since the deadlines for many fiscal year plans will have ended by the time the Act was passed). The Act is unclear if forfeited FSA amounts in 2020 can be recaptured and used through the end of the extended grace period deadline. If you have a fiscal year plan, would you adopt the changes now for 2021 only or wait until further guidance is issued for 2020?
9. *Employee Communications:* How would you communicate the changes to employees? Plan amendments and Summary of Material Modifications (SMM) are needed. However, those documents likely would follow the need for practical employee communications. Would you go through another FSA open enrollment period with these changes? All communications to employees need to be clear that these extensions are limited to 2020 and 2021 plan years, so that no expectation exists for the same flexibility in 2022 and beyond.
10. *Plan Amendments:* Who do you rely upon for maintaining your Section 125 and FSA plans? These plans will need to be amended to retroactively implement the relief you are adopting and any COVID-19 election change relief you implemented last year. The 2019 extensions need to be formally adopted by December 31, 2021. If not already adopted, it may be beneficial to adopt changes for 2019-2022 in one amendment. Communicate with your plan service provider and ERISA counsel before any changes

are implemented.

Jackson Lewis attorneys are available to help plan administrators understand and implement the FSA and election change relief options and requirements. Please contact a team member or the Jackson Lewis attorney with whom you regularly work if you have questions or need assistance.

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