

2021 Plan Amendment Deadlines and Other Looming Fourth Quarter Considerations

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As the year draws to a close, it is helpful for employers to pause to evaluate employee benefit plan amendment deadlines and other crucial fourth quarter considerations, including:

- 1. Cafeteria Plan and FSA Plan Amendments for COVID-19 Election Change and Other Relief.** With the COVID-19 pandemic came floods of Section 125 cafeteria plans and flexible spending accounts (FSA) guidance. These [legislative acts](#) and [agency](#) pronouncements allowed employers to pick and choose from a menu of relief, offering plan participants opportunities to change their coverage or FSA elections, carryover balances, have extended grace periods, and more. Employers who leveraged any of this relief must amend their Section 125 cafeteria plans and FSA plans by December 31, 2021.
- 2. Health FSA Changes – Qualified Medical Expenses.** The [CARES Act](#) amended the definition of a qualified medical expense to include over-the-counter medications without a prescription and menstrual products. Many FSA plans expressly exclude the reimbursement of over-the-counter drugs. Yet, many FSA administrators have already operationally implemented the CARES Act changes. Employers should confer with their FSA administrators to determine whether the definition of qualified medical expenses in their FSA plans should be amended to reflect this change in the law. The amendment deadline to implement the change for the 2020 plan year is December 31, 2021.
- 3. Health FSA Change – \$550 Carryover.** Under prior law, health FSA plans could allow participants to carryover up to \$500 in FSA dollars from one year to the next without running afoul of the Section 125 plan rules. The \$500 carryover limit was not indexed for inflation, whereas the regular FSA limit is (*i.e.*, the statutory \$2,500 health FSA maximum limit is currently indexed to \$2,750 for 2021). [IRS Notice 2020-33](#) changed the carryover rules to index the carryover amount as it relates to the health FSA contribution limit. For 2020 and 2021, the carryover limit was set at \$550. Employers who permitted carryovers of up to \$550 from the 2020 plan year to the 2021 plan year must amend their plans by December 31, 2021. The amendment may be retroactive to January 1, 2020, provided that participants were notified of the change. Employers first permitting carryovers of up to \$550 in 2021 must amend their health FSA plans on or before the last day of the plan year that begins in 2021.
- 4. Group Medical Plan Changes – COVID-19 Testing, Vaccines, Telemedicine.** [As expanded by the CARES Act, the Families First Coronavirus Response Act](#) required group health plans and insurers to cover COVID-19 testing and related preventive services without cost-sharing, preauthorization, or medical-management activities. [IRS Notice 2020-15](#) added that telemedicine and other remote health benefits

provided free of charge will not disqualify participants from Health Savings Account participation. To conform to the above requirements, employers should confer with their group medical plan providers and consultants about the plan amendments needed before December 31, 2021.

5. **Retirement Plans – Hardship Distribution Amendment Deadline.** The Bipartisan Budget Act of 2018 and [implementing final regulations](#) changed the hardship distribution provisions of 401(k) plans and to a lesser extent 403(b) plans. These plans must be amended by December 31, 2021, to implement these changes. Although the [SECURE Act](#) and the [CARES Act](#) changes already are in effect, employers are not required to amend their plans to conform to these requirements during 2021. These latter amendments can be put on employer’s to-do lists for next year. Employers also should keep an eye on pending legislation. New retirement plan legislation may come in the first quarter of 2022.
6. **Pre-approved 401(k) and Other Defined Contribution Plans – Restatement Deadline.** Employers who maintain pre-approved plans have until [July 31, 2022](#), to restate their plans as part of the “remedial amendment cycle 3.” Through this process, employers basically update their plans to reflect the most recent tax law changes. Many retirement plan document providers already have produced plan restatements for their employer clients. Employers who maintain pre-approved plans should contact those responsible for maintaining their plan documents to confirm they are scheduled for a timely restatement.
7. **Retirement Plans – Cybersecurity Compliance.** Since issuing [best practice guidelines](#) for retirement plan administrators in the early part of this year, the Department of Labor has initiated fiduciary investigations of cybersecurity compliance. Plan administrators and committees should put this item on the meeting agenda for the fourth quarter of 2021. Compliance begins by learning about the guidelines and initiating a risk assessment.
8. **Mental Health Parity and Addition Equity Act (MHPAEA) – Comparative Analysis, Compliance.** February 10, 2021, was the deadline for plan sponsors and insurers to complete a comparative analysis of the group medical plan’s nonquantitative treatment limitation rules, which requirement was added by the [Consolidated Appropriations Act of 2021](#) (CAA 2021). The Department of Labor is vigorously enforcing MHPAEA requirements. Employers who sponsor self-funded group health plans should engage their plan service providers to complete the required analysis and otherwise evaluate MHPAEA compliance using the Department of Labor’s [self-compliance tool](#).
9. **No Surprises Act – Group Health Plan Surprise Billing, Transparency.** Although the agencies reported some enforcement deadline delays, the bulk of the changes by [CAA 2021](#) are still effective January 1, 2022, on a good-faith basis, pending further guidance. Employers should tackle compliance efforts in the fourth quarter of 2021. Practically, the surprise billing and transparency guidance will require all plan sponsors to review their vendor relationships and service agreements. New vendors may be needed, and vendor agreements likely will need to be amended to capture additional responsibilities. Engaging in this process in the fourth quarter of 2021 will help to ensure timely compliance with the mandates. Group health plans also will

need to be amended to reflect these changes in the law.

10. **Tax Law Compliance – Remote and Hybrid Workers.** Since March of 2020, many employers have seen a substantial change in where people work. With remote and hybrid work arrangements come questions about wage withholding, unemployment, and statutory benefit compliance, among many employment law considerations. Some states issued COVID-19 guidance providing instructions to employers for the handling of wage withholdings for employees temporarily working across state lines due to the virus. This guidance largely has expired. With a new year fast approaching, which ties nicely with employees updating state and federal Form W-4 withholding certificates, the fourth quarter of 2021 is a good time for employers to evaluate their remote and hybrid work arrangements from business strategy and legal compliance standpoints.

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