

IRS Issues Guidance Clarifying COVID-19 Relief Rules for FSAs and Cafeteria Plans

February 24, 2021

On February 18, 2021, the IRS issued [guidance](#) (the “Guidance”) clarifying new temporary COVID-19 relief rules applicable to health and dependent care FSAs (Health FSAs and DCAPs, respectively) and Section 125 plans (Cafeteria Plans).

How does the Guidance Change the Law?

While the Guidance does not change current law, it does help to clarify and interpret ambiguous language in the most recently passed COVID-19 relief legislation, the Consolidated Appropriations Act, 2021 (CAA) by providing important details and examples that were not originally included in that law.

How Does the Guidance Clarify the Temporary Relief Rules applicable to Health FSAs and DCAPs?

The Guidance is intended to clarify the application of special rules for health FSAs and DCAPs provided under the CAA. The CAA provides flexibility with respect to carryovers of unused funds and extends the time period for incurring claims for health FSAs and DCAPs, permits post-termination reimbursements from health FSAs and provides special rules for dependents who “age out” of DCAP coverage during the COVID-19 public health emergency. (See our summary of the CAA’s [FSA relief provisions](#).) The Guidance provides

important details about how the CAA’s FSA relief provisions work, along with specific examples.

For example, while the CAA provides that plan sponsors may carry over any unused amounts remaining in health FSAs or DCAPs at the end of the applicable plan year (subject to “rules similar to current rules for health FSAs”), the new Guidance clarifies that when implementing a carryover for a health FSA or DCAP under these new rules, plan sponsors are permitted to limit the carryover amount to an amount that is less than “all unused amounts at the end of the plan year” and may limit the carryover to apply only up to a specified date during the plan year.

Additionally, the Guidance clarifies that plan sponsors may also choose to adopt one type of relief, or no relief, for a health FSA and a different type of relief, or no relief, for a DCAP, and further, that an employer that offers multiple health FSAs or DCAPs may also adopt differing relief for each particular health FSA or DCAP.

What Cafeteria Plan Rules were Extended?

The new relief for mid-year Section 125 plan elections for plan years ending in 2021 is similar to [prior guidance](#) for calendar year 2020. Section 125 plans may permit employees to make or revoke election

SYNOPSIS

- The new Guidance does not change current law, but clarifies ambiguous language in the Consolidated Appropriations Act, 2021 (CAA).
- The Guidance provides important details about how the CAA’s FSA relief provisions work, along with specific examples.
- The Guidance also clarifies that plan sponsors may choose to adopt one type of relief, or no relief, for a health FSA and a different type of relief, or no relief, for a DCAP.
- Those interested in taking advantage of the relief should talk to their trusted health plan advisors and ensure that any proposed changes are in line with these rules.

changes in certain circumstances. The Guidance clarifies that employers can decide how long to permit mid-year election changes with no change in status during the plan year and can limit the number of election changes during the plan year that are not associated with a change in status.

How does the Guidance Affect Over-the-Counter Drugs?

The Guidance also provides relief, similar to relief granted for plan years in 2020, with respect to plan amendments expanding reimbursable expenses for health FSAs and health reimbursement arrangements (HRAs) to include over-the-counter drugs and menstrual care products. Amendments to these plans must normally be made on a prospective basis, but these amendments may allow these reimbursements to be effective beginning on or after January 1, 2020.

Does the New Guidance Extend the 2020 “Outbreak Period” Rules that Had Extended COBRA and other Compliance Deadlines?

No, but language in those rules appears to indicate that they will expire on March 1, 2021. Specifically, in April 2020, the IRS and other agencies issued a [final rule](#) that requires extensions of certain benefits-related timeframes under ERISA and the Code during the COVID-19 National Emergency. Generally, this rule had extended deadlines applicable to the following health plan mandates:

- Special enrollment timeframes under HIPAA's portability requirements, including coverage under Medicaid and CHIP.
- COBRA's health plan continuation coverage requirements, including COBRA election procedures and premium payment deadlines.
- The DOL's claims procedure requirements for ERISA plans, including timeframes for filing initial claims and appealing plan benefit denials.
- The ACA's internal claims, appeals, and external review procedures.

Under these rules, covered plans were required to disregard the time period from March 1, 2020, until 60 days after the announced end of the COVID-19 National Emergency—a period of time designated as the “Outbreak Period”—for purposes of counting the days of applicable deadlines for the mandates listed above. Additionally, as explained in the final rule, this Outbreak Period described above is subject to the statutory duration limits in ERISA and the Code, under which a set-aside or “disregarded” period of up to one year is permitted (under 29 U.S.C. § 1148; 26 U.S.C. § 7508A). Accordingly, it appears that the deadline extensions permitted during the Outbreak Period are soon coming to an end, but there is still some confusion as to whether this one-year limit on these rules applies to all plan participants or only on an individual or

participant-by-participant basis. It's also not clear if the IRS and other agencies will decide to extend this temporary relief, particularly since the pandemic will likely continue past March 1, 2021. Additional guidance from the IRS and other agencies would be welcomed in these areas.

When Does the Guidance Go into Effect? What Should Employers and Plan Sponsors Do Next?

The Guidance is generally effective retroactively for both the 2020 and 2021 plan years, even if those plan years end in 2022 (*i.e.*, for non-calendar year plans). The Guidance clarifies that employers and plan sponsors can amend their plans retroactively to the beginning of the applicable plan year, so long as the plan operates in accordance with the amendment's terms and conditions for the relevant period and employees are informed of the change.

Employers and plan sponsors interested in taking advantage of the relief in the new Guidance should discuss these rules with their FSA administrators, third-party administrators, and other trusted health plan advisors and ensure that any proposed changes are in line with these rules.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.