

**ALERT**

**Employee Benefits &  
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## **CONGRESS TINKERS (AGAIN) WITH HEALTH FSAs AND DCAPs**

In what is fast becoming an annual holiday tradition, Congress enacted a massive spending bill in the last week of the year that also includes provisions affecting the benefits employers offer to their employees. The “Consolidated Appropriations Act, 2021” includes, among numerous other provisions, the “Taxpayer Certainty and Disaster Relief Act of 2020.” This Act, in turn, includes provisions that make changes to the rules governing Health Flexible Spending Accounts (“Health FSAs”) and Dependent Care Assistance Plans (“DCAPs”). These changes are not permanent – they are limited to 2021 and 2022 – and employers are not required to implement them.

Congress made the following changes to the normal rules governing Health FSAs and DCAPs:

- (1) *No Maximum Limit on Carryovers.* Under existing law, a Health FSA is permitted to allow unused amounts in a participant’s account at the end of a year to be carried over into the next year, but only up to a limit. That limit is currently \$550. Under the Act, employers that permit carryovers may choose (but are not required) to allow any amount of unused 2020 funds to be carried into 2021 and any amount of unused 2021 funds to be carried into 2022. Although unused amounts in a DCAP cannot normally be carried over, the Act allows the same rule to be applied to unused amounts in a DCAP.
- (2) *Extended Grace Periods.* Under existing law, both Health FSAs and DCAPs are permitted to allow leftover amounts at the end of a year to be used for expenses incurred during the first 2-1/2 months of the next year. Under the Act, an employer may choose (but is not required) to extend this grace period to 12 months for unused amounts remaining at the end of plan years ending in 2020 and/or 2021.
- (3) *Continued Health FSA Reimbursements to Former Employees.* Under existing law, once an employee’s participation in a Health FSA has ceased – for example, because the employee has terminated employment – new expenses that have been incurred cannot

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be reimbursed unless the employee qualified for and elected COBRA. Under the Act, however, if the employee has “unused benefits or contributions,” an employer may choose (but is not required) to reimburse newly incurred expenses through the end of the plan year, including any grace period.

- (4) *Election Changes for Health FSAs and DCAPs.* Under existing law, once an election to contribute to a Health FSA and/or a DCAP has taken effect, that election cannot be changed unless the participant experiences a “change in status” or another similar event. For plan years ending in 2021, however, the Act allows (but does not require) an employer to permit mid-year election changes to a Health FSA and/or DCAP, even if a change in status has not taken place, as long as the change takes effect on a prospective basis only.
- (5) *Upper Age Limit for DCAP Reimbursements.* Under existing law, DCAP reimbursements cannot be made for a child who is age 13 or older unless the child is physically or mentally incapable of caring for himself/herself. For DCAPs with a regular enrollment period ending on or before January 31, 2020, the Act allows (but does not require) the age limit for that plan year to be increased to 14. If an employee still has unused amounts at the end of that plan year, the age limit can be increased to 14 for the next plan year, but only as to the unused amounts remaining at the end of the first plan year.

### Points to Keep In Mind

In looking at the changes Congress has made to these rules, it is important to keep the following in mind:

- (1) *Temporary.* The changes are temporary. At the end of the 2021 or 2022 plan year, depending on the specific change, we’ll go back to the normal rules.
- (2) *Optional.* The changes are optional. Employers with Health FSAs and/or DCAPs are not required to implement them.
- (3) *“Pick and Choose.”* Employers can pick and choose which, if any, of the changes they will adopt.
- (4) *Plan Amendments.* Employers will be required to adopt a written plan amendment if they implement any of these changes; however, Congress specifically provided that the changes can be implemented first as long as a plan amendment is formally adopted and given retroactive effect by the last day of the next calendar year.

- (5) *Consequences of Implementation.* Many employers may not want to implement any of these changes. Not every employer will have employees who would be helped by these changes. Also, some of the changes may be difficult to administer and could create opportunities for employees to “game the system.”
- (6) *Open Questions.* The statutory language does not address every question that might come up. If and when the Internal Revenue Service chooses to address those questions, it is possible that the IRS could throw us a few curves. So stay tuned...

If we prepare plan documents for you and you would like for us to amend your plan for any of these changes, please let us know.

We hope this information is helpful. If you have any questions, please do not hesitate to call the Employee Benefits and Employment Law team at Hinkle Law Firm at (316) 267-2000.

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