DECEMBER 28, 2020

COVID Relief Bill Changes Health and Dependent Care FSAs for 2020 and 2021

The COVID-relief bill , which included year-end government funding provisions, was signed by President Trump last night.

The bill makes a number of changes to health and dependent care FSAs. Unless otherwise set forth below, all changes are applicable to both health and dependent care FSAs –

Permits carryovers of unused funds (no dollar limit) from 2020 to 2021 and from 2021 to 2022, or permits a 12-month grace period for 2020 and/or 2021.

KT Comments: For 2020 and 2021, an employer may choose either the carryover or the grace period for each FSA, but not both for the same FSA. For example, for 2020, the plan can choose a carryover for the health FSA and a grace period for the dependent care FSA, or a carryover for both the health and dependent care FSA. But, an employer may not choose both a carryover and a grace period for 2020 that applies to the same FSA.

Post termination spend down for a health FSA under 2020 and 2021.

KT Comments: The language states that such post–termination reimbursement is treated the same as the spend down rules for dependent care FSAs. For dependent care FSAs, the spend down rules allow unused contributions as of termination of employment to be reimbursed for expenses incurred after the termination and before the end of the plan year. Thus, the health FSA spend down should work the same. However, it is unclear whether the health FSA spend down applies just to unused contributions as of the termination date or the entire elected amount (as would be required if the uniform coverage rule applied). Additional IRS guidance is likely on this issue.

Maximum dependent care age of 13 temporarily increased to age 14.

KT Comments: For a plan year for which the regular enrollment period ended on or before January 31, 2020, the maximum age is increased from age 13 to age 14 for the 2020 calendar year. This means that an employee may be reimbursed for dependent care expenses until age 14 during 2020. Further, if such employee has an unused balance as of the end of 2020, the same rule can be applied to 2021, but only with respect to the unused balance that is carried forward into 2021 from 2020.

Employees may make a mid-year election change for health and dependent care FSAs during the 2021 plan year.

KT Comments: A new mid-year election may be made and an existing election may be changed prospectively mid-year during 2021, regardless of the application of any existing change in status rules.

Changes are voluntary and plan amendments are not required before making changes.

KT Comments: Plan amendments must be made by the end of the first calendar year beginning after the end of the plan year in which the amendment is effective – that is calendar year 2020 plan amendments must be adopted on or before December 31, 2021. All changes are voluntary. However, because the wording of the dependent care age 14 change revises the definition of a dependent child in the Code, if a

plan incorporates the definition of an eligible dependent by reference to the Code, that definition would need to be amended by those employers who do not want to adopt this change.