



## **Consolidated Appropriations Act (CAA) 2021 Health FSA & Dependent Care FSA FAQs**

*Revised 1.26.21*

On December 27, 2020, the Consolidated Appropriations Act (CAA) was signed into law, providing additional coronavirus pandemic relief.

The CAA affects Health and Dependent Care Flexible Spending Accounts (FSAs), permitting employers to amend their FSA plans to 1) allow employees to carry over unused benefits for plan years ending in 2020 and 2021 or 2) extend the grace period from a maximum of two-and-a-half months to a maximum of 12 months for plan years ending in 2020 and 2021. In addition, the CAA permits prospective modification of elections, allows terminated employees to receive reimbursements, and increases the age of a dependent care beneficiary to 13. To date, the IRS has not provided any guidance, but that is expected soon.

The following FAQs provide additional information. They represent our current understanding of the CAA provisions as of January 26, 2021. IRS guidance or other factors may affect our interpretation, so please verify this information with any more recent guidance before taking action.

### **GENERAL**

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**Q1. Are CAA extensions to an FSA's grace period and increases to amounts that can be carried over optional?**

A1. Yes. An extension of the grace period or an expansion of the carryover feature is optional. Any employer that adopts an FSA extension or expansion must amend the FSA plan document.

**Q2. If an employer chooses to amend its FSA plan, will the changes apply retroactively?**

A2. For plan years ending in 2020, the plan amendments must be completed no later than December 31, 2021 and will be effective retroactive to the plan year ending in 2020. Before the FSA plan is amended, an employer must operate the program as if it had been amended. Please note that retroactive amendments may cause operational problems, and participants may be required to resubmit claims.

### **CARRYOVER**

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**Q3. Does the CAA allow an FSA plan to add a carryover feature retroactively?**

A3. It does not appear that an employer can retroactively add a carryover feature. The rules governing amendments outside of those specified by the CAA have not been modified.

*Additional IRS guidance regarding this issue should be forthcoming.*

**Q4. Can an FSA plan be amended to have a carryover feature *and* a grace period?**

A4. No. An FSA plan can have either a carryover feature or a grace period, not both. It is not expected that the IRS will modify this rule.

**Q5. Can an FSA plan have a carryover feature for the new plan year *and* take advantage of the grace period extension?**

A5. For any plan year, an FSA plan cannot have both a carryover feature and a grace period. An employer could, however, amend an FSA plan with current carryover feature to replace the carryover provision with a grace period for a subsequent year.

**Q6. Can an employer set a minimum or maximum carryover amount?**

A6. This is not addressed in the CAA text, which refers simply to "unused amounts" without regard to any minimums or maximums.

Although "unused amounts" is not defined, the CAA provides that a participant may carry over "any unused benefits or contributions remaining." This appears to include all prior carryover amounts, including employee contributions and employer contributions, if applicable.

*Additional IRS guidance regarding this issue should be forthcoming.*

**Q7. Can an employer that currently offers a \$550 carryover balance amend the FSA plan document to allow a carryover of *any* unused benefits or contributions remaining?**

A7. Yes. An employer is permitted to amend the FSA plan document before the end of the calendar year following the plan year for which the carryover amount was increased. The amendment must be in writing and employees must be notified of the change as soon as administratively feasible.

For FSAs that are subject to ERISA, the plan administrator must provide a Summary of Material Modification (SMM) within 210 days following the close of the plan year in which the amendment was effective.

**Q8. Does the legislation allow an employer to refund money?**

A8. No. The legislation permits additional flexibility for an employee who is enrolled in an FSA plan to submit a claim for proper expense reimbursement only. The employee is not permitted to receive a cash out of any kind. This response will not differ if an employee has a carryover versus a grace period or vice versa.

***INTERACTION WITH OTHER COVERAGE***

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**Q9. What if an employer wants to extend the FSA grace period for the 2020 plan year but the open enrollment period for 2021 is closed?**

A9. If the employer wants to extend the grace period for a plan year ending in 2020, the employer has until December 31, 2021 to amend the FSA plan. Meanwhile, the employer must operate the FSA program as if it had been amended.

Please note that the CAA does not allow an employer to add a grace period retroactively to a prior plan year if the FSA plan does not already have a grace period. The grace period—up to 12 months following the end of the plan year—can be extended for those FSA plans with an existing grace period.

**Q10. Are otherwise HSA-eligible employees still eligible for an HSA if FSA amounts are carried over or if the FSA extends the grace period?**

A10. Existing guidance will apply to the new carryover and grace period extensions. Employees who carryover unused health FSA amounts or who take advantage of the extended health FSA grace period will not be eligible to contribute to an HSA. An employee must still forfeit any funds in a health FSA or carryover the funds to a limited FSA in order to be eligible contribute to an HSA.

#### ***TERMINATED PARTICIPANTS***

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**Q11. How can terminated participants get reimbursed from their Health FSAs?**

A11. The legislation is unclear on this item and we are awaiting guidance from the IRS.

#### ***DEPENDENT CARE***

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**Q12. Is the DCA participant eligible through the age of 13, or is eligibility based on employer choice?**

A12. The legislation's expansion of coverage through the age of 13 appears to be a discretionary provision, so the employer may or may not decide to expand eligibility.

*Additional IRS guidance regarding this issue should be forthcoming.*