



IRS Notice 2021-15 Guidance on Consolidated Appropriations Act (CAA) 2021 Effects on Healthcare FSAs & Dependent Care FSAs 2.25.21

The IRS released Notice 2021-15 on February 18, 2021, clarifying the application of Section 214 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (the Act), which was enacted as part of the Consolidated Appropriations Act, 2021 (CCA). The Act provides the following temporary rules for healthcare flexible spending accounts (FSAs) and dependent care flexible spending accounts (DCFSA).

Carryover Rules

Employers may amend their cafeteria plans in order to allow participants to carry over unused amounts remaining in a healthcare, limited healthcare or dependent care FSA. Any unused amounts as of the end of a plan year ending in 2020 or 2021 may be carried over to the immediately subsequent plan year. Employers may limit the carryover to an amount that is less than all unused amounts and may require the carryover to end by a specified date during the plan year.

- **Interaction with HSAs:** To preserve health savings account (HSA) eligibility, employers may amend their cafeteria plans to:
 - allow employees (on an employee-by-employee basis) to opt out of the carryover,
 - choose between an HSA-compatible limited healthcare FSA or a full healthcare FSA, or
 - automatically enroll employees that elect an HDHP in an HSA-compatible limited healthcare FSA.
- **Generally Applicable Rules:** Notice 2021-15 also reminds employers that the otherwise applicable rules affecting carryovers apply to plan years ending in or after 2022. As such, the carryover amount for a plan year ending in 2022 is \$550 (or if greater, 20% of the applicable indexed contribution limit) for expenses incurred during any month of the plan year ending in 2023. The carryover feature would not extend to DCFSAs for plan years ending in or after 2022.
- **Amendments:** The relief is available to cafeteria plans that provide a carryover feature and to those that do not provide a carryover feature. This allows employers to elect different features (i.e., a carryover or a grace period) for different plan years.
- **Nondiscrimination Testing:** Amounts carried over, as provided in Notice 2021-15, are not subject to the nondiscrimination rules applicable to cafeteria plans and dependent care assistance programs.

Extension of Grace Period

Employers may amend their cafeteria plans in order to permit participants to apply any unused amounts remaining in a healthcare, limited healthcare or dependent care FSA. Any unused amounts as of the end of a plan year ending in 2020 or 2021 may be used to reimburse expenses incurred for the same qualified benefit up to 12 months after the end of the plan year.

- **Interaction with HSAs:** To preserve HSA eligibility, employers may amend cafeteria plans to:
 - allow employees (on an employee-by-employee basis) to opt out of the extended claims period,
 - choose between an HSA-compatible limited healthcare FSA or a full healthcare FSA, or
 - automatically enroll employees that elect an HDHP in an HSA-compatible limited healthcare FSA.

- **Generally Applicable Rules:** Notice 2021-15 indicates that the otherwise applicable rules affecting grace periods apply to plan years ending in or after 2022. As such, the grace period is limited to the first 2½ months of the plan year ending in 2023.
- **Amendments:** The relief is available to cafeteria plans that provide a grace period feature and to those that do not provide a grace period feature. This allows an employer to have different features (i.e., a carryover or a grace period) for different plan years.
- **Nondiscrimination Testing:** Amounts available during an extended grace period, as provided in Notice 2021-15, are not subject to the nondiscrimination rules applicable to cafeteria plans and dependent care assistance programs.
- **Post-Termination Reimbursements:** Employers that offer a grace period may amend their cafeteria plans to permit an employee that ceases to be a participant to incur claims until the end of the plan year in which participation ceases—including any applicable grace period extensions. An employee ceases to be a participant because of termination of employment, change in employment status, or a new election during the 2020 or 2021 calendar year.
 - **Available Amount:** An employer may limit the unused health FSA amounts to the amount of salary reduction contributions the participant made from the beginning of the plan year up to the date the employee ceased to be a participant.
 - **Extension Period:** An employer may adopt an extended period for incurring claims that is less than 12 months. The employer may also adopt a period that ends before the end of the plan year.
 - **Employee Limitation:** An employer may adopt an extended period for some, but not all employees that cease to be a participant in the plan, subject to uniform coverage rules.
 - **COBRA:** The adoption of a post-termination reimbursement will not prevent an employee from having a loss of coverage resulting in a qualifying event. As such, an employee that ceases to be a participant that would otherwise be eligible for COBRA continuation coverage continues to be eligible for COBRA continuation coverage and the employer must offer applicable coverage and issue any applicable notices.

Special Age Limit Relief

An employer may amend its DCFSA to substitute “under age 14” for “under age 13” when determining which expenses may be paid or reimbursed. In addition, the employer may allow employees to carry over all unused amounts from the 2020 plan year to reimburse dependent care expenses during the 2021 plan year for a dependent that attained the age of 13 during the 2020 plan year. For this purpose, an eligible employee is an employee 1) that is enrolled in a DCFSA, 2) whose enrollment ended on or before January 31, 2020, and 3) has one or more dependents who attained the age of 13 during the 2020 plan year.

Elections

Employers may amend their cafeteria plans to permit their employees to prospectively revoke an election, make one or more elections, or increase or decrease an existing election.

- **Permitted Election Changes:** An employer may limit the permitted election changes to amounts no less than amounts already reimbursed and to certain types of mid-year election changes, such as decreases in elections only. Moreover, employers may permit election changes up to a specified date or limit the number of election changes.
- **No Cashouts:** An employer cannot pay cash for unused amounts or pay for taxable or nontaxable benefits to the employee.
- **Revoked Election:** If an employee revokes their participation in a healthcare FSA or DCFSA, the treatment of amounts previously contributed are subject to the terms of the plan. The plan may permit amounts contributed 1) to remain available for payment of expenses incurred for the remainder of the plan year, 2) to remain available only to reimburse expenses incurred before the revocation effective date; or 3) to be forfeited.

Plan Amendments

Notice 2021-15 provides that an employer must amend its cafeteria plan if the plan does not currently have a grace period or permit a carryover. A plan amendment pursuant to the Act may be retroactive if 1) the employer adopts the amendment no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, 2) the plan is operated consistent with the terms of the amendment during the period beginning on the amendment's effective date and ending on the amendment's adoption date, and 3) the employer informs all employees eligible to participate of the changes in the plan.

Employers may retroactively amend their cafeteria plans to permit mid-year election changes for employer-sponsored health coverage and retroactively amend their health reimbursement arrangements to permit reimbursement of over-the-counter drugs without a prescription and menstrual care products.