

January 11, 2021

### Use it or Lose it? Not this Year (or Last)! Year-End Law Brings Relief for Flexible Spending Account Participants

Let's think back to October or November 2019. Your employees were going through open enrollment, COVID-19 wasn't yet a widespread problem and everyone was planning their benefits as if 2020 was going to be a "normal" year. Some of your employees with young children likely maxed out their 2020 Dependent Care Assistance Program ("DCAP") contributions at \$5,000 and others with large upcoming health expenses perhaps maxed out contributions to their Health Care FSA ("HCFSA") at \$2,750. Fast forward to spring 2020, when daycares, schools, camps, hospital procedures, dental and orthodontic offices, and much more were cancelled or closed – for months on end. Though many employers amended their Code Section 125 Plans ("125 Plan") in the wake of [IRS Notice 2020-29](#) (see our prior Alert [HERE](#)) allowing employees to stop their HCFSA and/or DCAP contributions in mid-2020, many employees were still left with balances in their HCFsAs and DCAPs that they could not spend by the end of 2020 (or by the end of any grace period allowed by the 125 Plan).

As the New Year approached, it remained unclear if the government would offer employees any relief to the 125 Plan "Use it or Lose it" rule, requiring employees to use the funds in their HCFSA and DCAP accounts during the 2020 plan year (or by the end of any grace period) or forfeit them. In fact, until the very end of 2020, employers and advisors could only reiterate that this rule still applied and recommend some creative, yet legal ways for employees to spend the remaining funds. However, on December 27, 2020 the President signed into law the [Consolidated Appropriations Act](#) (the "Act"), which includes, among other provisions, highly anticipated and necessary relief for HCFsAs and DCAPs (collectively, "FSAs") due to the impact of the pandemic. Most notably, the Act sets forth that both HCFSA and DCAPs can allow unused amounts from these accounts in the 2020 plan year to carry over to the 2021 plan year. Likewise, the Act allows unused amounts from the 2021 plan year to carry over to the 2022 plan year. Additionally, the Act also contains guidance on other issues providing greater flexibility for FSAs, as set forth below.

- HCFSA and DCAPs *may* extend grace periods for plan years ending in 2020 and 2021 for up to twelve (12) months after the end of the plan year.
- For the 2021 plan year, 125 Plans *may* allow participants to prospectively change an FSA contribution without having an otherwise-required change in status event.
- If an employee ceased or ceases participation in a HCFSA during 2020 or 2021, such employee *may* continue to be reimbursed from unused funds in the account through the end of the year in which he or she ceased participation (including any applicable grace period).
- At least for the 2021 plan year, DCAPs *may* allow for expenses to be reimbursed for eligible dependents who aged out of eligibility during the prior plan year (i.e. the DCAP may reimburse qualifying expenses for children under the age of fourteen (14)).

From a compliance perspective, it is important to note that all these changes related to FSAs are voluntary. Employers *may* adopt any or all of these changes to offer more flexibility to plan participants, but the changes are not required. If employers do wish to allow for any of these changes,

they must amend their 125 Plans to allow for them by the end of the first calendar year beginning after the end of the year in which the change to effect (i.e. for any changes effective in 2020, the 125 Plan must be amended by the end of 2021, and for any changes effective in 2021, the 125 Plan must be amended by the end of 2022).

### Important Compliance Tips

- ✓ All these FSA changes are voluntary; employers do not have to allow for them.
- ✓ Employers must amend their 125 Plans within the time prescribed to allow for the changes; however, they can implement the change(s) now and amend later.
- ✓ Long-standing 125 Plan rules still apply! Employers still cannot return/cash out employees' contributions or unused HCFSA or DCAP funds; participants still must use the funds for health care or dependent care expenses, respectively.
- ✓ Employers with HSA and HCFSA plans should consult with their benefits advisors to understand whether their HCFSA plan allows for carryovers, grace periods, or extended coverage periods as HSA eligibility could be impacted.
- ✓ Employers should verify that their FSA administrators can administer any changes they wish to implement.

The Act covers not only FSA relief, but includes provisions on a host of other topics related to employer-sponsored benefit plans. Specifically, the Act addresses issues such as surprise medical billing, the expansion of Mental Health Parity, retirement plan disaster-relief provisions, retirement plan partial termination relief, student loan repayments, business meal deduction expenses, and the threshold for the medical expense deduction. Should you have any questions about the FSA relief addressed in this Alert or any other topics contained in the Act, please contact the experts at [Patriot Growth Insurance Services and our Partner Agencies](#).

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