



## Rewards Policy Insider 2021-4



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# **American Rescue Plan Act Includes Funding Relief, COBRA Premium Subsidy, and Other Employment Provisions**

The \$1.9 trillion American Rescue Plan Act, which Congress has passed and President Biden has signed into law, includes single-employer pension funding relief, a 100% COBRA premium subsidy for certain COBRA beneficiaries, and a temporary increase in the exclusion for employer-provided dependent care assistance, in addition to other employment-related provisions.

## **Single-Employer Plan Funding Relief**

For single-employer plans, the bill more than doubles the funding shortfall amortization period from 7 years to 15 years. This change is effective for 2022 plan years, but plan sponsors can elect to have it apply as early as the 2019 plan year. Any shortfall amortization bases for plan years preceding 2022 (or preceding the earlier plan year the plan sponsor elects) will be reset to zero so that all funding shortfalls will be subject to the new 15-year amortization period.

The bill also extends the period for widening the pension funding stabilization corridor. Briefly, the three segment rates used to determine a plan's funding target and target normal cost may only fluctuate within a corridor based on the 25-year average for each rate.

This bill resets the corridor to 95% to 105% from 2020 through 2025, and it will incrementally widen each year until it reaches 70% to 130% for 2030 and beyond. Additionally, the bill provides that the 25-year average for any segment rate may not be less than 5%.

The changes to the stabilization corridor will apply to plan years beginning after December 31, 2019. However, a plan sponsor can elect to have them not apply to any plan year beginning before January 1, 2022. If a plan sponsor elects to have the changes not apply before 2022, they can make the election for all purposes the stabilization percentages apply or just for purposes of calculating the adjusted funding target attainment percentage (AFTAP) under IRC section 436. This gives plan sponsors the option to take advantage of the new rules without adversely impacting any previously certified AFTAPs and related benefit restrictions.

The final bill does not include a previous revenue raising proposal to freeze COLAs for certain qualified retirement plan limits. In its place, the bill amends IRC section 162(m) to make a larger group of public company employees subject to the \$1 million cap on deductible compensation.

The bill also includes a series of changes to rules for multiemployer plans.

## **COBRA Premium Subsidy**

For the period from April 1, 2021 through September 30, 2021 (the "Applicable Period"), the bill states that "Assistance Eligible Individuals" (AEIs) will not be required to pay any COBRA premiums. Employers (or insurers or multiemployer plans, in certain cases) will be able to claim an advanceable, refundable, credit against their Hospital Insurance payroll tax liability to

subsidize the COBRA premiums these AEIs otherwise would pay during the Applicable Period.

Some important points for employers/COBRA administrators to know:

- AEIs are those COBRA beneficiaries whose COBRA qualifying event was an involuntary termination of employment or a reduction in hours. The subsidy will not be available for other COBRA beneficiaries.
- Employers are required to offer a 60-day **Extended Election Period** to individuals who would be AEI's during any part of the Applicable Period but for the fact they failed to elect COBRA or prematurely dropped COBRA coverage. A new notice of this Extended Election Period is required.
- Employers may offer a **Special Election Option** to permit AEIs to change health plans, but only if the change is to a health plan that is no more expensive than the one they are currently enrolled in.
- Employers must update their COBRA election notices to include information about the subsidy.
- Employers must prepare and distribute a new **Notice of Expiration of Period of Premium Assistance** to give AEIs advance notice of when their premium subsidy eligibility will end.
- If employers collect COBRA premiums from AEIs during the Applicable Period they must reimburse those individuals.

### Also of Note

For 2021 only, the bill increases the exclusion for employer provided dependent care assistance from \$5,000 to \$10,500. Dependent Care FSAs can be retroactively amended to take advantage of the higher limit.

The bill also extends the paid sick leave and paid family leave credits, first enacted as part of the Families First Coronavirus Relief Act, through September 30, 2021. It also modifies and extends the employee retention credit.

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## DOL Extends and Clarifies COVID-Related Suspensions of COBRA and Other Employee Benefit Time Limits

On February 26, just two days before the anticipated end of mandatory suspensions of certain COBRA and other employee benefit plan-related time limits, the U.S. Department of Labor issued updated guidance that will keep the COVID-related relief in place for the foreseeable future.

Last year, the Departments of Labor and Treasury issued guidance (the "Joint Guidance") to suspend certain employee benefit plan-related deadlines and other timeframes during the COVID National Emergency.

Briefly, the Joint Guidance provided that the period from March 1, 2020 through 60 days after the end of the Presidentially declared COVID National Emergency

(i.e., the “Outbreak Period”) must be disregarded for purposes of determining certain periods and dates, including:

- The 30-day (or 60-day, if applicable) period for an employee to exercise his or her HIPAA special enrollment rights;
- The 60-day COBRA election period, as well as any deadlines for paying COBRA premiums;
- The deadline for filing claims for benefits, appealing adverse benefit determinations, and exercising other rights under the plan’s claims procedure rules.

The underlying statutory authority for the Joint Guidance is ERISA Section 518 and IRC Section 7508A(b), which limits the duration of “disregarded periods” to no more than one year. That one-year period ended on February 28, 2021. However, new Employee Benefits Security Administration (“EBSA”) Disaster Relief Notice 2021-1 (“Notice”) takes the position that the one-year limit applies on an individual-by-individual basis.

Specifically, the Notice explains that the relief provided with respect to a relevant time period will apply only until the earlier of (1) one year from the date they were first eligible for relief, or (2) the end of the Outbreak Period. The Outbreak Period is still ongoing.

To understand what that means in practice, some examples might be helpful.

**Example 1:** Participant A’s 60-day COBRA election period was set to end on April 1, 2020. However, the 60-day period stopped running on March 1, 2020 pursuant to the Joint Guidance. Under the Notice, Participant A was first eligible for relief on March 1, 2020, the first day of the Outbreak Period. Since March 1, 2021 (i.e., one year from the date Participant A was first eligible for relief) is earlier than the end of the (still ongoing) Outbreak Period, Participant A’s COBRA election period started running again on March 1, 2021. That means she has until April 1, 2021 to make a COBRA election (i.e. 32 days after March 1, 2021).

**Example 2:** Participant B’s 60-day COBRA election period would have started to run on May 1, 2020, but for the Joint Guidance. Under the Notice, Participant B first became eligible for relief on May 1, 2020. One year from that date is May 1, 2021, which is earlier than the end of the (still ongoing) Outbreak Period. Unless the Outbreak Period ends earlier, Participant B’s 60-day COBRA election period can start running on May 1, 2021 and will end on June 30, 2021.

**Example 3:** Participant C’s 60-day COBRA election period starts running on June 1, 2021. Assuming the Outbreak Period hasn’t ended by June 1, 2021, then Participant C will get the same relief as Participants A and B. In other words, unless the Outbreak Period ends earlier, Participant C’s 60-day election period will not begin to run until June 1, 2022.

As noted, the Joint Guidance and Notice do not apply just to COBRA election periods. They also apply to COBRA premium payment timelines, HIPAA special enrollment rights, and ERISA claims procedure timelines, among others.

Consider, for example, a calendar year health flexible spending arrangement (FSA) that gives participants up to 90 days after the end of the plan year (the “runout period”) to file claims for expenses incurred during the plan year. For the 2020 plan year, the runout period normally would end on March 31, 2021.

However, under the Joint Guidance and Notice, the 90-day period could not begin to run on January 1, 2021 and may not be able to start until as late as January 1, 2022.

Plan sponsors should work with their COBRA, claims procedure, and other administrators to ensure they are complying with the new rules.

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## **IRS Issues Guidance on New FSA Flexibility Provisions in CAA**

As reported in Rewards Policy Insider 2021-1, the Consolidated Appropriations Act (CAA), 2021, included provisions designed to give temporary relief from some of the normal restrictions for health and dependent care flexible spending arrangements (FSAs) due to challenges the ongoing pandemic has created for participants to fully use these plans. The IRS has issued Notice 2021-15 to provide guidance for employers that choose to implement any or all of the CAA's temporary options. The Notice also gives additional flexibility for IRC § 125 cafeteria plans to permit mid-year election changes with respect to participants' health benefit elections for plan years ending in 2021.

One of the key themes running throughout the Notice is the optional nature of these provisions. That is, health and/or dependent care FSAs can adopt them, but do not have to. Likewise, the Notice gives employers significant latitude to structure the special relief to help employees without creating undue burdens on employers.

### **No Limits on Mid-Year Election Changes**

Under normal circumstances, employees must decide whether and how much to contribute to health and dependent care FSAs before the plan year begins, and once the plan year starts, those elections can be changed only in limited circumstances. However, for plan years ending in 2021, plans can allow employees to make prospective changes to their elections without regard to whether they have experienced any change in status. Of course, the annual contribution limits for health FSAs and dependent care FSAs will continue to apply.

The Notice clarifies that permissible prospective election changes include making a new election to enroll in the health or dependent care FSA for otherwise eligible employees who initially declined to enroll. It also clarifies that employers choosing to adopt this relief can limit the period during which employees can make election changes as well as the number of changes an employee can make. Significantly, the Notice states that employers can preclude employees from making mid-year election changes that would prevent them from fully funding amounts already reimbursed.

Additionally, the Notice goes beyond the CAA relief to allow employers to amend their IRC § 125 cafeteria plans to let employees make a new election for employer-sponsored health coverage (if they initially declined such coverage), to change from one health plan option to another (including to change from single to family coverage or vice versa), or to drop coverage if the employee attests in writing that he or she is enrolling in other comprehensive medical coverage.

## **Enhanced Carryover and Grace Period Rules**

In the current set of rules, there are two optional exceptions to the general rule that employees must forfeit any unused amounts in their health and dependent care FSAs at the end of a plan year – i.e., the “use-it-or-lose-it” rule. One is an optional grace period, permitting plans to allow participants to apply unused balances from one year during the first 2.5 months of the immediately following year. The other is an optional carryover of up to \$550 from one plan year to the next. Health FSAs can have either the grace period or carryover, but not both. Dependent care FSAs can only use the grace period.

For plan years ending in 2020 and 2021, the CAA allows both health and dependent care FSAs to offer unlimited carryovers of unused balances. Similarly, for plan years ending in 2020 and 2021, the CAA permits health and dependent care FSAs to extend their grace periods for a full 12 months (i.e., the entire next plan year) instead of the usual 2.5-month limit.

The Notice confirms that employers can choose different options for different health and dependent care FSAs. However, they cannot apply both the special carryover and grace period rule to a single plan for a specific plan year. Plan amendments must specify which option is adopted for the relevant plan year.

For plan years ending in or after 2022, the normal carryover and grace period rules will continue in effect.

## **Post-Termination Reimbursements from Health FSAs**

The CAA allows employers to amend their health FSAs to permit employees who stop participating in the plan during the 2020 or 2021 calendar year to continue receiving reimbursements through the end of the plan year in which participation stopped, plus any grace period. This is available for employees who terminate employment, change employment status, or make a mid-year election change in 2020 or 2021. According to the Notice, the employer can limit these terminated participants to salary reduction contributions made from the beginning of the plan year until the employee stopped participating, less any reimbursements to date.

## **Special Carry Forward Rule for Dependent Care FSAs**

For participants enrolled in a Dependent Care FSA during the “2020 Plan Year” (defined, for this purpose, as the last plan year for which the regular enrollment period ended on or before January 31, 2020), the CAA raises the age-out limit from 13 to 14 years old. That means participants can seek reimbursement for otherwise qualifying expenses incurred after a dependent child’s 13th birthday that occurred during the 2020 Plan Year. Additionally, if these participants still have unused dependent care FSA balances from the 2020 Plan Year, they can carry those amounts forward to the next plan year (the “2021 Plan Year”) and use them to pay otherwise eligible expenses incurred until their dependent’s 14th birthday.

The Notice confirms that, in order to be eligible for this relief, an employee must:

- Be enrolled in a dependent care assistance program for the 2020 Plan Year; and
- Have one or more dependents who turn 13 during the 2020 Plan Year or the 2021 Plan Year (but only in cases where the employee had an unused dependent care FSA balance as of the end of the 2020 Plan Year).

Additionally, the Notice specifies employers do not have to adopt any of the enhanced carryover or grace period relief in order to take advantage of these additional rules for Dependent Care FSAs.

## HSA Eligibility

The Notice also provides helpful guidance on the interaction of the special relief with HSA eligibility. For example, the Notice clarifies that employers can amend their plans to allow employees to opt-out of health FSA carryovers on an employee-by-employee basis so that the carryover does not prevent them from being eligible to fund an HSA. The Notice also allows mid-year election changes from a general-purpose health FSA to an HSA-compatible FSA.

## Plan Amendments

Plan amendments will be required to take advantage of any of these special provisions, if the plan sponsor chooses to do so. The CAA and Notice 2021-15 provide that plans can begin operating in accordance with these provisions immediately, so long as the appropriate amendments are adopted 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.

For example, an employer that wants to modify its dependent care FSA to allow unlimited carryovers from the 2020 to 2021 plan year can wait until December 31, 2021 to adopt the required plan amendment (assuming it is a calendar year plan). The amendment can be retroactively effective if the plan operates according to the amendment's terms as of the effective date, and the employer informs plan participants of the relevant changes. The Notice does not specify a timeline for notifying participants, but employers choosing to take advantage of these special rules presumably would want to tell participants about them as soon as possible.

## Other Considerations

Employers considering taking advantage of any of these options with respect to health FSAs should be mindful of the potential impact on employees' HSA eligibility, and they should design their plan amendments and communicate with participants accordingly. Another important consideration for both health and dependent care FSAs is the interaction of this relief with EBSA Disaster Relief Notice 2021-1, which was discussed in the preceding article.

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