

# **INCREASED FLEXIBILITY FOR FLEXIBLE SPENDING ACCOUNTS PROVIDED UNDER NEW IRS GUIDANCE: NOTICE 2021-15**

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# Presenters



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# Agenda

- Background on Consolidated Appropriations Act, 2021 (CAA) and Original Temporary Special Rules for Health and Dependent Care Flexible Spending Accounts (FSAs)
- New Notice 2015-21: Increased Flexibility for FSAs
- Next Steps: What Should Plan Sponsors Do Now?
- EBSA Disaster Relief Guidance – Suspended Deadlines Under ERISA

**BACKGROUND:  
TEMPORARY SPECIAL  
RULES FOR HEALTH AND  
DEPENDENT CARE FSAS  
UNDER THE CAA**

# Flexible Spending Accounts

- Healthcare Flexible Spending Account (HCFSA)
  - Permit carryover of unlimited amounts of unused HCFSA dollars from the plan year ending in 2020 into the plan year ending in 2021
  - Permit carryover of unlimited amounts of unused HCFSA dollars from the plan year ending in 2021 into the plan year ending in 2022
    - Be aware of any individuals who migrate to HDHP/HSA
  - Permit extension of an existing grace period for the plan year ending in 2020 (March 15, 2021) through December 31, 2021
  - Permit extension of an existing grace period for the plan year ending in 2021 (March 15, 2022) through December 31, 2022
    - More significant HDHP/HSA concerns

# Flexible Spending Accounts

- Dependent Care Flexible Spending Account (DCFSA)
  - Permit the carryover of unlimited unused DCFSA dollars from the plan year ending in 2020 to the plan year ending in 2021
  - Permit the carryover of unlimited unused DCFSA dollars from the plan year ending in 2021 to the plan year ending in 2022
    - DCFSAs have not historically been permitted to provide carryovers
  - Permit the extension of an existing grace period for the plan year ending in 2020 (March 15, 2021) through December 31, 2021
  - Permit the extension of an existing grace period for the plan year ending in 2021 (March 14, 2022) through December 31, 2022

# Additional Permissible Changes

- Permit an employee who ceases participation in an HCFSA to continue to receive reimbursements from unused benefits or contributions through the end of the plan year in which participation ceases (including any grace periods)
  - Provides an opportunity for employees to continue incurring claims and spending down any unused balances
  - Applies to 2020 and 2021 calendar years
- Extend the eligible dependent age from under age 13 to under age 14
  - Must have been enrolled in the plan before January 31, 2020
  - Changes the statutory language
  - Review plan document/summary plan description

# Flexible Spending Accounts

- Permit prospective participant election change opportunities under an HCFSA or DCFSA
  - Only for plan years ending in 2021
- Plans have to be amended prior to December 31 of the plan year in which the change is effective



# **NEW NOTICE 2021-15: INCREASED FLEXIBILITY FOR FSAS**

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# Notice 2021-15

- Clarifies and expands options for plan sponsors related to HCFASAs and DCFASAs
- Increased flexibility is welcome news to some plan sponsors and a greater headache to others
- Like prior guidance, all opportunities under Notice 2021-15 (the Notice) are optional and temporary in duration
- TPAs may not be able to implement quickly or in a cost-effective manner
- Relief is limited: after 2022, the normal rules will apply for carryovers and grace periods and the most that an employee can carry over from the 2022 plan year to 2023 is \$550 and it will be limited to HCFASAs only; DCFASAs will be forfeited following runout and/or grace period

# Carryovers and Extended Grace Periods for an HCFSA and DCFSA

- Carryovers
  - Carryover can be adopted now even if an FSA did not previously have one and can be adopted for some, but not all, FSAs (subject to the nondiscrimination rules)
  - The carryover may be limited to all or just part of the unused dollars remaining in an FSA at the end of the plan year ending in 2020 or 2021
  - A plan sponsor may require an employee to maintain a minimum election in the FSA in order to have access to unused carryover amounts from the prior plan year
  - A plan sponsor can limit the carryover to apply only up to a specified date during the plan year (e.g., require a 2020 carryover to be used by August 1, 2021)

# Carryovers and Extended Grace Periods for an HCFSA and DCFSA

- Extended Grace Periods
  - A grace period can be adopted now even if an FSA did not previously have one and can be adopted for some, but not all, FSAs (subject to the nondiscrimination rules)
  - A grace period can be extended for up to 12 months and can choose to extend for less than 12 months if desired

# Carryovers and Extended Grace Periods for an HCFSA and DCFSA

- Interaction with HSA eligibility
  - General Rule:
    - Not HSA eligible if covered under a general purpose HCFSA, including during a grace period or where there is carryover (if there is a balance at the end of the plan year)
    - Will be HSA eligible if covered under a limited purpose HCFSA (e.g., dental and vision only)
  - A plan sponsor can automatically convert a general purpose HCFSA to a limited purpose HCFSA to preserve HSA eligibility
  - A plan sponsor may allow each employee to opt out of any carryover under an HCFSA to preserve HSA eligibility OR may allow employees to make midyear election changes to be covered by a general-purpose HCFSA for part of the year and a limited purpose HCFSA for part of the year
    - Note: Opt-out for the grace period must be made prior to the start of the plan year
  - HSA contributions will be limited to only those months that an employee is HSA eligible

# Extended Period for Incurring Claims

- An employee may cease participation as a result of a termination of employment, change in employment status, or a new election to revoke contributions
- A plan sponsor may adopt a period that ends before the end of the plan year, during which an employee who ceased participation can continue to receive reimbursements
- A plan sponsor may permit an employee who ceases participation to continue to receive reimbursements for eligible claims incurred after the date participation in an HCFSA ceases including any grace period (or extended grace period)

# Extended Period for Incurring Claims

- An employee who ceases participation as a result of a COBRA qualifying event (termination from employment) must still be offered COBRA coverage
  - A plan sponsor may permit an employee to elect COBRA coverage to access HCFSA dollars; or
  - A plan sponsor may permit the employee to request reimbursements for up to the amount contributed to the HCFSA without electing COBRA coverage

# Age of an Eligible Dependent Under DCFSA

- An employee is eligible for this relief if the employee:
  - Was enrolled in the plan during enrollment for a plan year on or before January 31, 2020; and
  - Has one or more dependents who attained age 13 either:
    - During that plan year; or
    - For an employee who has unused dollars at the end of the last plan year, during the subsequent plan year
- Only dollars contributed during the prior plan year can be used to reimburse eligible expenses for children who aged out



# Permissible Prospective Election Changes

- A plan sponsor may permit election change opportunities under an HCFSA or DCFSA for the plan year ending in 2021
- A plan sponsor may permit employees, absent a change in status, the opportunity to prospectively make the following changes:
  - Make a new election
  - Revoke an existing election
  - Increase or decrease an existing election

# Permissible Prospective Election Changes

- May permit employees who make a new election to seek reimbursement for claims incurred back to January 1, 2021
  - Example: employee who makes a new election on April 1, 2021 may seek reimbursement for eligible expenses incurred back to January 1, 2021
  - Applies to DCFSA/HCFSA
- A plan sponsor may place any restrictions or parameters around this opportunity or not offer it at all

# Permissible Prospective Election Changes

- New enrollment opportunities permitted under the Notice for medical, dental and vision benefits for plan years ending in 2021
- A plan sponsor may permit employees, absent a change in status, the opportunity to prospectively make the following changes to medical, dental, or vision benefits:
  - Make a new election
  - Revoke an existing election and elect another benefit option
  - Revoke an existing election and attest in writing that the employee has obtained or will obtain coverage elsewhere
- A plan sponsor may place any restrictions or parameters around this opportunity or not offer it at all

# **NEXT STEPS: WHAT SHOULD PLAN SPONSORS DO NOW?**

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# Next Steps

- Decide which optional FSA opportunities may be available based on current or proposed plan structure
- Talk to TPAs about their ability to implement these optional FSA opportunities and associated cost, if applicable
- Communicate adopted opportunities to participants
- Amend HCFSA and/or DCFSA plans no later than the last day of the first calendar year beginning after the end of the plan year that the amendment is effective (e.g., December 31, 2021 for 2020 plan year amendments)
  - Plan must operate in accordance with the terms of the amendment even prior to its adoption

# **EBSA DISASTER RELIEF GUIDANCE: SUSPENDED DEADLINES UNDER ERISA**

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# Suspended Deadlines

- Time frames previously suspended for special enrollment elections; claims and appeals deadlines; and COBRA notice, election, and premium payment deadlines
- The guidance clarifies that each participant or beneficiary has his or her own rolling deadline from the date of his or her own event
- That deadline is now the **earlier** of (1) one year from the date of the event or (2) 60 days after the announced end of the National Emergency due to COVID-19 (Outbreak Period)
- Plan sponsors or administrators should be proactive about communicating these deadline changes to ensure that participants and beneficiaries are on notice
- May need to act quickly for any deadlines that are expiring in the next 30 to 60 days

# QUESTIONS?

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# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at [www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

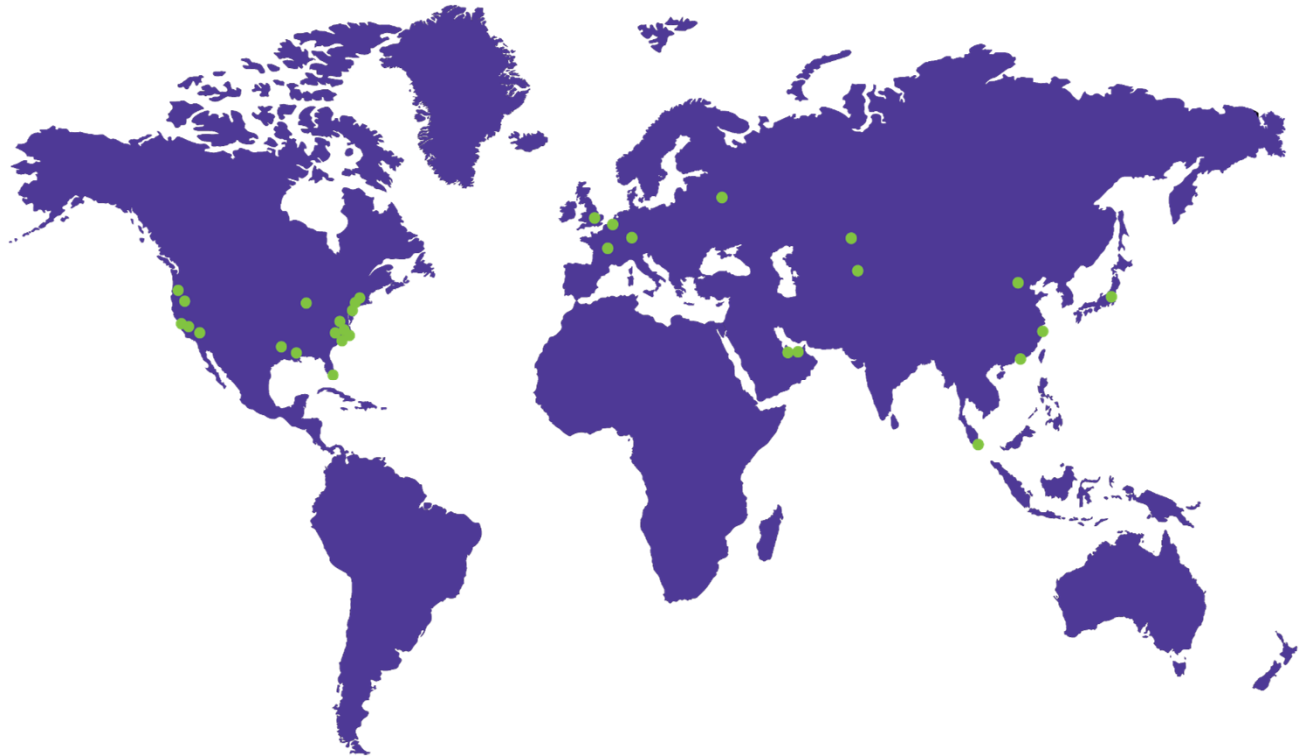


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