A Summary of Benefits Provisions in the 2021 Consolidated Appropriations Act

Limited Eleventh Hour Relief for Flexible Spending Accounts and Paid Leave, and the Inclusion of Surprise Billing Legislation

The Consolidated Appropriations Act, 2021 (the "Act") was signed into law on December 27, 2020. The Act combines the $1.4 trillion omnibus federal spending package for the 2021 fiscal year and a $900 billion COVID-19 stimulus package.

The Act includes certain provisions affecting health and welfare benefits, including:

- Limited relief for flexible spending account plans;
- An optional limited extension to emergency paid sick leave (EPSL) and public health emergency leave under the emergency Family and Medical Leave expansion act (this leave is referred to as "EFMLEA" in this Alert);
- Student loan repayment assistance; and
- Surprise billing legislation.

This Alert summarizes these provisions based on the language of the Act and attempts to identify issues federal agencies should address in later guidance. No additional guidance was available as of this Alert's publication date. We will also briefly touch on limited relief for qualified transportation fringe benefit plans unrelated to the Act. This Alert does not address the Act's amendments to the Paycheck Protection Program.

Limited Flexible Spending Account Relief

The Act does provide flexible spending account relief, although it falls short of the relief participants wanted most. Except where noted, the relief generally applies to both health care flexible spending account plans (HCFSAs) and dependent care flexible spending account plans (DCFSAs). We will refer to these collectively as "FSAs" in this Alert. The IRS will likely release a notice or other guidance addressing various issues in January 2021.

Not What You Wanted

The limited relief does not permit FSAs (or their employer/plan sponsors) to refund unused FSA balances from the 2020 plan year.

Unlimited Carryovers

FSAs *may* permit participants to carry over their entire unused FSA balances from a plan year ending in 2020 to a plan year ending in 2021, and/or from a plan year ending in 2021 to a plan year ending in 2022.[1] If adopted, this relief overrides the existing $550 carryover limit applicable to HCFSAs and enables carryovers for DCFSAs.[2] This relief is available for both calendar and non-calendar year FSAs, but an unlimited carryover from the plan year ending in 2020 may be administratively impractical for many non-calendar year FSAs.

There is no IRS relief preventing a HCFSA carryover or grace period (including the extended grace period relief described below) in a general purpose HCFSA from interfering with an individual's eligibility to make or receive contributions to a health savings account (HSA). We interpret the Act to permit unlimited carryovers from a general purpose HCFSA to a limited purpose or other HSA-compatible HCFSA. This can avoid potential HSA conflict for the following plan year.

Example: Assume an employer maintains FSAs with July 1 – June 30 plan years. The employer can amend its FSAs to permit unlimited carryovers from the July 1, 2019 – June 30, 2020 plan year to the July 1, 2020 – June 30, 2021 plan year, but it may be administratively difficult to do this so many months after-the-fact. The employer could limit its adoption of the unlimited carryover to the following FSA plan year, only permitting unlimited carryovers from the FSA plan year ending June 30, 2021 to the July 1, 2021 – June 30, 2022 plan year.

Additional Guidance Needed

Consistent with existing carryover rules, we assume the IRS will confirm:

- FSA carryovers do not count toward the following plan year's annual contribution limits; and
- HCFSA carryovers do not affect the calculation of any applicable HCFSA COBRA premium for the following plan year.

Extended Grace Periods

FSAs *may* allow for grace periods of up to 12 months for plan years ending in 2020 and/or 2021. This relief is available for both calendar and non-calendar year FSAs but, similar to the unlimited carryover, an extended grace period may be administratively impractical in 2020 for many non-calendar year FSAs.

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[1] Run-out periods and grace periods do not count as part of the FSA plan year for this purpose.
[2] DCFSAs cannot use a carryover feature without this relief.

Note: An unlimited carryover seems administratively preferable to an extended grace period, because it does not require tracking of the remaining unused FSA balance from the prior plan year and allows greater flexibility to avoid potential HSA conflicts.

Additional Guidance Needed

Under the cafeteria plan rules, a HCFSA cannot use a grace period and carryover feature during the same plan year. The IRS temporarily made an exception as a part of COVID-19 relief released earlier this year (see our earlier Alert addressing this relief). We expect the IRS will address whether an FSA can adopt both the unlimited carryover feature and extended grace period for the same plan year under this relief – if there is any advantage to doing so – or if an FSA is limited to one or the other.

HCFSA Spend-Down Feature for Former Employees

HCFSAs *may* allow employees who terminate employment in 2020 or 2021 to spend down their unused balances for qualifying medical expenses incurred through the end of the HCFSA plan year without a COBRA election. For this purpose, a grace period – including the extended grace period described above – counts as part of the HCFSA plan year. This relief does permit reimbursements for expenses incurred after termination.

The HCFSA uniform coverage rule does not apply to this spend-down feature, and HCFSA reimbursements are limited to a participant's remaining unused balance (including available employer contributions or reimbursements).

Note: A spend-down feature already exists for DCFSAs, although employers rarely adopt it.

Modified DCFSA Age Limit

DCFSAs *may* (but see *Additional Guidance Needed* below) provide age limit relief under the following two circumstances:

1. If a DCFSA participant's child turned 13 during the last DCFSA plan year with an open enrollment period ending by or before January 31, 2020, the limiting age increases to 14 years old for the remainder of the DCFSA plan year in which the child aged out.

    Example 1: Jack participates in his employer's DCFSA for the January 1, 2020 – December 31, 2020 plan year. Open enrollment for this plan year occurred during November 2019, which was by or before January 31, 2020. Jack's only eligible child turned 13 on August 20, 2020. Under this relief, Jack's child remains eligible under the DCFSA for the remainder of the 2020 plan year.

2. Another age limit modification is available if a DCFSA participant has an unused balance at the end of the last DCFSA plan year with an open enrollment period ending by or before January 31,

2020, and the employee's child turns 13 during the following DCFSA plan year.[3] In that instance, the limiting age increases to 14 years old for the following DCFSA plan year, and the unused balance remains available to reimburse for qualifying childcare expenses for that plan year. However, this increased age limit applies *only* to the unused balance and not any new DCFSA election made for the next plan year. This requires separate tracking of the two amounts.

> **Example 2:** Misti participates in her employer's DCFSA for the July 1, 2019 – June 30, 2020 plan year. Open enrollment occurred during June 2019, which was by or before January 31, 2020. Misti has a $1,400 unused balance as of June 30, 2020, and one of her children will turn 13 on September 15, 2020. Under this relief, the $1,400 balance remains available for qualifying childcare expenses for a child who is under 14 years old for the July 1, 2020 – June 30, 2021 plan year. Any new DCFSA election by Misti for that plan year will still be subject to the age 13 limit.

This relief may be administratively difficult for a number of non-calendar year DCFSAs, such as the DCFSA in Example #2.

Additional Guidance Needed

We assume the IRS will address or confirm the following:

- Based on the wording of the Act,[4] whether this relief is optional or mandatory for employers and their DCFSAs;
- Whether an employee must actually elect DCFSA coverage for the following plan year in order to have access to the unused funds under the second age limit modification relief, or if the unused balance is treated as a carryover (this seems more likely);
- Whether the unused balance is available for reimbursements for any eligible child during the following plan year;
- Whether the following plan year also includes that plan year's grace period, if any; and
- That the unused balance does not count toward the following DCFSA plan year's annual contribution limit.

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[3] This relief does not apply if the child is already 13 years old before the following DCFSA plan year begins.

[4] The Act's other FSA relief sections expressly indicate the FSAs may allow the relief. This particular relief does not and merely refers to the increased age limit for the purposes of determining qualifying child care expenses that "may be paid or reimbursed."

FSA Election Changes Permitted Without Qualifying Life Event

For plan years ending in 2021, FSAs *may* permit participants to make election changes without a corresponding qualifying life event (QLE). The Act appears to allow employers to limit the situations in which participants can increase or decrease elections similar to the "amnesty QLEs" we described in our earlier Alert.

Additional Guidance Needed

We expect the IRS will address employer flexibility to allow or limit election changes and will confirm employers can prohibit elections to reduce FSA coverage below amounts already reimbursed for the plan year.

Amendment Timing

The Act permits amendments for relief to be effective retroactive to the current plan year if adopted by the end of the following plan year. The plan must be administered consistently with the amendment from its intended effective date through its later adoption date.[5]

Example: ABC Company maintains calendar year FSAs. ABC Company must amend its FSAs no later than December 31, 2021 in order to permit unlimited carryovers from the 2020 to the 2021 plan year.

Note: The Act's amendment timing rules do not cover the existing unlimited spend-down feature for DCFSAs. If an employer wishes to implement this feature for its DCFSA, it must do so prospectively and should begin to take steps to implement this feature before the next DCFSA plan year begins.

An Optional Limited Extension to EPSL and EFMLEA

Employers have the option to extend either EPSL, EFMLEA, or both from January 1, 2021 through March 31, 2021. This is not required. The rules that were in effect during the April 1, 2020 – December 31, 2020 EPSL/EFMLEA mandate period substantially remain in effect during the extension. An employer may continue to claim tax credits for paid leave taken by eligible employees during the extended period. The regular due date for IRS Form 941 for the 1st Quarter of 2021 is April 30, 2021.

If an employer adopts extended EPSL, EFMLEA, or both, it may be prudent to continue offering and administering the extended leave(s) on the same general terms as during the April 1, 2020 – December 31, 2020 period to avoid potential discrimination claims and/or employee relations issues. Please see our Coronavirus Update for Employers for more information about EPSL and EFMLEA.

[5] We do not believe Congress intended this to conflict with FSA relief for plan years that ended earlier in 2020 and that retroactive application is still consistent administration in those instances.

But Something's Missing
The Act does not grant additional leave time during the extended EPSL or EFMLEA period.

- **Extended EPSL –** It appears a full-time employee is only eligible for extended EPSL up to the number of unused EPSL hours remaining from the 80 hours available during the April 1, 2020 – December 31, 2020 period.

- **Extended EFMLEA –** The availability of extended EFMLEA is unclear. As originally drafted, up to 12 weeks of EFMLEA (≈10 weeks paid) were available from April 1, 2020 through December 31, 2020. EFMLEA was also limited by an employee's remaining available FMLA leave. This raises the following questions:

    (1) Is a full-time employee only eligible for extended EFMLEA if the employee did not exhaust his or her 12 weeks of EFMLEA (≈10 weeks paid) available from April 1, 2020 through December 31, 2020?

    (2) Assume a full-time employee was unable to use all of his or her EFMLEA because s/he did not have 12 weeks of available FMLA leave from April 1, 2020 through December 31, 2020. If the employee's available FMLA leave wholly or partially resets during the extended EFMLEA period, does the employee regain the unused EFMLEA for use?

    (3) If the employee's available FMLA leave wholly or partially resets during the extended EFMLEA period, does the employee gain new EFMLEA for use? This seems unlikely.

Additional Guidance Needed
We expect the U.S. Departments of Labor (DOL) and Health and Human Services (HHS) to release new frequently asked questions or other guidance in January addressing:

- The availability and use of remaining or new leave during the extended EPSL and EFMLEA period;

- Whether an employer must extend EPSL/EFMLEA through March 31, 2020, or if the employer can adopt a shorter period; and

- Other issues related to the administration of extended EPSL/EFMLEA consistent with the rules that were in effect from April 1, 2020 – December 31, 2020.

Student Loan Repayment Assistance Extended

The CARES Act earlier amended Section 127 of the Internal Revenue Code to permit employers to pay up to $5,250 of an employee's existing student loans (including interest) on a tax-free basis through an educational assistance program. The employer may pay the lender directly or reimburse the employee for the employee's loan payments. This initially applied to student loan payments paid on or after March 27,

2020 through December 31, 2020. The Act extends the end date for student loan repayment assistance to **December 31, 2025**.

> **Note:** Educational assistance programs are usually limited to reimbursement for an employee's current tuition expenses, but a program may cover current tuition and/or loan repayment through 2025. The $5,250 limit applies to all tax-free educational assistance benefits provided by the employer for the year. Tax-free educational assistance program benefits require the employer to adopt an educational assistance program, and an existing program would need modified to permit payment for existing loans.

The No Surprises Act

Congress included long-awaited surprise billing legislation in the Act, and the portions of the No Surprises Act focusing on balance billing protection for patients and related disclosure requirements are more than 150 pages long.

When, Exactly?

The surprise billing protections are effective January 1, 2022. Certain disclosure requirements should also be effective on or about January 2022.

Highlights

The No Surprises Act includes the following provisions:

- Patients cannot be balance-billed for out-of-network emergency services. This protection applies from the initial evaluation until stabilization when the patient (or a representative) can consent to transfer to an in-network facility. The protection applies to both out-of-network facilities and out-of-network providers. This protection also applies to air ambulance services, but it does not apply to ground ambulance services.

- Patients can only be balance-billed for non-emergency services performed at an in-network facility by an out-of-network provider under certain circumstances. This protects patients who receive care at an in-network facility from surprise billing by an ancillary provider participating in the care or a specialist responding to an unexpected complication who is out-of-network. The most common examples of out-of-network ancillary providers are radiologists and anesthesiologists. Similarly, an out-of-network cardiologist might be necessary to respond to a surgical complication.

  A patient can waive this protection by consent if notified at least 72 hours in advance of the care. The No Surprises Act contains other limited exceptions.

- A dispute resolution procedure that includes binding arbitration to resolve conflict between health plans and out-of-network providers regarding the plan's payment for out-of-network care.

- Various cost estimate, transparency, and other disclosures.

To be Continued…
Due to the size of the No Surprises Act, its delayed effective date, and the likelihood that significant regulatory guidance will appear later in 2021, we will address the No Surprises Act in detail as a separate Alert in 2021.

Limited Relief for Qualified Transportation Fringe Benefit Plans

The Act does not provide any relief for qualified transportation fringe benefit ("QTF") plans. Existing IRS guidance does not permit employers to refund unused QTF plan contributions and there is no COVID relief guidance affecting this in any way.

The IRS informally indicated it approves of the following administrative relief if the QTF plan document allows it, or if the employer amends the QTF plan to allow it:

- Carryovers from an individual's parking account to a transit account (or vice versa) for the following plan year; and
- Transfers from a parking account to a transit account (or vice versa) during a plan year in progress.

The monthly QTF plan reimbursement limits still apply. An employer administering this relief may consider being lenient on substantiation, particularly for older expenses.

About the Author

***Christopher Beinecke, J.D., LL.M.** is the Employee Health & Benefits National Compliance Leader for Marsh & McLennan Agency.*

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