



Congress Passes a Second COVID-19-Related Stimulus Package

After weeks of negotiations, Congress overwhelmingly passed a second COVID-19 stimulus package – the COVID-Related Tax Relief Act of 2020 (COVIDTRA) and the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (TCDTR), both part of the [Consolidated Appropriations Act, 2021](#) (CAA, 2021). It has been reported that President Trump is expected to sign the bill in the coming days. While it appears that Congress has enough votes to override a presidential veto, it is not clear if or when that would happen or if any changes will be made. Therefore, employers should wait until the Act becomes law before relying on its provisions. The new stimulus package includes several employee benefits-related provisions relevant to health and welfare plans, as summarized below. A provision on surprise medical billing (effective for plan years beginning in 2022) will be the subject of a future client alert.

FFCRA Paid Leave

As the COVID-19 pandemic continues and the vaccine is unlikely to be available on a wide-scale basis in the next several months, the refundable payroll tax credits for emergency paid sick leave (EPSL) and extended family and medical leave (E-FMLA), which were enacted pursuant to the Families First Coronavirus Response Act, are extended through March 31, 2021. Notably, only the tax credits are extended, which means compliance with the EPSL or E-FMLA requirements is voluntary for employers after December 31, 2020.

The policy behind this may have been to incentivize employers to continue allowing employees in the middle of FFCRA leave as of January 1, 2021 to finish out, and be paid for, any remaining leave to which they would have otherwise been entitled. The tax credit is only available for leave that would otherwise satisfy the FFCRA, had it remained in effect, i.e., if employees for whom the employer provides paid leave would otherwise meet the eligibility requirements under the FFCRA and did not use the full amount of EPSL or E-FMLA leave between April 1, 2020 and December 31, 2020.

Relief for Health Care and Dependent Care Flexible Spending Accounts

As many employees are approaching the end of the year with significantly more unused funds in their health FSA and/or dependent care assistance plan (DCAP) than usual due to COVID-19, the stimulus package provides employers with the option of amending their plans to allow the following:

- Employers offering a DCAP or health FSA may allow participants to **carry over** all unused DCAP and health FSA contributions or benefits remaining at the end of the 2020 plan year to the 2021 plan year.
- Employers offering a DCAP or health FSA may allow participants to **carry over** all unused DCAP and health FSA contributions or benefits remaining at the end of the 2021 plan year to the 2022 plan year.
- Employers offering a DCAP or health FSA may **extend the grace period** for using any benefits or contributions remaining at the end of a plan year ending in 2020 or 2021 to 12 months after the end of the applicable plan year.
- Similar to DCAPs, employers offering a health FSA may allow participants who cease participation during the 2020 or 2021 plan year to continue to be reimbursed from any unused benefits through the end of the plan year (and applicable grace period) in which participation ceased. This is often referred to as a “spend down” provision when included in a traditional DCAP.
- Employers offering DCAPs may reimburse employees for dependent care expenses for children who turned 13 during the pandemic. The relief applies to plan years with open enrollments that ended on or before January 31, 2020 (e.g., calendar year 2020 plans). It also applies for the subsequent plan year (e.g., calendar year 2021 plans) to the extent the employee has a balance at the end of the 2020 plan year after any relief adopted by the employer, such as an extended grace period or carry over. The relief allows the employer to substitute “age 14” for “age 13” for purposes of determining eligibility for reimbursement of a child’s expenses. In general, DCAP eligibility ends at age 13, except in cases of mental or physical incapacity.

- Employers offering a health FSA or DCAP may allow employees to make prospective election changes (subject to annual limitations) to their 2021 contributions without experiencing a change in status event.

The stimulus bill allows employers to retroactively amend the plan to take advantage of any of the relief described above; however, any amendment must be 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.” The employer must also operate the plan consistent with the terms of the amendment in the interim between date the amendment is intended to be effective and when it is ultimately adopted by the plan. For calendar year plans, this means any changes to the 2020 plan year must be adopted on or before December 31, 2021 and any changes to the 2021 plan year must be adopted on or before December 31, 2022.

Employers who adopt any of the relief options must amend their cafeteria plan by the applicable deadline and communicate the changes to employees.

Conclusion

Employers should familiarize themselves with these changes and determine next steps. Employers should also consider any state or local COVID-19 related leave requirements. If an employer has employees in a state or locality with mandatory COVID-19 related leave, the expiration of mandatory paid leave under the FFCRA does not relieve employers of their obligation under state law. Finally, employers who intend to adopt any of the health FSA or DCAP related relief should communicate these changes to employees, operate the plan in accordance with these intended changes, and adopt the necessary amendments before the applicable timeframe. Employers should also wait until the Act becomes law before relying on its provisions.

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