Legal Update Article

Consolidated Appropriations Act, 2021: Employer-Sponsored Health and Welfare Plan Components

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The Consolidated Appropriations Act, 2021, generally provides the annual funding for the federal government and, in almost 5,600 pages, contains several important rules giving further COVID-19 relief, including the expansion of eligibility for Paycheck Protection Program (PPP) and the Employee Retention Tax Credit.

The Act also relaxes several health, welfare, and retirement plan rules in light of the on-going COVID-19 pandemic and eases the financial impact of other pandemic-caused employment changes.

The Act was approved by Congress on December 21, 2020, and signed by President Donald Trump on December 27, 2020.

The focus of this article is on key provisions that impact employer-sponsored health and welfare plan arrangements.

Health and Dependent FSA Relief

Following the path established through guidance issued by the Internal Revenue Service for 2020 (IRS Notice 2020-29 and 2020-33), Congress has expanded the opportunities for employers to amend existing Section 125 "cafeteria" plans to allow employees more flexibility in how they utilize unused flexible spending account (FSA) monies previously elected under the employer's plan for qualifying medical and dependent care expenses, at least through 2022.

Grace Period and Carryover Extensions

Employers have two options for allowing employees to utilize unused health and dependent care FSA amounts for 2020 and 2021 (the previous guidance issued under IRS Notices 2020-29 and 2020-33 addressed unused amounts from 2019 only). Employers can extend the applicable grace period (that generally limits the period in which unused FSA amounts can be used in the next year to 2½ months) until the end of the following year, so that unused FSA amounts that remain at the end of 2020 can be carried over and used for qualifying medical or dependent care expenses through the end of 2021; FSA amounts that remain from 2021 elections can be carried over and used for qualifying expenses through the end of 2022. Alternatively, the employer can elect to change existing health FSA carryover limits from the current $500 maximum limit (now indexed for cost of living, under IRS Notice 2020-33) to an unlimited amount for 2021 and 2022. Effectively, both options give an employee an extra 12-months to fully utilize unused health FSA amounts (although dependent FSA's would need to extend the grace period to achieve the same result), but employers with health savings account arrangements may find more flexibility with the carryover option.

Mid-Year Election Changes

Consistent with the methodology from IRS Notice-29 for 2020 elections, in light of the

continued impact of COVID-19 on employees and their opportunities to utilize medical and dependent care services at the end of 2020, the Act affords the opportunity for employees to elect or change existing health or dependent care FSA elections previously made for 2021 at any time during the year, even without any other "change in status" event (but refunds of previously contributed monies are still not allowable consistent with current IRS guidelines).

Dependent Care FSA Modification

Although current rules limit reimbursement of qualifying dependent care expenses to child under age 13, the Act affords an extra year for children who "aged out" during the ongoing pandemic event. Employers can allow unused dependent care FSA amounts for children until they turn age 14, at least through the end of the 2021 plan year.

Amendments for any of the above changes would need to be made by the end of the calendar year after the end of the plan year in which the amendment is made effective.

Surprise Medical Billing

Congress has finally followed through on more than two years' efforts to curb previous practices of healthcare providers who charged participating employees and related employer health plans for the excessive cost of services, typically provided out-of-network, when the individual often had no other healthcare alternative (such as with air ambulance and other urgent care service needs) and without any knowledge of the billed charges of the services provided until those individuals were "surprised" to receive a bill for potentially thousands of dollars outside of what was paid through an employer's health plan.

Encompassing more than 300 pages within the Act, the "No Surprises Act" sets forth new rules that begin in 2022, whereby individuals can no longer be "balanced billed" without their consent when they seek emergency care, when transported by an air ambulance, or when receiving non-emergency care at an in-network hospital but unknowingly are treated by out-of-network physicians or other specialty care services. Such providers are further limited in their ability to charge an employer for the excess costs, such as through the appeals process to dispute the amount being paid by the insurer or an employer's health plan. The Act requires those issues to be addressed through binding arbitration procedures that must use median in-network rates as a guideline for ultimate dispute resolution. While a welcomed step, insurers and health plan sponsors' concerns during previous legislative debates relate to the current, insufficient number of qualified arbitrators who are available to adequately address the looming number of disputes that will be raised. Further guidance undoubtedly will come to more fully address the manner in which these new requirements will be carried out. Employers will need to amend health plans to adopt these new provisions before they become effective.

Other Health Plan Provisions

Although the Act fails to provide financial relief for employees who have been required to elect COBRA-continuation coverage during the extended COVID-19 pandemic period, the Act includes other, new mandates for group health plans to implement requirements for insurers and healthcare providers to adopt cost transparency guidelines, including on the costs of pharmacy drugs. Likewise, additional obligations will exist for insurance brokers and consultants to more fully disclose direct or indirect compensation received from group health plans and other insured arrangements.

Lastly, guidelines continue to be strengthened to bring greater parity between medical and

surgical benefits and mental health and substance use disorder benefits, including required comparative analyses of the nonquantitative treatment limitations between services.

Jackson Lewis attorneys are available to help you understand these issues. Please contact the Jackson Lewis attorney with whom you regularly work if you have questions or need assistance.

Related:

- Consolidated Appropriations Act, 2021: Employer-Sponsored Retirement Plans
- Consolidated Appropriations Act, 2021: PPP and Tax Provisions
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- Consolidated Appropriations Act, 2021: Top Practical Considerations on FSA, Election Change Relief
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