ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES:

PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Earl Porter provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken and Amy are senior members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

GROUP HEALTH PLAN PROVISIONS OF THE CONSOLIDATED APPROPRIATIONS ACT: A DEEPER DIVE

On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA) was signed into law. In addition to funding the government and further COVID-19 relief, the CAA included significant provisions impacting health benefit coverage. Over the next several articles we will discuss four of the provisions relevant for group health plans: (1) expanded relief for health and dependent care flexible spending arrangements; (2) new expanded compliance requirements under the Mental Health Parity and Addiction Equity Act (MHPAEA); (3) new reporting requirements for commission and similar compensation; and (4) new requirements to limit surprise billing.

RELIEF FOR HEALTH AND DEPENDENT CARE ASSISTANCE FLEXIBLE SPENDING ARRANGEMENTS

In 2020, the Department of the Treasury and Internal Revenue Service issued Notice 2020-29 that provided an extended grace period for unused funds in health flexible spending arrangements (FSAs) and dependent care FSAs (DCAPs), as well as additional opportunities to change elections for health coverage and FSA benefits. The IRS also released Notice 2020-33, which increased the amount of the carryover permitted for health FSAs to $550 due to inflation indexing.

A portion of the CAA, the Taxpayer Certainty and Disaster Tax Relief Act, expands on the prior IRS relief. As was the case with the IRS relief, employers may choose whether to adopt any of the options provided in the Relief Act. If an employer adopts any of these options, a plan amendment (potentially retroactive) needs to be made by the end of the calendar year following the plan year the change relates to.

Extension of carryover amounts for health FSAs and DCAPs

The CAA allows employers to adopt a carryover for health FSAs or DCAPs (or both) for plan years ending in 2020 or 2021.

Thus, for a calendar year plan, health FSA and DCAP balances that are unused at the end of the 2020 plan year may be carried over into the 2021 plan year, and unused balances at the end of the 2021 plan year may be carried over into the 2022 plan year.

For a fiscal year plan (e.g., 7/1-6/30), funds remaining at the end of the FY ending in 2020 (e.g., 6/30/20) can be carried over into the FY ending in 2021 (7/1/20-6/30/21 PY) and funds remaining at the end of the FY ending in 2021 (e.g., 6/30/21) can be carried over into the next PY (7/1/21-6/30/22 PY). There is no limit on the amount of permitted carryover.

The prior IRS guidance allowed a more limited carryover only for health FSAs (not DCAPs). There are special issues to consider for employers that have high deductible health plans (HDHPs) and want to provide a health FSA carryover.

Employers that offer an HDHP should consider steps to protect ongoing health savings account (HSA) eligibility for employees (e.g., by restricting carryover funds in a health FSA for those who elect an HDHP to limited purpose vision/dental coverage).

DCAP benefits are subject to Form W-2 and participant reporting requirements that must be considered in connection with a carryover or grace period. More specifically, employers are required to report DCAP benefits on employee Forms W-2 each year.

The IRS has previously provided guidance allowing employers to report DCAP benefits based on the amount of salary reductions and has confirmed that this treatment still applies when a plan has a grace period. Presumably, the same rules apply to an extended 12-month grace period and a DCAP carryover.

Similarly, potential issues can arise if a carryover or grace period causes the amount of DCAP benefits received in a year to exceed the $5,000 maximum exclusion allowed for a DCAP. DCAP participants are required to report their excludable DCAP benefits on Form 2441 filed in conjunction with their annual Form 1040.

IRS Form 2441 notes that DCAP amounts are to be reported in the year they are used and that any amounts used in a year exceeding the annual $5,000 limit should be reported as taxable compensation on Forms 2441 and 1040. Presumably the same rules would apply to an extended 12-month grace period and a DCAP carryover.

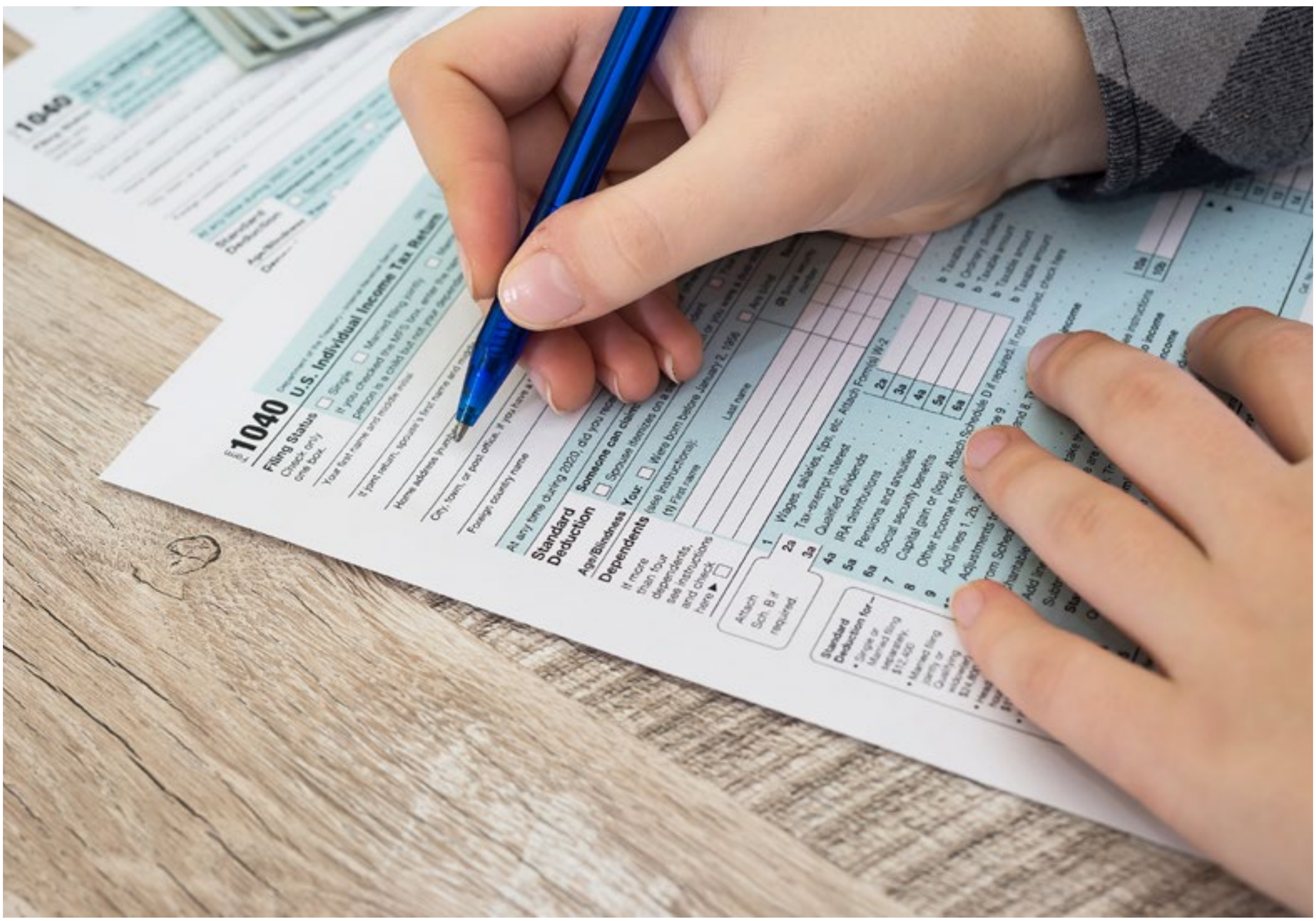
Extension of grace periods for health FSAs and DCAPs

Normally, health FSAs and DCAPs may provide a grace period of up to 2-1/2 months immediately following the end of each plan year (e.g., up to March 15 for a calendar-year plan year). Any used amounts remaining at the end of the plan year may be used to pay expenses incurred for the same benefits during the grace period.

The Relief Act permits a grace period for unused benefits in health FSAs and DCAPs to be extended to 12 months for plan years ending in 2020 or 2021. [Note that the Relief Act references an "extension" of the grace period; query whether such language could also apply to the extension of a grace period for the first time. We think it should, but formal confirmation would be welcome.]

The Relief Act does not address whether the extended grace period can be limited by plan design in amount or in duration. Under the pre-COVID-19 grace period guidance, plan sponsors could limit carryovers to specified amounts (e.g., no more than $2,000).

Also, it would seem that a plan sponsor should be able to choose to restrict the extended grace period to less than 12 months. Presumably, agency guidance will confirm that plan sponsors have similar leeway with the extended grace period under the Relief Act.



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As with the carryover, ongoing grace period coverage in a general-purpose health FSA would make an individual ineligible for an HSA for the entire period of coverage. Employers that offer an HDHP and are considering the grace period extension for a health FSA should also consider steps to protect ongoing HSA eligibility (e.g., by limiting the grace period duration or by restricting the use of unused funds for all participants to limited purpose vision/dental coverage).

Practice Pointer: Which is better, a 12-month grace period or a carryover? In many respects, for plan years ending in 2020 and 2021, both the extended grace period and the carryover accomplish the same thing – a carryover of unused funds. In some cases, the carryover may be advantageous because it would allow funds to move forward from 2020 to 2021 and 2021 to 2022. The grace period may only allow associated funds to move forward a single year before forfeiture, and if required, this feature may also be problematic for some third-party administrators (TPAs). Otherwise, it may come down to a matter of which approach employees are most familiar with and which arrangement might be continued after 2021. In addition, it is worth noting that employers that also sponsor an HDHP may be more comfortable with the carryover since the guidance relating to restricting existing balances for individual participants to a limited purpose vision/dental FSA based on a prospective HDHP election is clearer with the carryover.

Temporary expansion of eligible dependent to age 13 for 2020; also for 2021 for unused DCAP grace period or carryover funds

Normally, DCAP benefits may be provided for eligible dependents through age 12 (i.e., dependents who have not turned age 13). The Relief Act permits employers to reimburse DCAP expenses for eligible dependents through age 13 (i.e., dependents who have not attained age 14) for the 2020 plan year.

In order for this relief to apply, the plan's regular annual enrollment period must have ended on or before January 31, 2020. The same relief also applies for the next plan year, but only for unused grace period amounts from the 2020 plan year or other amounts carried over into the 2021 plan year.

Plan sponsors seeking to avail themselves of this change should ensure that their administrators can differentiate between carryover and non-carryover funds in processing claims for age 13 dependents.

Prospective election changes during 2021 for health FSAs and DCAPs

Prospective changes in health FSA and DCAP elections may be made for plan years ending in 2021 without a corresponding change-in-status event. This is a one-year extension of the relief provided in IRS Notice 2020-29 except that the extended relief applies only to FSAs.

Again, while the Relief Act is somewhat ambiguous, the relief likely applies to employees making new FSA elections since these employees had previously made an election not to participate. Employers considering such a provision may want to impose reasonable restrictions on the number of such changes and to possibly restrict prospective FSA reductions to be no lower than the amount of benefits already paid.

Post-termination spend down for health FSA funds

Plans may permit health FSA participants who terminate participation in the plan during the 2020 or 2021 plan year to spend down their unused balances for expenses incurred through the end of the plan year in which the termination occurred, including any grace period extension.

This approach is similar to what is and has always been permitted for DCAPs. Under such an approach, FSA reimbursements are limited to the amount of unused FSA contributions.

The Relief Act does not address whether the health FSA spend down can be limited by plan design in amount or in duration. It would seem that a plan sponsor should be able to choose to restrict the period for a spend-down provision (e.g., until 90 days following termination).

Also, steps should be taken to coordinate the spend down with any COBRA coverage required for the health FSA. Presumably, the spend down would be offered as a mutually exclusive alternative to COBRA coverage.

As with the grace period extension and carryover provisions, ongoing coverage in a general-purpose FSA will adversely impact HSA eligibility for the entire period of coverage.

Plan sponsor considerations

The FSA relief under the Relief Act is temporary (applicable only for plan years ending in 2020 or 2021) and discretionary. Plan sponsors should evaluate their individual circumstances and decide whether changes are appropriate for their plans. In some cases, the COVID-19 pandemic may have caused a large amount of potential forfeitures (e.g., because daycare centers and/or health care providers were closed). The FSA relief may make sense in such cases. In other situations, forfeitures may be small and there may not be a need for the expanded FSA carryover or grace period relief. Fortunately, employers may have a little time to consider which approach may be best for them since Relief Act FSA amendments can be adopted retroactively. ■