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HEALTH & WELFARE PLAN LUNCH GROUP

March 4, 2021

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1. Health & Welfare Benefits Monthly Update Presentation

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Agenda

- Legislative Update
- Outbreak Period Update
- COBRA Subsidy: A Deeper Dive
- Notice 2021-15: FSA and Election Change Relief
- Further Agency Guidance on COVID Testing and Vaccinations

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Legislative Update -- American Rescue Plan Act of 2021



- **Status Update**
- **COBRA Premium Subsidy**
- **Other provisions**
 - Enhanced Premium Tax Credits through ACA Marketplaces
 - DCAP Increase to \$10,500 for 2021

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American Rescue Plan – COBRA Subsidy

- 85% subsidy for coverage from April 1 through Sept. 30, 2021 (assuming March DOE)
 - Does not extend normal COBRA coverage period
 - **100% subsidy in Senate substitute of 3/3/2021**
- Triggering event is loss of coverage due to involuntary termination of employment or a reduction in hours
 - Applies to all qualified beneficiaries who lose coverage (e.g., spouse and dependents)
- Subsidy not available if individual is (or becomes) eligible under another group health plan (e.g., spouse's plan)
- Retroactive election period -- subsidy applies w/r/t prior events if COBRA period has not yet ended
 - Eligible QB can elect coverage just for subsidy period
- Coverage must be provided if QB pays their portion of the premium
- Employers/plans/insurers receive refundable tax credit for the remaining 85% of premium. The credit is paid to:
 - The plan, in the case of a multiemployer plan
 - If not a multiemployer plan --
 - The employer, if the plan is subject to COBRA under the IRC, ERISA or the PHSA **or**, if some or all of the coverage is not provided by insurance)
 - The insurer, in the case of fully-insured plans (not described above)
- Structure is similar to the ARRA 2009 COBRA subsidy

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Outbreak Period Update

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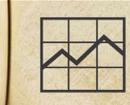
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Outbreak Period Guidance

- IRS issues guidance on 2/24/21 (Notice 2021-01) addressing the end of the Outbreak Period But first, a little history
- IRS/DOL jointly issued Notice 2020-01 in April of 2020.
- The Joint Notice prescribed a period that plans were required to disregard when determining due dates for certain enumerated actions.
 - HIPAA special enrollment
 - COBRA elections, premium payment, QB notices, and even election notices
 - Claims and appeals for all welfare and retirement plans subject to ERISA
 - External Review requests for non-grandfathered health plans subject to ACA
- This period of disregard is called the “Outbreak Period”
- The Outbreak Period began March 1 and ends 60 days after the declared end of the National Emergency.

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Outbreak Period Guidance

- Joint notice stopped the counting during the Outbreak Period of any time frame that fell within the Outbreak Period.
 - E.g. If 45 days of your 60 day election period had occurred on March 1, 2020, then you would get 15 days to elect once the Outbreak Period ended.
 - E.g. If your COBRA election period fell entirely within the Outbreak Period, then you would get 60 days when the Outbreak Period ended.



Outbreak Period Guidance

- The Joint Notice was a product of ERISA Section 518/IRC 7508A, which says:
 - In the case of a pension or other employer benefit plan, or any sponsor, administrator, participant, beneficiary or other person with respect to such plan,the Secretary may, notwithstanding any other provision of law, prescribe, by notice or otherwise, **a period of up to 1 year which may be disregarded** in determining the date by which any action is required or permitted to be completed under this chapter (emphasis supplied).
- Joint Notice acknowledged the 1 year limitation



Outbreak Period Guidance

- Fast forward to February 2021.
 - National Emergency yet to be declared over (in fact Biden Administration extended the declaration under the NEA)—no end in foreseeable future
 - Nevertheless, does Outbreak Period 2/28/21---1 year after it began on March 1, 2021?
 - New DOL/IRS guidance says No.



Outbreak Period Guidance

- Instead of applying the 1 year limitation to the Outbreak Period itself, the agencies applied it to the individual's specific time period.
- Individuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date they were first eligible for relief or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.

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Outbreak Period Guidance

- Basically, identify the original due date (but for the Outbreak Period) and add 1 year (per the examples in the guidance).
 - COBRA election period would have otherwise ended May 31, 2020. Plan can require election by May 31, 2021.
 - Health FSA run out period for 2019 plan year would have otherwise ended March 31, 2020. Plans can require submission of 2019 claims by March 31, 2021.
 - 1 year period for filing health plan claim would have otherwise ended July 31, 2020. Plan can require filing of claim by July 31, 2021.

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Outbreak Period Guidance

- Why not just measure the 1 year period starting with the beginning of the otherwise applicable time period and then add disregarded days?
 - IT WORKS OUT THE SAME.
 - (using same examples from prior slide) if COBRA election period would have begun March 31, 2020 and ended May 31, 2020, then then you could measure the 1 year period from March 31, 2020 and add 60 days. The new due date for making an election would be May 31, 2021 (same as in the prior example).

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Outbreak Period Guidance

- Still some unknowns:
 - My COBRA election would have been due on May 31, 2020. I elect on April 1, 2021. I have 45 days to make an election. (May 15, 2021).
 - I don't make the initial payment.
 - Since (assume) Outbreak Period is still ongoing, payment is presumably not late yet.
 - What is maximum time period for requiring payment?
 - May 15, 2022?
 - What periods of coverage are included in the initial premium payment?

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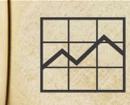
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Outbreak Period Guidance

- Still some unknowns:
 - I failed to make any COBRA premiums beginning with the March 2020 premium.
 - No doubt that the plan can require payment of March 2020 premium by March 31, 2021.
 - What about other monthly payments? E.g. Is April 2020 premium also due March 31, 2021 or does the plan have to allow until April 30, 2021 to pay the April premium now that march has been paid?
 - Original guidance indicated that all outstanding payments would be due 30 days after outbreak period ended. Does that apply here?

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American Rescue Plan: COBRA SUBSIDY DEEPER DIVE

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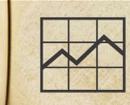
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Potential COBRA Subsidy

- Subsidy begins the first of the month after enactment—April 1st assuming enactment is in March.
- Subsidy lasts through September 30th.
 - Possible legislative extension?
- Subsidy is 85% in House-passed bill
 - 100% subsidy in Senate substitute of 3/3/21
- To receive the subsidy the COBRA event must be an involuntary termination of employment or reduction in hours.
 - COBRA administrators will need information on involuntary terminations since they likely do not have it.
 - Gross misconduct exception still applies but, as always, use with caution.
- Very similar procedurally to the ARRA subsidy back in 2009.
 - IRS FAQs to ARRA subsidy (Notice 2009-27) contain a number of FAQs around involuntary termination of employment.
 - ARRA did not have reduction in hours as a subsidy trigger.

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Potential COBRA Subsidy

- Cannot receive the subsidy if *eligible* for coverage under another group health plan or Medicare.
 - Qualified beneficiary must provide notice if no longer eligible or face a \$250 penalty.
 - Higher penalty if the failure to notify is fraudulent.
- Eligible individuals are those whose involuntary termination or reduction in hours occurred:
 - During the subsidy period.
 - Prior to the subsidy period but they have existing COBRA coverage extending into the subsidy period.
 - Prior to the subsidy period and have not elected COBRA. But if they had elected, coverage would have extended into the subsidy period.
 - Includes those who elected and subsequently dropped COBRA coverage before the subsidy period begins.

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Potential COBRA Subsidy

- Eligible individuals and qualified beneficiaries associated with the eligible individual may receive the subsidy.
 - ARRA FAQs had guidance on some issues that may arise (e.g. second qualifying event).
- Special Notice to eligible individuals must go out within 60 days from April 1st (May 31st) assuming enactment is in March.
 - DOL to issue model notices within 30 days of enactment.
- Eligible individuals have 60 days to elect coverage after receipt of the Special Notice with the subsidy back to April 1st (assuming enactment in March).
 - Because of Outbreak Period many qualified beneficiaries will have the option to elect COBRA *without* the subsidy back to the qualifying event and with the subsidy beginning April 1st.

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Potential COBRA Subsidy

- Notice on the expiration of the subsidy and the right to continue COBRA paying the full premium is also required.
 - Notice must go out in the period beginning 45 days before the subsidy ends and ending 15 days before the subsidy ends.
 - DOL to issue a model notice within 45 days of enactment.
- Employer may allow (permissive) individuals to change plan options provided the premium for the option is less than current premium and certain other conditions are met.

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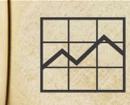
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Potential COBRA Subsidy

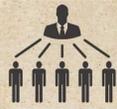
- Employer is responsible for the subsidy and takes a credit against Medicare payroll tax to be reimbursed for the subsidy.
 - Mechanics with COBRA administrator likely to vary whether fully insured or self-funded.
- Expedited review with DOL of disputes concerning the subsidy (15 business days).

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Points to Ponder

- Begin talking with your COBRA Administrator now.
 - Issues regarding costs associated with mailing the two notices.
- Identify involuntary terminations and reductions in hours going back to October 2019.
- Alert payroll departments to possible changes to remitting payroll taxes (Form 941).
- Further possible adverse selection for self-funded plans?
- Can any communication be coordinated with the now phased end to the Outbreak Period?

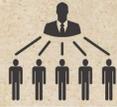
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FSA Relief Under CAA And Answers From IRS Notice 2021-15

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FSA Relief Under CAA

- Elective Temporary Relief for Health and DCAP FSAs (Pub. L. No. 116-260, Div. EE, § 214 (2020))
 - Carryover of unused FSA funds from PYs **ending in 2020** or 2021
 - Extended grace periods for PYs **ending in 2020** or 2021
 - Post-termination Health FSA spend-down following termination of participation in **CYs 2020 or 2021**
 - Temporary Expansion of Eligible DCAP Dependent to Age 13 for 2020; also for 2021 for Unused DCAP Grace Period or Carryover Funds
 - Election changes in PY ending in **2021** without change in status event
- Compare and Contrast 2020 Relief under IRS Notice 2020-29

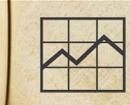
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Carryover of Unused FSA Funds

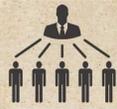
- Details
 - Health FSA **and DCAP** balances that are unused **in PYs ending in 2020** may be carried over into PY ending in 2021, and unused balances in **PYs ending in 2021** may be carried over into PY ending in 2022.
 - There is **no cap** on the amount of permitted carryover. Also, DCAPs can use carryover whereas the 2020 IRS Notice allowed a carryover only for health FSAs (not DCAPs).
- Employers that offer an HDHP should consider steps to protect ongoing Health Savings Account (HSA) eligibility for employees participating in a general-purpose FSA (*e.g.*, allowing a waiver of coverage or 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
 - How to handle W2 reporting
 - How to handle \$5000 cap
 - Further guidance expected revising Form 2441 for carryover and grace period

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IRS Notice 2021-15 Carryover Answers

- Carryover does not reduce amount that can be elected in subsequent year
- Can impose plan design limitations on carryover
 - Require that individual be a participant in subsequent year to get carryover
 - Require a minimum participation level
 - Impose a maximum carryover amount
 - Impose a limit on months (but this would complicate administration)
- Carryover amount does not count against employer for Health FSA excepted benefit (Maximum benefit) analysis
- Carryover does not count in subsequent year's discrimination testing (125 or 129)
- Carryover plus retroactive election could result in "springing" FSA participation

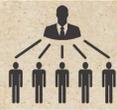
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Extended Grace Period

- Details
 - The Act permits a grace period for unused benefits in health FSAs and DCAPs to be **extended** up to 12 months for **plan years ending** in 2020 or 2021.
- 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 general-purpose health FSA should consider steps to protect ongoing HSA eligibility (e.g., by limiting the grace period duration or by restricting the use of unused funds for participants to limited purpose vision/dental coverage).
 - Per Notice 2021-15 HSA restriction applies for entire grace period to current participants AND participants who are eligible to incur claims but have ceased participation due to termination of election due to employment or change in status

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IRS Notice 2021-15 Grace Period Answers

- Grace period does not reduce amount that can be elected in subsequent year
- “Extension” is available for plans that currently have (or do not have) a grace period or carryover
- Grace period amounts are not required to be forfeited at end of plan year during extension period and thus could be available for subsequent grace period
- Grace period amount does not count in subsequent year’s discrimination testing (125 or 129)
- To protect HSA eligibility, for PYs ending in 2020 or 2021, more liberal “carryover rule” allowing health FSA coverage waivers or limitations of grace period to those who do not elect an HDHP can be implemented
- Can impose limitations on grace period
 - Can require a minimum participation level
 - Can impose a maximum grace period amount or limit on months
 - Can limit grace period amounts to amount contributed in the case of a post-participation continuation (e.g., following a termination or election not to participate)

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Which is better? Grace period or carryover?

- Clarifications in Notice 2021-15 make the two options very similar
- However, grace period participant can benefit from subsequent year carryover; however, carryover is not available to former participant who terminates participation (without grace period)
- Cannot adopt carryover and grace period for same year and amendment must specify which is adopted

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Post-termination Health FSA Spend-down

- Details
 - 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 can be limited by plan design to the amount of unused FSA contributions.
 - 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 an alternative to COBRA coverage, but Notice 2021-15 provides that they could run concurrently.
 - 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.



Temporary Expansion of Eligible DCAP Dependent to Age 13

- Details
 - Normally, DCAP benefits may be provided for eligible dependents through age 12 (*i.e.*, dependents who have not turned age 13).
 - The Act permits employers to amend their plans 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 Jan. 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 TPAs can differentiate between carryover and non-carryover funds in processing claims for age 13 dependents.

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Election Changes in PY Ending in 2021

- **Details**
 - Prospective changes in health FSA and DCAP elections may be made **for plan years ending in 2021** without a corresponding change in status event.
 - IRS Notice 2021-15 expands this relief to health (medical, dental, vision) coverage as well. This is consistent with the relief provided in IRS Notice 2020-29.
- Employers considering such a provision may want to impose reasonable restrictions on the number of such changes and restrict prospective FSA reductions to be no lower than amount of benefits already paid

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IRS Notice 2021-15 Election Change Answers

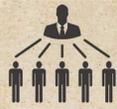
- Rule applies to PYs ending in 2021 (compare under 2020 Notice rule applied to CY 2020)
 - Non-CY plans will have a shorter period to allow changes
 - Employer can adopt rule for part of 2021.
- The relief applies to employees making new elections (including FSA elections).
- For health coverage elections, rules similar to IRS Notice 2020-19 apply
 - New health coverage election
 - Different health coverage election
 - Drop health coverage based on affidavit of other coverage
- Election changes may be limited to reduce adverse selection risk (e.g., can opt into less generous coverage but not vice versa)

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Points to Ponder

- Should Changes be Adopted
 - How many participants impacted (will “normal” carryover/grace period work)
 - How much is at stake
 - Potential impact on HSA eligibility
- Timing considerations
 - Amendments can be adopted until end of calendar year **that begins** following plan year for which change adopted
 - Earlier communications likely required
- TPA Capabilities
 - Can TPA handle 12 month grace period extension and/or unlimited carryover
 - Can TPA handle cap on spend down?
 - Can TPA differentiate funds for age 13 DCAP expansion

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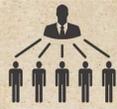
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Further Agency Guidance on COVID Testing and Vaccinations

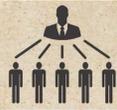
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COVID Testing and Vaccinations

- Fourteen new FAQs issued on February 26, 2021
 - <https://www.cms.gov/files/document/faqs-part-44.pdf>
- Testing
 - Plans may not impose medical screening criteria to deny or impose cost sharing for testing on asymptomatic individuals.
 - Plans are not required to cover testing for public health surveillance or employment purposes.
 - Plans are required to cover testing provided through governmental administered testing sites as well point-of-care tests.
 - Plans need to take steps to protect participants from inappropriate cost sharing for services related to testing and the Agencies will take enforcement action to insure those protections.



COVID Vaccinations

- Vaccinations
 - Plans must cover, without cost sharing, all approved vaccines within 15 business days after their recommendation. January 5th for Pfizer and January 12th for Moderna.
 - Plans need to cover the vaccine administration fee even where the government or another party pays for the vaccine itself.
 - Plans may not deny coverage for a vaccine based on an individual not being in a current category recommended for early vaccination.

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COVID Vaccinations

- Vaccinations
 - Agencies will take no action concerning the 60-day advance notice requirement for changes to a SBC with regard to the vaccine as long as notice is provided as soon as reasonably practicable.
 - Employers may offer vaccines through an EAP and it will not be considered to provide “significant benefits in the nature of medical care” allowing the EAP to qualify as an excepted benefit under the ACA.
 - Excepted benefit status also exists for vaccines provided through onsite clinics.

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Thanks!

- Questions?

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