



A Robinson+Cole Legal Update

March 18, 2021

New Opportunities and Issues for Dependent Care Flexible Spending Accounts in 2020 and 2021

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The COVID-19 pandemic and large-scale “stay at home” orders left many employers facing questions relating to the elections employees made with respect to their dependent care benefit accounts. Since then, a number of major pieces of pandemic relief legislation and related federal agency guidance have offered some relief by providing additional flexibility to make changes to dependent care flexible spending account (DCFSA) elections, carry over of unused amounts, and increased contribution limits.

Recently, the [Consolidated Appropriations Act](#) (CAA), which was signed on December 27, 2020, added a number of optional special rules for DCFSA, including, but not limited to, permitting employers to:

- carry over unused amounts from the 2020 plan year to the 2021 plan year, and from the 2021 plan year to the 2022 plan year;
- extend the grace period for plan years ending in 2020 and/or 2021 to 12 months after the end of the plan year (previously this was only 2 ½ months); and/or
- allow *prospective* election changes without regard to a change in status for plan years ending in 2021. Moreover, the [IRS issued](#) additional clarifying guidance regarding these provisions.

Following the CAA, the American Rescue Plan Act of 2021 (ARPA) was signed on March 11, 2021, permitting employers to voluntarily increase the annual limit on contributions to DCFSA up to \$10,500 (normally \$5,000) for the 2021 plan year. There are a number of issues an employer may consider when deciding whether to adopt any of the CAA provisions or the increased ARPA contribution limit, including, but not limited to, the following:

- Although ARPA increases the annual contribution limit, employers may want to consider whether they wish to take advantage of the CAA provision permitting prospective mid-year elections; otherwise, only those employees who have a mid-year qualifying event would be able to take advantage of the increased contribution limit. Please note that at this time, it appears that prospective mid-year elections apply to the withholding of an employee’s contributions and cannot cover expenses already incurred in excess of the amount initially elected for 2021 plus, any carry over from 2020. However, we are awaiting additional guidance from the IRS on this and other issues.
- Employers may wish to review their DCFSA plans to determine if the plan includes a dollar amount for the annual contribution limit, or whether the plan refers to Internal Revenue Code Section 129 (which may result in the plan automatically adopting the increased annual limit).

- If the employer is considering adopting both the carry-over provisions of the CAA for both the 2020 and 2021 plan years as well as the increased ARPA annual limit, this could result in some employees having very large balances in their DCFSA in 2022. For example, if an employee carries over \$5,000 from 2020 to 2021, contributes \$10,500 in 2021 and has no expenses, and then carries over the full \$15,500 to 2022 and contributes another \$5,000 in 2022 (when the limit is supposed to return to the normal amount), the employee could end up with an account balance of \$20,500 in 2022.

There are still a number of outstanding issues for which we hope to receive more guidance. Additionally, employers that wish to take advantage of the relief under CAA or ARPA may also need to amend their DCFSA plan as soon as the end of this year (depending on which provisions they adopt, and for which plan years). Therefore, plan sponsors are encouraged to seek competent counsel with respect to these issues.

FOR MORE INFORMATION

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