The Consolidated Appropriations Act of 2021 and Benefits Changes Employers Need to Focus on Right Now

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Retirement Plans Additional Relief May Help Prevent Partial Plan Terminations The recently adopted Consolidated Appropriations Act of 2021 (the ***CAA***) provides relief for qualified retirement plans of employers that had to reduce their workforce as a result of the pandemic (through furloughs, layoffs, or terminations) for plan years that include the period beginning on March 13, 2020 and ending on March 31, 2021. Specifically, these plans shall not be treated as incurring a partial plan termination if the number of active participants covered by the plan on March 31, 2021 is at least 80% of the number of active participants that were covered by the plan on March 13, 2020. A partial plan termination generally occurs when more than 20% of a plan's participants are terminated in a plan year. If a partial plan termination occurs, then the plan is required to 100% vest any affected employees. Affected employees are any employees who terminated employment for any reason during the plan year in which the partial plan termination occurred and who have an account balance in the plan. Typically, whether a partial plan termination occurs is measured based on a plan year basis (January 1 to December 31 for calendar year plans). The relief under the CAA essentially grants employers an additional period (three months for calendar year plans) to rehire employees and avoid a partial plan termination. While this relief is welcomed, and expands on the relief previously provided by the IRS that would have prevented a partial plan termination if employees were rehired before the end of 2020 (which we previously discussed here), employers that hope to rely on this relief should work with their third party administrators now to determine (i) the number of active participants covered by their plans on March 13, 2020, (ii) what percentage of those active participants remain covered under the plan currently, and (iii) if that number is less than 80% of the active participants on March 13, 2020, how many employees would need to be rehired and covered by the plan in order to rely on the offered relief. Any time an employer incurs a large reduction in its workforce, the employer should work with its third party administrator and outside counsel to assess whether a partial plan termination occurred and to ensure that affected employees are properly vested in their account balances.

IRS Extends Temporary Relief Allowing Individuals Making Participant Elections to do so Electronically In light of the COVID-19 pandemic, the IRS recently issued Notice 2021-03 to extend the temporary relief provided in Notice 2020-42 (discussed in our prior blog post here), which allows individuals making participant elections to do so through electronic means, for the period from January 1, 2021 through June 30, 2021. Typically, Treasury Regulations 1.401(a)-21(d)(6) requires participant elections, including spousal consents, to be witnessed in the physical presence of a plan representative or notary public. Notice 2021-03 extends temporary relief, under terms identical to those provided in Notice 2020-42, from (i) the physical presence requirement for any participant election witnessed by a notary public of a state that permits remote electronic notarization, and (ii) the physical presence requirement for any participant election witnessed by a plan representative. During this period of temporary relief, a participant may still have a participant election witnessed in the physical presence of a notary public. Notice 2021-03 is available here.

Health and Welfare Relief for Health FSAs and Dependent Care FSAs The CAA provides relief that would benefit employees who participate in employer-sponsored cafeteria plans that offer

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health flexible spending accounts (***FSA***) or dependent care FSAs. The CAA includes the following optional changes that cafeteria plan sponsors may choose to adopt:

- For plan years ending in 2020 or 2021, a cafeteria plan that includes a health FSA or dependent care FSA may be amended to allow participants to carry over any unused FSA balances to the following plan year;
- For plan years ending in 2020 or 2021, a cafeteria plan that includes a health FSA or dependent care FSA with a grace period may be amended to extend the grace period to 12 months after the end of such plan year;
- A cafeteria plan that includes a health FSA may be amended to allow a participant who ceases participating (*e.g.,* due to termination of employment) during 2020 or 2021 to continue to receive reimbursements from his or her unused FSA balance through the end of the plan year in which such participation ceased, including any regular grace period as well as the extended grace period permitted under the CAA;
- A dependent care FSA participant whose child turned age 13 during the COVID-19 pandemic may continue to receive reimbursements for such child's qualifying expenses for the rest of the plan year in which the regular enrollment period was on or before January 31, 2020. To the extent a balance remains in the participant's dependent care FSA at the end of such plan year, the participant may continue to receive reimbursements from such carryover balance during the following plan year until the child attains age 14; and
- For plan years ending in 2021, a plan that includes a health FSA or dependent care FSA may be amended to allow participants to make prospective changes to their elections, regardless of whether they have incurred a qualifying change in status event.

All of the above changes are permissive. In order to implement any of these changes, the plan sponsor must amend its cafeteria plan, generally by the end of the 2021 plan year. Also, the cafeteria plan must be administered in a manner that is consistent with the terms of such amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is actually adopted. Therefore, a plan sponsor may want to amend its plan as soon as practicable to ensure consistency between the plan's terms and its operation.

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