



Understanding Health FSA and DCAP Regulations

Including New Regulation Changes During



Coast to Coast Administration



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➤ Presented by



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➤ What Is a Health FSA?

- “FSA” is a Flexible Spending Arrangement, a benefit that can be offered under a cafeteria plan
- A medical reimbursement plan where an employee can be reimbursed for certain medical expenses using pre-tax dollars
- Multi-faceted nature means that many laws apply a health FSA and its administration
 - A self-insured medical reimbursement plan; a flexible spending arrangement; group health plan; AND employee welfare benefit plan

➤ What Is a DCAP?

- “DCAP” is a Dependent Care Assistance Program, another benefit that can be offered under a cafeteria plan
- A reimbursement plan that allows up to \$5,000 pre-tax dollars to be used by an employer for dependent care assistance
 - Greater benefit than claiming a Dependent Care Tax Credit
- Most DCAPs are FSAs, and are subject to the same laws except for the Uniform Coverage Rule
 - Uniform Coverage Rule – the maximum amount of reimbursement must be available at all times during coverage period

➤ What Laws Apply to a Health FSA?

- Internal Revenue Code § 105, 106, 125, and 213
 - Requires a properly adopted written document
 - Can be offered under a cafeteria plan
 - Can reimburse only certain medical expenses as defined under § 213(d)
- ERISA, COBRA, HIPAA, FMLA, USERRA, ACA, and others

➤ What Laws Apply to a Health FSA? Cont.

- Prop. Treas. Reg. § 1.125-5 and -6
 - Must offer uniform coverage throughout coverage period
 - Coverage period must be 12 months generally
 - Expenses must have been incurred during coverage period
 - Long-term care expenses and insurance premiums cannot be reimbursed
 - Claim substantiation must be provided, including a statement from the participant and an independent third party (like a physician)
- The IRS released two Notices on May 12, 2020 that alter some health FSA regulations to provide relief to participants
- On December 27, 2020, HR 133 (Consolidated Appropriations Act) became law and extended some cafeteria plan relief and implemented new relief; on February 18, 2021, the IRS released Notice 2021-15 clarifying the impact of these changes

➤ Who Can Participate in a Health FSA?

- Generally, any common-law employee of an employer offering it
- Practically, in order to be compliant with Healthcare Reform, only employees who are also eligible to participate in an employer's major medical plan
 - Unless the health FSA only offers limited dental or vision benefits
- As an employer:
 - If also offering a major medical plan, offer a health FSA only to those employees eligible for that major medical plan
 - If not offering a major medical plan, offer a limited-scope health FSA for dental and/or vision benefits

➤ Elections

- Under the cafeteria plan, eligible employees will make a prospective (not retroactive) election of benefits and salary reduction amounts, including amount contributed to the health FSA
 - At each annual open enrollment for all eligible employees
 - Within 30 days of hire for new employees
- Generally, elections are **irrevocable** for the coverage period

➤ Midyear Election Changes Pre-COVID

- Under ordinary circumstances, there are several exceptions to the irrevocable rule that allow participants to make a change their election (Prop. Treas. Reg. § 1.125-4):
 - Change in marital status of the employee
 - Change in number of employee's dependents
 - Change in employment status
 - Change in place of residence

➤ IRS Notice 2020-29; HR 133 & Notice 2021-15 Mid-year Election Changes

- An employer **may** allow employees to make **prospective** election changes during 2020 and 2021
 - An employer may limit the time period during which participants can make election changes
- The following are permitted election changes for both health FSAs (including HSA-compatible) and DCAPs:
 - To make a new election and enroll for the first time, even if the employee is enrolling only to gain use of the carryover or extended claims if the employee initially declined participation
 - To revoke an election
 - To decrease or increase an existing election

➤ IRS Notice 2020-29; HR 133 & Notice 2021-15 Mid-year Election Changes Cont.

- Also apply to prospective elections for contributions for group health plan (including dental or vision for these purposes) under 125 plan
 - Make a new election, if previously declined
 - Revoke an existing election and make a new election to enroll in different health coverage (including from self-only to family)
 - Revoke entirely with attestation of other comprehensive health coverage (not just dental or vision). Notice 2021-15 provides model language:
 - Name: _____ (and other identifying information requested by the employer for administrative purposes). I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan). Signature: _____
- Employers can limit number of times or breadth of changes permitted, no requirement to provide unlimited changes, can think about adverse selection and nondiscrimination impact

➤ IRS Notice 2020-29; HR 133 & Notice 2021-15 Mid-year Election Changes Cont.

- Although salary reductions are prospective under a revised election, employers may allow amounts contributed after the election change to be used for any qualified expense incurred during the first Plan Year (PY) that begins on or after 1/1/21, through the end of the 2021 PY
- This even extends to those employees who were not enrolled on 1/1/21
- Does not allow unused amounts to be paid in cash or any form of taxable or nontaxable benefit without qualifying expense during the period of coverage

➤ HR 133 & Notice 2021-15

Election Changes - FSA and HSA Interaction

- Notice 2021-15 clarifies that § 125 plans may be amended to allow employees to make mid-year election changes to be covered by general purpose FSA (GP-FSA) and HSA-compatible FSA for part of the year
- If an employee begins the year with an HSA-compatible FSA and then elects coverage under a GP-FSA, the employee's permissible HSA contribution is based on the number of months that the employee was covered under the HSA-compatible FSA and an HDHP (and was otherwise an eligible individual)
- Only those expenses allowed by the HSA-compatible FSA **and** incurred during the months in which the employee was covered by the HSA-compatible FSA may be reimbursed by that FSA

➤ HR 133 & Notice 2021-15

Election Changes - FSA and HSA Interaction

- Although unused amounts in the HSA-compatible health FSA may be added to the GP-FSA, the GP-FSA may reimburse only allowable medical care expenses incurred after the change in coverage
- Employers may offer employees a choice between an HSA-compatible FSA and GP-FSA during the period to which the § 214 carryover or the extended period for incurring claims applies, on an employee-by-employee basis
- Also, employers may automatically enroll employees who elect an HDHP in an HSA-compatible health FSA. To the extent changes result in an employee being ineligible for an HSA mid-year on a prospective basis, the employee would not be rendered HSA-ineligible for the earlier part of the plan year

➤ Use-or-Lose Rule

- The Rule: contributions that have not been used to reimburse expenses incurred during a coverage period must be forfeited
- Exceptions:
 - Carryover – the IRS allows health FSAs to offer carryovers of up to \$500 at the end of one PY to be used for reimbursements in the following PY
 - Carryovers are not permitted for DCAPs
 - Grace period – plans may offer a grace period of up to two months and 15 days following the end of the PY during which participants may access unused amounts to pay or reimburse expenses for qualified benefits

➤ Run-out Period

- Plans may provide a run-out period after a grace period during which expenses incurred during the preceding PY and grace period may still be paid or reimbursed
- Run-out period allows for extra time to submit a claim, a grace period allows for extra time to incur an expense
- A run-out period can last for any period of time
- A plan can have both a run-out period and grace period, neither, or one or the other

➤ HR 133 & Notice 20121-15 Use-or-Lose Rule Cont.

- § 214 Carryover relief:
 - Employer may allow participants to carry over all or some unused balances from a PY ending 2020 to a PY ending in 2021, and from a PY ending in 2021 to a PY ending in 2022 – this applies to **all unused amounts and to health FSAs and DCAPs**
- Grace period relief:
 - Allows a grace period for a PY ending in 2020 or 2021 to be extended 12 months after the end of such PY
- Termination relief:
 - If an employee ceases participation in an FSA in 2020 or 2021, they may continue to receive reimbursements from unused balances through the end of the PY in which participation ceased, including any grace period

➤ IRS Notice 2020-33; HR 133 & Notice 2021-15 Carryover Relief

- Notice 2020-33 provided a permanent increase to the maximum carryover amount for health FSAs from \$500 to an amount equal to 20% of the maximum salary reduction contribution under 125(i) – currently \$2,750
 - For carryovers from 2020 PYs, the maximum carryover amount is \$550
- § 214 Carryover - Notice 2021-15 clarifies that for 2020 and 2021 PY, employers may permit employees to carryover all unused amounts into the next year

➤ HR 133 & Notice 2021-15

§ 214 Carryover Relief

- All amounts available on the last day of the 2020 or 2021 PY are available to carryover, regardless of the source of the amounts
 - Calendar Plan Years - a \$500 amount carried over from a 2019 PY to the 2020 PY that remains unused is available to be carried over to the 2021 PY
 - Non-Calendar Plan Years - a \$500 amount carried over from a 2019 PY to a 2020 PY that remains unused is available to be carried over to the 2021 PY
- For employers with PY or grace periods ending in 2020 that adopted the extended claims period until 12/31/20 under previous relief, amounts made available during that extended claims period that remain unused as of 12/31/20, may also be carried over, but they must convert to carryover for this relief – if a plan allows a carryover from 2022 PY to 2023 PY, a grace period may not be provided for 2022

➤ HR 133 & Notice 2021-15

§ 214 Carryover Relief

- If a plan did not provide for a carryover for its 2019 PY, the extension of the runout period to submit 2019 claims for health FSAs until after the COVID-19 emergency period does not permit the carryover of unused 2019 amounts to the 2020 PY
- An employer may require employees to enroll in the health FSA or DCAP with a minimum election amount to have access to the unused amounts from the prior PY
- If an employer adopts both the § 214 carryover from the 2020 calendar year to the 2021 PY and the flexibility for mid-year election changes, and an employee later elects to participate in the health FSA or DCAP mid-year, the § 214 carryover amount may be made available to reimburse employee expenses retroactive to January 1, 2021
- May limit carryover amount or apply up to a specified date during the PY
- Cannot have a carryover and contribute to HSA, but could allow conversion to HSA-compatible FSA to allow contributions to HSA, or opt-out of carryover

➤ HR 133 & Notice 2021-15

Extended Claims Period – COVID Grace Period

- Employers may allow employees to apply any unused amounts remaining in a health FSA or a DCAP as of the end of a PY ending in 2020 or 2021 to reimburse expenses up to 12 months after the end of the PY
- Because this extends the claims incurred date for reimbursement, it is a grace period extension, not an extension of run-out
- For example, an employer may amend a calendar year 2020 health FSA to permit employees to apply the entire unused amount remaining in their health FSAs as of December 31, 2020, to reimburse employees for medical care expenses incurred through December 31, 2021
- Also, employers may allow an employee who ceases participation in the plan during calendar year 2020 or 2021 to continue to receive reimbursements from unused benefits or contributions through the end of the PY in which participation ceased (including any grace period, considering any modification of a grace period permitted under the Act)

➤ HR 133 & Notice 2021-15

Extended Claims Period – COVID Grace Period

- Applies to all health FSAs, including HSA-compatible FSA
- May not make contributions to HSA if in extended grace period for general purpose FSA
 - Applies to current participants and terminated employees
 - Could convert or allow opt-out to preserve HSA eligibility
- This is maximum time and amount permitted, employers may restrict in their discretion
 - Employers may restrict terminated employees to actual salary reduction contributions made to the FSA by the employee from the beginning of the PY through the date of termination

➤ HR 133 & Notice 2021-15

Carryover and Grace Period Interaction

- Practically, the two provide the same relief – an extension of time to incur and submit claims for PY ending in 2020 and 2021 into 2021 and 2022, respectively
- However, there is one main difference depending on which method the employer adopts
 - If the extended grace period is adopted, terminated employees may continue to receive reimbursements until the end of the subsequent PY after their termination
 - If the carryover is adopted, terminated employees may only continue to receive reimbursements until the end of the PY in which they terminated

➤ HR 133 & Notice 2021-15

Carryover and Grace Period Interaction

- Must clearly state which method is being adopted for each PY in the amendment
- General carryover and grace period rules (pre-COVID) will apply for PYs ending in or after 2022
 - For a plan that provides for a grace period for the PY ending in 2022, the grace period would allow a participant to use all unused amounts remaining at the end of the PY ending in 2022 for expenses incurred during the first two and one-half months of the PY ending in 2023
 - For a plan that provides for a carryover for the PY ending in 2022, the carryover would allow the participant to use up to \$550 (or, if greater, 20% of the indexed contribution limit) of unused amounts remaining at the end of the PY ending in 2022 for expenses incurred during any month of the PY ending in 2023
 - For PYs ending in or after 2022, the carryover is available only for a health FSA and is not available for a DCAP

HR 133 & Notice 2021-15

➤ Example – HFSA Calendar Year Plan COVID Grace Period

- Employer provides a health FSA with a \$550 carryover and amends to allow COVID Grace Period with respect to the 2020 PY, allowing for claims incurred on or after 1/1/21, but prior to 1/1/22, to be paid with amounts remaining from the 2020 PY.
- As of 12/31/20, employee has a balance of \$2,000. Employee elects to contribute \$2,000 for 2021. In 2021 employee incurs \$3,300 in medical expenses. The health FSA may reimburse \$3,300, leaving \$700 in the health FSA as of 12/31/21.
- Employer amends to allow COVID Grace Period with respect to the 2021 PY, allowing for claims incurred on or after 1/1/22, but prior to 1/1/23, to be paid with amounts remaining from the 2021 PY. Employee elects to contribute \$1,500 for 2022. Between 1/1/22, and 12/31/22, employee incurs \$1,200 in medical expenses. The health FSA may reimburse \$1,200, leaving \$1,000 in the health FSA as of 12/31/22.
- Under the plan terms that provide for a \$550 carryover from the 2022 PY to the 2023 PY, employee can use \$550 of the remaining \$1,000 in the health FSA during the 2023 PY to reimburse expenses incurred on or after 1/1/23 and before 1/1/24. The \$450 remaining as of 12/31/22 is forfeited. A 2½ month grace period is not available for the plan year ending 12/31/23, because the plan provides for a carryover.

HR 133 & Notice 2021-15

➤ Example – HFSA Non-Calendar Year Plan COVID Grace Period

- Employer provides a non-calendar year health FSA (July 1 to June 30) that allows a \$550 carryover and amends to allow COVID Grace Period with respect to the 2020 PY, allowing claims incurred on or after 7/7/21, but prior to 7/1/22, to be paid with amounts from the 2020 PY(which ends on 6/30/21).
- Employee elects to contribute \$1,800 for 2020 PY. As of 6/30/21 there is a remaining balance for the 2020 PY of \$1,800.
- Employee elects to contribute \$1,000 for the 2021 PY. Between 7/1/21, and 6/30/22, employee incurs \$2,000 in medical expenses. The health FSA may reimburse \$2,000, leaving \$800 as of 6/30/22.
- Under the plan terms that provide for a carryover, employee is allowed to use \$550 of the remaining \$800 during the 2022 PY to reimburse expenses incurred on or after 7/1/22, but prior to 7/1/23. The \$250 remaining as of 6/30/22 is forfeited. A 2½ month grace period is not available for the plan year ending 6/30/22, because the plan provides for a carryover.

HR 133 & Notice 2021-15

➤ Example – DCAP Calendar Year Plan COVID Grace Period

- Employer provides a DCAP and amends the plan to adopt the COVID Grace Period with respect to the 2020 PY, allowing for claims incurred on or after 1/1/21, but prior to 1/1/22, to be paid with amounts remaining from the 2020 PY.
- As of 12/31/20, employee has \$4,000 in the DCAP. Employee elects to contribute \$3,000 for the 2021 PY. During the 2021 PY, employee incurs \$6,000 in dependent care expenses. The DCAP may reimburse \$6,000, leaving \$1,000 in the DCAP as of 12/31/21.
- Employer amends the plan to adopt the COVID Grace Period with respect to the 2021 PY, allowing for claims incurred on or after 1/1/22, but prior to 1/1/23, to be paid with amounts remaining at the end of the 2021 PY.
- Employee elects to contribute \$2,000 for the 2022 PY. Between 1/1/22, and 12/31/22, employee incurs \$2,800 in dependent care expenses. The DCAP may reimburse \$2,800, leaving \$200 in the DCAP as of 12/31/22.
- A carryover is not available for a DCAP from the 2022 PY to the 2023 PY. Employer adopts a 2½ month grace period for the 2022 PY, during which the \$200 remaining as of 12/31/22, may be applied to reimburse dependent care expenses incurred during the grace period.

➤ HR 133 Changes to DCAPs – Limiting Age

- Pre-COVID, for childcare to be an eligible expense for a DCAP, the child must be under 13, absent special circumstances
- For PYs that had an enrollment period on or before January 31, 2020, plans may permit a participant to continue receiving reimbursements for a qualifying child that turned age 13 during the pandemic for the remainder of the PY
- If there are unused funds at the end of that PY (2020 PY), those funds may also be used to reimburse for childcare of those children under 14 through the next PY (2021 PY)

➤ HR 133 Changes to DCAPs – Limiting Age – Special Considerations

- However, no new funds (2021) may be used to reimburse these expenses
- The employee must have been enrolled in the DCAP for the 2020 PY with an enrollment period ending on or before January 31, 2020
- This limiting age change is separate from the carryover and extended claims periods
- This is permissive, meaning that the plans may be amended to allow this but are not required to
- Employer can just substitute age 14 for age 13 for expense qualification and may allow employees to carryover ALL unused amounts from the first plan year to the second plan year until the dependent turns 14 AND for a dependent that turns 13 during the second plan year

HR 133 Changes to DCAPs – Limiting Age –

➤ Examples in Notice 2021-15 – Non-Calendar Year Plans

- Example 1:
 - Non-CY Plan with 2020 PY (3/1/20 – 2/28/21) with regular enrollment period ending 1/31/20.
 - EE elects \$5,000 max for 2020 PY. Dependent turns 13 on 2/1/21. As of 1/31/21, no qualifying expenses for 2020 plan year. EE anticipates incurring expenses during Feb 2021, which is during the 2020 PY.
 - ER amends the plan substituting “under age 14” for 2020 and 2021 PY but adopts no other COVID-19 relief.
 - All amounts are then eligible for this limiting age relief. If EE incurs \$5,000 in expenses in Feb 2021, they are eligible for reimbursement.
- Example 2:
 - Non-CY Plan with 2020 PY (3/1/20 – 2/28/21) with regular enrollment period ending 1/31/20.
 - EE elects \$4,000 max for 2020 PY. Dependent turns 13 on 2/1/21. As of 1/31/21, no qualifying expenses for 2020 plan year. EE anticipates incurring expenses during summer 2021, which is during the 2021 PY.
 - ER amends the plan substituting “under age 14” for 2020 and 2021 PY but adopts no other COVID-19 relief.
 - EE elects \$500 for 2021 PY.
 - All amounts are then eligible for this limiting age relief. If EE incurs \$4,200 in expenses in June – Aug of 2021 during the 2021 PY, \$4,000 of the expenses are eligible for reimbursement under the limiting age relief. The \$200 may not be reimbursed and if no additional expenses are incurred during the 2021 PY, the \$500 remaining as of 2/28/2022 at the end of the 2021 PY is forfeited.

➤ IRS Notice 2020-29; HR 133 Plan Amendments

- These mid-year election changes only apply to 2020 and 2021
 - An employer may adopt all, some, or none
- If any changes are to be applied, there must be an amendment to the plan on or before December 31, 2021 or 2022, respectively
- For non-calendar year plans, they must be adopted the last day of the first calendar year beginning after the end of the PY
 - Amendment for non-calendar 2020 PY deadline is December 31, 2022 because the last day of the first calendar year beginning after the end of the 2020 PY that ends in 2021 is the last day of 2022
- However, an employer must inform employees currently of any changes to be adopted

➤ FAQs

- What expenses may be reimbursed?
 - Even with the relief, the employer may only reimburse qualifying expenses from the accounts. This means that DCAPs may only reimburse for DCAP expenses and health FSAs may only reimburse for health expenses.
- How are participants made aware of these changes?
 - Not only participants, but all employees eligible to participate in the plan should be informed of any changes. Per ERISA regulations, one or more methods of delivery likely to result in full distribution must be used. For most employers, this means using first class mail.
- Will the plan year dates be extended?
 - Plan year dates are not affected.

➤ FAQs Cont.

- What happens to the standard 2½ month grace period if I adopt relief changes?
 - This depends on how you choose to amend the plan. If an employer adopts a plan amendment pursuant to § 214 of the Act and this notice that provides that the amendment supersedes normal operations for the duration of the period for which the plan adopts the relief, an employer is not required to also delete an existing plan provision that provides for a \$550 carryover or a 2½ month grace period.
 - However, if a broader amendment is adopted for changes, you could need a second amendment at the end of relief period to bring plan back into operational compliance.
- Do I have to amend all my programs?
 - An employer also may choose to adopt one type of relief, or no relief, for a health FSA and a different type of relief, or no relief, for a DCAP. An employer that offers multiple health FSAs or DCAPs may also adopt differing relief for each particular health FSA or DCAP.

➤ FAQs Cont.

- How can I limit adverse selection in election changes?
 - Only allow increase or improvement of coverage (from self-only to family, low option with narrow network to broader network or more expansive coverage)
- How can I limit overspending?
 - With FSAs and DCAPs, may limit election changes to amount no less than already reimbursed, only allow events without a status change up to a certain date but required later in the PY, limit the number of election changes without a status change.

➤ FAQs Cont.

- How do I handle revoked elections?
 - Under the terms of the plan, in a uniform and consistent manner.
 - May provide that amounts prior to revocation remain available for remainder of the PY for claims incurred after revocation, or limit to claims incurred prior to revocation.
 - May allow to revoke as of a future specified date.
- How does a revocation impact HSA-compatibility?
 - If revocation equals termination of participation, then FSA will no longer be disqualifying after termination date.
 - If claims incurred after revocation are not reimbursable, FSA coverage will no longer be disqualifying after revocation date.
 - If employer allows claims after revocation but allows employee to opt-out of the extended period, FSA will no longer be disqualifying after revocation date.

➤ FAQs Cont.

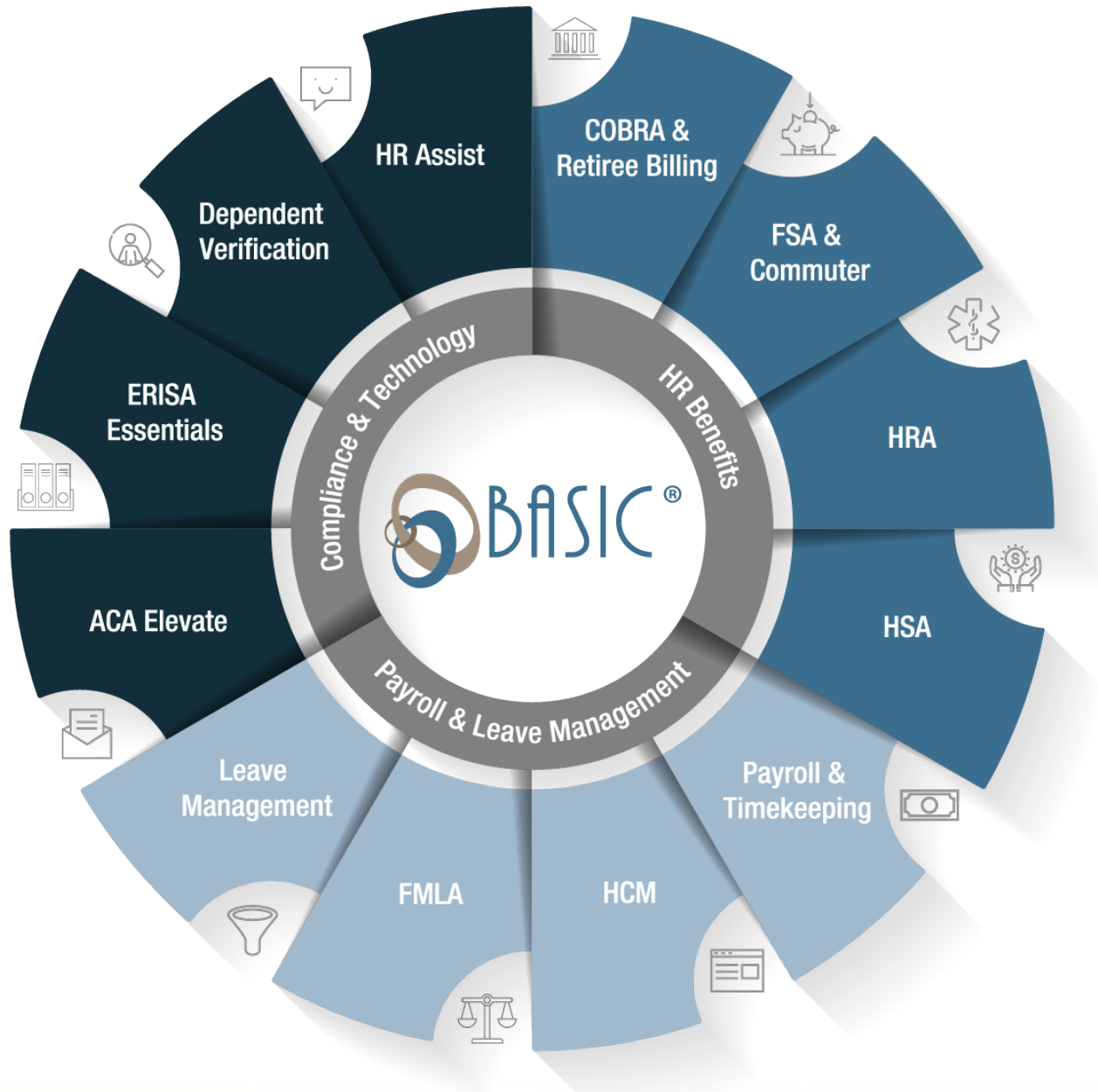
- How do these changes interact with COBRA?
 - Under Notice 2021-15, if an individual is a qualified beneficiary and FSA coverage is extended under the relief, COBRA will still need to be offered.
 - If an employer allows an employee to be reimbursed for expenses incurred after the termination or reduction in hours through access to the amount of salary reduction contributions that have been made as of the date the employee ceased being a participant, this event **would** constitute a COBRA qualifying event subject to notice requirements.
 - If an employee elected to contribute \$2,400 to a health FSA, terminated employment on January 31 after making \$200 in salary reduction contributions, the employer may allow the employee to request reimbursement for up to \$200, or the employee may elect COBRA continuation coverage to have access to \$2,400 by paying the applicable COBRA premium of \$200 per month on an after-tax basis.
 - A revocation is not a COBRA event.
 - The FSA may reimburse expenses incurred after the termination of participation and through the end of the plan year if the employer adopts the extensions regardless of COBRA.
 - The maximum COBRA amount that a health FSA may require does not include unused amounts carried over or available during the extended period for incurring claims if the employer adopts the relief.

➤ FAQs Cont.

- How do I report DCAPs on W-2s with these changes?
 - Under Notice 2021-15, employers are not required to adjust the amounts reported in Box 10 (normal reporting) to take into account amounts that remain available in a grace period.
 - For this purpose, any amount carried forward from 2019 and used in 2020, whether a carryover or an extended period for incurring claims, is treated as an amount that remains available in a grace period.

QUESTIONS





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