

COVID-19 Update

The COVID-19 illness (referred to as “Coronavirus”) has significantly impacted the entire country (and many other countries). Social distancing is in full effect and some states and cities are issuing shelter in place orders and prohibiting any businesses other than essential businesses (such as grocery stores, pharmacies, hospitals) from opening its doors. As a result of the social distancing policies that have either been recommended or mandated, companies are implementing strict work from home policies, furloughing employees and in some cases, shutting its doors. Employers want to help employees through this difficult time, but laws and regulations can often impede those desires. We know that you have many questions about the impact this has on your employees’ flexible spending accounts and your COBRA obligations. To date, the agencies have not issued any guidance or relief from the otherwise applicable rules. Although we believe that guidance is likely forthcoming, we wanted to help you navigate through the requirements until then. Below is a short FAQ to hopefully answer many of your questions regarding your and your employees’ rights and obligations with respect to flexible spending accounts and COBRA. If you have any questions, do not hesitate to contact us. **We are here to serve you.**

Can an employer extend the run-out period? Yes. The IRS does not prescribe a run out period for Health and Dependent Care FSAs; it is up to the employer to establish a run out period and to include that period in the plan document. If the employer wants to extend the period or open up another run-out period (assuming it has already ended for 2019), the employer need only amend the plan. **OCA is waiving our fee to amend your run-out period if you choose to do so now.**

Can the employer extend the grace period? Not currently. The IRS has indicated in prior guidance that the grace period ends on the 15th day of the 3rd month following the end of the plan year and only the IRS can change that. It is our understanding that the possibility of extending the grace period has been proposed to the IRS.

Can the employer allow employees to revoke FSA elections and seek a refund of all unused dollars? Not currently. The election rules still apply without exception.

Can the employer allow employees to revoke FSA elections without a corresponding event? Not currently.

What events during this period of time of work from home policies, furloughs and terminations will allow an FSA election change? Health FSA election changes are permitted to the extent that they are on account of and consistent with a change in status event (as defined in the cafeteria plan regulations). An election change will not be consistent with the event unless the event causes the participant or a covered person to gain or lose eligibility under the Health FSA or

cafeteria plan. Dependent Care FSAs are subject to the same rules; however, there are two notable differences: (i) Dependent Care FSA elections may also be changed on account of cost or coverage changes set forth in the cafeteria plan regulations and (ii) the election change rules are applied more loosely to the Dependent Care FSA elections than to Health FSA elections.

The following is an overview of the types of situations that might arise as a result of the pandemic and whether such situations will permit an election change.

Plan	Election Change Permitted
Health FSA	
Termination of employment, furlough or reduction in hours of employment that causes the employee to lose eligibility for the Health FSA	Election automatically terminates by virtue of losing eligibility coverage under the plan
Reduction in hours of employment that causes the employee to lose eligibility for the Health FSA.	Election automatically terminates by virtue of losing coverage
Employee begins a paid leave of absence that does not cause the employee to lose eligibility for the Health FSA	No election change permitted since eligibility under the Health FSA and the cafeteria plan are not affected by the event.
Employee begins an unpaid leave of absence that does not cause the employee to lose eligibility for the Health FSA (i.e. employee may continue coverage under the Health FSA so long as the employee pays the contributions, usually through after-tax payments from the employee's bank account)	Unless your plan requires employees on an unpaid leave to pay with catch up contributions upon return, or you have agreed to allow pre-payment of pre-tax salary reductions, we believe that an election change to revoke coverage is permissible.
Employee is urged to or is forced to work from home	No election change permitted
Employee or dependent is unable to have a planned medical procedure due to facility closings or forced rescheduling of appointments	No election change permitted
Employee's spouse loses coverage under his/her employer's health plan as a result of a termination, furlough or layoff	Employee may enroll or increase his or her Health FSA salary reduction election
Employer makes changes to comply with federal benefit mandates (e.g. the changes in the Families First legislation)	No election changes permitted.

Dependent Care FSA	
Termination of employment, furlough or reduction in hours of employment that causes the employee to lose eligibility for the Dependent Care FSA	Election automatically terminates by virtue of losing coverage
Reduction in hours of employment that causes the employee to lose eligibility for the Dependent Care FSA	Election automatically terminates by virtue of losing coverage
Employee begins paid leave of absence that does not cause the employee to lose eligibility	Employee may reduce or revoke his/her election to account inability to seek tax free reimbursement due to the employee no longer needing day care to work or look for work
Employee begins an unpaid leave of absence that does not cause the employee to lose eligibility	Employee may reduce or revoke his/her election to account for inability to seek tax free reimbursement due to the employee no longer needing day care to work or look for work
Employee's day care closes	Employee may revoke election
Employee switches day care providers	Employee may change election to account for new day care
Employee works from home and takes child out of day care	Employee may revoke election to account for no longer needing day care.
Employee works from home but pays babysitter to watch child while working	Although unclear, we believe that the IRS would consider this to be childcare that is necessary for the employee to work—at least during these times.
Employee's spouse becomes subject to a work from home policy, is furloughed or is laid off.	Employee may revoke his or her election.

Can an employer pay an employee's COBRA premium for continued Health FSA coverage?

Nothing in COBRA prohibits an employer from paying a qualified beneficiary's COBRA premiums for continued Health FSA coverage. We caution the employer to be aware of the Code Section 105(h) nondiscrimination rules when deciding which classes of employees for whom you will subsidize the cost of COBRA.

Will an employee who is working from home lose his or her unused commuter elections? No. The transportation fringe benefit plan regulations allow participants to carry over funds from month to month so long as they remain employed. In addition, the regulations allow employees to change their salary reductions at any time for any reason so long as the election is made before the taxable benefits become available (i.e. it is prospective). This will allow employees to revoke

their salary reductions while they are working from home. When they return, the unused funds will be available for eligible commuter benefits incurred after they return, and they can also make a new election for subsequent months if they wish to participate.

If a furloughed or laid off employee would otherwise lose health plan coverage in the absence of a COBRA election, can the employer continue active-like coverage for a period of time without a COBRA election? The answer is an unequivocal “no” if the plan is fully insured or is self-insured with stop loss coverage. In those situations, if coverage is extended without the employee first having made a COBRA election, as required by the plan or policy, the employee is arguably covered erroneously and the carrier would be entitled to refuse coverage and could potentially claim fraud on the part of the employer. Employers who wish to provide such coverage should consult first with the insurance carrier **and we strongly suggest you get any answer in writing.**

Can an employer subsidize a qualified beneficiary’s COBRA coverage? Probably, but we caution employers to first consult with the carrier before doing so. We are aware of situations where carriers have refused to provide benefits for a COBRA beneficiary on the basis that the beneficiary wasn’t eligible because the beneficiary didn’t pay 102% of the premium.