

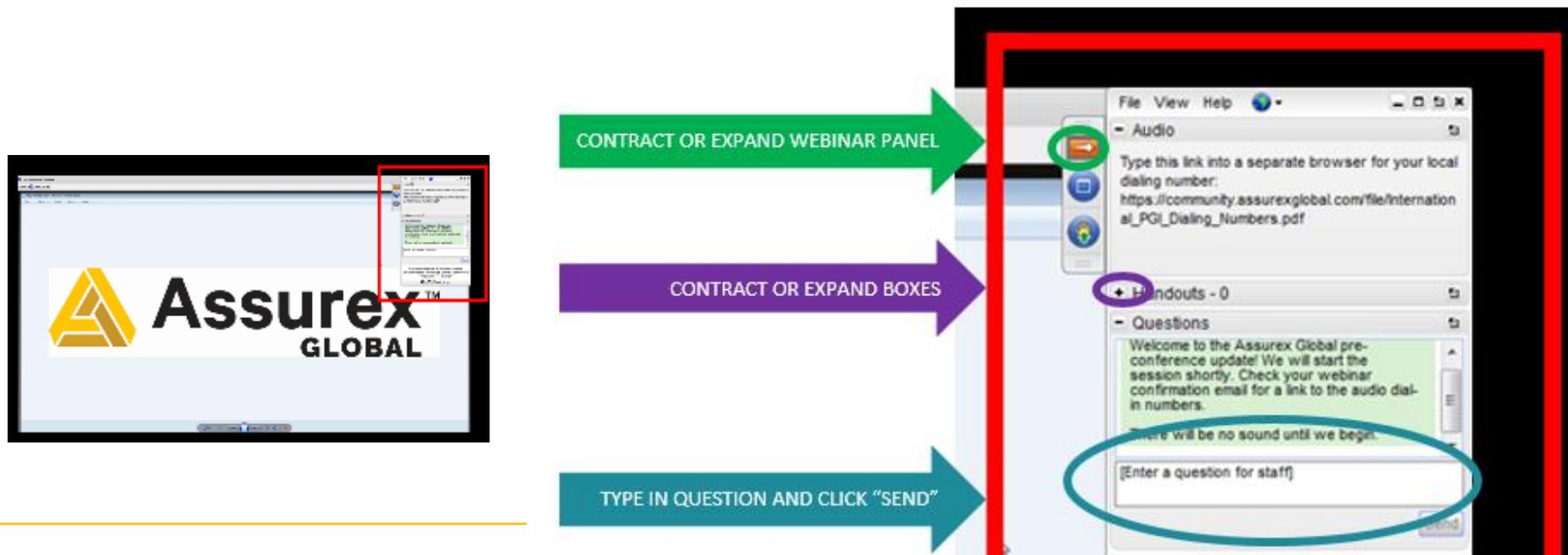
2020

# Answers to Your Employee Benefits Questions

Presented by Benefit Comply

## Answers to Your Employee Benefits Questions

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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## **QUESTION:**

**What emergency changes to DCAP elections require a plan amendment?**

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# IRS Notice 2020-29

- Background
  - May 2020, IRS released Notice 2020-29
    - Increased flexibility in permitted mid-year election changes for employer-sponsored health coverage, health FSAs, and DCAPs
    - Applies only to calendar year 2020
    - Midyear changes permitted in accordance only on a prospective basis, the relief itself applies retroactively to January 1, 2020
    - Required to notify plan participants and amend plan documents by December 31, 2021
    - Permitted to have a retroactive effect back to January 1, 2020
- DCAPS
  - Allowances for midyear election changes tend to be flexible
  - Changes generally permitted due to changes in status that affect eligibility, change in cost and coverage (change in the cost of a dependent care provider or participant changes providers), FMLA leave

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## Section 125 Election Changes

- Examples of situations where a change to a DCAP would be permitted under existing rules:
  - Daycare closes due to statewide shutdown orders (Could reduce/revoke election)
  - Uses after-school care, but now need full-day care (Could enroll/increase election)
  - Schools close and employee needs full-day childcare (Could enroll/increase election)
  - Employee takes expanded FMLA to care for a child whose school has closed (Could decrease/revoke election for duration)
  - Employee or Spouse loses job, is laid off or furloughed (Employee may decrease/revoke election)
  - Employee or spouse begins working from home and no longer needs childcare (Employee may decrease/revoke election)
- When is an Amendment Required?
  - The employer permits changes past the cafeteria plan's election change deadline
  - The employer permitted changes due to economic duress
  - The employer permitted changes for no reason at all

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**QUESTION:**  
**What additional flexibility do employers have with open enrollment materials this year?**

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## DOL Notice 2020-1

- Released April 29, 2020
- Provides flexibility for notices and disclosures required between March 1 and 60 days after the announced end of the Covid-19 National Emergency ("Outbreak Period")
- Relief applies "if the [plan acts] in good faith and [furnishes] the notice, disclosure, or document as soon as administratively practicable under the circumstances."
- Good faith acts include use of the following with participants the employer reasonably believes have effective access to electronic communication:
  - Email
  - Text
  - Continuous Access Websites

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# Applying Flexibility to SBCs

- Reminder: SBCs must be provided annually during open enrollment
- General SBC Delivery Rules
  - Safe Harbor for Electronic Delivery with Online Enrollment
    - SBC may be provided online as part of the enrollment process. The individual must have the option to receive a paper copy of the SBC upon request
  - Electronic Delivery for Offline Enrollment
    - For enrolled participants who have not enrolled online, electronic delivery is allowed if standard DOL safe harbor requirements are met (i.e. regular workplace access to employer's electronic system or affirmative consent)
    - For those who waive, notification (by paper or e-mail) that the SBC is available on the Internet is adequate
- Under Notice 2020-1, employers who aren't using online enrollment processes can still rely on flexibility even if DOL safe harbor standards are not met
  - Can email SBCs to participants
  - Can make SBC available on website to be accessed by participants
  - Can notify participants via text that SBC is available and where to locate it

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## **QUESTION:**

**Recently President Trump issued an executive order regarding health care. What impact will this have on my employer sponsored group health plans?**

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# Health Care Executive Order #13951

- Executive Order Background
  - Relevant governmental structural issues
    - Regulatory agencies (e.g. DOL, IRS, HHS) are part of the Executive Branch with leadership appointed by the President
      - These agencies interpret, and write the rules and regulations to implement, laws passed by Congress
      - The President has an obligation under the Constitution to direct subordinate executive officials (i.e. agency heads)
    - Federal budgets are passed by Congress, but there is often flexibility in how money is to be spent
  - Examples of what Executive Orders can (or maybe can) do...
    - Reallocate money within the budget
    - Request regulatory agencies to try to modify existing rules and regulations
    - Instruct regulatory agencies to enforce existing laws in different ways
  - Examples of what executive orders cannot (or maybe cannot) do
    - Modify existing laws
    - Create new laws
    - Spend money not appropriated by Congress

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# Health Care Executive Order

- Examples of Recent Employee Benefit Related Executive Orders
  - Trump EO to broaden access to health reimbursement arrangements (HRAs)
    - DOL, IRS, and HHS created Individual Coverage Health Reimbursement Arrangements (ICHRAs) allowing employers to pay for individual health insurance plans
  - Trump EO to expand short-term health plans
    - DOL, IRS, HHS issued new regulations allowing short-term health plans to provide coverage for up to three 12-month periods (for a total of 36 months)
- Executive Order #13951 - An America-First Healthcare Plan
  - Section 1 – Review of prior administration actions
  - Sections 2 & 3 – Instructs regulatory agencies to “maintain and build upon existing actions to expand access to and options for affordable healthcare...”
  - Section 4 – Instructs HHS to issue rules “to prevent a patient from receiving a bill for out-of-pocket expenses” if Congress does not pass surprise billing legislation by 12/31/2020

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## **QUESTION:**

**What common mistakes do employers make when designing an HSA-compatible HDHP?**

# HSA Eligibility Requirements



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# Qualifying HDHP Requirements

In order to be HSA-compatible, a plan needs to be a "qualifying HDHP," which means it must satisfy the following:

- Must Provide "Significant Benefits"
- Must Satisfy Minimum Deductible Requirements
  - **2021 Minimum Deductible**
    - Single (individual) – \$1,400
    - Other than single (family) – \$2,800\*
    - *\*If the family coverage has an embedded individual deductible, it cannot be less than \$2,800*
- Must Satisfy OOP Maximum Requirements
  - **2021 Maximum OOP**
    - Single (individual) – \$7,000
    - Other than single (family) – \$14,000\*
    - *\*To comply with ACA requirements as well, the plan must have an embedded individual OOP maximum of \$8,550 or less if the OOP maximum for family coverage is more than \$8,550*

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## Common Mistakes

- Applying too low a deductible for individuals with family coverage
  - *Ex: Employer A establishes a HDHP with a minimum family deductible of \$5,000 and an embedded individual deductible of \$2,000. This is not a qualifying HDHP because the embedded individual deductible is less than the statutory minimum family deductible.*
- Allowing Deductible Carryovers without increasing the minimum deductible
  - *Ex: Employer B establishes a HDHP with a minimum family deductible of \$2,800 and permits a deductible carryover for expenses incurred during the last 3 months of the prior plan year. Unless the employer adjusts the minimum deductible to account for the extra 3 months ( $(\$2,800 \times 15)/12 = \$3,500$ ), the HDHP will not be a qualifying HDHP.*

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## Common Mistakes (Cont.)

- Applying too high an OOP maximum for individuals with family coverage
  - *Ex: Employer C establishes a HDHP with a family OOP maximum of \$10,000 and no embedded individual OOP maximum. This is not a qualifying HDHP because no individual on a family plan can be required to pay more than the ACA individual OOP maximum (\$8,550 in 2021).*
- Offering a HDHP alongside a Telemedicine Plan that provides first-dollar coverage
  - *Ex: Employer D offers a qualifying HDHP alongside a telemedicine program that provides significant medical benefits and charges a \$15 copay for care. Based on guidance available, it appears this arrangement would violate the prohibition on providing first-dollar coverage before the minimum deductible is met.\**

*\*Note that Covid-19 relief allows telemedicine to be offered at least through 2021, without impacting HSA-eligibility. It's not clear whether that will be extended further.*

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## **QUESTION:**

**What flexibility do employers have in designing HSA employer contributions?**

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# Health Savings Accounts

- HSA Eligibility
  - An employee must:
    - Be enrolled in a qualifying high-deductible health plan (HDHP);
    - Not have any other “disqualifying coverage”; and
    - Cannot be claimed as a tax dependent by another individual
  - The following does not impact HSA eligibility:
    - Whether the employee is enrolled in the *employer’s* HDHP
    - Which custodian facilitates the employee’s HSA
- Employer Contributions
  - HSAs are not generally considered group health plans and are therefore not subject to ERISA or COBRA continuation requirements
  - Employer contributions made through a cafeteria plan are not subject to comparability rules, but are subject to §125 nondiscrimination rules, which prohibit offering benefits in a way that favors highly compensated individuals
  - Employer contributions to HSAs are generally non-forfeitable

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## Common Design Questions

- Can the ER require EEs to establish HSA with one particular custodian?
- Can the ER require EEs to be enrolled in the ER's HDHP in order to receive the ER contribution?
- Can the ER require the EE to be actively at work in order to receive the ER contribution?
- Can the ER change their contribution strategy midyear?
- Can the ER divide contributions into bi-annual or quarterly contributions, and only give them to individuals who are still employed at the time?
- Can the ER contribute more to some EE HSAs than others?
- Does the ER have to offer HSA contributions under COBRA?

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## **QUESTION:**

**How do state insurance laws apply to fully-insured employer sponsored group health plans?**

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# State Insurance Laws

- ERISA Preemption Background
  - Most employer sponsored health plans (fully-insured and self-insured) are subject to ERISA
    - Notable exceptions are state and local government entities and church plans.
  - ERISA preemption generally does not allow state insurance law to apply to an ERISA plan
    - However, ERISA “savings clause” allows state states to regulate insurance – consequently state insurance laws apply to the insurance company not directly to the employer sponsored plan
  - Importantly - Other state laws (i.e. employment laws, leave laws, etc.) are also preempted by ERISA
- States Insurance Regulation
  - Insurers must follow state insurance law in state where the policy is issued
- Fully-insured vs Self-insured ERISA Group Health Plan
  - Self-insured plans are clearly not subject to state laws that are preempted by ERISA
  - Fully-insured plans may be indirectly effected by state insurance laws that apply to the carrier
    - Example – state mandated benefits

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# State Insurance Laws

- Multi-state Employers with Fully-Insured ERISA Group Health Plans
  - The group health plan is subject to the state insurance laws where the plan is issued
  - It does not matter where the employee/participant lives
  - It does not matter if the employer has “remote” locations in other states
- Examples
  - State insurance laws requiring dependent coverage to older ages (IL is 30 yrs old!)
    - Only applies to fully-insured group policies issued in that state
    - But it applies to all participants covered by that policy no matter where they live
  - State paid leave laws
    - FMLA (federal law) requires health coverage during an FMLA leave
    - State leave laws could not require an employer subject to ERISA to maintain health coverage during a leave subject to state leave rules

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