Published: May 5, 2020

New Guidance Offers Relief and Extends Deadlines for Benefit Plans

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The Department of Labor's Employee Benefit Security Administration (EBSA), along with the Treasury Department (collectively, "the Departments"), issued several pieces of guidance over the last week affecting employer-sponsored benefit programs.

Briefly, the guidance provides the following:

- Employee Relief. Participants have an extension until at least June 29, 2020 of deadlines related to COBRA notification, elections and premium payment; special enrollment requests; and to make timely claims.

- Employer Relief. Employers have relief related to deadlines for furnishing required notices to plan participants and flexibility around electronic delivery of these notices.

- Revised Model COBRA Notices. A new General Notice and Election Notice are available, along with a new FAQ addressing COBRA and Medicare interaction.

The guidance brings helpful relief for employers, but it is important to pay attention to the timing extensions under the final rule, as these may create additional administrative burdens.

Final Rule

The final rule requires all group health plans, disability, and other employee welfare benefit plans to disregard the period from March 1, 2020 until 60 days after the announced end of the National Emergency (the "Outbreak Period") when determining the following periods and dates:

- COBRA
  - The date for a plan sponsor to provide a COBRA election notice.
  - The 60-day election period for a qualified beneficiary to elect COBRA continuation of coverage.
  - The date for making monthly COBRA premium payments.
  - The date for individuals to notify the plan of a qualifying event or disability determination.

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- Special Enrollment Rights. The date for a participant to request a special enrollment right for group health plan coverage which is otherwise 30 days from the loss of other coverage or acquisition of a dependent (60 days for loss of Medicaid or SCHIP or for a gain of premium assistance).

- Claims for Benefits. The date within which individuals may file a benefit claim. This appears to apply to health FSAs and HRAs and well as to other ERISA-covered benefits.

- Appeals of Denied Claims. The date within which claimants may file an appeal for an adverse benefit determination.

- External Review.
  - The date the claimant may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination.
  - The date within which a claimant may file information to perfect a request for external review.

The National Emergency ends on a date as announced by the Departments (no earlier than April 30, 2020, in which case the Outbreak Period ends on June 29, 2020, the 60th day after the end of the National Emergency).

Employers should note:

- The end of the Outbreak Period has not yet been announced. Further guidance will likely be issued to reflect that date once it is established. To the extent there are different Outbreak Period end dates for different locations in the country, the Departments will issue additional guidance regarding application of this relief.

- These requirements have retroactive application and apply to any applicable events on or after March 1, 2020, until the Outbreak Period ends.

- With respect to COBRA, there are administrative (and likely financial) burdens on employers with respect to the extended timeframe for qualified beneficiaries to elect COBRA and make timely premium payments.

The final rule provides helpful examples using a hypothetical Outbreak Period end date of April 30, 2020. Note that the actual end of the Outbreak Period will be later than what is reflected in these examples.

1. **Electing COBRA**

   Mary works for Employer X and participates in X's group health plan. Due to the National Emergency, Mary experiences a qualifying event for COBRA purposes as a result of a reduction of hours and has no other coverage. Mary is provided with a COBRA notice on April 1, 2020. What is the deadline for Mary to elect COBRA?

   Normal Deadline: 60 days after notice is provided – May 31, 2020

   Extended Deadline: The Outbreak Period is disregarded. Mary has until 60 days after the end of the Outbreak Period (June 29, 2020) – August 28, 2020.

2. **COBRA Premium Payment**

   On March 1, 2020, Karen was receiving COBRA under a group health plan. More than 45 days had passed since Karen had elected COBRA. Monthly premium payments are due by the first of the month.

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The plan does not permit qualified beneficiaries ("QBs") longer than the 30-day grace period to make premium payment. Karen made a timely February payment, but did not make the March payment or any subsequent payment during the Outbreak Period. As of July 1, Karen has made no premium payments for March, April, May or June. Does Karen lose coverage, and if so, for which months?

Normal Deadline: Karen would have lost coverage if premium not paid by March 31, 2020.

Extended Deadline: Premiums are timely if made within 30 days after the end of the Outbreak Period. Premium payments for 4 months (March through June) are all due by July 29, 2020 to be considered timely and preserve coverage. Karen is eligible to receive coverage under the terms of the plan during this interim period even though some of the premium payments are not received until July 29, 2020. Since the due date for Karen's premiums would be postponed and payment for premiums would be retroactive during the initial COBRA election period, Karen's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.

3. COBRA Premium Payment

Same facts as Example 2. By July 29, Karen has made a payment equal to 2 months' premiums. For how long does COBRA continue?

Normal Deadline: Karen would have lost coverage if premium not paid by March 31, 2020.

Extended Deadline: Karen has COBRA coverage for March and April 2020 only. Karen is not entitled to COBRA for any months after April 2020. Benefits and services that occurred prior to April 30, 2020 are covered. The group health plan is not obligated to cover benefits or services that occurred after April 30, 2020.

4. Special Enrollment Period

Betsy is eligible for, but previously declined participation in her employer-sponsored group health plan. On March 31, 2020, Betsy gave birth and would like to enroll herself and the child in her employer's plan; however, open enrollment does not begin until November 15. When may Betsy exercise her special enrollment rights?

Normal Deadline: 30 days after the qualifying event – April 30, 2020.

Extended Deadline: The Outbreak Period is disregarded. Betsy and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth (March 31, 2020). Betsy has until 30 days after the end of the Outbreak Period (June 29, 2020) – July 29, 2020 to exercise her special enrollment right, provided she pays her share of the premium for any period of coverage.

5. Group Health Plan Claims

Darla is a participant in a group health plan. On March 1, 2020, Darla received medical treatment for a condition covered under the plan, but a claim relating to the treatment was not submitted until April 1, 2021. Under the plan, claims must be submitted within 365 days of the participant's receipt of medical treatment. Was Darla's claim timely?

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Normal Deadline: Darla's claim should have been submitted by March 1, 2021 to be considered timely under the plan.

Extended Deadline: The Outbreak Period is disregarded. Darla has 365 days from the end of the Outbreak Period to file a claim. Darla's claim is timely if filed by June 29, 2021.

6. **Internal Appeal – Disability Plan**

Erin received a notification of an adverse benefit determination from her disability plan on January 28, 2020. The notification advised that Erin has 180 days within which to file an appeal. What is Erin's appeal deadline?

Normal Deadline: Erin's appeal deadline would be July 26, 2020.

Extended Deadline: The Outbreak Period is disregarded. Erin's last day to file an appeal is 148 days (180 minus 32 days following January 28 to March 1) after June 29, 2020 – November 24, 2020.

For a copy of the final rule, visit https://www.govinfo.gov/content/pkg/FR-2020-05-04/pdf/2020-09399.pdf.

Disaster Relief Notice 2020-01

In addition to the relief afforded under the final rule (described above), EBSA is also extending deadlines to furnish certain required notices or disclosures to plan participants, beneficiaries, and other persons. A plan will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020 and 60 days after the announced end of the Outbreak Period if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances.

Good faith acts include use of electronic alternative means for communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

This relief appears to apply to the following notices, disclosures, and documents:

- Summary Plan Descriptions
- Summaries of Material Modification/Material Reduction
- Summary Annual Reports
- Claim Notices/Explanations of Benefits
- Plan Documents
- COBRA Notices (except as described above)
- Medical Child Support Notices
- Notice of Special Enrollment Rights
- CHIPRA Notice
- Wellness Program Disclosures
- Women's Health Cancer Rights Act Notice
- Grandfathered Plan Notice
- Marketplace Notice (Notice to Employees of Coverage Options)
- Summaries of Benefits and Coverage

The guidance also confirms:

- The Form 5500 extension (previously announced by the IRS) for filings due from April 1 – July 15, 2020. Form 5500 filings with a due date in this range are now due July 15, 2020. At this time, no relief has been issued for 2019 calendar year plans, with Form 5500 filings due July 31, 2020.

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- That Form M-1 filings (associated with Multiple Employer Welfare Arrangements, "MEWAs") are provided the same relief (i.e., M-1 filings due between April 1 and July 15, 2020, are now due July 15, 2020).

Finally, the Notice highlights general fiduciary compliance and the approach to enforcement, stating that:

- the guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

- the approach to enforcement will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible.

COBRA Model Notices

EBSA also released new Frequently Asked Questions and revised COBRA model notices. The revised model notices were issued to ensure qualified beneficiaries understand the interaction between COBRA and Medicare. The FAQs further highlight this interaction and state:

- in the event group health plan coverage ends due to a termination of employment, a Medicare-eligible individual may be able to enroll in Medicare beginning the earlier of (a) the month after employment ends or (b) the month after group health plan coverage ends based on currently employment status.

- that when an individual has both Medicare and COBRA coverage, Medicare is generally the primary payer and COBRA pays second.

For a copy of the revised Model COBRA General and Election notices, visit https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Employer Action

Employers should:

- review the revised timeframes under the final rules and work with COBRA vendors, carriers, and third-party administrators ("TPAs") to ensure compliance. To the extent needed, employers should secure stop loss approval.

- take advantage of the relief around furnishing certain required notices, disclosures, and documents as needed, and provide as soon as reasonable.

- be aware that if a Form 5500 (or M-1 filing) is due between April 1, 2020 and July 15, 2020, the due date has been automatically extended to July 15, 2020.

- update COBRA General and Election notices, if necessary.

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