

DOL and Treasury Extend ERISA-Required Deadlines, Creating Questions & Disruptions in Administrative Procedures

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On April 29, 2020, the Departments of Labor (“DOL”) and Treasury (together, the “Departments”) issued guidance extending certain deadlines related to retirement, health, and welfare plans in response to the current COVID-19 pandemic. While some of the extensions are a welcome relief to employers and plan sponsors, the new final regulations have the potential to cause major administrative burdens, be costly to health and welfare plan sponsors and administrators, and disrupt the automatic processes plans have in place with respect to special enrollment, COBRA, and claims and appeals. The new rules are particularly problematic in that they are retroactive to March 1, 2020 and extend through a yet-to-be-determined “outbreak period.”

There were three pieces of “guidance” issued:

- **EBSA Disaster Relief Notice 2020-01 (the “Notice”)** – extends the time for plans to furnish ERISA-required notifications, including SPDs, SMMs, and benefit determinations, as long as there is a good faith effort to furnish the documents as soon as administratively practicable.
- **Final Regulations (the “Final Rule”)** – delays/suspends participant COBRA, HIPAA special enrollment, and claims filing procedure deadlines, as well as the deadline for the plan administrator to provide the COBRA election notice.
- **FAQs** –help participants impacted by the COVID-19 pandemic understand their rights under ERISA with regard to health and

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retirement benefits. These FAQs essentially just explain and/or reiterate prior guidance, so we do not go into detail on them in this alert.

The extensions/suspensions in both the Notice and the Final Rule apply during an “Outbreak Period,” which runs retroactively from March 1, 2020 to 60 days after a yet-to-be announced end of the COVID-19 national emergency (or such other date announced by the Departments in a future notice), but no longer than one year. Generally, these extended/suspended deadlines are tolled and start up again at the end of the Outbreak Period.

1. Notice

The Notice announces DOL’s authority to adopt these extensions based on ERISA section 518, which allows the Secretary to delay deadlines under ERISA due to a Presidentially-declared disaster. The Secretary has used this authority previously in various hurricanes, and the guidance here largely mirrors that guidance, but on a broader scale.

The Notice provides relief during the Outbreak Period for all disclosures and notifications required under Title I of ERISA (except those addressed in the Final Rule) and states that a plan will not be in violation of ERISA as long as these disclosures and notifications are provided “as soon as administratively practicable under the circumstances.” The Notice goes on to say that good faith delivery includes use of electronic means of communicating where the plan fiduciary reasonably believes participants have effective access, including email, text messages, and continuous access websites.

What This Means: This is welcome relief for plan sponsors who are struggling to provide required notices, particularly SMMs. The relief also applies to SPDs, claims procedure extension and denial notices, and responses to requests for plan documents. Notably, the relief expands the strict ERISA electronic delivery rules during this Outbreak Period.

The Notice also reiterates the Form 5500 relief in prior [IRS Notice 2020-23](#) and provides Form M-1 filing relief. Filings due on or after April 1, 2020 and before July 14, 2020 have now been postponed until July 15, 2020. Thus, there is no relief for calendar year plans with a regular due date of July 31, 2020. So, for example, a calendar year plan with a Form 5500 filing deadline of July 31, 2020 is not subject to this filing relief.

2. Final Rule

The Final Rule suspends the imposition of certain deadlines otherwise imposed on health and welfare plan participants (and one applicable to group health plans, plan sponsors, and plan administrators)

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during the Outbreak Period. In other words, these deadlines do not apply during the Outbreak Period and do not start to run again until after the Outbreak Period is over.

The extensions apply to all plans subject to ERISA and the Internal Revenue Code. However, the Final Rule states that HHS “concur[s]” with the relief and will essentially adopt a non-enforcement policy to extend similar timeframes to non-Federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan.

The Departments’ stated rationale for suspending these deadlines is that, due to the COVID-19 pandemic, participants may have problems in exercising certain rights or filing their benefit claims and that group health plans may have difficulty in complying with certain notice obligations.^[1] While this is understandably true, the extensions raise a number of practical questions and are likely to result in significant administrative and financial burdens on plan sponsors, especially due to the potentially long and uncertain timeframe by which plans may have to provide retroactive coverage to participants, even if they have not made timely premium payments.

We summarize the suspended deadlines and the potential impacts on employers below.

A. Plan Administrator Relief

The Final Rule suspends the 14-day deadline (44 days where the employer is the plan administrator) for a plan administrator to provide a COBRA election notice to qualified beneficiaries. This period will start to run again when the Outbreak Period ends.

What This Means: Plan administrators are not required to provide the COBRA election notice during the Outbreak Period. However, a plan does have to provide COBRA coverage if a participant elects it.

Most plan administrators likely will want to timely provide election notices to encourage qualified beneficiaries to timely elect and pay for COBRA coverage. These notices generally are automatically sent, so it could be more administratively burdensome to re-program systems not to send.

There is an open question whether employers need to revise COBRA notices to reflect the extended deadlines applicable to participants. Two days after the Final Rule was issued, DOL issued updated model COBRA notices. Notably, the updated model notices do not address these extensions, suggesting that employers are not responsible for updating the notices to reflect the extension – or possibly even notify employees at all. Further guidance from the Departments on this issue would be helpful.

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B. Participant Relief

The following deadlines do not apply to participants during the Outbreak Period and do not begin to run until the Outbreak Period ends.

- *HIPAA Special Enrollment Period* – The 30-day (in some instances, 60-day) deadline to request enrollment in a group health plan following a special enrollment event (i.e., birth, adoption or placement for adoption of a child, marriage, loss of other health coverage, or eligibility for a state premium assistance subsidy).

What This Means: As of March 1, 2020 and through the end of the Outbreak Period, there are no deadlines by which an employee must request HIPAA special enrollment. Thus, employer may need to retroactively provide the employee and applicable dependents coverage once finally elected by the employee, possibly back to March 1, 2020. An open question is what, if any, notice obligation an employer has to communicate this right and whether the plan has an affirmative obligation to identify and automatically enroll employees who submitted late special enrollment requests on or after March 1.

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- *COBRA Qualifying Event and Disability Extension Notices* – The 60-day deadline by which qualified beneficiaries must notify the plan of certain qualifying events (e.g., divorce or legal separation, a dependent child ceasing to be a dependent under the terms of the plan) or disability determination.

What This Means: As of March 1, 2020, and through the end of the Outbreak Period, there are no deadlines by which a qualified beneficiary must notify the plan that a qualifying event occurred. Employers should determine whether they need to make any revisions to the deadline language in their general COBRA notice.

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- *COBRA Election* – The 60-day deadline to elect COBRA continuation coverage.

What This Means: As of March 1, 2020 and through the end of the Outbreak Period, there are no deadlines by which an employee, spouse, or child who lose coverage due to a qualifying event must notify the plan. Thus, employers may have to provide COBRA coverage retroactive many months, and this could result in adverse selection if individuals wait to see if they incur claims before electing COBRA. An open question is whether employers

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need to make any revisions to the deadlines in their COBRA election notice. Given that the employer is not required to send the notice, it may be possible to take the position that no amendment is needed.

- *COBRA Premium Payments* – The 45-day (for the initial payment) and 30-day (for subsequent payments) deadlines to timely pay COBRA premiums.
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What This Means: As of March 1, 2020 and through the end of the Outbreak Period, COBRA participants are not required to pay COBRA premiums. Some COBRA participants may wait to pay for coverage until the Outbreak Period ends, which could impose a significant financial burden on employers because the employer may have already paid for benefits and, for insured plans, possibly fronted the premium payment to the insurer and could not easily recoup those payments. It also may be difficult for employers to collect the many months of accumulated premiums payments from participants given the economic situation. It is not clear whether employers may decide to suspend coverage due to non-payment, but re-instate if a participant pays back-premiums once the Outbreak Period is over. There also an open question as to whether employers have an affirmative obligation to identify and reach out to participants who have failed to make a payment to alert them of this extension or whether employers can instead simply respond if a participant requests.

- *Benefit Claims and Appeals* – The deadline under the plan by which participants may file a benefit claim (under the terms of the plan) and the 180-day (for group health plans) and 60-day (for other welfare benefit plans) deadlines for appealing an adverse benefit determination.
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What This Means: As of March 1, 2020 and through the end of the Outbreak Period, there are no deadlines to file claims or appeals. Importantly, this includes health FSA and HRA expense reimbursement requests, which are generally a few months after the end of the plan year. For example, if a calendar year FSA plan had a runout period that ended on April 30, 2020, the plan could not require that participants forfeit any remaining balance during the Outbreak Period. Notably, these extensions do not apply to dependent care FSAs.

Plans will need to establish a process to flag past denials based on failure to timely submit a claim or appeal to see if these need to be reviewed or extended. Plans also may need to coordinate with TPAs who decide the plans' claims and appeals to make sure the TPAs are

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complying with these extensions. It is an open question whether plans need to reach out to participants whose had denied claims on or after March 1, 2020 to have these claims and appeals re-processed and whether the dates on claim denial letters or other plan communications must be updated. Doing so may result in significant administrative costs for a plan and would be difficult to do given that there is no end date. Finally, it is important to note that the deadlines under ERISA for plans to adjudicate claims and appeals have not been suspended. Therefore, plans will need to adhere to their current procedures for reviewing claims and appeals in a timely manner.

- *External Review* – the 4-month (for the federal external review process; this period could be different for a state external review process) period for a claimant to file a request for external review.
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What This Means: As of March 1, 2020 and through the end of the Outbreak Period, there is no deadline by which a claimant must file a request for external review. Plans should confirm with their independent review organizations that they are aware of this requirement and prepared to comply.

- *Perfecting a Request for External Review* – the 4-month (or 48-hour following receipt of the incomplete request notification, if later) period for a claimant to perfect an incomplete request for external review.
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What This Means: As of March 1, 2020 and through the end of the Outbreak Period, there is no deadline by which a claimant must file a request for external review. Plans should confirm with their independent review organizations that they are aware of this requirement and prepared to comply.

Please contact your Groom attorney to discuss how we can help you prepare to comply with these requirements.

[1] The Departments have previously issued similar guidance after Hurricane Maria

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