

DOL Issues Guidance on Outbreak Period Extensions – With 2 Days to Spare!

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On February 17th, we posted an alert that the COVID-19 extensions that the DOL and IRS had issued last year as part of their “Joint Notice” were set to expire at midnight on February 28th. For weeks, we have been asking DOL and IRS for guidance on how to handle the statutorily-mandated expiration, and as a result of the lack of guidance, most plans, TPAs, insurers, and COBRA administrators had to make a judgment call as to how to proceed.

But – with 2 days to spare – DOL finally issued [Disaster Relief Notice 2021-01](#) this morning – February 26, 2021.

Notice 2021-01 sets forth the DOL and IRS’ position that the COVID-19 extensions will continue past February 28th, and that all such extensions must be measured on a person-by-person basis – which was not clear from the prior guidance. Plans, TPAs, insurers, and COBRA administrators may have to reconsider their administrative practices in light of this new direction.

Short Background

The original Joint Notice (85 Fed. Reg. 26351 (May 4, 2020) required that health and retirement plans toll a number of deadlines for individuals during the COVID-19 National Emergency, plus a 60-day period (the “Outbreak Period”) starting March 1, 2020.

But, as described in Footnote 4 of the Joint Notice, ERISA and the Code limit DOL and Treasury’s ability to toll deadlines to one year (“Tolling Period”).

The deadlines impacted in the Joint Notice are:

- Deadline to elect COBRA;
- Deadline to pay COBRA premiums;

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- Deadline to elect HIPAA special enrollment;
- Deadlines to file claims, appeals, and requests for external review; and
- Deadline for plan to provide COBRA election notice

See our original alerts with more detail

- [Breaking Down the “Outbreak Period” Extensions: The Clock May Begin Ticking Soon for Important Deadlines Suspended Due to COVID-19](#) (Feb. 17, 2021)
- [DOL & Treasury Extend ERISA-Required Deadlines, Creating Questions & Disruptions in Administrative Procedures](#) (May 4, 2020)

When there has been disaster relief guidance in the past, these periods have not bumped up against the statutorily-imposed one-year limit, so this COVID-19 extension is new territory – hence all the requests for the agencies to issue guidance regarding the expiration date.

Disaster Relief Notice 2021-01

In this late-breaking Notice 2021-01, DOL says it coordinated with HHS and IRS, and the agencies are interpreting the Tolling Period to be read on a person-by-person basis.

Specifically, DOL says that the Tolling Period ends the earlier of:

1. One year from the date the deadline would have begun running for that individual; or
2. 60 days from the end of the National Emergency (which is still ongoing).

This means that each individual has his or her own Tolling Period!

For example, a COBRA Qualified Beneficiary (QB) has 60 days to elect COBRA, counted from the later of their loss of coverage or the date their COBRA election notice is provided. Under the Joint Notice, a QB’s 60-day deadline was tolled as of March 1, 2020, until the end of the Outbreak Period (that is, until the end of the National Emergency + 60 days).

At the end of the Outbreak Period, the deadlines would start running again, and the QB would have their normal 60-day COBRA election period (or the balance of their election period if it started before March 1, 2020).

BUT – with the 1-year expiration, DOL’s new Notice 2021-01 says that the one-year period does not end on February 28, 2021 for all individuals, but rather each individual has his/her own one-year Tolling Period.

Examples:

- If QB A’s election period started 2/1/20, her election deadline was tolled as of 3/1/20. Her one-year Tolling Period would end 2/28/21, so her election period would start 3/1/21, and she would have the balance of her 60-day election period.

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- If QB B's election period started 3/1/20, her election deadline was tolled as of 3/1/20. Her one-year Tolling Period would end 2/28/21, so her 60-day election period would start 3/1/21.
- If QB C's election period started 6/1/20, her election deadline was tolled right away, as of 6/1/20. Her one-year Outbreak Period would end 5/31/21, so her 60-day Tolling period would start 6/1/21.
- If QB D's election period starts 4/1/21, her election deadline also will be tolled right away on 4/1/21, as long as we are still in the National Emergency. Her one-year Tolling Period would end 3/31/22, so her 60-day election period would start 4/1/22.

For all of these examples, the tolling would end earlier if the National Emergency ends. In that case, the election period would end 60 days after the end of the National Emergency.

GROOM INSIGHT. The application of this interpretation of the law will be complicated, to say the least. In the absence of clear guidance, most plans were expecting that the tolling would end for all enrollees as of March 1, 2021 and that there would be no new tolling for future deadlines. It is unclear how plans, TPAs, and insurers will be able to build their systems to create custom COBRA, special enrollment, and claims deadlines individual-by-individual- especially on 2-days' notice. Many may have to extend the deadlines for all while they determine how to proceed.

This complexity will be even greater if COBRA subsidies are enacted, as is anticipated under the pending reconciliation bill, because it is unclear how the employer/plan/issuer timely claims a tax credit when QBs have not yet elected COBRA and/or paid premiums due to the Outbreak Period tolling.

Reasonable Accommodation Requirement

Notice 2021-01 also says that DOL recognizes that enrollees may continue to encounter COVID issues, even after the one-year Tolling Period expiration. DOL says that the "guiding principle" is for plans to act reasonably, prudently, and in the interest of the workers and their families. DOL says that plan fiduciaries should make "reasonable accommodations to prevent the loss of or undue delay in payment of benefits . . . and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames."

GROOM INSIGHT. Notice 2021-01 does not provide any direction regarding what would constitute a "reasonable accommodation." It sounds like plans may need a process to consider whether to continue to waive deadlines on a case-by-case basis, but without any

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guidance as to what parameters to apply. And DOL suggests that failure to do so could be a fiduciary issue.

Notices

Regarding communicating these changes to enrollees, DOL says:

- The plan administrator or fiduciary “should consider” affirmatively sending a notice regarding the end of the one-year relief period (presumably to each person based on her own customized extension period).
 - Plans “may need” to reissue or amend prior disclosures if they failed to provide accurate information regarding these new extension deadlines.
 - Plans “should consider” making enrollees aware of other coverage options, such as the Special Enrollment Period under the Health Insurance Marketplace.
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GROOM INSIGHT. DOL seems to be saying that plans may need to notify each individual when his or her one-year extension is about to be up and should include information about the Health Insurance Marketplace. In addition, plans may need to update prior communications that did not anticipate this new DOL interpretation.

Enforcement

DOL says it acknowledges that there may be instances when plans or service providers themselves may not be able to fully and timely comply with pre-established timeframes and disclosure requirements. DOL says that where fiduciaries have acted in “good faith and with reasonable diligence under the circumstances,” DOL’s approach to enforcement will be “marked by an emphasis on compliance assistance,” including grace periods or other relief.

GROOM INSIGHT. It sounds like DOL’s enforcement approach generally will be to help plans come into compliance with DOL’s new interpretation of the extension guidance, as long as the plan acts in good faith. However, it is unclear if this enforcement stance ties into notices and deadlines described previously in EBSA Disaster Relief Notice 2020-01 as well. We certainly would welcome more explanation, including additional relief and guidance about the new requirements set out in Notice 2021-01.

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