

# COMPLIANCE ALERT

## DEPARTMENTS EXTEND CERTAIN BENEFIT ELECTION AND NOTICE DATES, OFFER RELAXED DISCLOSURE RULES

April 29, 2020

The Employee Benefits Security Administration (EBSA) has issued [Disaster Relief Notice 2020-01](#) (Notice) in which it declared that employee benefit plans, employers, plan sponsors, plan fiduciaries, plan service providers, participants, beneficiaries and employees will have additional time to perform certain time-sensitive plan actions due to the impact of the COVID-19 pandemic.

The Notice provides relief for a period beginning March 1, 2020, and ending 60 days after the officially announced end of the COVID-19 National Emergency (Outbreak Period) or such other date announced by the Department of Labor (DOL) in a future notice. The Department of the Treasury (Treasury), the Internal Revenue Service (IRS), and the Department of Health and Human Services (HHS), concurred with EBSA's announced approach and stated that they would similarly handle the laws they regulate and enforce. The Notice is effective immediately, whereas further joint agency guidance outlined below will be effective as soon as published in the Federal Register.

### Background

The Coronavirus Aid, Relief and Economic Security Act (CARES Act), which became law on March 27, 2020, included a provision that amended the Employee Retirement Income Security Act of 1974 (ERISA) to allow the DOL to disregard for up to one year certain failures by an employee benefit plan – along with any plan sponsor, administrator, employee, participant or other person with respect to such a plan – affected by a presidentially declared disaster or a public health emergency declared by the Secretary of HHS. The CARES Act also revised ERISA Section 518 to provide that no plan shall be treated as failing to follow its written terms solely because it complied with an allowable deadline delay.

### Extended ERISA Notice and Disclosure Deadlines

The Notice extends the deadlines for furnishing required notices or disclosures to plan participants, beneficiaries, and other persons so that plan fiduciaries and plan sponsors have additional time to meet their obligations under Title of I ERISA during the COVID-19 outbreak.

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Plans that are required to provide any of the following documents during the Outbreak Period will not violate ERISA and not be subject to penalties for timing failures related to the following disclosures:

- ERISA plan document
- Summary Plan Description (SPD)
- Summary of Benefits and Coverage (SBC)
- Summary of Material Modifications (SMM)
- Summary of Material Reductions (SMR)
- Summary Annual Reports (SAR)
- COBRA general election notices, notices of unavailability and notices of early termination
- Notice of medical child support order or National Medical Support Notice procedures
- Marketplace notice
- CHIP Notice
- Notice of HIPAA special enrollment rights
- ACA grandfathered status notification
- Newborns' and Mothers' Health Protection Act description
- Michelle's Law notice
- Women's Health and Cancer Rights Act notification

The DOL cautions that the deadline relief will apply only where a 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 using electronic alternative means of 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 appears to be a broad, temporary, relaxation of the DOL's standard electronic disclosure rules during the Outbreak Period.

## **Additional Joint Guidance**

The DOL, Treasury and the IRS (Departments) have released a separate joint notice (Joint Notice) to announce an extension for a number of deadlines so plan participants, beneficiaries, and employers have additional time to make critical health coverage and other decisions affecting benefits during the COVID-19 outbreak.

## ***Health and Welfare Plan Guidance***

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For group health plans, subject to ERISA or the Internal Revenue Code, the relief provides additional time to comply with certain deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims, and external review of certain claims.

With regard to disability, retirement, and other plans, the Joint Notice provides additional time for participants and beneficiaries to make claims for benefits and appeal denied claims. The Departments stated that they believe the relief is needed so individuals will not miss key deadlines during the COVID-19 outbreak that could result in a loss or lapse of group health coverage or the denial of a valid claim for benefits.

This relief specifically applies to:

- The standard 30-day period (or 60-day period, if applicable) to request special enrollment under HIPAA,
- The required time period for providing COBRA election notices to qualified beneficiaries,
- The typical 60-day election period for COBRA continuation coverage,
- The usual date(s) for making COBRA premium payments,
- The date for individuals to notify the plan of a qualifying event or determination of disability under COBRA,
- The date within which individuals may file a benefit claim under a plan's claims procedures,
- The date within which claimants may file an appeal of an adverse benefit determination under a plan's claims procedures,
- The date within which claimants may file a request for an external review after receiving an adverse benefit determination or final internal adverse benefit determination, and
- The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete under DOL claims regulations.

The Joint Notice gives the following specific examples intended to illustrate how relief will apply in particular cases. All of the examples assume a fictitious April 30, 2020 end date to the COVID-19 National Emergency, with the Outbreak Period ending on June 29, 2020 (the 60<sup>th</sup> day after the end of the COVID-19 National Emergency).

**Example 1 – Electing COBRA.** Assume that an employee works for an employer and participates in the employer's group health plan and, due to the COVID-19 National Emergency, experiences a COBRA qualifying event due to a reduction of hours below the group health plan's eligibility requirements and

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has no other coverage. The employer provides the employee a COBRA election notice on April 1, 2020. What is the COBRA election deadline?

*Conclusion.* The employee is eligible to elect COBRA coverage under the employer's plan. The Outbreak Period is disregarded for purposes of determining the COBRA election period, so the last day the employee can elect COBRA continuation coverage is 60 days after June 29, 2020, or August 28, 2020.

**Example 2 – HIPAA Special Enrollment Period.** Assume an employee is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, she 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 the employee exercise her special enrollment rights?

*Conclusion.* Disregard the Outbreak for purposes of determining the employee's HIPAA special enrollment period. Thus, she and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. The employee may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

**Example 3 – COBRA Premium Payments.** Assume that on March 1, 2020, a qualified beneficiary had COBRA continuation coverage under a group health plan, and more than 45 days had passed since he had elected COBRA. Monthly COBRA premium payments are due by the first of the month, and the plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. The qualified beneficiary made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, the employee has made no premium payments for March, April, May, or June. Does the qualified beneficiary lose COBRA coverage, and if so for which month(s)?

*Conclusion.* Disregard the Outbreak Period for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and the qualified beneficiary can maintain COBRA continuation coverage for these months if he timely makes payment.

Under COBRA, premium payments are timely if made within 30 days from the date they are first due. In calculating the 30-day period, however, an administrator must disregard the Outbreak Period. So payments for March, April, May, and June are all deemed to be timely if they are made within 30 days

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after the end of the Outbreak Period. Accordingly, premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. The qualified beneficiary is eligible to receive coverage under the terms of the plan during this interim period even though some or all of his premium payments may not be received until July 29, 2020. Since the due dates for his premiums would be postponed, and his payment for premiums would be retroactive during the initial COBRA election period, his insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.

**Example 4 – COBRA Premium Payments.** Assume the same facts as Example 3, above. By July 29, 2020, the qualified beneficiary made a payment equal to two months' premiums. For how long does he have COBRA continuation coverage?

**Conclusion.** The qualified beneficiary is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and he is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020, would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.

**Example 5 – Claims for Medical Treatment under a Group Health Plan.** Assume a participant in a group health plan received medical treatment for a condition covered under the plan on March 1, 2020, but a claim relating to the medical treatment was not submitted until April 1, 2021. The plan requires claims to be submitted within 365 days of a participant's receipt of medical treatment. Is the participant's claim timely?

**Conclusion.** Yes, because the plan must disregard the Outbreak Period when determining the 365-day period applicable to the participant's claim. Therefore, the participant's last day to submit a claim is 365 days after June 29, 2020, which is June 29, 2021, so her claim was timely.

**Example 6 – Internal Appeal under Disability Plan.** Assume a participant received notification of an adverse benefit determination from his disability plan on January 28, 2020. The notification advised him that he had 180 days within which to file an appeal. What is the participant's appeal deadline?

**Conclusion.** Disregard the Outbreak Period when determining the 180-day period within which the participant must file an appeal. So, his last day to submit an appeal is 148 days (180 days, less the 32

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from January 29 through February 29 before the Outbreak Period started) after June 29, 2020, which is November 24, 2020.

**Example 7 -- Internal Appeal under Employee Pension Benefit Plan.** Assume a participant received a notice of adverse benefit determination from her 401(k) plan on April 15, 2020. The notification advised her that she had 60 days within which to file an appeal. What is her appeal deadline?

**Conclusion.** Disregard the Outbreak Period when determining the 60-day period within the participant must file an appeal. Thus, the last day on which she may submit an appeal is 60 days after June 29, 2020, which is August 28, 2020.

## **Retirement Plan Guidance**

The Notice provides that a qualified retirement plan, like a 401(k) plan, that fails to follow verification procedures for plan loans or distributions that are imposed by the plan's terms will not violate relevant plan rules and will not be subject to DOL enforcement if:

- The failure is solely due to the COVID-19 outbreak;
- the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
- the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

This relief for loan and distribution verification procedures imposed by a plan's terms applies only to applicable ERISA requirements that the DOL interprets and regulates. It specifically does **not** include spousal consent or other statutory or regulatory requirements interpreted and enforced by the Treasury or the IRS. Employers should visit [IRS.gov](https://www.irs.gov) or call 1-877-829-5500 for questions about Treasury and IRS coronavirus relief or other guidance.

The Notice further confirms that the DOL will not treat any qualified retirement plan or its administrator or other fiduciary that makes plan distributions or administers plan loans under the relaxed rules implemented by the CARES Act as having violated relevant ERISA provisions, including adequate security and reasonably equivalent basis requirements. Additionally, the DOL states that it will consider a plan to have followed its written terms if it is amended to provide for the CARES Act relief for plan loans and distributions, as long as it

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adopts the amendment on or before the last day of the first plan year beginning on or after January 1, 2022 (or a later date as provided by the Secretary of the Treasury).

The Notice also relaxes the general requirement that an employer or plan service provider forward participant payments and withholdings to a qualified retirement plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15<sup>th</sup> business day of the month following the month in which the amounts were paid to or withheld by the employer. If an employer or plan service provider cannot meet this deadline during the Outbreak Period, the DOL will not take enforcement action for a temporary delay in forwarding payments or contributions but only if due to the COVID-19 outbreak. Moreover, employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

## Conclusion

How this well-intentioned guidance actually works in practice remains to be seen. We expect additional information from the Departments as employers and plan sponsors wrestle with particular fact patterns in light of the Notice and Joint Notice relief, especially in cases where past decisions might need to be reconsidered. We will monitor further developments and alert you as soon as more details emerge.

Employers should remember that the Departments reiterate that they will continue to implement and enforce employer obligations impacted by COVID-19 by emphasizing assistance rather than punishment. They have explained that they will focus on working with employers who continue to work diligently and in good faith to comply, and will deemphasize fines and penalties where appropriate under the circumstances.

We express to all of our clients and friends our deep appreciation for our ongoing relationships, and we look forward to strengthening those ties as we work through this shared adversity. Stay safe and be well.

### ***EPIC Employee Benefits Compliance Services***

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