



## **DOL Disaster Relief Notice Extends Deadlines, Enables COBRA Gamesmanship**

The Department of Labor's Employee Benefits Security Administration ("EBSA") issued guidance on April 28, 2020, providing temporary, coronavirus-related relief from many deadlines and requirements under ERISA. Along with EBSA Disaster Relief Notice 2020-01 (the "[Notice](#)"), the DOL contemporaneously released a set of 23 questions and answers about COVID-19 for plan participants and beneficiaries ("[FAQs](#)") and a joint [Final Rule](#) with the IRS describing how the relaxed deadlines will be administered. The Notice relaxes the standards for employers to provide notices and documents electronically, and the joint Final Rule affords significant latitude to COBRA qualified beneficiaries for electing, and paying for, COBRA continuation coverage.

The Notice, FAQs, and Final Rule recognize that the coronavirus pandemic may impede compliance with various deadlines and requirements under ERISA and the Code. The relief afforded applies during the period from March 1, 2020 (the date as of which President Trump declared a COVID-19 national emergency) to the date that is 60 days after the government announces the end of the national emergency (or such other date announced by the EBSA). This period is referred to as the "Outbreak Period."

### **Notice 2020-01 – Relaxed Electronic Notice and Relief for Retirement Plans**

The Notice gives plan sponsors additional time to respond to participant requests and to distribute certain notices, disclosures, or documents during the Outbreak Period, as long as they act in good faith and provide the notice, disclosure, or document as soon as administratively practicable under the circumstances. Notably, good faith compliance includes the use of electronic alternative means of

communicating with participants and beneficiaries who the plan administrator “reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.” Thus, the Notice effectively relaxes the standard DOL guidelines for electronic notice delivery. (Those rules are summarized in our October 24, 2019, [article](#).)

The DOL also has announced that it will not take enforcement action against retirement plan sponsors that are temporarily unable to promptly remit contributions to the plan solely as a result of COVID-19. Employers are required to comply with ERISA’s contribution remittance requirements as soon as administratively practicable under the circumstances, and must act prudently and in good faith. In addition, the Notice provides guidance concerning the treatment of plan loans, including “enhanced” loans authorized by the CARES Act.

### **Final Rule and COBRA Gamesmanship**

In coordination with the IRS, the Final Rule provides additional time for employers, plans, fiduciaries, and plan participants to comply with deadlines affecting retirement and health plans, including COBRA continuation coverage, special enrollment periods, claims and appeals, and other notice requirements. In general, ERISA-covered group health plans must disregard the Outbreak Period for purposes of determining:

- The 30- or 60-day period in which employees may request HIPAA special enrollment rights;
- The date by which a group health plan must provide a COBRA election notice;
- The date as of which individuals must notify a group health plan administrator of a COBRA qualifying event;
- The 60-day period in which qualified beneficiaries may elect COBRA coverage;
- The date by which qualified beneficiaries must make COBRA premium payments;
- The date within which individuals must file a claim for benefits or appeal the denial of a claim; or
- The date a claimant must request external review of a denied group health plan appeal.

An example in the Final Rule illustrates how the requirement to disregard COBRA deadlines during the Outbreak Period may enable affected individuals to manipulate the COBRA election process. The example assumes that the national emergency ends on April 30, and that the Outbreak Period therefore ends on June 29, 2020 (60 days after the end of the national emergency). An individual who loses eligibility under a group health plan in March due to a reduction in hours caused by the COVID-19 pandemic is given a COBRA election notice on April 1, 2020. Because the Outbreak Period is disregarded for purposes of determining this individual's 60-day COBRA election period, he or she will have until August 28, 2020 – that is, 60 days after the June 29 end of the Outbreak Period – to make a COBRA election.

Another example in the Final Rule suggests that an individual who has elected COBRA coverage may effectively stop making premium payments during the Outbreak Period, and then decide (based on whether he or she has had any claims in the interim) whether to make a lump-sum, retroactive premium payment after the end of the Outbreak Period, or to let the coverage lapse. If the national emergency ends on April 30 and the Outbreak Period ends on June 29, an individual could wait up to five months to make the required premium payments. Although this gives individuals who lose health coverage during the pandemic significant latitude, it also creates a very real risk of adverse selection for group health plans.

At a minimum, the Notice and Final Rule change the administrative landscape for health and retirement plans. Plan fiduciaries should take the time to understand this guidance and ensure that their record keepers and third-party administrators apply it appropriately.

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