



DOL Issues Guidance on COVID-19 Outbreak Period Relief Duration

On February 26, 2021, the Department of Labor (DOL) Employee Benefits Security Administration (EBSA) issued Disaster Relief Notice 2021-01¹ to confirm the position of both the DOL and the Department of the Treasury (collectively, the “Agencies”) concerning the calculation of the COVID-19 Outbreak Period plan deadline suspensions² with regard to participants’ ability to enroll mid-year in group health plan coverage, elect and pay for COBRA continuation coverage, submit benefit claims, and file appeals for benefit determinations.³

Notice 2021-01 affirms that the relief introduced in May 2020 continues for the duration of the COVID-19 national emergency period, but any period that is to be disregarded with respect to certain plan deadlines applying to a participant cannot extend beyond one year *with respect to that participant*. In other words, the Agencies have applied the one-year limitation⁴ to each impacted participant and event deadline.

Background

Pursuant to the “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak” (the “Final Rule”), the Outbreak Period (defined as the period beginning March 1, 2020 and ending sixty days after the date on which the President declares the COVID-19 national emergency has ended) must be disregarded for impacted participants and beneficiaries when calculating:

- the 30-day period to exercise special enrollment rights under HIPAA (or the 60-day period, in the case of the special enrollment rights added by the Children’s Health Insurance Program Reauthorization Act of 2009) for major medical plans and other non-excepted benefits (e.g., allowing the addition of a spouse through marriage or the addition of a child through birth, adoption, or placement for adoption);
- the 60-day election period for electing COBRA coverage;
- the date by which COBRA premium payments must be made;
- the date by which an individual must notify the plan of a qualifying event (e.g., a divorce or legal separation) or a Social Security disability determination;
- the date by which members may file claims for benefits under the plan’s generally applicable claims procedures; and

¹ <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01.pdf>

² See the “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak” (available at <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>)

³ See our original publication [here](#).

⁴ <https://www.law.cornell.edu/uscode/text/29/1148>; <https://www.law.cornell.edu/uscode/text/26/7508A>

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- the date by which claimants may file an appeal of adverse benefits determinations or request external review after receipt of an adverse benefit determination or a final internal adverse benefit determination.

However, within the text of the Final Rule, the definition and application of the Outbreak Period was tied to statutory provisions in section 518 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 7508A(b) of the Internal Revenue Code of 1986 (the “Code”). These provisions limited the maximum period permitted to be disregarded with respect to these plan deadlines to a period of one year. When the Final Rule was published, few anticipated the COVID-19 national emergency period would still be in effect almost a year later, or that the relief could have created effectively open-ended COBRA election and premium payment grace periods into 2021.

Almost a year after the first national emergency declaration – on February 24, 2021 – President Biden determined in a letter to Congress that it is necessary to continue the national emergency period concerning the COVID-19 pandemic. In light of this, it became necessary to understand how the Agencies would reconcile the one-year statutory limit on the extension in light of this ongoing national emergency.

Or, at least, what would happen when the maximum statutory period was to come to a close at midnight on February 28, 2021 (i.e., one year from the Final Rule’s March 1, 2020 start date).

Notice 2021-01

In the notice published February 26, 2021, the DOL underscored President Biden’s determination and concurred the COVID-19 national emergency – and therefore the Outbreak Period – is still underway. While the ERISA and Code provisions expressly limit the maximum disregarded period for individual actions (whether those actions are “required or permitted”) to a period of one year from the date the individual action would otherwise have been required or permitted, the Notice provides that this one-year period should be interpreted to be applied on an ***individual-by-individual*** basis. Specifically, the Notice instructs:

Individuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date they were first eligible for relief⁵, or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.

What Does This Mean?

In short, every individual to whom the tolling period applies has their own tolling period. For example, generally, a COBRA qualified beneficiary has 60 days – from the later of the date of their coverage loss or the date on which their COBRA Election Notice is provided – to make an

⁵ The first date upon which an individual or plan could be eligible for relief was March 1, 2020 (that is, the first day of the national emergency period). Therefore, the *earliest date* upon which a disregarded period can resume is March 1, 2021.

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affirmative COBRA election. According to the provisions of the Final Rule, COBRA election periods were suspended as of March 1, 2020 through the end of the Outbreak Period (again, defined ending 60 days after “the announced end of the National Emergency or other date announced by the Departments in a future notification”). Once the Outbreak Period ends, the suspended plan deadlines would resume. A qualified beneficiary whose COBRA election period began prior to March 1, 2020 would have the remaining balance of her 60-day COBRA election period at the end of the Outbreak Period; a qualified beneficiary who was furnished a COBRA election notice on or after March 1, 2020 would have the full 60-day election period following the end of the Outbreak Period.

However, with the statutory one-year limit on the tolling period in mind, Notice 2021-01 provides that this period does *not* end on February 28, 2021 for all participants, but rather the one-year period is calculated with respect to each individual.

Example – Employee Currently in 30-day HIPAA Special Enrollment Period

Andrew has elected employee-only coverage under his employer’s group health plan. Andrew got married on February 14, 2020. His employer’s group health plan says that the HIPAA special enrollment period is 30 days – beginning on the date of marriage, birth, adoption, or placement for adoption – to exercise special enrollment rights to add a new dependent. His special enrollment period was tolled as of March 1, 2020. His one-year maximum Outbreak Period would end February 28, 2021, so he would have the remaining balance of his special enrollment period (that is 30 days minus 15 days prior to March 1, 2020) starting March 1, 2021 and ending March 16, 2021.

Example – Qualified Beneficiary Who Terminated Day Before Outbreak Period

Brandy was terminated from her employer on February 28, 2020 and provided a COBRA election notice. Her 60-day election period, which would have begun March 1, 2020, is also tolled as of that date. Her one-year maximum Outbreak Period would end February 28, 2021; her 60-day COBRA election period would begin March 1, 2021 and end April 30, 2021.

Example – COBRA Continuant Who Has Yet to Pay Initial COBRA Premium

Christopher was terminated from his employer on March 31, 2020 and provided a COBRA election notice. He made his COBRA election on May 30, 2020 but has yet to make his initial COBRA premium payment(s). As his 45-day initial premium payment period began within the Outbreak Period, it was immediately suspended. His one-year maximum Outbreak Period would end May 29, 2021. His 45-day initial premium payment period would begin May 30, 2021 (ending July 14, 2021). By this time, Christopher would be expected to pay COBRA premiums for April 1, 2020 through June 30, 2021 if he wished to bring his account current (**fifteen months of COBRA premiums**).

Example – Claim Appeal

Diana is a health Flexible Spending Account (Health FSA) participant; she received a notification of an adverse benefit determination advising that her health FSA claim was denied on March 31, 2021. Generally, Diana would be given 180 days (under the generally applicable claims procedures of her health FSA) in which to appeal the denial. Assuming there has yet to be an announced end to the National Emergency period, her 180-day appeal period will be tolled as of

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March 31, 2021. Her one-year Outbreak Period would end March 30, 2022, affording her 180 days after that date (or September 26, 2022) to submit her appeal.

It bears repeating that the tolling periods contemplated in the examples above would end earlier than one year if the President declares the COVID-19 national emergency has ended. In this case, the tolling would end 60 day after the declared end of the National Emergency and the otherwise applicable election period would start.

Reasonable Accommodations

Notice 2021-01 also states that the DOL recognizes that impacted plan participants and beneficiaries may continue to encounter complications related to the ongoing COVID-19 pandemic, even after the expiration of the up-to-one-year tolling period (limited by the Agencies' authority to grant such relief). In light of this, the DOL states – consistent with previous informal commentary – that the “guiding principle” is for plans to act reasonably, prudently, and in the interest of the workers and their families. Furthermore, the DOL states 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 [timeframes].”

Notice Requirements?

While the original Final Rule did not impose specific notice requirements, the DOL in Notice 2021-01 directs the plan administrator or plan fiduciary to “consider affirmatively sending a notice regarding the end” of the one-year relief period (presumably to each member based on their own applicable tolling period expiration date).

Furthermore, plans “may need” to reissue or amend plan disclosures issued prior to or during the COVID-19 pandemic if they failed to accurately communicate these new extensions and the dates by which impacted participants and beneficiaries should take action (e.g., COBRA election notices). HealthEquity/WageWorks has – as a best practice – added notifications to relevant member communications advising of the provisions of the Agencies' relief.

The DOL also encourages plans to “consider” ways to ensure that those participants and beneficiaries who are losing coverage under their group health plans are advised of other coverage options that may be available to them (e.g., their respective states' Health Insurance Marketplaces).⁶ HealthEquity/WageWorks is currently updating our relevant member notices commensurate to these extensions.

Enforcement

The DOL also acknowledges that there may be circumstances in which plans or service providers may experience difficulty in adhering to ERISA's disclosure and claims processing requirements. In these instances where fiduciaries have acted in “good faith and with reasonable diligence under

⁶ Pursuant to [Executive Order on Strengthening Medicaid and the Affordable Care Act](#), a special enrollment period is available beginning February 15, 2021 to May 15, 2021 for the consumers in the 36 states that use [HealthCare.gov](#). At least 13 states (plus the District of Columbia), which operate their own Marketplace platforms, are offering a similar opportunity



the circumstances,” the DOL has commented its approach to enforcement will be “marked by an emphasis on compliance assistance,” including grace periods or other relief.

HealthEquity will continue to stay abreast of this topic and, as additional guidance is available, we will advise accordingly.

Continuation coverage benefits (including COBRA, state, and Direct Bill) are administered by WageWorks, Inc. as a subsidiary of HealthEquity, Inc.

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