

## Employee Benefits and Executive Compensation COVID-19 Benefit Plan Updates

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The Department of Labor (DOL) and Internal Revenue Service (IRS) continue to issue regular updates for benefit plans in the midst of the COVID-19 outbreak.

On April 28, 2020, the DOL issued the following relief and guidance for employee benefit plans:

- [Notification of Relief](#), which was issued jointly with the IRS and the Department of the Treasury (Treasury).
- [EBSA Disaster Relief Notice 2020-01](#), which was coordinated with Treasury, IRS, and the Department of Health and Human Services (HHS).
- [COVID-19 FAQs for Participants and Beneficiaries](#).

On May 4, 2020, the IRS issued questions and answers on [coronavirus-related relief for retirement plans and IRAs](#).

Together, the guidance:

- Extends numerous deadlines applicable to individual participants and beneficiaries;
- Extends and adopts a non-enforcement policy with respect to certain deadlines and timeframes applicable to employers and other plan sponsors and fiduciaries;
- Clarifies and provides guidance about CARES Act (and non-CARES Act) loans and distributions; and
- Provides guidance with respect to participant deferrals and loan repayments and provides general fiduciary compliance guidance during the COVID-19 outbreak.

Although the guidance addresses a number of open issues for employers, the agencies did not address various items that employers are requesting guidance on (such as spousal consent notarization requirements and safe harbor notice obligations for CARES Act changes). The guidance also presents new challenges for the administration of benefit plans in the current environment. In particular, given that the individual deadline extensions apply retroactively, employers and fiduciaries should start working with their administrators immediately.

### **Individual Deadline Extensions**

The Notification of Relief extends the following deadlines that apply to participants and beneficiaries.

	Minimum Individual Deadline <sup>[1]</sup>
<u>Group Health Plans</u>	
HIPAA Special Enrollment	<ul style="list-style-type: none"> <li>• 30 days for loss of other coverage, birth, marriage, adoption, or placement for adoption</li> <li>• 60 days for a loss of Medicaid or CHIP or eligibility for premium assistance under</li> </ul>

	Medicaid or CHIP
COBRA Election Period <sup>[2]</sup>	<ul style="list-style-type: none"> <li>• 60 days to elect COBRA continuation coverage</li> </ul>
COBRA Premium Payment (Grace Period)	<ul style="list-style-type: none"> <li>• 45 days for initial premium payment</li> <li>• 30 days thereafter (30 days after the first day of the coverage period)</li> </ul>
Benefit Claim	<ul style="list-style-type: none"> <li>• Generally set by plan</li> </ul>
Appeal of Benefit Claim	<ul style="list-style-type: none"> <li>• 180 days to appeal an adverse benefit determination</li> </ul>
External Review Request	<ul style="list-style-type: none"> <li>• 4 months to appeal an adverse benefit determination or final internal adverse benefit determination</li> </ul>
Incomplete External Review Request	<ul style="list-style-type: none"> <li>• 4-month filing period, or within 48 hours following the receipt of the notification, whichever is later, for claimant to file information to perfect a request for external review upon a finding that the request was not complete</li> </ul>
<i>Plans With Disability Benefits</i>	
Benefit Claim	<ul style="list-style-type: none"> <li>• Generally set by plan</li> </ul>
Benefit Claim Appeal	<ul style="list-style-type: none"> <li>• 180 days to appeal an adverse benefit determination</li> </ul>
<i>Other Plans (e.g., Pension, Life Insurance)</i>	
Benefit Claim	<ul style="list-style-type: none"> <li>• Generally set by plan</li> </ul>
Benefit Claim Appeal	<ul style="list-style-type: none"> <li>• 60 days to appeal an adverse benefit determination</li> </ul>

The Notification of Relief extends these deadlines by requiring that plans disregard the period from March 1, 2020, until 60 days after the announced end of the National Emergency<sup>[3]</sup> (or an earlier date announced by the applicable agencies). For example, if the end of the National Emergency is July 1, 2020, plans would be required to disregard the period from March 1, 2020, until August 30, 2020 (60 days after July 1, 2020) for any of the above actions.

The effect of this guidance is that individuals will have the minimum individual deadline plus the disregarded period. For any event that is first triggered before March 1, 2020, but the deadline is on or after March 1, 2020, the minimum individual deadline will be tolled during the disregarded period. For any event that is first triggered on or after March 1, 2020, the minimum individual deadline will not begin until the disregarded period ends.

Although the Notification of Relief provides examples to illustrate these extensions, they are based on an assumed end to the National Emergency of April 30, 2020. Because the National Emergency

continues, employers should be mindful that the end of the National Emergency is unknown for these purposes.

***The following examples assume that the plans use the statutory minimum deadlines set forth above (and do not provide more generous deadlines) and that the National Emergency ends on July 1, 2020:***

**COBRA Election Period:** If an individual loses coverage on April 30, 2020, and receives a COBRA notice on May 1, 2020, the COBRA election period would end on October 29, 2020 (60 days after the disregarded period ending on August 30, 2020).<sup>[4]</sup>

**COBRA Payment Period:** If the same individual makes a payment for May coverage, but does not make the June and July payments, the individual's COBRA premiums will be timely if they are made by September 29, 2020 (30 days after the disregarded period ending on August 30, 2020). At that time, premiums for June, July, August and September will all be due. If the individual fails to pay all or a portion of the due premiums, coverage may be terminated retroactively to the last period for which payment was received.<sup>[5]</sup>

**Special Enrollment Period:** If an individual who previously declined coverage has a child on April 15, 2020, the individual may enroll himself or herself plus the child as early as April 15, 2020, and as late as September 29, 2020 (30 days after the disregarded period ending on August 30, 2020), provided that the individual pays the premiums for coverage.

**Benefit Claim:** If a plan requires claims to be filed within 365 days after the claim is incurred, and the claim is incurred on March 15, 2020, the claim is not required to be filed until August 30, 2021 (365 days after the disregarded period ending on August 30, 2020).

**Benefit Appeal:** If a participant is issued an adverse benefit determination under a disability plan on January 28, 2020, the individual has 148 days (180 – 32 from January 28, 2020 to March 1, 2020) after the disregarded period ending on August 30, 2020 (i.e., January 25, 2021) to file an appeal.

The guidance presents a number of administrative challenges, at the front end, during, and at the back-end of the disregarded period.

- Because the disregarded period began almost two months prior to the guidance (March 1, 2020), plans will need to evaluate the treatment of deadlines that have already expired. For example, COBRA coverage may have already been terminated for non-payment of premiums in March or April, or claim filing deadlines may have expired in March or April (such as a health FSA submission deadline for the prior calendar year). Employers and fiduciaries should consider what events may have occurred in the last two months that could be affected by this guidance.
- Plans should also be prepared for extended periods of time during which COBRA coverage may be required without the payment of premiums, and should understand the impact of this extension on the processing of claims (e.g., paying claims and then retroactively attempting to recover them if coverage is not actively elected and paid for, or pending claims for an indefinite period until coverage is actively elected and paid for). Existing COBRA regulations provide direction on how to treat coverage during the initial election period and during payment grace periods, but the unknown duration of these extensions may create complications with the normal process.
- Although it does not appear that plans have a written notice obligation with respect to these extensions, employers and benefit call centers should be prepared to answer individual questions. Consideration should also be given to how to communicate with individuals who may have been affected in March and April.
- Importantly, these extensions do not automatically extend employer obligations, other than as set forth in the next section.

In sum, employers and fiduciaries should act quickly to prepare for and implement these administrative changes.

## **Plan and Fiduciary Deadline Extension and Relief**

### *I. COBRA Election Notice Deadline Extension*

The Notification of Relief also provides an extension for plans in addition to the numerous individual extensions explained above. The deadline by which a plan must provide a COBRA election notice to a qualified beneficiary is extended for the same disregarded period.

### *II. Title I Document Relief and Electronic Communications*

More broadly than the Notification of Relief, Notice 2020-01 provides fiduciary relief for the same disregarded period for all Title I documents over which the DOL has authority. This would include, for example, summary plan descriptions, summaries of material modifications, summary annual reports, and annual funding notices, but would not include IRS regulated documents such as safe harbor notices. Under this extension, a plan and the responsible fiduciary will not be in violation of ERISA if acting in good faith to furnish the notice, disclosure or other document as soon as administratively practicable. Good faith acts include the use of electronic communications if the fiduciary reasonably believes the participant or beneficiary has effective access to electronic communication, including email, text and continuous access websites.

### *III. Blackout Notices*

Normally, participants and beneficiaries in an individual account plan must be provided 30 days' advance notice when there is a suspension, limitation or restriction caused by a blackout period. An exception to the advance notice requirement exists under the regulations for events beyond the reasonable control of the plan administrator, where the fiduciary so determines in writing. The Title I document relief set forth above will apply to blackout notices, including any notices required to be provided after the blackout period begins. Further, the DOL will not require a fiduciary to make a written determination that an exception to the advance notice requirement exists because, as stated by the DOL, "pandemics are by definition beyond a plan administrator's control."

### *IV. Form 5500 and Form M-1 Filings*

The IRS previously issued guidance extending until July 15, 2020, the filing of a Form 5500 with a filing deadline between April 1, 2020, and July 14, 2020. Notice 2020-01 provides the same relief for Form M-1 filings.

## **Participant Loans and Distributions**

Notice 2020-01 and the IRS guidance address participant loans and distributions. The guidance covers CARES Act loans and distributions as well as the administration of plan loans and distributions generally.

### *I. CARES Act Loans and Distributions*

The CARES Act provided for special distribution and loan options for defined contribution plans. (See [Benefit Plan Relief in Response to COVID-19: CARES Act Impact on Retirement and Health Plans.](#)) Although many employers implemented these loans and distributions quickly following the enactment of the CARES Act, a number of open questions remained. The DOL and IRS guidance answers some, but not all, of these questions.

The IRS guidance confirms that the adoption of the distribution and loan rules of the CARES Act is optional. Even if a plan does not treat a distribution as a coronavirus-related distribution, a qualified individual may do so with respect to his or her own taxes. It is ultimately up to the individual to treat the

distribution as a coronavirus-related distribution, and the administrator's reliance on the individual's certification does not dictate the satisfaction of the tax requirements.

The IRS guidance also suggests (but does not confirm) that any plan that accepts rollovers will accept repayments of coronavirus-related distributions. A plan that does not accept any rollover contributions is not required to accept repayments of coronavirus-related distributions.

In addition to the IRS guidance, Notice 2020-01 also solves an open ERISA issue related to CARES Act loans. The CARES Act amended the Internal Revenue Code to increase the maximum available defined contribution loan from \$50,000 or 50% to \$100,000 or 100%, without regard for the 50% security limit under ERISA. The CARES Act also allowed qualifying individuals to delay plan loan repayments for up to one year, which could have been viewed as violating ERISA's reasonably equivalent basis requirements. The DOL announced that it would not treat any person as having violated ERISA, including the adequate security limit and reasonably equivalent basis requirement, solely because the loan complies with the CARES Act.

## *II. General DOL Relief*

Notice 2020-01 also provides general relief for retirement plan loans and distributions that fail to follow any procedural requirements imposed by the terms of the plan. The DOL will not treat a plan as failing to satisfy its terms if:

- The failure is solely attributable to the COVID-19 outbreak;
- The plan administrator makes a good faith diligent effort under the circumstances to comply with the plan's 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 does not apply to requirements that fall within the jurisdiction of Treasury and the IRS. Notice 2020-01 specifically states that its relief does not apply to the spousal consent requirement. Thus, no relief has been provided to date with respect to the physical presence notarization requirement for spousal consent.

## **Other Guidance**

### *I. Participant Deferrals and Loan Repayments*

Notice 2020-01 provides that the DOL will not, solely on the basis of a failure attributable to the COVID-19 outbreak, take enforcement action with respect to a delay in remitting participant deferrals and loan repayments. Generally, these amounts must be paid to the plan on the earliest date that they can be reasonably segregated from an employer's general assets. Employers must still act reasonably and prudently to remit payments as soon as administratively practicable.

### *II. General Fiduciary Compliance*

Notice 2020-01 provides general fiduciary guidance for compliance during the COVID-19 outbreak. The DOL's approach to enforcement during this period will emphasize compliance assistance and include grace periods and other relief where appropriate. This includes situations where physical disruption to a plan or service provider's principal place of business makes compliance impossible. The Notice provides:

"The guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes."

## **Conclusion**

While the guidance recently issued by the DOL and IRS is primarily participant-driven, it provides a helpful framework for employers and fiduciaries. Employers and fiduciaries continue to await direction on various issues, and the DOL and IRS indicate that future guidance is possible as the outbreak continues. We will continue to monitor this guidance.

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[1] Plans may provide a more generous deadline period. To the extent a plan provides a more generous deadline period, that period would apply for these purposes.

[2] Unrelated to the COVID-19 guidance, the DOL issued new [COBRA model notices](#) and [FAQs](#) on May 1, 2020. These documents primarily address the interaction between COBRA and Medicare.

[3] On March 13, 2020, President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak and by separate letter made a determination, under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act that a national emergency exists nationwide beginning March 1, 2020. This period beginning March 1, 2020 is referred to as the “National Emergency.”

[4] Under currently existing COBRA regulations, during the initial election period, health plans generally can (i) provide for plan coverage during the election period and terminate the coverage if an election is not made, or (ii) terminate the coverage and reinstate coverage when the election (and, if applicable, payment for the coverage) is made.

[5] Similar to the initial election period, currently existing regulations provide for coverage during the premium grace periods by (i) continuing coverage during the payment period and then retroactively cancelling coverage if the premium is not timely made, or (ii) canceling coverage and then retroactively reinstating it upon payment of the premium.



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