

Client Alert: The End of the COVID-19 Emergencies: Considerations for Health and Welfare Plan Administrators

Publications

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By: Ray Sinnappan, Maliha Ikram

On January 30, 2023, the Biden administration^[1] announced that on May 11, 2023 it plans to end the COVID-19 national emergency (Outbreak Period) and public health emergency (Public Health Emergency), which were declared by the Trump administration in 2020. Since their institution, the emergency declarations have been extended many times without indication of a true sunset. Currently, the Outbreak Period will expire on March 1, 2023, and the Public Health Emergency will expire on April 11, 2023. Each declaration apparently will be extended only once more to get to May 11, 2023. The period from the President's announcement on January 30, 2023 through May 11, 2023 is intended to provide a timeframe for the nation to adjust to another shift in healthcare administration.

When the COVID-19 pandemic began, plan sponsors and plan administrators were required to comply with a myriad of temporary changes impacting ERISA health and welfare plans. For example, recall that individuals and plans whose timelines were under the purview of the joint agency notices promulgated by the Department of Labor, the Internal Revenue Service, and the Department of the Treasury (the Joint Notices) (e.g., Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01^[2]) would have such timelines disregarded for the earlier of: (i) one year from the date they were first eligible for relief or (ii) 60 days after the announced end of the Outbreak Period. However, this period could not exceed one year in any case. Then, at the applicable date, the "tolling" of the deadline would stop.

With the end of the Outbreak Period and Public Health Emergency announced, the temporary changes will revert to pre-pandemic rules and requirements absent any intervening guidance (which has not been issued by any government agencies since the announcement was made). Because it is unclear if any guidance will be promulgated, health and welfare plan sponsors and administrators should be ready to operate under the assumption that pandemic-related mandates will soon conclude.

The purpose of the Joint Notices was to provide guidance on and relief for employee benefit plans in light of the COVID-19 outbreak. Subject to any intervening guidance, the Joint Notices explain that the relief for certain plan benefit actions continues for 60 days following the end of the Outbreak Period. Accordingly, below is a list of pandemic mandates affecting ERISA plans that will presumptively end on July 10, 2023, which is 60 days following May 11, 2023.

- Deadlines will no longer be tolled for the following:
 - The 30 or 60-day deadline (as applicable) for participants to request enrollment following a HIPAA special enrollment event (e.g., birth)
 - The 60-day deadline for qualified beneficiaries to elect COBRA continuation coverage
 - The 60-day deadline for participants to notify the plan of a qualifying event under COBRA or a disability determination
 - The date for a participant to pay COBRA premium payments
 - The individual deadline applicable to participants to file a claim for benefits under the ERISA claim and appeal procedure^[3]
 - The individual deadline applicable to participants to request an internal appeal of an adverse benefit determination under the ERISA claim and appeal procedure
 - The period for a claimant to request external review (four months for the federal review process)
 - The 14-day (or 44 days if the employer is the plan administrator) period to provide COBRA election notices to qualified beneficiaries following notice of a qualifying event

Further, after the end of the Public Health Emergency (which will end on May 11, 2023 without the 60-day tail that the Outbreak Period has), private health insurance plans (i.e., not Medicaid) will no longer have to cover the following:

- COVID-19 diagnostic testing and related services (e.g., over-the-counter counter tests or tests administered by healthcare providers) without imposing cost sharing (e.g., deductibles or copayments) or prior authorization or other medical management requirements
- COVID-19 vaccines and boosters from out of network providers without imposing cost sharing, prior authorization or other medical management requirements

Understandably, the move to end the declarations on May 11, 2023 does not come without some concern from the various healthcare stakeholders. In its Statement of Administration Policy, the Office of Management and Budget highlighted the concern rippling through the US health care

system – that “an abrupt end to the emergency declarations would create wide-ranging chaos and uncertainty throughout the health care system – for states, for hospitals and doctors’ offices, and, most importantly, for tens of millions of Americans.” While brief, the roughly three-month wind-down period is an opportunity for plan sponsors and plan administrators to prepare and consider plan design changes and adjustments to their administrative rules and procedures to comport with changing law.

Plan sponsors and administrators should consider the following:

- How will the plan cover out of network COVID-19 tests, vaccines, and boosters going forward? Will it continue to cover these items without cost sharing, prior authorization, or other medical management requirements (other than for high deductible plans that require the covered individual to satisfy their deductible)?
- Is there a potential risk that continued coverage of COVID-19 tests, vaccines, and boosters as before (e.g., without cost sharing) may cause parity concerns under the Mental Health Parity and Addiction Equity Act?
- How and when to inform plan participants and beneficiaries that the Outbreak Period and Public Health Emergency will be ending/what will change for them under their plan(s).
- Do plan documents and ancillary participant communications need to be updated to reflect pre-pandemic deadlines and remove mention of the Outbreak Period and Public Health Emergency?
- Consideration of any risk that any modification could be considered a material reduction in covered services or benefits that must be documented and communicated within 60 days of the change.
- Whether to proactively extend deadlines for participant claims and appeals coming up prior to May 11, 2023 (e.g., deadline to appeal an adverse benefit determination).

Given the level of disruption that will ensue as the relief provided by the Joint Notices sunsets with the end of the COVID-19 emergencies, we are hopeful that guidance on some or all of the above-mentioned items is promulgated in a timely fashion.

With much to consider on a relatively compressed timeline, plan administrators should begin reviewing their plans to assess the impact that the May 11, 2023 announcement may have on them. If your company has any questions related to the announcement that the Outbreak Period and Public Health Emergency is ending, reach out to your Jenner & Block contact for assistance. The Employee Benefits and Executive Compensation Practice is keeping current on regulatory and legislative guidance that may be promulgated for employee benefit plans and administration thereof during this transition period and beyond.

Footnotes

[1] During his State of the Union address on February 7, 2023, President Biden stated that his administration will “soon end the public health emergency” and further stated that COVID-19 “no longer controls” Americans’ lives, and that “thanks to the resilience of the American people and the ingenuity of medicine, we have broken the Covid grip on us.”

<https://www.nytimes.com/2023/02/08/us/politics/biden-state-of-the-union-transcript.html>

[2] <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01.pdf>

[3] Note that, while the focus of this alert is on the impact to health and welfare plan sponsors, the tolling provisions in this and the subsequent bullet also impact ERISA-covered retirement plans.

Related Attorneys



Ray Sinnappan

Partner

rsinnappan@jenner.com

+1 312 840 8634



Maliha Ikram

Associate

mikram@jenner.com

+1 312 840 8972

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