

# Client Alert: The End of the COVID-19 Emergencies: New Joint Agency FAQs Published

## Publications

April 7, 2023

By: Ray Sinnappan, Maliha Ikram

On March 29, 2023, the US Department of Labor, the Department of Health and Human Services and the Department of the Treasury (the “Joint Agencies”) released welcome guidance on the announced end of the COVID-19 national emergency (“Outbreak Period”) and public health emergency (“Public Health Emergency”).

On January 30, 2023, the Biden administration announced that May 11, 2023 would be the end of the Outbreak Period and Public Health Emergency. This announcement left health and welfare plan administrators with little time to take action related to the emergencies, and with modest guidance to rely on. The March 29, 2023 guidance, entitled Frequently Asked Questions (FAQs) About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58, targets some of the lingering questions in health and welfare plan administration that went unaddressed in prior FAQ guidance.

As discussed in our prior client alert on the sunset of the Outbreak Period and Public Health Emergency, plan sponsors and plan administrators are grappling with unwinding the temporary changes presently impacting ERISA health and welfare plans. This alert briefly summarizes a few of these changes and the manner in which the Joint Agencies recommend that plans address them post-COVID-19 national emergency.

### *Diagnostic Testing.*

Effective March 18, 2020, plans were required to provide coverage for COVID-19 diagnostic testing without the imposition of any cost-sharing requirements, prior authorization or other medical management requirements (collectively, “cost-sharing”). This requirement extended to both at-home tests and polymerase chain reaction (PCR) tests. The Joint Agency guidance<sup>[1]</sup> published in January 2022 regarding US Food and Drug Administration authorized over-the-counter COVID-19 self-test kits (“Test Kits”) clarified that group health plans and health insurance issuers are required to cover the cost of such Test Kits without imposing cost-sharing.

The FAQs confirm that this requirement for Test Kits will end when the Public Health Emergency ends on May 11, 2023. In other words, group health plans will no longer be required to cover the full cost of diagnostic Test Kits on or after May 11, 2023. However, if plan administrators do decide to reinstitute cost-sharing by modifying their plans, they must provide reasonable advance notice to plan participants of the change (unless, in narrow circumstances, participants were previously notified in 2023 that the additional coverage would only apply during the Public Health Emergency). Notably, the Joint Agencies expressly state that “plans and issuers are encouraged” to continue providing coverage without imposing cost sharing.

#### *Preventative Services.*

The Joint Agencies provide that after the Public Health Emergency ends, preventative COVID-19 vaccines must continue to be fully covered without the imposition of cost-sharing. However, the FAQs clarify that plans are not required to provide benefits for qualifying coronavirus preventative services (such as vaccines) that are administered by out-of-network providers. Further, plans are not precluded from generally imposing cost-sharing for such services delivered by an out-of-network provider.

#### *Individual Deadline Extension during the Outbreak Period.*

When the Joint Agencies published the Employee Benefits Security Administration (EBSA) disaster relief notices (e.g., Notice 2020-01<sup>[2]</sup>), they determined that individuals and plans would have certain 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 (in no case could the “tolling” of such deadlines exceed one year). The new FAQs clarify that the Outbreak Period will end on July 10, 2023 – the date that is 60 days after the end of the national emergency (May 11, 2023). In addition, the FAQs provide examples of how individual deadlines will be calculated in light of the end of the Outbreak Period.

While temporary changes (such as tolled HIPAA special enrollment periods, for example) will revert back to pre-pandemic rules and requirements, the Joint Agencies repeat their sentiment that plans and issuers are encouraged to provide longer timeframes for employees, participants and beneficiaries to take plan actions – thus recognizing the helpfulness of deadline laxity that was afforded to covered persons during the national emergency.

Of the deadlines that were required to be tolled during the Outbreak Period, the most opaque was arguably when COBRA premium payments would become due following July 10, 2023.<sup>[3]</sup> Recall that, as a general rule, an individual has 45 days to pay their initial premium payment and a 30-day grace period to pay subsequent monthly payments. Until the publication of the March 29, 2023 FAQs, it was unclear how the 45-day and 30-day periods would be tolled come July 10, 2023. The FAQs provide that the initial COBRA premium payment for the first month of coverage prior to July 10, 2023 and all months of COBRA continuation coverage until July 10, 2023 would become due

45 days after July 10, 2023 (i.e., August 24, 2023) and the premium payments for months of coverage after July 10, 2023 (if any) would become due in accordance with the normal 30-day grace period (e.g., for August 2023, the payment would be due by August 30<sup>th</sup> since the month of coverage begins on August 1<sup>st</sup>).

\*\*\*

Although the new guidance is helpful, the Joint Agencies leave implementation of several matters (e.g., deadline tolling) up to plan administrators to decide for themselves. Despite, for example, having clearer guidance as to when deadline tolling ends and whether or not cost-sharing may be imposed on diagnostic tests, the Joint Agencies' "encouragement" that plans continue providing more generous timelines and COVID-19-related coverage puts pressure on plan administrators to make plan design choices that may or may not harmonize with other employers.

It is important that plan administrators and plan sponsors carefully consider plan design choices and work with their advisors to both implement them and adapt administrative procedures to adequately address them. We are hopeful that the Joint Agencies will continue to promulgate timely guidance on the impact of the end of the national emergency on health and welfare plan administration. If your company has any questions related to this interplay, reach out to your Jenner & Block contact for assistance. We are staying abreast of the evolving landscape.

## Footnotes

[1] <https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free-tests.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 the new FAQs provide several helpful examples on the topics of COBRA elections and HIPAA special enrollment elections. See questions 5, 6 and 7 of the FAQs.

the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact [dataprotection@jenner.com](mailto:dataprotection@jenner.com).

**Stay Informed**

