

EMPLOYEE BENEFITS ADVISORY

Department of Labor and Department of Treasury Release COVID-19 ERISA and COBRA Deadline Extensions



On April 28, 2020, the Department of Labor (DOL) and the Department of Treasury (together, the Agencies) issued three pieces of guidance extending certain deadlines as a result of the impacts of the COVID-19 outbreak:

- The DOL issued [EBSA Disaster Relief Notice 2020-01](#) (Notice 2020-01), discussed first in this advisory, that extends the time for plan officials to furnish benefit statements, annual funding notices, and other ERISA notices and disclosures, and offers limited relief from the employee contribution deposit deadlines.
- The Agencies also issued a joint notice (the Joint Notice), discussed second in this advisory, regarding the extension of certain HIPAA, COBRA, and other deadlines for employee benefit plans, participants, and beneficiaries affected by the COVID-19 outbreak.
- The DOL issued a set of [FAQs](#) directed to health and retirement plan participants. This guidance incorporates the extensions announced in the Joint Notice. It also provides helpful information and resources for participants to use in seeking answers to questions they may have during the COVID-19 outbreak.

As discussed in more detail below, Notice 2020-01 and the Joint Notice generally apply to a period from March 1, 2020, until 60 days after the announced end of the COVID-19 National Emergency or other date announced by the Agencies in future notices. This period, which is still open throughout the country, is called the "Outbreak Period." The Agencies acknowledge that there may be different Outbreak Period end dates for different parts of the country and indicate that they will issue additional guidance in that circumstance.



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NOTICE 2020-01

Notice 2020-01 applies to employee benefit plans, plan sponsors, and plan fiduciaries subject to ERISA. In general, Notice 2020-01 provides that an ERISA plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished during the Outbreak Period so long as the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. Notice 2020-01 indicates that good-faith acts include the use of alternative electronic means to communicate with plan participants and beneficiaries, and that electronic means can include email, text messages, and continuous-access websites. In order to use alternative electronic means, however, the plan fiduciary should reasonably believe the participants and beneficiaries have effective access to such electronic means.

Notice 2020-01 provides the following specific relief:

- Verification Procedures for Plan Loans and Distributions. If a retirement plan fails to follow any verification requirements for plan loans or distributions imposed by the terms of the plan, the DOL will not treat it as a failure if: (i) the failure is solely attributable to the COVID-19 outbreak; (ii) the plan administrator makes a good-faith, diligent effort to comply with the requirement; and (iii) the plan administrator makes a reasonable attempt to correct any deficiencies as soon as administratively practicable.
- Plan Loans Under the CARES Act. The DOL will not treat the plan or any fiduciary as having violated ERISA solely as a result of following the plan loan relief provisions contained in the CARES Act. Similarly, the DOL will treat a retirement plan that is retroactively amended to offer coronavirus-related distributions and plan loan relief as permitted in the CARES Act as having been operated in compliance with the plan terms if: (i) the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022 (as such date may be updated in the future); and (ii) the amendment meets the specific retroactive amendment rules contained in the CARES Act.
- Contribution Deposit Timing and Loan Repayments. The DOL recognizes that, due to COVID-19, some employers and service providers may not be able to timely deposit participant payroll deductions and loan repayments to their retirement plans and therefore will not take enforcement action for such temporary delays to the extent attributable to the COVID-19 outbreak. The DOL further clarified that “employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.” We caution plan sponsors to continue to be diligent about depositing these amounts to the plan as soon as possible, as we expect the DOL to scrutinize any delays to be sure that the delay was solely attributable to the COVID-19 outbreak.
- Blackout Notices. The DOL waived the 30-day advance notice requirement for blackouts impacting retirement plan operations due to “events beyond the reasonable control of the plan administrator” and will not require a written determination by a fiduciary of the reasons for any delayed notice of a blackout.
- Form 5500 and Form M-1 Filing Deadlines. The DOL reiterated that relief for filing Form 5500 as provided in accordance with the guidance published by the IRS on its COVID-19 website and clarified that Form M-1 MEWA filings are subject to similar relief.

Notice 2020-01 concludes by acknowledging the COVID-19 outbreak may impact participants and beneficiaries, and that plan sponsors should act “reasonably, prudently, and in the interest of the covered workers and their families.” The notice indicates that plan sponsors should make reasonable accommodations to avoid lost benefits and delayed benefit payments. Finally, the DOL recognized there may be instances where compliance cannot be met and provided that their enforcement approach will emphasize assistance and include grace periods where appropriate.

THE JOINT NOTICE

The Agencies also issued a final rule extending certain deadlines and timeframes under ERISA and the Internal Revenue Code for group health plans, disability and other welfare plans, and employee pension benefit plans (including 401(k), defined benefit, and 403(b) plans) subject to ERISA.

Under this rule and effective upon final publication in the Federal Register (which is expected on May 4, 2020), those plans must disregard the Outbreak Period in determining certain timeframes and deadlines.

The Agencies provide some examples to help illustrate the timeframe. In the examples, the Agencies assume that the National Emergency will end on April 30, 2020, with an Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency). Obviously, these examples will need to be adjusted based on when the National Emergency actually ends.

The extension applies to all plan participants, beneficiaries, qualified beneficiaries, or claimants under impacted plans in determining the following periods and dates:

- The HIPAA special enrollment timeframes for allowing an individual to enroll in a group health plan (normally 30 days of the occurrence of birth, adoption, placement for adoption, marriage, or loss of other coverage, and 60 days in the case of special enrollment rights added by the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA))
- The 60-day election period for COBRA continuation coverage in a group health plan
 - For example, assume an individual works for an employer and participates in its group health plan. Due to the National Emergency, the individual's hours are reduced, which results in a loss of coverage and a qualifying event under COBRA. The individual is given a COBRA election notice on April 1, 2020 (during the Outbreak Period). The Outbreak Period is disregarded for purposes of determining the individual's COBRA election period, and the individual will have 60 days after the date the Outbreak Period ends to make an election retroactive to the date coverage was lost.
- The dates for making COBRA premium payments to a group health plan (normally 45 days after the day of the initial COBRA election or 30 days after the first day of the period for which payment is being made)
- The date for individuals to notify a group health plan of a qualifying event or determination of disability for purposes of COBRA (normally within 60 days after an event and within 60 days of a determination of disability)
- The date within which individuals may file a benefit claim under the plan's claims procedures (generally this depends upon the terms of the plan; for example, some group health plans require a claim to be filed within 365 days of receipt of treatment)

- For example, assume an individual is a participant in a group health plan. On March 1, 2020 (the first day of the Outbreak Period), the individual received medical treatment for a condition covered under the plan, but the claim is not submitted until April 1, 2021. Under the plan, claims must be submitted within 365 days of the participant's receipt of the medical treatment. The Outbreak Period must be disregarded under the plan. The individual's last day to submit a claim is 365 days after the end of the Outbreak Period so the individual's claim will be timely.
- The date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedures (normally 180 days following receipt of an adverse benefit determination for group health plans and disability plans; 60 days in the case of other plans)
 - For example, assume a participant received notice of an adverse benefit determination from his employer's disability plan on January 28, 2020 (32 days before the beginning of the Outbreak Period on March 1, 2020). The notification stated that the individual has 180 days within which to file an appeal. Prior to the beginning of the Outbreak Period, 32 days of the 180-day deadline had passed. The Outbreak Period is disregarded when determining the deadline. The participant's last day to submit an appeal is 148 days after the end of the Outbreak Period.
- The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination (for purposes of the federal external review process, generally four months after the date of the receipt of a notice of an adverse benefit determination or final internal adverse benefit determination)
- The date within which a claimant may file information to perfect a request for external review upon finding that the request was not complete (for purposes of the federal external review process, generally within the four-month filing period or within the 48-hour period following the receipt of the notification, whichever is later)

While COBRA payment deadlines have been extended, we note that the rule does not extend deadlines for the payment of premiums for other participants (for example, employees on leaves of absence or retirees under a retiree program).

These extensions also do not apply to many deadlines applicable to employers and plans (for example, the plan does not get an extension to respond to claims or appeals). Employers, group health plans, and administrators are given an extension during the Outbreak Period only with respect to determining the date for providing a COBRA election notice (generally 44 days after the qualifying event).

The Department of Health and Human Services also "encourages" plan sponsors of non-ERISA state and local government plans to provide similar relief and encourages states and health insurance issuers to enforce and operate in a manner consistent with this relief.

These extensions are unprecedented, and employers and plan administrators will need to take steps to ensure that participants understand the new rules. During the Outbreak Period, employers and plan administrators should consider supplementing and modifying adverse benefit determination notices, special enrollment notices, summary plan descriptions, and COBRA forms to reflect these extensions.

QUESTIONS

For any questions about this client advisory, please contact a member of the Sherman & Howard [Employee Benefits Group](#).

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