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DOL/Treasury COVID-19 Relief Includes Long Extension of Participant Deadlines and Rule of Reasonableness for Plan Administration

Employee Benefits & Executive Compensation Blog on **April 30, 2020**

On April 29, 2020, the U.S. Departments of Labor (Employee Benefits Security Administration, "EBSA") and Treasury (IRS) published a final regulation, and EBSA issued a package of guidance and relief, for employee benefit plans affected by the COVID-19 outbreak. EBSA's package includes (i) EBSA Disaster Relief Notice 2020-1, (ii) DOL COVID-19 FAQs for Participants and Beneficiaries (answering basic participant questions), and (iii) a press release. At a high level, the package includes important guidance and extensions of various deadlines. The IRS/DOL regulation is particularly noteworthy because it provides an extended period for employees to elect health coverage retroactively.

Highlights from the final regulation and the EBSA Disaster Relief Notice are described below. Both pieces of guidance state that the U.S. Department of Health and Human Services has reviewed, concurs, and will exercise its enforcement discretion to adopt a temporary policy of measured enforcement to extend certain similar timeframes.

Final Regulation Extending Certain Deadlines

Under the final regulation, all group health plans, disability, and other employee welfare plans, and all pension plans that are subject to ERISA or the Internal Revenue Code, must disregard the "Outbreak Period" for purposes of determining certain deadlines. The "Outbreak Period" runs from March 1, 2020 until 60 days after the COVID-19 National Emergency ends (or such other date as the agencies announce). If there are different Outbreak Period end dates for different parts of the country, the agencies will issue additional guidance for relevant areas.

The Outbreak Period must be disregarded for purposes of:

- The special enrollment period for enrolling in a health plan after a loss of coverage or acquiring a new dependent due to birth, marriage, adoption, or placement of adoption. Without the extension, the special enrollment period would be 30 days (or 60 days in the case of special enrollment rights under CHIP);
- The period to elect COBRA coverage. Without the extension, the election period would be 60 days from the time the election notice is provided;
- The deadline to pay COBRA premiums;
- The period to file a claim or appeal for benefits (but not the period for deciding the claim);
- The period to request external review under a health plan; and
- The deadline for a plan to provide COBRA election notices.

For example, suppose an employee terminated employment and lost health coverage on February 29, 2020. The employer would have had 14 days to provide a COBRA election notice (deadline March 14, 2020), and the employee then would have had 60 days to make an election (deadline May 13, 2020) and another 45 days to make the first premium payment (deadline June 27, 2020). With the extension, the period from March 1, 2020, until 60 days after the National Emergency ends is disregarded. Assuming that the COBRA notice would have already been provided, this means that the employee would have until 120 days after the National Emergency ends to elect COBRA—retroactive to March 1, 2020—and another 45 days after that to make the first premium payment.

EBSA Disaster Relief Notice 2020-01: Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak

In addition to the relief described above for plan participants and beneficiaries, EBSA Disaster Relief Notice 2020-01 includes more limited relief for plan sponsors, fiduciaries, and service providers. Rather than waive technical obligations or provide wholesale extensions of deadlines, the Notice recognizes that plan sponsors, fiduciaries, and service providers might face challenges in meeting ERISA requirements during the Outbreak Period and applies a rule of reasonableness. EBSA outlines the following guiding principles for plan sponsors, fiduciaries, and service providers who encounter problems during the Outbreak Period:

- Act reasonably, prudently, and in the interest of the covered workers and their families who rely on the plans for physical and economic well-being.
- Make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments, and attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.
- EBSA's enforcement efforts will emphasize compliance assistance, including grace periods and other relief where appropriate, such as where physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes impossible.

The Notice also includes the following specific relief, all of which is subject to the caveat that the relief is available only to the extent it is needed:

- Delayed remittance of participant contributions and loan repayments to plans. In general, participant contributions and loan repayments must be remitted to the plan as soon as they can reasonably be segregated from the employer's general assets. Remittance may be temporarily delayed if solely attributable to the outbreak.
- Notices and disclosures. A responsible plan fiduciary will not be in violation of ERISA for failure to timely furnish a notice (including a blackout notice), disclosure, or other document required under Title I of ERISA, if:
    - The responsible fiduciary acts in good faith; and
    - The notice, disclosure, or document is furnished as soon as administratively practicable under the circumstances.

Good faith includes using electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access, including email, text messages, and continuous access websites (for example, an intranet site).

- Temporary relaxation of ERISA plan loan and distribution verification requirements. A failure to follow plan verification procedures for loans or distributions will be excused for purposes of Title I of ERISA if:
    - The failure is solely attributable to the outbreak;
    - The plan administrator makes a good-faith diligent effort under the circumstances to comply with plan procedures; and
    - The plan administrator makes a reasonable attempt to correct any procedural deficiencies (*g.*, assemble missing documentation) as soon as administratively

practicable.

The Notice states that this relief does not relax requirements under the Internal Revenue Code, such as spousal consent requirements (where applicable).

- Clarification with respect to the CARES Act. The Notice confirms that the expansion of loan rights under the CARES Act (described here) will not violate Title I of ERISA.
- Extension of the deadline for Form M-1 filings. The deadline for Form M-1 filings (for MEWAs and certain entities claiming exception) has been extended to align with the deadline for filing the Form 5500 (*e.*, filings otherwise due from April 1, 2020 through July 14, 2020 are now due on July 15, 2020).

The guidance does not get into details on logistics for implementation. Plan sponsors and fiduciaries will need to grapple with issues such as:

- When and how to communicate the extensions to affected participants and beneficiaries. For example, should form notices for COBRA and special enrollment periods be updated? What format, and how much detail is appropriate, given that the extension period is fluid and will be short-lived? What should be done for people who are already in election periods and were previously informed of a deadline that has now been extended?
- Whether and how past actions can be undone. For example, if an individual's COBRA coverage was previously canceled for not paying premiums, can it be reinstated? What happens if an eligible COBRA beneficiary already obtained coverage somewhere else?

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