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COBRA Election and Payment Periods: Does One Year of "Tolling" Really Mean One Year?

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Remember the DOL/Treasury relief that tolled the COBRA election and payment deadlines for up to one year due to the COVID-19 pandemic (referred to below as "Tolling Relief")? If you have been wondering whether, under that relief, a qualified beneficiary may wait one year to elect COBRA and then wait another year to make their initial premium payment (assuming the COVID-19 "outbreak period" has not ended sooner), the IRS has finally answered your question. (The answer is "no.")

In Notice 2021-58, the IRS (with the blessing of DOL and HHS) clarified that the one-year Tolling Relief periods for COBRA elections and initial premium payments run *concurrently* not consecutively. That means that a qualified beneficiary generally will have only one year of total disregarded time for the election and initial payment periods (subject to the ambiguities noted below). The IRS illustrated this point as follows:

- If a qualified beneficiary elected COBRA coverage *outside of* the normal 60-day COBRA election period (*i.e.*, the qualified beneficiary took advantage of the Tolling Relief when electing COBRA coverage), the tolled period for making the initial premium payment begins on the date the COBRA notice was provided, and the payment deadline is one year and 105 days later (*i.e.*, the 60-day election period plus the usual 45-day period in which to make the initial payment).
- If the qualified beneficiary elected COBRA *within* the normal 60-day COBRA election period (*i.e.*, the qualified beneficiary did *not* take advantage of the Tolling Relief when electing COBRA coverage), the tolled period for making the initial premium payment begins on the date of the COBRA election, and the payment deadline is one year and 45 days later (*i.e.*, to account for the usual 45-day period in which to make the initial payment).

However, just to keep everyone on their toes, the IRS included an exception to the above rules, in the form of "transition relief." Under the transition rule, a plan may not require a qualified beneficiary to make an initial COBRA premium payment before November 1, 2021, as long as the payment is made within one year and 45 days of the individual's COBRA election. This is the IRS's way of protecting individuals who may have thought they had a longer period in which to make their first COBRA payment (i.e., a *new* one-year tolling period applicable to their initial payment after delaying their COBRA election via the Tolling Relief).

With regard to payment deadlines for periods not covered by the initial COBRA premium payment (i.e., generally, premiums due each subsequent month), the IRS Notice indicates that the payments are due one year from the date that the payment originally would have been due, taking into account the normal 30-day grace period. In addition, the Notice reminds us of the earlier guidance stating that the Tolling Relief does *not* apply to elections of ARPA's no-cost COBRA coverage.

Before anyone assumes that the IRS clarification is entirely clear, it is worth pointing out a couple of ambiguities introduced in the IRS Notice. The Notice provides that individuals have to make the initial COBRA election by "the earlier of (1) one year and 60 days after the individual's *receipt* of the COBRA election notice, or (2) the end of the Outbreak Period." Why did the IRS Notice refer to the date a COBRA notice was "received" as opposed to what appears in the immediately prior paragraph in the Notice where the IRS referred to the date COBRA notices were "provided"? We do not know. It is clear that existing COBRA guidance measures periods from when notices were provided, not received.

Here's another ambiguity. What happens if a plan administrator delayed sending COBRA notices due to the Tolling Relief? The IRS Notice seems to suggest that each party involved in COBRA gets a separate one-year tolling period. There is one tolling period for qualified beneficiaries and one tolling period for plan administrators. So if the plan administrator provided the COBRA notice late, as permitted by the Tolling Relief, there could be a disregarded period of longer than one year in total for the qualified beneficiary.

The IRS Notice contains numerous examples illustrating how these rules work in real life, and is a must-read for anyone who is responsible for determining whether a COBRA election or payment is timely in these tolled times.

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