

U.S. Department of Labor Issues Guidance on Employee Benefits and COVID-19 Outbreak

On April 28, 2020, the Employee Benefits Security Administration (EBSA), a subdivision of the U.S. Department of Labor (DOL), issued two items of guidance relating to employee benefits and the COVID-19 outbreak.

- [EBSA Disaster Relief Notice 2020-01](#) (EBSA Notice)
- A [final rule](#) issued jointly by the DOL and Department of Treasury (Joint Notice)

This guidance collectively provides helpful relief to plan sponsors, participants and beneficiaries in connection with a variety of employee benefits-related compliance deadlines and requirements. However, some of the changes will complicate the administration of employee benefit plans for plan sponsors and administrators already struggling with the myriad issues created by the COVID-19 pandemic.

EBSA Notice

The EBSA Notice provides guidance and relief regarding a number of employee benefit requirements under the Employee Retirement Income Security Act (ERISA).

Notice and Disclosure Requirements

In accordance with the authority granted to the DOL by the recently enacted CARES Act, the DOL has announced the extension of the deadlines for furnishing required notices and disclosures to employee benefit plan participants, beneficiaries and other affected persons required by the Employee Retirement Income Security Act (ERISA). Pursuant to this guidance, an employee benefit 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 would otherwise be required to be furnished during the period that began on March 1, 2020 and ends 60 days after the announced end of the COVID-19 National Emergency (EBSA Relief Period). This relief is available provided that the plan and responsible fiduciary act in good faith and furnish the notice, disclosure or document as soon as administratively practical under the circumstances.

The EBSA Notice specifically provides that good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages and continuous access websites. This is a temporary relaxation of the DOL's otherwise applicable guidance on the use of electronic communications to provide notices, disclosures and documents required by ERISA.

The relief provided by the EBSA Notice applies to the furnishing of any notices, disclosures and documents required by Title I of ERISA over which the DOL has interpretive and regulatory authority, except for those notices and disclosures specifically addressed in the Joint Notice. Some of the notice and disclosure requirements covered by the EBSA Notice are:

- Summary plan descriptions and summaries of material medications
- Summary annual reports
- Benefit statements under ERISA Section 105

- Annual funding notices under ERISA Section 101(f)
- Participant-directed investment disclosures, including plan fee information and blackout notices
- Qualified-default investment alternative notices
- Notices and disclosures relating to qualified domestic relations orders
- Notices and disclosures in connection with benefit claim determinations and appeals

Distributions and Loans

The EBSA Notice also provides relief from procedural requirements associated with distributions and loans from retirement plans. Under this relief, the DOL will not treat a failure to follow procedural requirements as a failure if:

- the failure is attributable solely to the COVID-19 outbreak;
- the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
- the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively feasible.

This relief does not apply to distribution and plan loan verification procedures not within the DOL's authority. Most significantly, no relief is provided from the spousal consent rules applicable to retirement plans under the Internal Revenue Code (Code), including the requirement that a spouse's signature on a consent to waive a qualified joint and survivor annuity form of benefit be witnessed by a plan representative or notary public.

CARES Act Loan Changes

The EBSA Notice also provides relief from certain ERISA requirements regarding participant loans under the CARES Act. The CARES Act amended the Code to increase the limit on plan loans for individuals affected by COVID-19 to the lesser of \$100,000 or 100% of the participant's account balance (under normal rules, participant loans are limited to the lesser of \$50,000 or 50% of the participant's account balance). However, the CARES Act did not amend the provisions of ERISA that apply to participant loans, namely rules regarding adequate security and the availability of loans on a reasonably equivalent basis. In addition, the CARES Act provides that any repayment of a plan loan made to a qualified individual that is due during the period from March 27, 2020 to December 31, 2020 may be delayed for up to one year. The EBSA Notice provides that the DOL will not treat any person as violating the ERISA plan loan requirements solely because (1) the person made a plan loan to a qualified individual during the loan relief period under the CARES Act or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act.

Timely Remittance of Participant Contributions and Loan Repayments

ERISA provides that amounts withheld from an employee's wages for contribution to a retirement plan or repayment of a plan loan constitute plan assets and must be remitted to the plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets. The EBSA Notice recognizes that some employers may not be able to forward participant contributions and withholdings to a plan within the prescribed time period due to the COVID-19 outbreak. During the EBSA Relief Period, the DOL will not take enforcement action with respect to a temporary delay in forwarding such payments or contributions to a plan provided that the failure is attributable to the COVID-19 outbreak. However, the DOL cautions that employers must act reasonably, prudently and in the interests of employees to comply as soon as administratively practicable under the circumstances.

No Additional Form 5500 or Form M-1 Extensions

The EBSA Notice does not provide any additional relief from the Form 5500 and Form M-1 filing deadlines (prior guidance provided for an extended July 15, 2020 due date for Forms 5500 that were otherwise due between April 1, 2020 and July 14, 2020). The July 31, 2020 Form 5500 due date for a calendar year plan has not been extended. However, such plans have the option to extend the due date until October 15, 2020 under the normally applicable rules. The EBSA Notice indicates that the DOL is continuing to monitor the COVID-19 outbreak and may issue further guidance if deemed appropriate.

Joint Notice

The Joint Notice provides employees and their beneficiaries with extended deadlines associated with several employee benefit plan actions. While these rules provide relief to individuals, they will complicate the administration of the affected employee benefit plans by requiring potentially lengthy extensions of certain deadlines.

The Joint Notice requires that the period from March 1, 2020 until 60 days after the announced end of the COVID-19 National Emergency (Outbreak Period) be disregarded for purposes of the following employee benefits plan deadlines:

- the deadline (generally, 30 days) to request special enrollment under a group health plan;
- the deadline for a health plan participant or qualified beneficiary to notify the plan administrator of the occurrence of certain COBRA qualifying events;
- the 60-day election period for COBRA continuation coverage;
- the due date for making COBRA premium payments;
- the deadline by which an individual may file a claim for benefits under a plan's claims procedure;
- the deadline by which a claimant may file an appeal of an adverse benefit determination under the plan's claims procedure;
- the deadline by which a claimant may file a request for external review after receipt of an adverse benefit determination or final internal adverse benefit determination; and
- the deadline by which a claimant may provide information to perfect a request for external review following a finding that the request was not complete.

In addition, the Joint Notice provides that the Outbreak Period is disregarded when determining the date by which the COBRA election notice must be provided to a qualified beneficiary by the plan administrator.

The Joint Notice provides several examples of how the required extensions operate. These examples assume that the end of the COVID-19 National Emergency is April 30, 2020 and that, as a result, the end of the Outbreak Period is June 29, 2020 (the 60th day after the end of the COVID-19 National Emergency). However, the actual Outbreak Period will be determined based upon the announced end of the National Emergency. The Joint Notice notes that the end of the National Emergency may vary for different parts of the country and that, as a result, different parts of the country may have different Outbreak Periods.

Two of the examples from the Joint Notice relating to COBRA continuation coverage are summarized below. However, for the purposes of these examples, June 30, 2020 is assumed to be the announced end of the COVID-19 National Emergency. Thus, for these examples, the end of the Outbreak Period is August 29, 2020.

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Electing COBRA

Employee A experiences a COBRA qualifying event as a result of termination of employment with Employer X. Employee A is provided with a COBRA election notice on April 1, 2020. Ordinarily, Employee A would have 60 days after receiving the COBRA election notice to elect COBRA continuation coverage. However, the Outbreak Period (March 1, 2020 to August 29, 2020) is disregarded when determining Employee A's election period. As a result, the last day of Employee A's COBRA election period is 60 days after August 29, 2020, which is October 28, 2020.

Paying COBRA Premiums

On March 1, 2020, Employee B was receiving COBRA continuation coverage under Employer Y's group health plan. Monthly premium payments are due by the first of the month (Employee B is beyond the 45-day period after COBRA was elected). Employee B made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of September 1, 2020, Employee B has made no premium payments for March, April, May, June, July or August.

Ordinarily, to be timely, COBRA premium payments must be made within 30 days of when they are first due (after the initial 45-day period following the COBRA election). However, in calculating the 30-day period, the Outbreak Period is disregarded and payments for March, April, May, June, July and August are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period. Accordingly, the premium payments for these six months are all due by September 28, 2020. Employee B is eligible to receive coverage under the terms of Employer Y's plan during this period even though some or all of the premium payments may not be received until September 28, 2020. The plan may not deny coverage during this period and, if Employee B makes the required premium payments by September 28, 2020, must make retroactive payments for benefits and services received by Employee B during this period.

The Joint Notice also provides examples of how the other deadlines noted above are affected by the Outbreak Period. In each case, the Outbreak Period is disregarded when determining the applicable deadline, effectively extending the otherwise applicable due date beyond the end of the Outbreak Period.

The administration of these extended deadlines will present challenges for plan sponsors. Employers will need to coordinate with their insurers and/or service providers to ensure that affected participants and beneficiaries are afforded the benefit of the extended deadlines. Notices and communications regarding the deadlines may need to be revised to inform participants and beneficiaries of the extensions.

If you have any questions about this information memo, please contact [Aaron Pierce](#), any [attorney](#) in our [Employee Benefits and Executive Compensation Practice](#) or the attorney at the firm with whom you are regularly in contact.



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