



Employee Benefits & Executive Compensation ADVISORY ■

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How Is COBRA Affected by the COVID-19 Outbreak Period?

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On February 26, the Department of Labor (DOL) released [EBSA Disaster Notice 2021-01](#), which clarifies the application of the one-year limit in ERISA Section 518 (and IRC Section 7508A) to the “Outbreak Period” established by the DOL and IRS in a [2020 Joint Notice](#). The Outbreak Period is the period beginning March 1, 2020 and ending 60 days after the announced end of the COVID-19 National Emergency that plans must disregard when determining the due dates of certain actions by plan participants and other individuals.

Background

Back in early May 2020, the DOL and the Department of Treasury (the “agencies”) issued the 2020 Notice. The 2020 Notice provided relief for the following actions and deadlines for plan participants and other individuals due to the COVID-19 pandemic:

- The 60-day period to elect COBRA.
- The 45-day grace period to make initial COBRA premium payments and the 30-day grace period to make subsequent payments.
- The date for individuals to notify the plan of certain COBRA qualifying events or a determination of disability.
- The 30-day period (or 60-day period, if applicable) for HIPAA special enrollment rights.
- The date for filing benefit claims and appeals for welfare and retirement plans subject to ERISA.
- External review requests for non-grandfathered health plans subject to the Affordable Care Act.

In determining the due dates for any of these actions, employee benefit plans were required to disregard the Outbreak Period when determining the due dates for these actions. In essence, plans have been required to stop counting such time during the Outbreak Period. When the Outbreak Period ends, plans can resume counting.

The One-Year Limitation

Although the National Emergency continues, questions were raised in February 2021 regarding the end of the Outbreak Period. This is because the 2020 Notice was a product of ERISA Section 518 and IRC Section 7508A, which allow the agencies to prescribe a period “of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed.”

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The 2020 Notice acknowledged the applicability of the one-year limitation, but it did not clarify how that one-year limit would be applied. Since the Outbreak Period started on March 1, 2020, many believed that the Outbreak Period would end February 28, 2021 even though the President has not yet declared an end to the National Emergency. And, if it ended February 28, 2021, plans could resume counting on March 1, 2021 to determine the due dates of any of the actions affected by the Outbreak Period.

2021 Notice

On February 26, 2021, the DOL issued the 2021 Notice to clarify how the one-year limitation is applied to the Outbreak Period. Much to the dismay of many plan sponsors and administrators, the agencies did not apply the one-year limitation to the Outbreak Period itself. Instead, the DOL indicated that the one-year limitation is applied to individual periods affected by the Outbreak Period. More specifically, the 2021 Notice provides that the period for disregarding days in an individual's affected period ends the earlier of one year from the date that an individual was "first eligible for relief" or 60 days after the announced end of the National Emergency (i.e., the end of the Outbreak Period). Thus, the 2021 Notice creates Outbreak Periods for each affected action. The 2021 Notice further states that once the Outbreak Period ends for a particular action, plans may resume counting when determining the due date for that action.

Here are a few examples of how this will work:

Example #1: Bob's COBRA election period began February 15, 2020, and the due date for electing COBRA would have been April 15, 2020; however, the Outbreak Period began 14 days into his 60-day election period. The Outbreak Period related to Bob's COBRA election period will end on the earlier of one year from March 1, 2020, the date that Bob first became eligible for relief for his COBRA election period, or 60 days after the end of the National Emergency. In this example, the Outbreak Period for Bob's COBRA election period ends February 28, 2021, and Bob's plan can start counting his COBRA election period again on March 1, 2021. Since Bob had 46 days remaining in his 60-day election period when the Outbreak Period began, Bob's plan can require Bob to make his COBRA election by April 15, 2021.

Example #2: Joe's COBRA election period began May 1, 2020 and would have ended June 29, 2020; however, all 60 days of Joe's election period fell during the Outbreak Period. Assume that the National Emergency is still ongoing in June 2021. Joe's Outbreak Period for his COBRA election period will end April 30, 2021—one year after Joe first became eligible for relief. This means Joe's plan can start counting the 60-day period on May 1, 2021. Joe's plan can require him to elect COBRA by June 29, 2021.

Practice Pointer: The DOL provides two COBRA election examples that appear to provide a shortcut for applying the one-year limitation that would apply to all affected events. Instead of measuring the one-year period from the date the individual first became eligible for relief and then adding the days that were disregarded during the Outbreak Period to determine the new due date, plans can identify the new due date simply by adding one year to the otherwise applicable due date. For example, you can also determine Joe's new due date under the one-year limitation by measuring the one-year period from June 29, 2020. As it was above, the new due date for electing COBRA is June 29, 2021. If the Outbreak Period ends in its entirety before the one-year limitation is reached, then plans would add the disregarded days to the end of the Outbreak Period.

Example #3: Rhonda was on COBRA when the Outbreak Period began on March 1, 2020. As of that date, Rhonda stopped paying her COBRA premiums. The Outbreak Period for the March 2020 premium ends on the earlier of one year from March 1, 2020 or the 60 days after the National Emergency ends. Since the National Emergency is ongoing, the Outbreak Period for the March 2020 premium ended February 28, 2021. This means that the plan can require

Rhonda to pay her March 2020 premium by March 31, 2021. However, if Rhonda has not been notified about the end of her individual Outbreak Period, the plan may want to make an accommodation and provide Rhonda a reasonable period of time after she receives notice to make a payment.

Practice Pointer: Does the plan have to give Rhonda until April 30, 2021 to pay her April 2020 premium (if she wants April 2020 coverage) or can the plan require her to pay April 2020 and any other coverage months in 2020 that she wants by March 31, 2021? While there is little doubt that the plan can require Rhonda to pay her March 2020 premium by March 31, 2021, it is unclear how the one-year limitation is applied to other months because it is not clear when Rhonda first became eligible for relief for the other months that were not paid. Conservative sponsors will measure the one-year period separately for each monthly premium that was not paid. It is interesting to note that the DOL provides an example in the 2020 Notice indicating that when the Outbreak Period ends, a qualified beneficiary must pay by the end of the first month after the Outbreak Period ends all premiums for all months that he or she desires that were not paid during the Outbreak Period.

Example #4: ABC's run-out period for the 2019 plan year would have ended March 31, 2020; however, 31 days of that run-out period—March 1, 2020 through March 31, 2020—were disregarded since it fell during the Outbreak Period. The Outbreak Period for the run-out period for the 2019 plan year will end February 28, 2021, which means ABC can start counting again on March 1, 2021. Thus, ABC can require participants to submit claims incurred in 2019 by March 31, 2021.

Practice Pointer: Unlike COBRA elections or premiums, the run-out period for health FSAs is not connected to a participant-specific date. In our example, all claims incurred during 2019 would have otherwise been required to be filed by no later than March 31, 2020, irrespective of when in 2019 the claims were incurred.

Prudent Fiduciary Actions Under the 2021 Notice

The 2021 Notice states that plan fiduciaries:

should take reasonable steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames. For example, where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period.

The DOL goes on to note that plans should make reasonable accommodations to prevent the loss of benefits and that plan disclosures may need to be revised if they "failed to provide accurate information regarding the time in which participants and beneficiaries were required to take action"—specifically mentioning COBRA election notices and claims procedure notices. Also, the DOL indicates that fiduciaries should "consider ways to ensure that participants and beneficiaries who are losing coverage under their group health plans are made aware of other coverage options that may be available to them, including the opportunity to obtain coverage through the Health Insurance Marketplace in their state."

In light of the fiduciary considerations posed by the DOL, employers, plans, and third-party administrators (TPAs) should consider the following action plan:

- Revise current COBRA materials and adverse benefit determination notices to reflect the one-year limitation.
- Coordinate with COBRA administrators, TPAs, and insurers to see how they anticipate addressing the 2021 Notice and any individualized disclosures.

- Likely, at a minimum, a communication should be sent to all individuals who had a COBRA qualifying event from January 1, 2020 (60 days before the beginning of the Outbreak Period) explaining how the one-year limitation period is applied.

Practice Pointer: If the one-year limitation for an individual expired before the notification was sent (or shortly thereafter) and an individual wishes to make an otherwise untimely COBRA election or delinquent COBRA premium payment, then an accommodation should likely be made assuming the applicable insurer or stop-loss carrier agrees.

- Similarly, at a minimum, a communication should go out to all affected current and former participants informing them of the calculation of applicable periods for claims and appeals, external review requests, and HIPAA special enrollment rights in addition to the COBRA deadlines.
- All applicable websites (employer, COBRA administrator, and TPA) should be updated with this new guidance.
- For COBRA, thought should be given on how this notice might be coordinated with notification concerning COBRA subsidies that are part of the recently enacted American Rescue Plan Act of 2021.

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