

ALSTON & BIRD



HEALTH & WELFARE PLAN LUNCH GROUP

June 4, 2020

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IRS Notices 2020-29 and 2020-33

- Optional changes for:
 - Cafeteria plan elections
 - FSA elections
 - Grace period
 - Carryover

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Notice 2020-29 – Cafeteria Plan Elections

- Not a Free For All
 - Prospectively enroll employee or family member in employer sponsored health coverage without an event;
 - Prospectively change to another health plan option of the same employer without an event;
 - Prospectively revoke health coverage but only if attestation is provided that the employee is or will be enrolled in other health coverage not sponsored by the employer.
- Amendment required by December 31, 2021

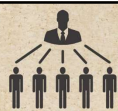
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Notice 2020-29 – FSA Elections

- Prospectively enroll, increase, decrease, or revoke FSA elections for any reason.
- By plan design employers may limit decrease/revoke to the FSA reimbursement already provided (i.e. if elected 2500 and have received 2000, you may limit decrease to 2000 so that salary reductions will cover the reimbursement).
- Although salary reductions must be prospective, any increase may be used for amounts incurred in the plan year prior to the election change.
- Also, as salary reduction contributions are changed, changes likely will need to be made to the available FSA coverage level.
 - IRS guidance on how to address health FSA coverage levels post mid year election changes is not clear (split coverage period, etc.).
- Changes may not be retroactive (i.e. no refunds).
- Amendment required by December 31, 2021.

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Notice 2020-29 – Grace Period

- Extension of Grace Period for Plan Year or grace period ending in 2020.
 - This means not applicable for 2019 CY plan where plan does not have grace period.
- Grace period ending in 2020 may be extended through December 31, 2020.
- A plan year ending in 2020 without a grace period may extend the plan year through December 31, 2020.
- The extension of the Plan year through December 31, 2020 is allowed even if a plan also has a carryover.
 - Thus effectively allowing a combination of the grace period and carryover for 2020.
- An employer that adopts this rule for a general health FSA will make an employee ineligible for an HSA through at least December 31, 2020.
 - Consideration should be given to ending the grace period as of November 30, 2020 to allow HSA eligibility and a full contribution through the December full contribution rule.

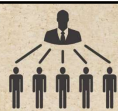
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Notice 2020-33 - Carryover

- Carryover amount is increased to \$550 for plan years beginning on or after January 1, 2020.
 - Thus, the carryover for the 2019 plan year that is used in 2020 is still 500.
- Plan amendment required by December 31, 2021.

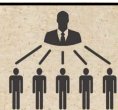
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IRS/DOL Joint Notice

- Joint Notice issued by DOL/IRS on April 28, 2020.
 - HHS was consulted and agrees; exercise enforcement discretion but extension of certain deadlines not mandatory for non-federal governmental plans.
 - Extends certain time periods to the end of the “Outbreak Period.”
- Employee/Participant extensions **mandatory** as opposed to the discretionary changes to cafeteria plans under IRS Notice 2020-29.
- FAQs issued along with the Joint Notice.

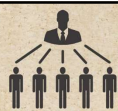
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Timeframe Extensions—General Rule

- When applying certain time frames, the period March 1, 2020 through a date that is 60 days after the end of the National Emergency (“Outbreak Period”) is disregarded.
 - Unclear when National Emergency will end.
 - Additional guidance is promised if the National Emergency ends at different dates for different parts of the country.
 - Cannot extend beyond a year under ERISA Section 518.
 - Distinct from Public Health Emergency (scheduled to end July 25).
 - Effective immediately.
 - Technically has a retroactive effect to March 1, 2020.

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Timeframe Extensions

- 30/60 day HIPAA special enrollment periods (only group health plans that provide other than excepted benefits).
- 60-day COBRA election period.
 - Qualified beneficiaries must elect COBRA within 60 days from the later of the date that coverage is lost as a result of the event or the date the notice is received.
- 45-(initial) and 30-day (subsequent) COBRA premium deadlines (group health plans).
 - Qualified beneficiaries have 45 days from the date COBRA is elected to pay the first premium.
 - Qualified beneficiaries have a 30 day grace period each month thereafter to pay the monthly COBRA premium.

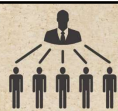
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Timeframe Extensions

- COBRA Election Notice from Plan Administrator.
- COBRA Qualifying Event Notice from Qualified Beneficiaries.
 - Qualified Beneficiaries must provide notice of the following qualifying events within 60 days of the event to preserve right to COBRA or an extension of COBRA coverage (if a 2nd qualifying event):
 - Divorce
 - Child ceasing to be a dependent
 - Covered Employee (retiree)'s Medicare Entitlement
- 60 day period for Qualified Beneficiaries to provide a notice of a determination of disability by the Social Security Administration.

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Timeframe Extensions

- Time period for filing claims and appeals under the plan in accordance with ERISA Section 503.
 - Includes Health FSA/HRA runout periods.
- Time period for requesting external review and providing additional information for external review under ACA (only non-grandfathered group health plans).

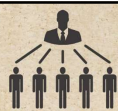
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Notices/Disclosures/Communications

- What does the Joint Notice require?
 - Joint Notice does not prescribe any communications or disclosures regarding the extensions.
 - Fiduciary duty dictates notice must be furnished.
 - EBSA Notice 2020-01 provides some disclosure relief if acting in good faith.
- Documents/notices that may be affected:
 - HIPAA special enrollment notice
 - General COBRA Notice
 - SPD
 - Welfare plan documents
 - Cafeteria plan documents
 - Cafeteria Plan
 - Health FSA
 - COBRA Election Notice
 - EOBs from vendors

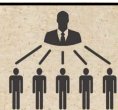
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Plan of Action

- Minimum defensible plan (as soon as practicable) :
 - Post summary of changes on benefits website and notify participants (e.g. email or postcard) that extensions to certain time periods are on the website)
 - Reach out to participants and qualified beneficiaries whose election period and/or premium payment period and/or appeal period have already expired during this Outbreak Period
 - Website posting likely not accessible to qualified beneficiaries
 - Reach out to vendors and carriers
 - Standard approach vs. custom approach?
 - Will there be additional fees?

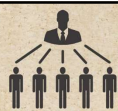
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Plan of Action: COBRA

- Complete COBRA Election Notice as usual but provide supplement explaining timeframe extensions
 - Why not revise notices?
- What about those whose election deadline or COBRA premium deadline would otherwise fall within the Outbreak period but did not receive the supplemental notice?
- Best practices is to send a postcard.
 - Deadlines for electing COBRA coverage and paying premiums have been suspended during the COVID-19 Outbreak Period beginning March 1, 2020
 - We do not know, at this point, when the Outbreak Period will end.
 - If you would have otherwise been required to make a COBRA election or submit a premium payment during the Outbreak Period and failed to do so you may have more time.
 - For more information please contact (telephone number and website).

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Plan of Action: COBRA

- COBRA regulations have not changed for coverage prior to election and payment of initial premium.
 - Two options
 - No coverage but retroactively reinstate.
 - Coverage but retroactively terminate.
 - Most are electing the first option.
 - Coordination carriers is critical (fully insured and stop loss).
 - Many previously only allowed 60-90 day retroactive reinstatement.
 - Unclear whether Joint Notice binds fully insured carriers.
 - Anecdotally we hear that most will reinstate in accordance Joint Notice.
 - Communication with healthcare providers.
 - Regulations provide that the plan must inform the provider that there is no current coverage but coverage can be reinstated retroactively if there is an election and payment of the initial premium.
 - Most fully insured plans and ASOs just have covered/not covered indicators (nothing for pended).

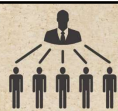
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Plan of Action: COBRA

- Failure to pay monthly premium that would have been due but/for the extension.
 - Joint Notice provides that the plan “may not deny coverage, and may make retroactive payments for benefits and services received by the participant.”
- Appears to allow coverage to be suspended (not denied) until monthly premiums are actually paid.
 - Communications to the qualified beneficiary of the coverage “suspension”
 - This is not a notice of early termination of COBRA coverage.
 - Communications with health care providers who inquire about coverage.
 - Most insurers/ASOs do not have a “suspended/pended” indicator.

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Plan of Action: COBRA

- COBRA election period or premium grace period begins before March 1 but would otherwise end during the Outbreak Period.
 - Example. Bob was sent a COBRA Election Notice on January 14th and election would have otherwise been due on March 14th.
 - Under the Joint Notice Bob would have 14 days after the end of the Outbreak Period to elect COBRA.
- If a due date would otherwise fall within the Outbreak Period some COBRA administrators are allowing the full election or grace period after the end of the Outbreak Period
 - In this example Bob would be provided 60 days to make an election after the end of the Outbreak Period instead of 14.
- Make sure carrier (fully insured or stop loss) agrees to provide coverage beyond what is required in the Joint Notice.
- Communication to qualified beneficiaries.
- Similar Issues with HIPAA special enrollment and not pro-rating days.

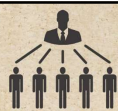
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Plan of Action: Plan Documents/SPDs/SMMs/EOBs

- EBSA Notice 2020-01 provides some disclosure relief if acting in good faith.
 - In the short-term website posting/postcards.
- SMM is not due until 210 days after the end of the plan year.
 - Outbreak Period will presumably be over by then for most plans.
- Best practice is still to send an SMM and amend plan documents.
 - In some plan designs, SMMs also serves as a plan amendment.
- Reach out to carriers/TPAs/ASOs with regard to EOBs and time frames for appeals disclosed in the EOB.

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Insurer Refunds

- Some health and welfare insurers are issuing premium refunds due to the under utilization of benefits caused by the coronavirus-related closures.
- If the refund is composed, in whole or in part, of ERISA plan assets, the refund must be handled in accordance with ERISA's general fiduciary standards.

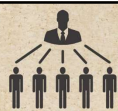
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Does the Refund Contain ERISA Plan Assets?

- Is the policy in the name of the plan or the plan's trust? If yes, then all of the refund is a plan asset in the absence of plan language to the contrary.
- Is the policy in the name of the employer? If yes, then the employer may be able to keep some of the refund depending on the policy and plan language.
- If the plan language is silent, then the DOL looks to the relative portion of the premium paid by employees and the employer during the period that gave rise to the refund.

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Plan Asset Guidelines

IF	THEN
The plan or plan trust is the policyholder	The entire refund is plan assets
The employer pays the entire premium	No part of the refund is plan assets; the employer is entitled to the entire refund
The participants pay the entire premium	The entire refund is plan assets
The participants and employer each pay a fixed percentage of the premium	The percentage of the refund equal to the percentage of the premium paid by participants is plan assets
The employer pays a fixed amount and participants pay the rest	The refund is plan assets, except to the extent the refund exceeds the total amount paid by participants
Participants pay a fixed amount and the employer pays the rest	The refund belongs to the employer, except to the extent the refund exceeds the total amount paid by the employer

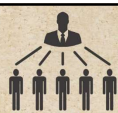
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General ERISA Fiduciary Standards

- Most recent guidance is DOL Technical Release (TR) 2011-04 on MLR rebates, which restates general guidance on ERISA fiduciary principles.
- The plan fiduciary determines the allocation method among plan participants and the particular use of the refunds, *e.g.*, to reduce premiums, make cash distributions, or for other permitted plan purposes, in accordance with ERISA's general prudence standard.
- The plan fiduciary should take into account and document the relative costs and benefits of different approaches.
- If there is already a trust for the plan, then the plan assets must be placed in a trust.
- If there is not a trust, then TR 2011-04 does not require the assets be placed in trust if the cafeteria plan safe harbor applies under TR 92-01.

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How to Allocate the Plan Assets

- Based on the TR 2011-04, as well as prior guidance, the following general principles apply:
 - No requirement to allocate precisely among plan participants based upon their premium payments.
 - Allocation method must be reasonable, fair, objective, and cannot benefit a plan fiduciary who is also a plan participant at the expense of other participants.
 - May be allocated to only current plan participants if the cost of allocating a portion of the refund to former plan participants is unreasonable.
 - General rule is to allocate the refund among the participants covered by the policy to which the refund relates.
 - Not required if the fiduciary determines under the circumstances that it is not prudent or in the best interests of plan participants.
 - It may be prudent in some circumstances to allocate the refund for all participants in a plan, not just those in the option that generated the refund.

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How to Use the Plan Assets

- TR 2011-04 does not contain specific rules or safe harbors regarding permitted uses.
- Refunds may be distributed in cash, used to reduce future premiums, enhance benefits, or for any other permissible plan purposes consistent with ERISA fiduciary requirements.
- The amount of the refund will be a significant factor in determining an appropriate use.
 - Administrative costs of reducing future premiums or distributing cash refunds are likely to be prohibitive and other uses may be permissible.
 - May be appropriate to enhance benefits or offer a wellness benefit.
- Cannot use refunds from one plan for the benefit of participants in another plan.

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Tax Considerations from IRS FAQs for MLR Rebates

IF	THEN
Employee portion of premium is pre-tax	<ul style="list-style-type: none"> Any cash refund is taxable If there is a reduction in premium cost (<i>i.e.</i> premium holiday) the increased portion in salary is taxable
Employee portion of the premium is after-tax	<ul style="list-style-type: none"> Any cash refund or reduction in premium cost is generally is not subject to tax, exceptions include where an employee has previously deducted the premium on his or her federal income tax return

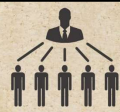
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Thank you!



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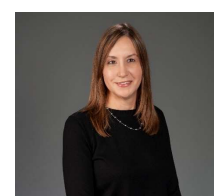
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