

May 13, 2020

We have heard from Council members that COBRA administrators and vendors have widely varying interpretations of the Department of Labor's guidance on extension of COBRA deadlines to elect coverage and to pay premiums. Our counsel at Steptoe & Johnson spoke with a DOL official today to seek some clarity. Below is what they learned.

By way of background, DOL issued guidance in mid-April that essentially tolls existing statutory deadlines for electing COBRA coverage (generally, 60 days) and making COBRA premium payments (generally, 45 days from election for the first payment and then prescribed grace period thereafter). Under the guidance, for purposes of determining/calculating those deadlines, plans must **disregard** the period from March 1, 2020 until 60 days after the announced end of the National COVID-19 Emergency. This applies to all qualified beneficiaries, wherever located.

In a nutshell, current COBRA rules allow plans to:

- Notify healthcare providers of a beneficiary's COBRA status (e.g., "has not yet elected coverage and/or paid premiums, but still has the opportunity to do so and will be covered when timely payment is made;");
- "Pend" the beneficiary's claims until they satisfy the election and premium payment requirements; and
- Then – to the extent the beneficiary elects and pays within the timeframe they're supposed to – retroactively pays any claims back to when COBRA eligibility was triggered.

The DOL guidance did not change these rules. It just dramatically extended the timeframe in which elections can be made and premiums can be paid.

Given that the National Emergency could persist for a long period of time, questions have arisen about what plans must cover/pay during this "tolling" period and what should be communicated to providers about beneficiaries' coverage status. Council members report that COBRA administrators and vendors are taking very different views here.

Today, one DOL official clarified:

- Nothing in the guidance is intended to revise or undo any existing COBRA rules, except calculation of the election and premium payment deadlines. Everything else stays in place, including the permissible "pending claims" approach described above, so long as proper notices are given to providers by plans in accordance with current rules and guidance. This "pending" approach applies to individuals who elected COBRA coverage pre-crisis, but take advantage of delaying premium payments during the tolling period.

- Alternatively, as allowed under COBRA rules, plans may pay claims during the tolling period and notify providers that a beneficiary is covered but that coverage will be retroactively terminated if the beneficiary ultimately does not make timely payment.
- DOL is not requiring employers to issue new COBRA notices (or reissue old notices) in response to this guidance; they do not want to put an additional burden on employers. Nothing prohibits employers, however, from issuing notices with this new information and/or directing individuals to DOL's online resources.
- In terms of ending the tolling period, DOL expects that it will be tied to a Federal announcement and will not be state-by-state. It is unclear, however, if/how DOL will handle states that keep an emergency declaration in place after the federal emergency is declared over.
- At this time, DOL is gathering questions and feedback from stakeholders and evaluating whether additional guidance/FAQs should be issued. They do not appear to have any immediate plans to issue further guidance on the issues described above, but did say that they are hearing from many people on these topics.