



AMERICAN BENEFITS COUNCIL

May 1, 2020

SUMMARY OF COVID-19-RELATED REGULATORY GUIDANCE DELAYING CERTAIN PARTICIPANT, PLAN DEADLINES

In a series of documents released on April 28, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA), along with other agencies, announced timing extensions to a host of deadlines for plans and participants that apply during the coronavirus/COVID-19 outbreak period.

The documents posted were:

- [A notification of relief](#) (previously labeled as “final regulations,” jointly issued with the U.S. Treasury Department and the Internal Revenue Service)
- [EBSA Disaster Relief Notice 2020-01: Guidance and Relief for Employee Benefit Plans Due to COVID-19 \(Novel Coronavirus\) Outbreak](#) (issued in coordination with the Treasury Department, the IRS and the U.S. Department of Health and Human Services)
- [DOL COVID-19 FAQs for Participants and Beneficiaries](#)
- [A news release on the guidance package](#)

Many of the forms of relief provided in Notice 2020-01 had been requested by the Council in conversations with agency personnel, as memorialized in a March 26 [letter to Treasury/IRS/DOL/PBGC requesting retirement-related emergency relief](#).

However, the notification of relief, issued at the same time, provides extensions that the Council had not requested and which raise a number of administrative and other issues for plan sponsors that are described more fully below. Although the regulations provide extensions for participants regarding, among other things, election of and payment for COBRA, the guidance does not help make COBRA more affordable for participants.

Below we summarize the regulations and Notice 2020-01. As noted above, DOL also released FAQs that do not provide new guidance but instead provide answers to questions participants may have during this crisis related to their health and retirement plans.

'NOTIFICATION OF RELIEF' REGULATIONS REGARDING PARTICIPANT AND PLAN DEADLINE EXTENSIONS

On April 28, DOL posted on its website [a rule, characterized as a “notification of relief.”](#) The rule, which is a joint rule of DOL and Treasury, provides extensions with respect to a number of deadlines for plan participants and beneficiaries and, on one item, for group health plans and their sponsors/administrators. A number of aspects of the rule are relevant only to participants in group health plans, but other aspects are relevant to participants in disability, welfare and pension plans as well. The rule is effective immediately and not subject to notice and comment.

DOL and Treasury have provided [similar extensions](#) in recent crises, including following Hurricane Maria in 2017. However, the current context is different, and due to the broad applicability of these extensions their retroactive effect and their potentially substantial duration, these regulations may raise issues for plans and plan sponsors more significant than those in previous crises.

Duration of Relief

The rule provides that in determining certain plan timeframes, the duration of the “outbreak period” is to be disregarded. The outbreak period is the period from March 1, 2020 until 60 days after the end of the national emergency or another date announced by DOL and Treasury in a future notice. The rule provides that, to the extent there are different outbreak period end dates for different parts of the country, DOL and Treasury will issue additional guidance. The rule also notes that, per the statutory provisions in the Internal Revenue Code and ERISA that provide the basis for these extensions, the period required to be disregarded may not be longer than one year.

Extensions for Participants

In order to minimize the possibility of individuals losing benefits because of a failure to comply with certain pre-established timeframes, the rule requires that plans *disregard any days within the outbreak period* when determining the periods and deadlines noted below for all plan participants, beneficiaries, qualified beneficiaries and claimants, regardless of where the individuals are located.

- For group health plans, this includes:

- The 30-day period (or 60-day period, in the case of loss of Medicaid or CHIP or eligibility for premium assistance under Medicaid or CHIP) to request special enrollment in a group health plan.
- The 60-day election period for COBRA continuation coverage.
- The deadline for making COBRA premium payments.
- The date for individuals to notify the plan of a COBRA qualifying event related to the employee's divorce or a dependent child ceasing to be a dependent child, and the date for individuals to notify the plan of a determination of disability.
- The date by which a claimant may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination.
- The date by which a claimant may file information to perfect a request for external review upon a finding that the request was not complete.
- For group health plans, disability and other employee welfare benefit plans and employee pension benefit plans, this includes:
 - The date by which individuals may file a benefit claim under the plan's claims procedures.
 - The date by which claimants may file an appeal of an adverse benefit determination under the plan's claims procedures.

Plan Relief

The rule also states that because group health plans may have difficulty complying with COBRA notice obligations, the outbreak period is disregarded when determining the deadline by which a group health plan, plan sponsor and/or plan administrator must provide a COBRA election notice to participants.

Examples and Future Guidance

The rule includes a number of examples to illustrate how these rules apply, and the rule also notes that DOL and the Treasury Department are continuing to monitor the COVID-19 outbreak and may provide additional relief as warranted.

We also note that on May 1, DOL issued updated [COBRA model notices](#) and [a related FAQ](#), but those documents address the interaction of COBRA and Medicare and do not reflect changes related to the new deadline extension rule.

Health and Human Services (HHS) Coordination

The rule applies to group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the tax code. However, the rule also notes that HHS concurs with the relief specified in the rule and generally provides that HHS will adopt similar extensions for non-federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan, and their participants and beneficiaries. Further, HHS encourages sponsors of non-federal governmental plans and health insurance issuers offering coverage in connection with a group health plan to provide similar relief as in the rule to participants.

Issues

Due to the retroactive nature of the rule and the potentially significant duration of the disregarded period, this guidance raises a number of administrative and other issues for plan sponsors. For example, the extension of deadlines for electing COBRA and paying COBRA premiums, which could last anywhere from a few months to a year, could impose significant administrative burdens on plans and plan sponsors and could have a significant impact on plan costs. Also, as the rule requires days after March 1 to be disregarded, plans and plan sponsors will also need to make efforts to ensure compliance with the rule for certain deadlines which lapsed before the rule was issued (e.g., a special enrollment period election deadline of April 15).

We welcome feedback and questions on this guidance, which are helpful to inform our future efforts, including an upcoming webinar to walk through the issues and possible additional outreach to DOL and the Treasury Department to obtain clarification and address concerns we have identified.

We note that the Council has been urging Congress to pass legislation to provide a subsidy of no less than 90% of premiums for COBRA during this crisis, to allow those who lose their job to retain employer-sponsored health insurance. (For more information, see the Council's March 23 letter to Congress, as well as letters from the [Alliance to Fight for Health Care](#) and [an informal group of employers, trade associations and organized labor groups](#).)

The rule, which may result in participants paying many months of COBRA premiums at once instead of making continuation coverage more affordable, makes this proposed legislation even more important.

DOL NOTICE 2020-01

On April 28, the DOL also posted [EBSA Disaster Relief Notice 2020-01](#), which is also effective retroactively. The Council had asked for these delays in notice and disclosure deadlines and is delighted to see the relief provided in this notice. The notice was coordinated with and reviewed by Treasury, the IRS and HHS. A number of aspects of the notice are primarily relevant to retirement plans but other aspects are relevant to health and welfare plans as well.

Duration of Relief

The notice provides various forms of relief for certain actions that must be taken during the outbreak period. The “outbreak period” is the same time frame described in the rule above.

Good Faith Relief for Notice and Disclosure Deadlines

The notice provides that an employee benefit plan and the plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or other document that must be furnished during the “outbreak period” if they act “in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances.” This relief applies to notices, disclosures and other documents required by Title I of ERISA over which the DOL has interpretive and regulatory authority, including the Annual Funding Notice and quarterly benefit statements generally due April 29 and May 15 for calendar year plans, respectively.

Electronic Communication

The notice states that “good faith” acts include the use of electronic communication with participants and beneficiaries that the plan “reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.”

Verification Requirements for Plan Loans and Distributions

During the outbreak period, DOL will not treat it as a failure to meet plan loan and distribution verification requirements imposed by the terms of a plan if:

- (1) the failure is solely attributable to the COVID-19 outbreak,
- (2) the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements, *and*

- (3) the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation as soon as administratively practicable.

This relief does not apply to requirements under the jurisdiction of Treasury /IRS such as spousal consent or other statutory or regulatory requirements.

CARES Act Loans

The [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) increased the maximum loan amount available to participants affected by COVID-19 to the lesser of \$100,000 or 100% of the participant's vested benefit (from the lesser of (a) \$50,000, or (b) the greater of \$10,000 or 50% of the participant's vested benefit), and allows plans to delay certain otherwise required loan repayments in 2020 for affected participants for a period of up to one year (see the [March 26 Benefits Byte](#) for more information).

These changes raised questions about whether these loans would meet DOL requirements to adequately secure loans and to offer loans on a reasonably equivalent basis to all plan participants. The notice states DOL will not treat any person as violating Title I of ERISA, including the adequate security and reasonably equivalent basis requirements solely because (1) the person made a plan loan to a qualified individual during the loan relief period in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance, or (2) a qualified individual delayed making a plan loan repayments in compliance with the CARES Act and any published guidance.

Blackout Periods

Generally, the plan administrator of an individual account plan is required to provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period. Existing regulations provide an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing. The "outbreak period" relief applies to blackout notices required to be provided, including those required to be provided after the blackout period begins, and the DOL will not require the written determination by the fiduciary as pandemics are by definition beyond a plan administrator's control.

MEWA and Form 5500 Filings

The notice indicates that Form M-1 filings required for multiple employer welfare arrangements (MEWAs) and certain entities claiming exception (ECEs) are provided the

same filing relief extended to the Form 5500. According to prior IRS guidance, this means that any entity with a filing deadline between April 1 and July 14, 2020, will be timely if it files by July 15.

General Fiduciary Compliance Guidelines

The notice provides general fiduciary compliance guidelines, stating that “[t]he guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families ...” and “make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments ... and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.” The DOL also acknowledged “that there may be instances when plans and service providers may be unable to achieve full and timely compliance with claims processing and other requirements” and that their “approach to enforcement will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider’s principal place of business makes compliance with pre-established timeframes for certain claims’ decisions or disclosures impossible.”