

WEBINAR

Compliance with COBRA During the COVID-19 Pandemic

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Today's Speakers



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Agenda

- Employer group health plan COBRA obligations in connection with reduced hours, furloughs, layoffs and terminations.
- Overview and impact of new agency guidance that is already in effect and that extends COBRA election and premium payment deadlines.
- Newly updated DOL Model COBRA Notices and interaction of COBRA with coverage under Medicare and the Health Insurance Marketplace Exchange.
- Recent wave of litigation related to COBRA Notices.
- Best practices for employer plan sponsors and plan administrators regarding COBRA compliance.

Reduced Hours, Furloughs, Layoffs and Terminations

- A reduction in hours, which includes a temporary lay-off and furlough, is considered a COBRA qualifying event if it results in a loss of coverage.
 - Review plan eligibility rules and consider how reduced hours, extended leaves of absence, alternative work arrangements, temporary layoffs, etc. affect coverage.
 - Consider whether to amend eligibility provisions and obtain approval from insurers (stop-loss insurers for self-insured plans) and third party administrators if employees that are not working or not meeting hourly eligibility requirements remain active on the plan.

Reduced Hours, Furloughs, Layoffs and Terminations

- Furloughed workers who do not lose coverage under the employer group health plan are not eligible for COBRA coverage. However, the employer may qualify for Employee Retention Credits for group health plan coverage provided to certain workers, including employees on furlough.
- The Employee Retention Credit is a refundable tax credit against certain employment taxes equal to 50% of the qualified wages an eligible employer pays to employees after March 12, 2020, and before January 1, 2021.
 - Wages (including qualified health plan expenses) up to \$10,000 can be counted to determine the amount of the 50% credit (max \$5,000 credit).
- IRS originally did not treat qualified health expenses as qualified wages when employees were not being paid, but reversed course on May 7, 2020. Updated FAQs allow employers to treat allocable health plan expenses as qualified wages even if the employees are not working and not being paid wages.
 - FAQs are not binding, but represent current IRS thinking.

Employer Provided Subsidies

- COBRA sets the premium limit at 102% of the cost of coverage. Employers can subsidize COBRA premiums and charge employees less.
 - Employers with self-insured plans should consider nondiscrimination rules under Code § 105(h).
 - Employers should set and communicate specific timeframes and conditions.
 - Need to coordinate termination of active coverage with eligibility for Medicare and coverage under the Health Marketplace Exchanges. COBRA subsidies may provide incentives for former employees to enroll in Medicare or Marketplace coverage which can make such coverage unavailable or more expensive when COBRA subsidies end.

Medicare Late Enrollment Complications

- If a participant does not enroll in Medicare Part B when he/she is first eligible, and no longer has group health plan coverage due to current employment status, his/her monthly Part B premium may go up 10% for each 12-month period he/she could have enrolled in Medicare Part B, but didn't sign up.
- COBRA is not group health plan coverage for purposes of the above.
- For example, if an individual enrolls in COBRA for 18 months, and then enrolls in Medicare Part B in month 19, the individual will be subject to a Medicare Part B penalty when he/she enrolls.

Potential Government Subsidies

- The Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800), passed by the House of Representatives on May 15, 2020, would provide a 100% subsidy of health plan premiums for terminated workers enrolled in COBRA, as well as furloughed workers remaining on employer plans, from March 2020 through January 2021.

Agency Guidance Extends Deadlines

- Departments of Labor and Treasury and the Internal Revenue Service issued a final rule that extends various plan deadlines during the COVID-19 “Outbreak Period,” which began March 1, 2020, and will end 60 days after the National Emergency officially ends or such other date as the Agencies later provide (the “Outbreak Period”).
- The Outbreak Period is disregarded when calculating the COBRA deadlines, including:
 - 30- or 60-day deadline for employers or individuals to notify plan of a COBRA qualifying event;
 - 60-day deadline for individuals to notify the plan of a determination of disability;
 - 14-day deadline for plan administrators to furnish COBRA election notices;
 - 60-day deadline for participants to elect COBRA; and
 - 45-day deadline for which individuals must make a first premium payment and 30-day deadline for subsequent premium payments.

Old Versus New Timeframes

Deadline	Old Timeframe	New Timeframe
When qualified beneficiary has to make an election	60 days	60 days after the Outbreak Period*
Qualified beneficiary has to make first premium payment	45 days	30 days after the Outbreak Period*
Qualified beneficiary has to make subsequent premium payments	30 days	Ignore the Outbreak Period*

Old Versus New Timeframes

Deadline	Old Timeframe	New Timeframe
When employers or individuals need to notify the plan of a qualifying event	30/60 days	Ignore the Outbreak Period*
When individuals must notify the plan of a determination of disability	60days	Ignore the Outbreak Period* *We currently do not know when the Outbreak Period will end, and the end date could vary for different parts of the country

Joint Guidance Examples

- **Electing COBRA coverage:** An individual who experiences a qualifying event for COBRA purposes during the National Emergency has 60 days after the Outbreak Period, which currently ends on June 29, 2020 (e., until August 28, 2020), to elect COBRA coverage.
- **Paying COBRA premiums:** An individual receiving COBRA coverage on March 1, 2020, and failed to make monthly premium payments for March through June 2020 would have 30 days after the end of the Outbreak Period, which currently ends on June 29, 2020 (*i.e.*, until July 29, 2020), to make timely premium payments for March, April, May, and June. Because the premium due dates are postponed, any payment for premiums would be retroactive to the initial COBRA election period.

Issues Presented by Joint Guidance

- The Joint Guidance presents several plan administration issues, including:
 - Whether employers are required to notify plan participants of the deadline extensions and by when?
 - Whether COBRA model notices need to be updated to reflect the deadline extensions?
 - Whether claims can be pended during the Outbreak Period for qualified beneficiaries who have not yet elected coverage, and for those who have elected coverage but failed to timely pay premiums.
 - Coordination issues with insurance carriers and providers regarding retroactive termination of coverage, compliance with state prompt payment of claims laws.
 - Do you have to go back to March 1 and “correct” situations that did not comply with the Joint Guidance?

Updated DOL Model COBRA Notices & Litigation

- A new section titled “Can I enroll in Medicare instead of COBRA continuation coverage after my group health plan coverage ends?” has been added to the model notices.
 - The model notices explain Medicare special enrollment period and warn of late enrollment penalties and potential gaps in coverage if individual elects COBRA instead of enrolling in Medicare.
 - Also explain interaction of COBRA coverage and Medicare coverage.
- Unfortunately, the new model notices do not address extended deadline relief provided under the Joint Guidance. The model notices also do not contain an effective date.
- Updated model notices are accompanied by new FAQs about the model notices.

Updated DOL Model COBRA Notices & Litigation

- Several recent cases have been brought against large employers alleging that COBRA notices did not include all of the details contained in the DOL model notices or regulations and/or contained misleading and confusing information.
 - Cases are brought as class actions on behalf of all participants and beneficiaries who were sent a COBRA notice.
- Cases have focused on a variety of alleged deficiencies, including:
 - Failure to identify plan administrator.
 - Failure to identify termination date for coverage, location where payments should be sent, plan procedures for electing COBRA coverage.
 - Failure to provide COBRA notices in Spanish.
 - Overly long and threatening language regarding potential penalties.

Potential Penalties for Non-Compliance

- ERISA grants a district court discretion to award penalties to qualified beneficiaries of up to \$110 per day per person for a plan administrator's failure to provide the required initial COBRA notice or the COBRA election notice.
- Court may also grant legal fees to plaintiff's counsel.
- In addition, IRS excise taxes for COBRA violations are up to \$100 per day per individual or up to \$200 per day for families.

Best Practices

- Ensure that you understand what is required, including knowing what notices are needed and when.
- Review current COBRA notices (including vendor-provided notices) to ensure the notices contain all of the details provided in the DOL's model notices.
 - If notices are provided during the Outbreak Period covered by the Joint Guidance, consider including the new extensions of time granted for election and remittance of COBRA premiums.
- Ensure that your COBRA vendor is using updated model notices and has updated its procedures to comply with Joint Guidance time frames.
- Review plan documents to ensure they reflect current practices.
- Stay vigilant for new guidance or congressional action that may affect COBRA rights and obligations.
- Stay in front of COBRA litigation and proactively address weaknesses in your process.

Questions?

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